

**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

**AVENAL POWER CENTER, LLC'S COMMENTS ON THE
PRESIDING MEMBER'S PROPOSED DECISION**

DOCKET

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Avenal Power Center, LLC ("Avenal Power") appreciates the Committee's careful and diligent consideration of this Application for Certification ("AFC") for the Avenal Energy Project and the evidence presented during the hearings in this proceeding. Avenal Power has reviewed the Presiding Member's Proposed Decision and presents these limited comments to the Committee and the California Energy Commission ("Commission"). These comments are divided into three parts: 1) minor suggested revisions, 2) editorial corrections, and 3) additional responses to comments. Avenal Power appreciates the Committee's and the Commission's consideration of these comments.

I. AVENAL POWER'S SUGGESTED REVISIONS

Avenal Power requests the Committee and the Commission consider the following minor revisions to the Proposed Decision.

- Pages 73 and 77 state the applicant has elected to pursue a power purchase agreement with Pacific Gas and Electric Company. Avenal Power notes it is not limiting its efforts to obtain a power purchase agreement to Pacific Gas and Electric Company. Avenal Power suggests the following revisions:

(Page 73, second paragraph, last sentence) Applicant has elected to pursue a

power purchase agreement with Pacific Gas and Electric (PG&E) and other potential off takers after this licensing process concludes.

(Page 77, Findings of Fact number 11) The Applicant intends to procure a power purchase agreement with Pacific Gas and Electric Company and other potential off takers following completion of this licensing proceeding.

- On page 304 (subsection 3, Consistency with Land Use LORS) and on page 308 (Findings of Fact 8 and 9), the Proposed Decision discusses the applicable zoning. The record reflects that the Zoning Ordinance of the City of Avenal specifically allows an “electrical power generating plant” as a conditional use within the “M-2” zone. (Zoning Ordinance of the City of Avenal § 9.31; see Ex. 1 at 6.9-10; Ex. 200 at 3-2; PMPD at 12.) To make the discussion in the Land Use section of the Decision consistent with other information in the record, Avenal Power proposes the following revisions:

(Page 304) Use of the site for power plant development is consistent with the city’s General Plan Industrial Land Use element. The Heavy Industrial “M-2” zone within the Industrial “I” district is intended to accommodate a broad range of industrial activities and development. ~~Although power plants are not specifically listed as a permitted use in the “M-2” District, “public utility” uses are allowed. The City has determined that power plants are included in “public utility” uses.~~ (Ex. 200, pp. 4.5-11 to 4.5-12.) The “M-2” zone specifically allows development of an “electrical power generating plant” as a conditional use within the “M-2” zone. (See Zoning Ordinance of the City of Avenal § 9.31; see also Ex. 200, p. 3-2.)

(Page 308, Finding of Fact 8) The project site is designated Industrial “I” under the Avenal General Plan and zoned Heavy Industrial “M-2”, which allows a broad range of industrial activities and development including ~~“public utilities.”~~ an “electrical power generating plant.”

(Page 308, Finding of Fact 9) The City of Avenal has determined that power plants are a ~~permitted~~ conditional use in the Heavy Industrial “M-2” zone under the ~~“public utilities~~ utilities and resource extraction” category.

- Avenal Power notes that the timeframe for compliance with Condition of Certification LAND-2 has changed from “60 days prior to the start of commercial operation” (FSA at 4.5-18) to “[a]t least 60 calendar days prior to the start of construction” (PMPD at 310). Avenal Power assumes the purpose of this change is to secure mitigation for the loss of prime farmland at the project site by the time that land is actually developed. In order to make the time mitigation is required closer to the actual development of the farmland, Avenal Power

suggests basing this verification on the commencement of “ground disturbance,” a term defined at page 27 of the PMPD, rather than construction. Avenal Power proposes the following change to the verification for LAND-2:

Verification: ~~At least 60 calendar days prior~~ Prior to the start of ~~construction~~ ground disturbance (as defined in this Decision), the project owner shall provide documentation to the CPM demonstrating compliance with one of these options.

- Avenal Power notes the addition of school bus scheduling information to Condition of Certification TRANS-1. (PMPD at 322.) These bus schedules have already changed at least once during the project approval process, and may change again before construction is initiated. Avenal Power will continue to work with the school district and other bus operators to ensure the project’s construction traffic does not interfere with bus schedules.

II. AVENAL POWER’S PROPOSED EDITORIAL CORRECTIONS

Avenal Power requests the Committee make and the Commission accept the following editorial corrections to the Proposed Decision.

- Page 59: add the word “Verification” to Condition of Certification GEN-6.

Verification: At least 15 days (or within a project owner and CBO approved . . .

- Page 62: In the electronic version of the PMPD, but not the hard copies mailed to the parties, language is missing from Condition of Certification STRUC-1, subpart 4. Condition of Certification STRUC-1, subpart 4 should read as follows:

4. Ensure that the final plans, calculations, and specifications clearly reflect the inclusion of approved criteria, assumptions, and methods used to develop the design. The final designs, plans, calculations, and specifications shall be signed and stamped by the responsible design engineer (2007 CBC, Appendix Chapter 1, § 106.3.4, Design Professional in Responsible Charge); and

- Page 219: correct the spelling of “Kettleman Hills” in the first line of the first full paragraph and the last sentence of the first full paragraph.

The closest natural habitat communities are located within the Kettleman Hills on . . .

