STATE OF CALIFORNIA

State Energy Resources
Conservation and Development Commission

In the Matter of:

The Application for Certification for the
AVENAL ENERGY PROJECT

Docket No. 08-AFC-1

REPLY BRIEF OF INTERVENOR
CENTER ON RACE, POVERTY & THE ENVIRONMENT

August 24, 2009

Ingrid Brostrom
Center on Race, Poverty & the Environment
47 Kearny Street, Suite 804
San Francisco, CA 94108
(415) 346-4179 Voice
(415) 436-8723 Facsimile
ibrostrom@crpe-ej.org

Attorney for CENTER ON RACE, POVERTY & THE ENVIRONMENT

STATE OF CALIFORNIA

State Energy Resources
Conservation and Development Commission

In the Matter of: The Application for Certification for the AVENAL ENERGY PROJECT	Docket No. 08-AFC-1

REPLY BRIEF OF INTERVENOR
CENTER ON RACE, POVERTY & THE ENVIRONMENT

In its Opening Brief, the CEC failed to demonstrate that it thoroughly evaluated and mitigated the project's adverse impacts to local and regional air quality, public health, and climate change. Additionally, the CEC repeatedly failed to support its findings of insignificance with substantial evidence in the record. Because the CEC's analyses are incomplete or not supported by evidence in the record, the CEC can not approve the project.

I. The Applicant and the CEC Have the Initial Burden of Proof.

When an agency fails to require an applicant to provide certain information mandated by CEQA or fails to include that information in its environmental analysis, the agency has failed to proceed in the manner required by law. *Sierra Club v. State Bd. of Forestry* (1994) 7 Cal.4th 1215, 1236; *Bakersfield Citizens for Local Control v. City of Bakersfield* (2004)124 Cal.App.4th 1184, 1197-98. Moreover, an agency's environmental conclusions must be supported by

substantial evidence, which includes "facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts" and excludes "[a]rgument, speculation, unsubstantiated opinion or narrative, [and] evidence which is clearly inaccurate or erroneous . . ." Pub. Res. Code § 21082.2(c)§§.

In its Opening Brief, CEC Staff argue that the interveners must demonstrate that mitigation adopted by the CEC fails to avoid significant impacts on the environment. CEC Opening Brief 2, 3. The CEC is mistaken about which party bears the initial burden of proof. The project applicant bears the burden of providing substantial evidence to support each of the findings and conclusions required for certification of the Project. 20 CCR § 1748(d). Under CEQA, the CEC is also responsible for supporting its conclusions regarding the effectiveness of mitigation measures with substantial evidence in the record. *See*, *e.g.*, *Gray v. County of Madera* (2008) 167 Cal.App.4th 1099, 1110-11; *Sierra Club v. Contra Costa County* (1992) 10 Cal.App.4th 1212, 1222-23. Pub. Res. Code § 21081.5; CEQA Guidelines §§ 15091(b), 15093.

II. The CEC Failed to Properly Analyze the Project's Climate Change Impacts.

The CEC's analysis of climate change impacts using the "system approach" fails to take into account the long-term effect of adding new fossil fuel power generation to the power system. Environmental review under CEQA must include "both the short-term and long-term effects" of the project. CEQA Guidelines § 15126.2; *See also* Pub. Res. Code § 21001(d) (CEQA is intended to "ensure the long-term protection of the environment.").

Even assuming that the electricity system operates with optimal efficiency such that the most polluting sources of energy are displaced the instant less polluting energy sources enter the system, CEQA analyzes impacts over the life of the project, not one particular instant.

Additionally, displaced energy that is actually diverted to out-of state markets can not be counted as offsetting the project's impacts. CEQA Guidelines § 15126.2(a) ("Direct and indirect significant effects of the project on the environment shall be clearly identified and described, giving due consideration to both the short-term and long-term effects."); *Davidon Homes v. City of San Jose* (1997) 54 Cal.App.4th 106, 119 ("CEQA is not confined to the immediate effects of an agency's decisions but should be applied whenever physical changes to the environment are a reasonably foreseeable result of the activity.").

