

January 7, 2013



**VIA E-MAIL CAMILLE.REMY-OBAD@ENERGY.CA.GOV**

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Compliance Project Manager  
Siting, Transmission and Environmental Protection (STEP) Division  
California Energy Commission  
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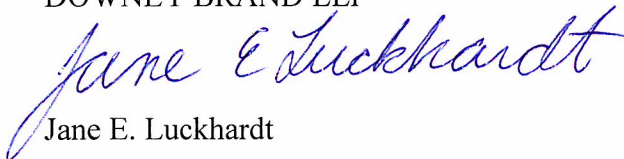
Re: Docket No. 08-AFC-1C  
Avenal Power Center, LLC's Response to Comments of Center on Race, Poverty & The Environment

Dear Ms. Obad:

Attached is Avenal Power Center's Response to the Comments of Center on Race, Poverty & The Environment in the above-entitled matter.

Very truly yours,

DOWNEY BRAND LLP

  
Jane E. Luckhardt

JEL:ln

Attachments

cc: Dick Ratcliff (via e-mail **dick.ratcliff@energy.ca.gov**)

**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-1C**

**AVENAL POWER CENTER, LLC'S RESPONSE TO COMMENTS OF  
CENTER ON RACE, POVERTY & THE ENVIRONMENT**

**January 7, 2013**

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

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

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**AVENAL POWER CENTER, LLC'S RESPONSE TO COMMENTS OF CENTER ON  
RACE, POVERTY & THE ENVIRONMENT**

First and foremost, Avenal Power Center, LLC's ("APC") Petition for Post-Certification Amendment requests the California Energy Commission ("Commission") allow an option to construct the Avenal Energy Project ("Project") as a minor source (the "Amendment") and thereby, reduce emissions of oxides of nitrogen (NO<sub>x</sub>) to no more than 198,840 pounds per year (lb/y) and emissions of carbon monoxide (CO) to no more than 197,928 lb/y. If APC elects to construct the Project as a minor source, the environmental impacts can only be the same or less than those evaluated and permitted in the Final Commission Decision for the Avenal Energy Project (CEC-800-2009-006-CMF [Dec. 2009] "Decision"). The Decision allows the Project to emit no more than 143,951 lb/y NO<sub>x</sub> for each turbine (287,902 lb/y NO<sub>x</sub> total) and 601,810 lb/y CO for each turbine (1,203,620 lb/y CO total), whereas the requested minor source alternative caps total emissions at no more than 198,840 lb/y NO<sub>x</sub> and 197,928 lb/y CO.<sup>1</sup>

The issues raised by the Center on Race, Poverty & the Environment ("CRPE") in their December 28, 2012 letter to the Commission ("CRPE Comment Letter") have been previously raised and addressed over the course of the many reviews, analyses and approvals granted to the Project. CRPE raises concerns about NO<sub>2</sub> impacts associated with the Project. The San Joaquin Valley Air Pollution Control District ("District") has evaluated the operation of the Project as a

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<sup>1</sup> Decision at Condition of Certification AQ-33; Staff Analysis of Proposed Modification to Allow for Construction and Operation as Either a Major or a Minor Stationary Source of Criteria Air Pollutant Emissions and to Make Minor Modifications to Air Quality Conditions of Certification, Avenal Energy Project 08-AFC-1C ("Staff Analysis") (Nov. 20, 2012) at 12.

minor source and issued an Alternative Final Determination of Compliance (“AFDOC”).<sup>2</sup> The District included in Attachment G of the AFDOC an analysis of the Project’s NO<sub>2</sub> impacts and compliance with the federal 1-hour NO<sub>2</sub> standard. The District concluded the Project “will not cause or contribute significantly to a violation of the State and National AAQS”<sup>3</sup> – specifically including the federal 1-hour NO<sub>2</sub> standard raised by CRPE. The District concluded the AFDOC with the following recommendation:

Compliance with all applicable prohibitory rules and regulations is expected.  
Issue the Final Determination of Compliance for the facility subject to the  
conditions presented in Attachment A [AFDOC Conditions].<sup>4</sup>

In addition, the Commission Staff evaluated the District’s NO<sub>2</sub> analysis at pages 9-11 of the Staff Analysis. Commission Staff confirmed the District’s conclusions:

The result of this analysis is that the project would not cause or contribute to any  
exceedances of the federal 1-hour NO<sub>2</sub> standard.

