Center on Race, Poverty & the Environment

47 Kearny Street, Suite 804
San Francisco, CA 94108

415/346-4179 • fax 415/346-8723

ibrostrom@crpe-ej.org

DOCKET
08-AFC-1
DATE MAR 11 2009
RECD. MAR 12 2009

March 11, 2009

Commissioner Jeffrey D. Byron
Commissioner Arthur Rosenfeld
California Energy Commission
1516 Ninth Street
Sacramento, CA 95814

Re: Avenal Energy, Application for Certification (08-AFC-1)

Dear Commissioners Byron and Rosenfeld:

I am writing to urge you to deny the license for the Avenal Energy Project.

The Center on Race, Poverty and the Environment (CRPE) represents low income communities and communities of color throughout the Central Valley. In recent years, our client communities' paramount concern has been the unhealthy air quality in the Central Valley. The San Joaquin Valley is in "severe" non-attainment for ozone, and has been recently designated in "extreme" non-attainment. The Valley is also in non-attainment for PM-2.5.

CEQA contains a provision that allows a regulatory agency to seek certification from the Secretary of the Resources Agency when it is adopting rules or regulations. Pub. Res. Code § 21080.5. This certification permits the agency to submit a plan or other written document ("functional equivalent document" or "FED") in lieu of an environmental impact report. Pub. Res. Code § 21080.5. A functional equivalent document is procedurally different from an environmental impact report, but the California legislature has clearly stated that a functional equivalent document must contain much of the same information that is required by an environmental impact report. Like environmental impact reports, functional equivalent documents *must* include a description of alternatives to the proposed activity as well as mitigation measures to minimize any significant adverse effect that the activity will have on the environment. Pub. Res. Code § 21080.5(d)(3)(A). Moreover, the California Supreme Court has held that an agency that is preparing a functional equivalent document "pursuant to a certified regulatory program must comply with all of CEQA's other requirements." *Mountain Lion Foundation v. Fish & Game*, 16 Cal.4th 105, (1997).

The functional equivalent document for the proposed Avenal Power Plant violates CEQA because it failed to properly analyze and mitigate project impacts, failed to properly inform the public of the project's impacts, and failed to assess a reasonable range of project alternatives. The California Energy Commission must revise and recirculate the FED before approving this project.

I. Emission Offsets are Illusory and Will Not Mitigate the Project Air Quality Impacts.

Beyond reliance on state and federal permits, the major mitigation measure for the project's air quality impacts in the FED is the application of emission reduction credits. These emission reduction credits must be spatially, temporally, and qualitatively equivalent to the project's actual emissions. The applicant's plan to claim offsets from outside the local area and as far away as Stockton fails to mitigate the project's local air quality impacts or recognize the impacts caused by localized emissions. Avenal, Kettleman City and Huron residents will face increased daily exposure to the emissions even if other Central Valley regions can claim reductions.

Logically, the requirement for pre-existing ERCs to be included in an approved plan makes sense in areas where attainment has been achieved. Attainment and maintenance plans are required by US EPA to show that an area's planned emission reductions will lead to or continue attainment of national ambient air quality standards in light of any future growth. If pre-existing emission reductions are relied upon in making this determination, they logically cannot be available to offset future growth. Given the severity and extent of the District's non-attainment for ozone and forms of particulate matter, limiting the actual use of such pre-existing credits is in the best interest of the District's residents.

In addition, interpollutant trading is used to justify the substitution of SOx ERCs for increases in PM2.5. If interpollutant trading is valid under CEQA, the proposed ratio of 1:1 between SOx and PM2.5 is insufficient for mitigation of PM2.5. EPA's final implementation rule for PM2.5 new source review relies upon a much higher ratio for SOx: PM2.5, namely 10:1. Since interpollutant trading is only allowed with "the appropriate scientific demonstration of an adequate

trading ratio" (Rule 2201, Section 4.13), the applicant has failed to adequately mitigate PM2.5 unless it greatly increases its SOx reductions.

