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California Energy Commission
Docket Unit
1516 Ninth Street
Sacramento, CA 95814-5512

Subject: **CCGS LLC'S REPLY TO INTERVENOR SARVEY'S OPENING BRIEF**
OAKLEY GENERATING STATION
DOCKET NO. (09-AFC-4)

Enclosed for filing with the California Energy Commission is the original of, **CCGS LLC'S REPLY TO INTERVENOR SARVEY'S OPENING BRIEF**, for the Oakley Generating Station (09-AFC-4).

Sincerely,

Marie Mills

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STATE OF CALIFORNIA

Energy Resources
Conservation and Development Commission

In the Matter of: Application for Certification for the **OAKLEY GENERATING STATION**	**DOCKET NO: 09-AFC-4** **CCGS LLC'S REPLY TO INTERVENOR SARVEY'S OPENING BRIEF**

INTRODUCTION

Contra Costa Generating Station LLC (CCGS LLC), a wholly owned subsidiary of Radback Energy Inc., hereby files its Reply to Intervenor Sarvey's Opening Brief for the Oakley Generating Station (OGS).

BIOLOGICAL RESOURCES

Intervenor Sarvey contends on one hand that the efforts by the USFWS have been ineffective in mitigating the existing nitrogen impacts on the Lange's metalmark butterfly but then contends that the Commission should rely on the USFWS recommendations to increase the mitigation obligation of OGS to the very same activities. Mr. Sarvey cites no legal authority that would support his contention that the OGS should mitigate more than its fair share contribution to the cumulative impact. The law is clearly contrary to his contentions. Specifically Section 15130 (a) (3) of the California Environmental Quality Act (CEQA) Guidelines states,

> An EIR may determine that a project's contribution to a significant cumulative impact will be rendered less than cumulatively considerable and thus is not significant. A project's contribution is less than cumulatively considerable if the project is required to implement ***or fund its fair share of a mitigation measure or measures designed to alleviate the cumulative impact***. The lead agency shall identify facts and analysis

> supporting its conclusion that the contribution will be rendered less than cumulatively considerable. (***Emphasis Added***)

As shown in our Opening Brief, the amount of actual fertilization of the soil due to the emissions of the OGS is almost immeasurable, yet the Staff has assessed and CCGS LLC has agreed to mitigate for every gram of potential nitrogen deposition. Mr. Sarvey does not acknowledge that the amount of nitrogen calculated is based on worst case operating scenarios of the OGS. Mr. Sarvey cites to the testimony of his witness Dr. Weiss, but the Committee should note that Dr. Weiss does not quantify the OGS contribution to the existing nitrogen levels, nor does he dispute Staff's quantification of the OGS contribution.

Mr. Sarvey's sole contention is that the mitigation is not enough and should not take the form of payment to the USFWS. Mr. Sarvey contends that the case of *Kings County Farm Bureau v. City of Hanford*, 221 Cal. App. 3d 692 (*Kings County)* stands for the proposition that payment of fees cannot be mitigation. This is not a fair reading of this case and is contrary to CEQA Guidelines Section 15130 (a) (3) outlined above and case law interpreting it. In *Kings County,* the applicant proposed an agreement with the water district and included many water saving features in the design of the project. The Appellants contended that the mitigation agreement was not mitigation without a finding that the requirement to purchase recharge water was even feasible. The court held,

> Appellants' contention assumes the mitigation agreement was, at least in part, a basis for finding no significant impact. GWF's contention assumes the mitigation agreement was, for the most part, irrelevant to the finding of no significant impact. Because the City made no specific findings concerning whether it considered the GWF-KCWD agreement to mitigate the effect of the project on ground water, we cannot determine how the City viewed the agreement.
>
> To the extent the GWF-KCWD agreement was an independent basis for finding no significant impact, the failure to evaluate whether the agreement was feasible and to what extent water would be available for purchase was fatal to a meaningful evaluation by the city council and the public.[1]

Condition of Certification **BIO-20** requires the payment of funds to a third party approved by the USFWS Antioch Dunes NWR in order to carry out the specific mitigation activities over which the USFWS has exclusive expertise and control. This is in no way analogous to the facts or holding in *Kings County*.

In fact, Mr. Sarvey properly acknowledges in his Opening Brief, that the USFWS Antioch Dunes NWR operating budget is used for the following purposes.

> The annual operating budget is approximately $385,000 and includes money for non-native plant removal/fire prevention, sand acquisition, grazing management, butterfly propagation, and rare plant propagation (Picco 2009).[2]

These are the same activities that Dr. Weiss recommends in his testimony.