CRPE’s statements regarding significant NO<sub>2</sub> impacts from the Project are incorrect and based upon outdated documents. Included as Attachment A to this filing is a timeline showing the permitting chronology for this project. The letter cited by CRPE<sup>5</sup> from the Environmental Protection Agency (“EPA”) to Jim Rexroad from August 2010 addresses submissions by APC to EPA during the prevention of significant deterioration (“PSD”) permitting process. In August 2010, EPA was still developing guidance on how to demonstrate compliance with the federal NO<sub>2</sub> standard. Avenal presented a proposed NO<sub>2</sub> analysis in an attempt to meet EPA’s evolving guidance to which the August 2010 letter responds. In an action consistent with the Clean Air Act, that was subject to public notice, comment, and review by the Environmental Appeals Board, EPA grandfathered the Project from having to demonstrate compliance with the new 1-hour NO<sub>2</sub> standard. However, the analysis performed by the District as part of its review of the minor source application demonstrates that the Project complies with the federal 1-hour NO<sub>2</sub> standard. CRPE did not question the District’s analysis of the Project’s compliance with this

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<sup>2</sup> San Joaquin Valley Air Pollution Control District, Notice of Final Determination of Compliance, Project number C-1100751 – Avenal Power Center LLC (08-AFC-01) (December 17, 2010).

<sup>3</sup> AFDOC at Attachment G, p. 3.

<sup>4</sup> AFDOC at 111.

<sup>5</sup> CRPE Comment Letter at 2.

standard when CRPE commented on the District's Alternative *Preliminary* Determination of Compliance.

In their comments to the Commission regarding the Amendment, CRPE ignores the District's NO<sub>2</sub> analysis and instead relies upon EPA's comments on the District's NO<sub>2</sub> analysis presented in the *Preliminary* Determination of Compliance for the minor source permit. The District responded to EPA's comments in Attachment J to the AFDOC. Despite EPA's initial comments on the method the District uses to analyze the Project's NO<sub>2</sub> impacts, the District's guidance used in the AFDOC has become the framework under which the California air districts developed the current statewide guidance document. CRPE's claims that both EPA's and the District's data show a significant impact based upon the federal 1-hour NO<sub>2</sub> standard are without merit, without technical basis, and contradict the District's own, explicit conclusions.

CRPE also refers to the ongoing litigation regarding the PSD permit. As you may recall, CRPE along with other organizations have appealed EPA's issuance of the Project's final PSD permit. That appeal has been fully briefed in the Ninth Circuit and is awaiting a hearing date or further action from the court. We have no information at this time as to when the court may take up the appeal. In any event, the PSD permit and appeal process is a separate federal permit.

It is because of the lengthy process to obtain a PSD permit and the continuing litigation regarding that permit that APC has requested the ability to construct and operate the Project as a minor source. APC has requested enforceable limits from the District and this Commission to ensure the Project will remain a minor source should APC decide to proceed as a minor source. These emission limits will be monitored and recorded by the continuous emissions monitoring system ("CEMS") and reported to both the District and the Commission, as is required of all power plants licensed by the Commission. Of all the Conditions of Certification established by this Commission, a hard emissions limit recorded by CEMS is one of the easiest to monitor and enforce. CRPE's claims to the contrary are completely without merit.

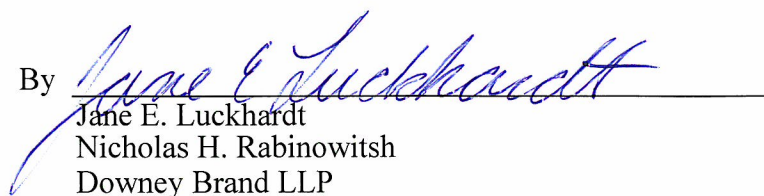
Finally, this Commission conducted an extensive analysis of environmental justice issues for this Project. This Amendment only results in a potential *decrease* in emissions. Therefore, the Amendment does not trigger additional environmental justice review.