Offsets with regard to construction emissions are also problematic. The ERCs provided by Avenal Energy are from the shut-down of stationary equipment. These emissions are qualitatively different than those from construction activities. Point sources typically emit pollutants from a stack. Such pollutants are dispersed far more widely than those emitted at ground level, which is typical for construction-related emissions. The applicant should offset construction emissions with emissions that are qualitatively equivalent to those that will be created by the project.

II. FED Failed to Analyze the Project's Cumulative Impacts.

CEQA requires the California Energy Commission (CEC) to discover, analyze, and mitigate the project's significant impacts. Pub. Res. Code §§ 21002; 21002.1(b); 21100(b)(1). Here, the CEC failed to analyze the project's cumulative impacts by ignoring large scale projects in the vicinity, including the Kettleman Hills hazardous waste and PCB disposal facility, and a sludge "farm" which will receive 900,000 tons of sewage and agriculture waste trucked in from Los Angeles. By failing to adequately consider cumulative impacts, the CEC unlawfully precluded "a meaningful assessment of the potentially significant environmental impacts of the Project." *Napa Citizens for Honest Gov't v. Napa County Bd.,* 91 Cal.App. 4th 342, 374 (2001).

CEQA mandates a finding of significance for impacts that are cumulatively considerable. CEQA 15064(I)(1); Pub. Resources Code 21083(b). Cumulatively considerable impacts are those that exacerbate an existing environmental condition that is significantly degraded. An FED must be prepared if the cumulative impact may be significant and the project's incremental effect, though individually limited, is cumulatively considerable. The incremental effects of an individual project are considerable when viewed in connection with the effects of past projects, effects of other current projects, and the effects of probable future projects" (CEQA Guidelines, 15064(I)(1); 15065(c); Public Resources Code 21083(b).

The CEC failed to consider impacts of the Kettleman Hills Facility (KHF) which is one of only three facilities permitted to receive hazardous waste in the state of California. It is also only one of a handful of facilities that is permitted to dispose of and store PCBs in the United States. The facility receives up to 1,400 tons of hazardous and non-hazardous wastes a day. KHF consists of a 1600 acre site just north of State Highway 41 at 35251 Old Skyline Road. Of the 1600 acres, 499 acres are used to manage RCRA hazardous waste and TSCA PCB waste. The KHF is currently in the process of expanding its capacity and is attempting to renew its PCB permit.

The Kettleman Hills Facility impacts the local area's air quality, traffic, and water quality, and poses a significant public health risk from exposure to hazardous waste. The proposed Avenal power plant will exacerbate many of these problems. The CEC must analyze the impacts of the power plant in conjunction with the KHF.

The CEC failed to conduct any research to determine whether or not residents have already experienced health effects from living near the Kettleman Hills Facility. The CEC did not perform a

health survey, did not ask any residents to be tested for chemical exposures, and did not talk to the community about health concerns or possible disproportionate health impacts. The CEC therefore does not have sufficient information to judge potential cumulative health impacts from locating a power plant so close to an existing hazardous waste and PCB storage and disposal facility. Such a study is important and necessary here because current epidemiological studies on the health effects of residence near hazardous waste landfills indicate some increase in risk of adverse health effects such as low birth weight, cancer and birth defects.

The CEC has also ignored LA County's proposal to truck all their sewage sludge to a 14,000 acre "farm" two miles west of Kettleman City. Kettleman City will soon start receiving over half a million tons per year of sewage sludge which includes heavy metals, pathogens, and industrial wastes that thousands of companies allow to drain into the sewer system. This project will have an impact on ground water quality, air quality, traffic, public health, and odors. These impacts must be analyzed in conjunction with the proposed power plant.

Trucks delivering waste to these two projects will also have significant air quality impacts that must be analyzed in conjunction with the air quality impacts from the proposed power plant.

The CEC must not approve the FED or the project until these cumulative impacts can be analyzed and mitigated.