The displacement theory is premised on the erroneous assumption that the relationship between electricity supply and demand is completely inelastic. This approach ignores the realities of pre-existing contractual agreements for energy generation; inter-state generation and usage of electricity; and future growth in energy demand. Taken to its logical conclusion, under this approach one could add an infinite number of power plants to the system without any present or future impact on greenhouse gas production or electricity consumption. However, as new growth occurs – regardless of whether facilitated in part by the construction of proposed power plants – energy sources that may have been temporarily displaced in the short term will be reutilized. As described in CRPE's Opening Brief, absent a showing that more polluting energy sources will be permanently taken offline as a result of the proposed project, there is no legitimate basis to conclude that new power plants will not ultimately result in increased greenhouse gas emissions.

The proposition that the new fossil fuel commitments resulting from power plant construction simply displaces existing higher carbon intensive energy supply has already been rejected under similar circumstances. In *Center for Biological Diversity v. City of Desert Hot*

Springs, RIC 464585, Riv. Sup. Ct. (Aug. 8, 2008), the trial court rejected an EIR's assertion that a residential and commercial development would have a "beneficial impact on CO_2 emissions" because California homes are more efficient than those elsewhere in the country absent any showing that existing homes would be demolished or remain unoccupied. Similarly, absent any showing that aging power plants are decommissioned as a consequence of new power plant approval, there is no substantial evidence that putting new power plants on-line will not have environmental impacts.

Finally, the determination that all new power plants, regardless of their design, have a less than significant environmental effect subverts the purpose of CEQA by precluding the consideration of less environmentally damaging options. While power plants built today are more efficient that previous generations of power plants, significant quantities of emissions are still generated that could be further reduced through the adoption of alternatives and mitigation measures. *See, e.g., Center for Biological Diversity v. NHTSA*, 538 F.3d 1172, 1216 (9th Cir. 2008) (noting that new fuel economy rule "will not actually result in a decrease in carbon emissions, but potentially only a decrease in the rate of growth of carbon emissions."). Because significant greenhouse gas emission reductions from existing levels are necessary to stabilize the climate, the CEC can not afford to squander any opportunity to adopt feasible mitigation and alternatives that reduce the greenhouse gas emissions from proposed projects.

III. The CEC Failed to Demonstrate that ERCs Would Mitigate the Project's Local Air Quality Impacts.

The CEC failed to analyze how Emission Reduction Credits (ERCs) mitigate local air quality impacts. In its Opening Brief, Staff explains that "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." CEC Opening Brief 2. However, Staff does not identify any such credits near Avenal in the record or in its Opening Brief. Nor does Staff provide any analysis demonstrating that these hypothetical credits are of similar quantity and type to the ERCs used by the applicant. Speculation and unsubstantiated narrative is not substantial evidence. Pub. Res. Code §21082.2(c)§§. This argument fails because it lacks evidentiary support in the record.

The CEC also argues that local impacts are adequately mitigated because "credits over 15 miles from the project are given less value by the air district." CEC Opening Brief 2. CEQA Guidelines specify that each public agency is responsible for meeting its own responsibilities under CEQA and can not rely on comments from other public agencies as a substitute for the agency's own work. CEQA Guidelines § 15020. Therefore local air district policies do not excuse the CEC from its independent duty to assess the efficacy of its chosen mitigation measure—ERCs located between 60 and 160 miles away from the project site. Because the CEC staff failed to conduct or include any analysis demonstrating that ERCs located as far as 160 miles from the project site have the same mitigation effect as those located only 15 miles away, it has failed to satisfy its obligations under CEQA.

Finally, in determining the adequacy of the inter-pollutant ratio, the air district assumed that the ERCs were being used to satisfy regional particulate matter attainment goals. FSA 4.1-38. Neither the local air district, nor the CEC, considered the adequacy of the ERCs in offsetting local air quality impacts.