The Avenal Energy Project will not directly impact these species and Interstate 5

limits movement of terrestrial wildlife between the Kettleman Hills and the . . .

- Page 220 (first full paragraph, last sentence): delete the word “as”.

The site ~~as~~ has recently been used as an irrigated grain field.

- Page 229 (subsection 3, LORS Compliance, second paragraph): modify the second sentence as follows.

The Applicant has requested ~~would obtain the Biological Opinion (BO) from~~ the Environmental Protection Agency (EPA) consult with the USFWS under the Section 7 consultation process based upon Avenal Power’s request for a Prevention of Significant Deterioration Permit from EPA ~~with USFWS~~.

- Page 307 (Findings of Fact): finding number 2 is missing a colon.

The project owner will provide mitigation by preserving other Prime Farmland in the vicinity at a 1:1 ratio to compensate for the loss of 34.8 acres . . .

- Page 340 (last paragraph under subsection 2. Operations): correct the reference to “Chemways”.

Finally, the evidence shows that the noise from the Avenal Energy Project, even when coupled with noise from expansion and operation of the ~~Chemways facility in Kettleman Hills~~ Chemical Waste Management Kettleman Hills Facility, . . .

III. AVENAL POWER’S SUGGESTED ADDITIONAL RESPONSES TO COMMENTS

Avenal Power requests the Committee and the Commission consider adding the following responses to comments to the Proposed Decision to aid the public and other parties in their review of the Proposed Decision.

- Page 128: add the following language immediately prior to the last sentence of the second full paragraph.

The reference by Intervenor CRPE to a federal rulemaking at 73 FR 28339 is misplaced. In the same rulemaking document cited by CRPE, beginning at 73 FR 28331, EPA indicates that the major source threshold for direct emissions of PM_{2.5} is 100 tons per year. As noted in the FSA, the project’s direct emissions of PM_{2.5} are 80.78 tons per year and, as a result, the project would not be subject to *any* offset requirements for its direct PM_{2.5} emissions under EPA regulations.

(Ex. 200, p. 4.1-20.)

- Page 130: add the following to the end of the first paragraph under Response to Agency and Public Comments.

Rather than repeat the detailed and complete responses provided by staff in the FSA, this Decision incorporates the responses to comments contained in the FSA (Ex. 200) at pages 4.1-37 to 4.1-38. In addition to the responses to comments included in the FSA, CRPE expressed concerns about the potential impacts of the criteria pollutant emissions to public health in the local area and specifically, the correlation between air emissions and health effects. CRPE claims the project's analysis fails to correlate air quality impacts to resulting public health impacts, in violation of 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) ("*Bakersfield Citizens*"), which invalidated two environmental impact reports in part because, despite a finding of significant air quality impacts, they lacked analysis of the connection between reduction in air quality and increases in specific respiratory conditions and illnesses. (See *Bakersfield Citizens*, *supra*, at 1220.) However, the analysis conducted in this case is distinguishable because 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, pp. 4.7-15 through -20 [Attachment A – Criteria Pollutants].) Furthermore, unlike in *Bakersfield Citizens*, the project will not cause any significant unmitigated air quality impacts. (Ex. 200, p. 4.1-1.) Therefore, the holding in *Bakersfield Citizens* is inapposite.

In its reply brief, 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. (See *Berkeley Keep Jets Over the Bay Comm.*, *supra*, at 1352.) This case is not relevant here because Commission 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, 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, pp. 4.1-1, 4.7-1.) Therefore, the cases cited by CRPE do not demonstrate any inadequacy in the project's public health impact analysis.

Further, in its reply brief, CRPE suggests the Commission has improperly relied upon the judgment of SJVAPCD without sufficient independent analysis. (CRPE Reply Brief at 7.) We disagree. The Commission has properly considered the comments of SJVAPCD, a responsible agency under CEQA, in an area in which it has demonstrated expertise and jurisdiction. (See 14 C.C.R. § 15204[f]; see also Pub. Res. Code § 25216.3[a].) In addition, Commission staff has, in fact,

independently evaluated the District's analysis and concluded that it is sound.
(Ex. 200, pp. 4.1-30 to 4.1-39.)

- Page 229: add the following to the end of the first paragraph that is the last paragraph discussing cumulative impacts in response to questions from Rob Simpson.

Mr. Simpson also presented no evidence but questioned Commission staff about the potential impacts of nitrogen deposition to plant species. (7/7/2009 RT 330:16-331:10.) Staff's witness explained that given the soil and plant types in the project area, nitrogen deposition is unlikely to have a negative impact on plant life. (See *id.*)

IV. CONCLUSION

Avenal Power appreciates the Committee's and the Commission's consideration of these comments and thanks the Committee for its careful review of this Application for Certification.

DATED: November 30, 2009

DOWNEY BRAND LLP

By: 

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PROOF OF SERVICE
(Revised 6/24/09)

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Declaration of Service

I, Lois Navarrot, declare that on November 30, 2009, I served and filed copies of the attached **Avenal Power Center, LLC's Comments on the Presiding Member's Proposed Decision**. 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, 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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- ☒ sending an original paper copy and one disk copy by hand delivery to the address below;

OR

- _____ depositing in the mail an original and 12 paper copies as follow:

California Energy Commission
Attn: Docket No. 08-AFC-1
1516 Ninth Street, MS-4
Sacramento, CA 95814-5512

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



Lois Navarrot