III. The CEC Failed to Analyze the Growth Inducing Impacts of the Power Plant.

CEQA requires that a lead agency examine whether a project will lead to economic or population growth or encourage development or other activities that could affect the environment. Pub. Res. Code 21100(b)(5); 14 Cal Code Regs 15126.2(d). An EIR must discuss "the ways" in which the project could directly or indirectly foster economic or population growth or the construction of new housing. 14 Cal. Code Regs 15126.2(d). The discussion should also describe growth-accommodating features of the project that may remove obstacles to population growth. The CEQA Guidelines explicitly includes growth-accommodating infrastructure projects, such as power plants, within the context of this requirement.

Here, the CEC fails to include any analysis of how increasing energy capacity in the State of California may have a growth inducing effect. CEQA requires this analysis, even if the agency cannot mitigate those impacts.

The addition of a 600 Megawatt energy plant will provide sufficient energy for many new homes, businesses or other development. However, the CEC only analyzed growth in the immediately surrounding areas. CEQA does not limit the growth-inducing analysis in this fashion. Additionally, because the project is a utility system it is possible to develop a reasonable forecast, based on historic averages or other data, of the amount of new development that could be accommodated by the expanded capacity. The CEC must include such an analysis to comply with CEQA.

IV. CEC Failed to Adequately Analyze and Mitigate Greenhouse Gas Emissions.

The CEC violates CEQA with respect to global warming impacts by (1) failing to analyze the individual impact of the project on global warming and (2) failing to mitigate the cumulative global warming impacts of the project.

Even though CEC admits that it can identify how many gross GHG emissions are attributable to a project and it admits that the project will result in an above-average emission rate for GHG as compared with other California power plants, the CEC makes the finding that it would be speculative to conclude that the project would result in a cumulatively significant GHG impact. The CEC rationalizes that because the "interchange among facilities that make up California's electricity system" are so complex, an individual energy plant's contribution cannot be ascertained. However, CEQA does not allow this type of justification for failing to analyze a project's individual direct impacts. There is nothing in CEQA that permits an agency to avoid analyzing and mitigating project impacts on the basis that a different project would produce more impacts. Since the CEC can identify GHG emissions, and these emissions are cumulatively considerable, the CEC must analyze their impact and mitigate them to the extent feasible.

The CEC violates CEQA by relying on undisclosed, unanalyzed mitigation measures which may or may not be discovered during future proceedings.The CEC has not required the project to adopt all feasible mitigation measures to reduce global warming impacts. The CEQA Guidelines require the CEC to select mitigation measures, analyze their efficacy and then require enforceable mitigation measures be employed by the applicant. 14 CCR § 15126.4. Here, the CEC defers possible mitigation measures and defers the selection of mitigation until formal GHG regulatory efforts are adopted and implemented. Under CEQA, the CEC must meet its own responsibilities and cannot rely on another public agency or process as a substitute for its work as lead agency. 14 CCR § 15020. The CEC as lead agency must identify, analyze and mitigate all potentially significant impacts from the project. The CEC relies on future California Air Resources Board regulations to reduce GHG emissions from the project. However, the CEC ignores that as lead agency, it is responsible for mitigating GHG emissions from the project, not the Air Resources Board or any other agency and that mitigation must be enforceable by the lead agency. 14 CCR § 15126.4(a)(2).

The CEC has not analyzed the efficacy of any mitigation measures to reduce global warming, nor has the CEC affirmatively required the applicant employ these mitigation measures. The CEC must make the feasibility determination prior to project approval and require the applicant to employ those mitigation measures as part of its permit.

V. The County Failed to Analyze Feasible Alternatives

The CEC must foster meaningful public participation and informed decision making in deciding the range of feasible alternatives to be discussed in the EIR. Cal. Code Regs., tit. 14, § 15126.6(f). The CEC can only eliminate alternatives from detailed consideration in the EIR for "(i) failure to meet most of the basic project objectives, (ii) infeasibility, or (iii) inability to avoid significant environmental impacts." Cal. Code Regs., tit. 14, § 15126.6(c). Here, the CEC eliminated alternative technologies such as solar and wind from detailed consideration because these facilities would take up more acreage than a conventional gas-fired power plant. In addition, the CEC confined the geographic area for site alternatives to the industrial zoned area in the city of

Avenal. Both of these actions precluded a reasonable range of alternatives from being analyzed and considered.