IV. The CEC Failed to Demonstrate that ERCs will Mitigate the Project's Regional Air Quality Impacts.

In its Opening Brief, CEC staff argues that "the San Joaquin Valley Air Pollution Control District has demonstrated why a 1:1 ratio of SOx offset for PM10/PM2.5 is justified in this case and staff has accepted SVJAPCD's analysis as reasonable." CEC Opening Brief 3. CEC staff cites only one page in the entire record for this proposition. *Id.* That page merely lists the SJVUAPCD's conclusion that a 1:1 ratio is adequate but does not explain the local air district's reasoning or cite any evidence that serves as the basis for the local air district's findings. FSA 4.1-38. The CEC's acceptance of the local air district conclusions without its own analysis is an improper delegation of its legal duties under CEQA. Pub. Res. Code §§ 21002§§, 21081; Guidelines § 15090§§. The CEC has a duty to meet its own responsibilities as lead agency to demonstrate that it has mitigated all potentially significant air quality impacts from the project; it cannot merely rely on another public agency or process as a substitute for its work as lead agency. 14 CCR §§ 15020, 15126.4(a)(2); *see also Kleist v. City of Glendale* (1976) 56 Cal.App.3d 770, 779; *Citizens for Quality Growth v. City of Mt. Shasta* (1988) 198 Cal.App.3d 433, 443.

Additionally, as stated in CRPE's Opening Brief, before adopting the SJVUAPCD's method for determining offset requirements, the CEC must explain its basis for rejecting the ratios used by the EPA and the applicant and support its decision with relevant data. *Berkeley Keep Jets Over the Bay v. Bd. of Port Commrs.* (2001) 91 Cal.App.4th 1344. The CEC provided no such support in its Opening Brief.

CRPE also challenged the CEC's failure to disclose sufficient information to judge the equivalency and validity of the ERCs as mitigation for the project's air quality impacts. In response, the CEC explained that "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." CEC Opening Brief 3. The failure to provide the data relied upon by staff in making their determination violates CEQA by withholding relevant information from the public and decision-makers. *See Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1219-1220. T1his failure to include relevant information "precludes informed decision-making and informed public participation, thereby thwarting the statutory goals of the EIR process." *Kings County Farm Bureau v. City of Hanford*, 221 Cal. App. 3d 692, 712 (1990). Moreover, a public agency may not delegate to its staff its responsibility to make findings that impacts have been mitigated as required by CEQA Guidelines 15091 and 15093. CEQA Guidelines 15025; *Vedanta Soc'y v. California Quartet, Ltd.* (2000) 84 Cal.App.4th 517.

Finally, the type of information included in the record - certificate numbers and the approximate locations of some of the credits - is not sufficient to judge the validity and equivalency of the credits. Because the FSA "must be prepared with a sufficient degree of analysis to provide decision-makers with information needed to make informed decisions concerning a project's environmental consequences" (CEQA Guidelines 15151), the CEC has failed to meet its burden.

V. The CEC Fails to Support Its Finding that Construction-Related Impacts Will Be Mitigated to a Less Than Significant Level.

CEC staff requested from CRPE legal authority for its proposition that the applicant is required to offset all of its construction emissions in order for staff to conclude that construction emissions impacts are less than significant. CEC Opening Brief 4. That authority comes from the CEC's setting of its own significance threshold for assessing air quality impacts; CEC staff have already concluded that "all project emissions of nonattainment criteria pollutant and their precursors (NOx, VOC, CO PM10, PM2.5, and SOx) are considered significant and must be mitigated." FSA 4.1-20 (emphasis added). Since CEC staff does not specify any other threshold of significance for construction emissions, it must mitigate all nonattainment emissions from the construction of the project.

Staff does not fully mitigate those emissions, yet still considers the impact to be less than significant. In fact, the CEC does not even attempt to measure the impact of construction related mitigation. CEC staff argues that CEQA does not require that the precise effects of the mitigation measures to be quantified. However, it is well-established CEQA law that a mitigation measure is legally inadequate if it is not sufficiently defined so as to gauge its effectiveness. *San Franciscans for Reasonable Growth v. City & County of San Francisco* (1984) 151 Cal. App. 3d 61, 79; *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal. App. 3d 692, 727. Additionally, Courts have held that in some situations, including assessing cumulative air emissions, a quantitative analysis is necessary to analyze an impact adequately. *Citizens to Preserve the Ojai v. County of Ventura* (1985) 176 Cal.App.3d 421. Here, the CEC

provides insufficient information on the impact of construction related mitigation to gauge whether or not emissions have been fully mitigated, and therefore has failed to meet its burden.