For all of the reasons stated above, the Commission should adopt the Staff's analysis and approve APC's Amendment.

DATED: January 7, 2013

DOWNEY BRAND LLP

By



Jane E. Luckhardt

Nicholas H. Rabinowitsh

Downey Brand LLP

Attorney for Avenal Power Center, LLC

**Attachment A**  
**Avenal Energy Project Permitting Timeline**  
**January 2013**

Date	CEC/SJVAPCD Permit Process	Federal PSD Permit Process
<b>February 13, 2008</b>	<b>Avenal Power Center (APC) files the Application for Certification (AFC) for the Avenal Energy Project (Project) with the California Energy Commission (CEC). (CEC Exhibit 1.)</b>	
February 15, 2008		Project's Prevention of Significant Deterioration (PSD) permit application filed with Region 9. (APC Amendment Petition [March 5, 2012] at 5.)
March 18, 2008	SJVAPCD issued Notice of Receipt of Complete Application for an Authority to Construct permit (Project No. C-1080386)	
<b>March 19, 2008</b>		<b>EPA issued letter finding the PSD Permit application to be complete. (See CEC Exhibit 3, Attachment A.1; APC Amendment Petition [March 5, 2012] at 5.)</b>
July 16, 2008	Preliminary Determination of Compliance (PDOC) for Major Source issued by San Joaquin Valley Air Pollution Control District (SJVAPCD). (CEC Exhibit 58 at 1.)	
October 30, 2008	Final Determination of Compliance (FDOC) for Major Source issued by SJVAPCD. (CEC Exhibit 58.)	
<b>March 19, 2009</b>		<b>Date by which Project should have received final PSD Permit (per 1 year limit in 42 U.S.C. § 7475(c)).</b>

Date	CEC/SJVAPCD Permit Process	Federal PSD Permit Process
<b>June 16, 2009</b>		<b>Proposed (Draft) PSD permit issued. (APC Amendment Petition [March 5, 2012] at 5.)</b>
<b>July 15, 2009</b>		<b>EPA Administrator publishes proposed 1 hr NO<sub>2</sub> NAAQS in Federal Register. (74 Fed. Reg. 34404 [July 15, 2009].)</b>
July 16, 2009		Date originally scheduled for end of public comment period on proposed PSD permit, and deadline for requests for Public Hearing. EPA extended this comment period through October 15, 2009. (See EPA Doc. No. EPA-R09-OAR-2009-0438-0002.)
September 30, 2009		EPA holds Public Information Meeting to provide information and discussion regarding the project's proposed PSD permit. (See EPA Doc. No. EPA-R09-2009-0438-0141.)
October 1, 2009		EPA holds Public Hearing to provide information and discussion regarding the project's proposed PSD permit. (See EPA Doc. No. EPA-R09-2009-0438-0141.)
June 16, 2009 through October 15, 2009		Extended public comment period on Proposed PSD Permit. (See EPA Doc. No. EPA-R09-2009-0438-0141.)
<b>December 23, 2009</b>	<b>CEC issued Final Commission Decision approving the Project's AFC (CEC-800-2009-006-CMF). By this point, Project has received all required approvals <u>except</u> for the PSD permit</b>	



Date	CEC/SJVAPCD Permit Process	Federal PSD Permit Process
January 22, 2010		Final rule establishing new 1-hour NO <sub>2</sub> standard is signed. (EPA Supplemental Statement of Basis, PSD Permit Application for Avenal Energy Project [March 2011] at 19.)
February 9, 2010		EPA publishes notice of new 1-hour NO <sub>2</sub> standard. See 75 FR 6474.
February 25, 2010		EPA issues guidance regarding the ambient air quality assessment under the new 1-hour NO <sub>2</sub> standard. (EPA Supplemental Statement of Basis, PSD Permit Application for Avenal Energy Project [March 2011] at 19.)
March 2, 2010	Application for the Alternative (Minor Source) FDOC submitted to SJVAPCD.	
March 8, 2010		Avenal files complaint in <i>Avenal v. EPA</i> to compel EPA to issue or deny the PSD permit.
<b>April 12, 2010</b>		<b>1-hr federal hourly NO<sub>2</sub> standard becomes effective. (See 75 FR 6474.)</b>
May 13 and 14, 2010		Additional modeling submitted to address new 1 hr NO <sub>2</sub> standard (see July 13, 2010 Avenal Letter to Stephanie Talbert [DOJ]; see also EPA-R09-2009-0438-0119)
July 23, 2010	PDOC for Minor Source issued by SJVAPCD (District Project No. C-1100751)	
September 12, 2010	EPA submits letter to SJVAPCD regarding Avenal Power Center's application for a minor source permit. (Comments included in Alternative FDOC)	