The CEC can eliminate infeasible alternatives from detailed consideration in the EIR. Cal. Code Regs., tit. 14, § 15126.6(c). However, "if the agency finds certain alternatives to be infeasible, its analysis must explain in meaningful detail the reasons and facts supporting that conclusion." *Marin Municipal Water District v. KG Land Cal. Corp.*, 235 Cal. App. 3d 1652, 1664 (1991). Here, the County excluded the alternative energy projects from detailed analysis because these projects would require additional acreage than the proposed project. This is insufficient to support a finding of infeasibility. Feasible means "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. In finding infeasibility, the CEC relied upon the mistaken assumption that an alternative project must have the same capacity or output as the proposed project. However, a 600 megawatt capacity is not included in the project objectives and, therefore, the CEC cannot eliminate alternative energy projects solely because the energy output would be reduced. The CEC should consider the feasibility of a smaller capacity solar or wind facility at the proposed location.

The requirement to set forth project alternatives in the EIR "is crucial to CEQA's substantive mandate that avoidable significant environmental damage be substantially lessened or avoided where feasible." Michael H. Remy, et. al, Guide to the California Environmental Quality Act 431 (10th ed. 1999) (citations omitted). The County alleges that project impacts would not be reduced if the project was located in a different location within the County. However, this is just not the case. Project impacts on air quality, traffic and public health would be reduced if the project was sited in a different location.

The CEC should have considered alternative locations outside of the severely impaired San Joaquin Air Basin. Instead, the CEC limited itself to alternative locations within a mile or two of the proposed site. These alternatives will do virtually nothing to reduce impacts to the three nearby communities, which already face an inequitable distribution of polluting industries surrounding them. There is no reason why the CEC must limit itself to alternative locations within the same area, especially if the project serves a regional, rather than a local purpose. CEQA Guidelines § 15126(f)(1) (While jurisdictional boundaries are a factor which can be considered in finding infeasibility, "projects with a regionally significant impact should consider the regional context."). This is especially true given that the energy needs to be met by the plant are unlikely to originate in the region but instead will come from the urban areas in Northern and Southern California. The County does not have sufficient justification for failing to consider alternative locations outside the region. The FED should be set aside until the CEC examines other locations.

VI. **CEC Failed to Adequately Analyze and Mitigate Potential Soil Contamination**

The proposed project is located on converted agriculture land. Construction of the site will include the excavation of lands and soils that were previously used in cultivating crops. The land most likely has been subject to heavy pesticide use and may contain chemicals harmful to public health. However, the CEC has not tested the soils to ensure that construction workers will not be

exposed to dangerous amounts of pesticides or other chemicals. Instead, the only mitigation offered for potential exposures to contaminated soils is the presence of an engineer or geologist during the construction phase. Since the CEC did not conduct soil contamination tests, the agency does not know what kind of risks it maybe be exposing to workers. Without the tests, the CEC cannot properly mitigate potential harms if contamination is presents. The CEC must conduct soil samples to confirm that workers will not be placed at risk from constructing at the site.

VII. CEC Violated CEQA's Public Participation Requirements

"Public Participation is an essential part of the CEQA process." CEQA Guidelines § 15201. However, the CEC has made the FED inaccessible to the public by neglecting to translate any portion of the FED document into a language that can be understood by the communities most affected by this project.