VI. The CEC Failed to Properly Analyze the Project's Cumulative Impacts.

The CEC has virtually ignored on-going large scale projects in the vicinity in its assessment of the project's cumulative impacts, including the Kettleman Hills hazardous waste expansion project, the Kettleman Hills PCB permit renewal, and a high-capacity biosolids land disposal site. The CEC's analysis has also ignored a recently discovered large birth defect cluster in Kettleman City, the cause of which is currently unknown.

The CEC alleges that it analyzed the Chem Waste facility in several sections of the FSA. However, in its Opening Brief, the CEC acknowledged that the Chem Waste facility was only specifically included in a couple sections, not including its assessment of air quality impacts, traffic, or water quality and supply. CEC Opening Brief 8. The CEC explained that the Chem Waste Facility was not specifically included throughout the FSA because the staff determined that the facility was reflected in baseline data, that there was insufficient data available concerning the anticipated expansion of the facility to support inclusion in an analysis, or it could not feasibly contribute to a cumulative impact with Avenal Energy. These findings and supporting evidence should appear in the FSA itself. However, he CEC does not cite to anywhere in the FSA in support of this statement.

The Chem Waste Expansion Project is at a very late stage in its permitting process. In fact, several EIRs have been circulated for public and agency review. The CEC's arguments about insufficient data on the project are therefore unfounded. The CEC has access to all the

data on Chem Waste it needs to consider its cumulative impact in conjunction with the Avenal Energy Project.

CEC Staff also state that they considered the birth defect cluster occurring in Kettleman City and that they addressed these concerns in its section on public health and hazardous materials management. The CEC, like the many other organizations and agencies involved in Kettleman City, has only recently become aware of the birth defect cluster. The birth defect cluster, involving babies born with cleft palate, heart, and brain defects, has affected about 25 to 30 percent of babies born in Kettleman City during an 18-month period and new cases are still emerging. Three of the five babies born with birth defects have since died. The EPA and Kings County are only now beginning their investigation into potential causes of the cluster. To say that the CEC has already considered and addressed the birth defect cluster in its analysis of the Avenal Power Plant is both premature and disingenuous.

The pages cited by the CEC in its FSA to support its findings concerning the cluster do not mention birth defects, but focus on general air quality impacts. The CEC can not adequately analyze the potential cumulative impact of this project on the birth defect cluster until an investigation into the cause of the birth defect has been completed. Until then, its analysis remains deficient.

The applicant goes so far as to cite the 2007 Draft Refined Environmental Justice Assessment as evidence that the birth defects are not connected to Chem Waste or any other industrial facility. APC Opening Brief 41. The applicant cites the document as evidence that a 25 to 30 percent birth defect rate is not statistically significant. *Id.* The applicant's citing to a document that pre-dates the discovery of the cluster by two years; that was subject to widespread

condemnation; and that ultimately has never been adopted by the EPA is not only insufficient under CEQA, it also underscores the applicant's and the CEC's failure to assess the recent spike in birth defects.

As other agencies such as EPA, Department of Toxic Substances Control, Kings County Health Department, Kings County Board of Supervisors, and the San Joaquin Valley Air Pollution Control District have begun meeting with the community to learn more about the issue and potential next steps, the CEC has been conspicuously missing from these collaborative meetings. These agencies are in agreement that an analysis of the cluster must be performed immediately, so it is surprising that the CEC and the applicant have already determined that there is no possibility that the Avenal Power Project would contribute to its unknown cause.

VII. The CEC Has Not Responded to All CRPE's Arguments.

The CEC has not addressed CRPE's concerns about the project's growth inducing impacts and construction-related greenhouse gas emissions, or the CEC's failure to translate any of the environmental review documents into Spanish. Therefore, CRPE stands by its original argument and offers no rebuttal on those issues.

VIII. Conclusion

For the foregoing reasons, the Commission should deny the application for certification.

Dated: August 24, 2009

Respectfully Submitted,

/s/_____
Ingrid Brostrom

Attorney for the
Center on Race, Poverty & the Environment