Date	CEC/SJVAPCD Permit Process	Federal PSD Permit Process
September 13, 2010	CRPE and NRDC submit letter to SJVAPCD regarding the July 2010 Alternative (Minor Source) PDOC. (Comments included in Alternative FDOC)	
<b>December 17, 2010</b>	<b>SJVAPCD issues the Alternative FDOC allowing the Project to operate as a minor source (District Project No. C-1100751). The Alternative FDOC includes a response to comments by EPA and CRPE/NRDC.</b>	
March 2011		EPA issues Supplemental Statement of Basis for the Avenal Energy Project Prevention of Significant Deterioration (PSD) Permit Application, and sets hearing date of April 12, 2011.
April 12, 2011		Third public hearing, on Avenal PSD Permit and Supplemental Statement of Basis, including the topics of environmental justice and grandfathering from new NO <sub>2</sub> hourly standard.
April 12, 2011		Public comment period closes on Avenal PSD Permit and Supplemental Statement of Basis, including the topics of environmental justice and grandfathering from new NO <sub>2</sub> hourly standard. (See public notice of Third Public Hearing on Proposed Action and Supplemental Statement of Basis [March 7, 2011].)

Date	CEC/SJVAPCD Permit Process	Federal PSD Permit Process
May 11, 2011	Avenal Power Center files petition with the CEC for post-certification amendment requesting a new condition of certification allowing construction and operation of the Avenal Energy Project as a minor source (later superseded by Avenal Power Center's March 5, 2012 amendment petition).	
May 26, 2011		District Court in <i>Avenal v. EPA</i> issues order requiring EPA to grant or deny Avenal Power Center's PSD permit no later than August 27, 2011, including all administrative appeals.
<b>May 27, 2011</b>		<b>EPA issues PSD Permit.</b>
June 25-28, 2011		Administrative challenges filed against the Project's PSD permit by El Pueblo Para El Aire y Agua Limpio, Sierra Club, Center for Biological Diversity, Greenaction, and Rob Simpson before the EPA Environmental Appeals Board (EAB).
August 18, 2011		EAB issues final order denying review of all petitions.
<b>September 9, 2011</b>		<b>Final Action on PSD Permit Approval published in the Federal Register.</b>
November 2011		Three petitions for review filed in the Ninth Circuit Court of Appeal. One has been dismissed (Simpson), but the other two are still pending.
March 5, 2012	Avenal Power Center files consolidated petition for post-certification amendment requesting a new condition of certification allowing construction and operation of the Avenal Energy Project as a minor source, requesting an extension of the deadline to begin	

Date	CEC/SJVAPCD Permit Process	Federal PSD Permit Process
	construction, and requesting minor modifications to air quality conditions. (Separate petitions originally filed on May 17, 2011 and February 29, 2012.)	
May 2012		Ninth Circuit challenge against the Project's PSD permit is fully briefed.
May 2012		Avenal Power Center files motion to expedite hearing in Ninth Circuit PSD litigation.
June 12, 2012		Avenal Power Center's motion to expedite Ninth Circuit hearing denied.
November 20, 2012	CEC Staff issues Staff Analysis of Avenal Energy Center's post-certification amendment petition.	
December 28, 2012	CRPE files comments on Staff Analysis of Avenal Energy Center's post-certification amendment petition.	
<b>Current PSD Permit Status</b>	The Ninth Circuit litigation challenging the Project's PSD permit remains ongoing, and a date has not yet been set for hearing. Therefore, the duration of this litigation is uncertain.	