Avenal, Kettleman City, and Huron are over 90% Latino, and many residents are monolingual Spanish speakers. By failing to translate the Draft SEIR into Spanish, the CEC made it impossible for these residents to make an independent, reasoned judgment about the environmental documentation relied upon, and as a result, denied the public its statutory right under CEQA to comment meaningfully upon its conclusions. *Emmington v. Solano County Redevelopment Agency,* 195 Cal.App.3d 491 (1987). California courts have interpreted CEQA's "plain language" requirements to ensure that the public has access to EIR documents. "The message of this regulatory scheme is clear: an EIR in this state must be written and presented in such a way that its message can be understood by governmental decision-makers and members of the public who have reason to be concerned with the impacts which the document studies." *San Franciscans for Reasonable Growth v. City and County of San Francisco,* 193 Cal.App.3d 1544, 1549 (1987). To ensure the public has an adequate opportunity to understand the consequences of the project and provide comment, the CEC must translate the FED and extend the comment period before approving the power plant.

Though the CEC has attempted to provide translation during public meetings, the numerous questions raised by Kings County residents about notice and process during the CEQA mandated public comment period indicate that significant weaknesses exist in the public review process. For starters, the CEC should develop protocols for projects in rural areas, where a notification zone of one half mile from the proposed project used in urban areas is clearly insufficient. If there are small rural communities near the proposed project, such as the three communities in this case, notification of the project and meetings about the project should go out to all households in the interested communities.

This is especially important when one of the project objectives is community acceptance. The CEC will be unable to determine if the project meets this objective unless and until it does more to reach out to residents in the affected communities of Avenal, Kettleman City, and Huron.

For the reasons stated above, the CEC has failed to comply with CEQA and must recirculate its FED for public review before approving the project.

Sincerely,
Original signed by
Ingrid Brostrom
Staff Attorney

BEFORE THE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT COMMISSION
OF THE STATE OF CALIFORNIA
1516 NINTH STREET, SACRAMENTO, CA 95814
1-800-822-6228 – WWW.ENERGY.CA.GOV

APPLICATION FOR CERTIFICATION
For the AVENAL ENERGY PROJECT

Docket No. 08-AFC-1
PROOF OF SERVICE
(Revised 2/3/2009)

APPLICANT

Jim Rexroad,
Project Manager
Avenal Power Center, LLC
500 Dallas Street, Level 31
Houston, TX 77002 USA
Jim.Rexroad@macquarie.com

Tracey Gilliland and
Avenal Power Center, LLC
500 Dallas Street, Level 31
Houston TX 77002
Tracey.Gilliland@macquarie.com

APPLICANT CONSULTANT

Joe Stenger, Project Director
TRC Companies
2666 Rodman Drive
Los Osos, CA 93402
jstenger@trcsolutions.com

COUNSEL FOR APPLICANT

Jane E. Luckhardt
DOWNEY BRAND
621 Capitol Mall, 18th Floor
Sacramento, CA 95814
jluckhardt@downeybrand.com

INTERESTED AGENCIES

California ISO
e-recipient@caiso.com

INTERVENORS

Loulena A. Miles
Marc D. Joseph
Adams Broadwell Joseph & Cardozo
601 Gateway Boulevard,
Ste. 1000
South San Francisco, CA 94080
mdjoseph@adamsbroadwell.com
lmiles@adamsbroadwell.com

ENERGY COMMISSION

Jeffrey D. Byron
Commissioner and Presiding Member
jbyron@energy.state.ca.us

Arthur Rosenfeld
Commissioner and Associate Member
arosenfe@energy.state.ca.us

Gary Fay
Hearing Officer
gfay@energy.state.ca.us

*Ivor Benci-Woodward
Project Manager
IBenciwo@energy.state.ca.us

Lisa DeCarlo
Staff Counsel
ldecarlo@energy.state.ca.us

Public Adviser's Office
publicadviser@energy.state.ca.us

DECLARATION OF SERVICE

I, April Albright, declare that on March 12, 2009, I served and filed copies of the attached Center on Race, Poverty & the Environment's Comments Regarding Air Quaility Issues. 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:

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

__✓__ by personal delivery or by depositing in the United States mail at Sacramento, CA 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

FOR FILING WITH THE ENERGY COMMISSION:

__✓__ 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.

Original signed by
April Albright