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[1] Kings County; 221 Cal. App. 3d 692; page 728

[2] Intervenor Sarvey Opening Brief, page 3, citing Exhibit 300, page 4.2-45

> The mitigation should be a series of specific projects, as proposed by USFWS including captive breeding, buckwheat and other endangered plant propagation, and weed control, rather than a set amount of money, so that real actions are accountable.[3]

These are the same activities recommended by USFWS in its previous letters and oral testimony. USFWS is entirely capable and the Commission can rely on it fulfilling its mission at the Antioch Dunes NWR by using the funds provided by OGS to reduce the effects of nitrogen deposition. As described above, Section 15130 (a) (3) of the CEQA Guidelines specifically authorizes agencies to allow the payment of a contribution to a fund designed to mitigate the impact. The entire purpose of the Antioch NWR mission is to enhance and preserve the Antioch Dunes and includes the specific activities to mitigate the cumulative effects (of which the OGS has an almost immeasurable contribution) of nitrogen deposition. The courts have upheld this section and in *Save Our Peninsula Committee v. Monterey County Board of Supervisors*, 87 Cal. App. 4th 99 distinguished the mere payment of fees versus the payment into a fund to be used for mitigation. In that case, the funds were required to be paid to the County for traffic improvements and the court relied on the fact that the County had demonstrated a commitment to actually implementing the traffic improvements. Similarly, the Commission can rely on the commitment of the USFWS Antioch Dunes NWR to use the funds to augment the existing programs it is undertaking to respond to nitrogen deposition. As discussed in our Opening Brief, this is exactly what the Commission concluded in the Marsh Landing Final Decision.

SOIL AND WATER RESOURCES

Mr. Sarvey contends that Condition of Certification **SOIL & WATER-4** does not comply with applicable water law, Commission Policy and does not mitigate impacts. With respect to impacts, there is no evidence that the use of water by the OGS will result in significant impacts to water resources. In fact, Staff made it clear in its Rebuttal Testimony that it did not contend the OGS causes significant impacts to water resources and Intervenor Sarvey provided no evidence to the contrary.

> Therefore, staff has not concluded there will be any known significant impacts and has not recommended any mitigation for impacts that may be believed to be speculative.[4]

Therefore, Mr. Sarvey's contentions that **SOIL&WATER-4** does not properly mitigate impacts should be rejected.

Similarly, Mr. Sarvey's contention that **SOIL&WATER-4** does not ensure compliance with existing laws, ordinances, regulations or standards (LORS) should be rejected. There is no law or water policy that requires a power plant that is currently using dry-cooled technology to use recycled water. Even assuming that the Section 13550 of the Water Code was applicable to the OGS, recycled water would need to be available at a cost that is comparable to potable water. Notwithstanding the lack of authority requiring the use of recycled water, CCGS LLC has agreed to use the recycled water if it becomes available at a cost that is comparable to potable water ***in the future.*** This commitment is unparalleled

[3] Exhibit 404, Page 1
[4] Exhibit 303, Staff Rebuttal Testimony, Page 3

and should be applauded. CCGS LLC has no control over when and whether recycled water will actually become available, or at what cost. Contrary to Mr. Sarvey's contentions, Condition of Certification **SOIL&WATER-4** does not impose any obligation on the Ironhouse Sanitation District (ISD). It simply acknowledges the criteria under which recycled water would be available and at a comparable cost for the OGS in the future.

There is simply no evidence in the record to support any conclusions other than 1) the OGS will not have significant impacts to water resources and; 2) the OGS will comply with all applicable water resource-related LORS.

ALTERNATIVES

Under the area of Alternatives, Mr. Sarvey is basically contending that the Commission should resurrect its need analysis. The Legislature removed the Commission's need analysis requirement in 2000[5]. The Commission should reject Mr. Sarvey's attempt to adjudicate the issues adjudicated by the California Public Utilities Commission (CPUC) when it approved the Purchase and Sale Agreement of the OGS to PG&E.

Mr. Sarvey provides no credible evidence that the OGS will result in significant unmitigated impacts. CEQA only requires an agency to consider alternatives that will reduce ***significant impacts***. Specifically Section 15126.6 of the CEQA Guidelines provides,

> (a) Alternatives to the Proposed Project. An EIR shall describe a 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, and evaluate the comparative merits of the alternatives. 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 decision making and public participation. An EIR is not required to consider alternatives which are infeasible. The lead agency is responsible for selecting a range of project alternatives for examination and must publicly disclose its reasoning for selecting those alternatives. There is no ironclad rule governing the nature or scope of the alternatives to be discussed other than the rule of reason. (*Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553 and *Laurel Heights Improvement Association v. Regents of the University of California* (1988) 47 Cal.3d 376).
>
> (b) Purpose. Because an EIR must identify ways to mitigate or avoid the ***significant effects*** that a project may have on the environment (Public Resources Code Section 21002.1), the discussion of alternatives shall focus on alternatives to the project or its location which are capable of avoiding or substantially lessening any ***significant effects*** of the project, even if these alternatives would impede to some degree the

[5] SB 110 (1999)

attainment of the project objectives, or would be more costly.
(***Emphasis Added***)

All of the OGS impacts are mitigated to less than significant levels. Nothing in CEQA compels an agency to select the "No Project Alternative" or any other Alternative, especially if the proposed project does not result in any significant impacts.

ENVIRONMENTAL JUSTICE

Mr. Sarvey fails to acknowledge a fundamental point in any environmental justice analysis – significant, large, and adverse impacts that would also disproportionately affect minority and low income populations. In the case of the OGS, the evidence is clear that there are no significant and adverse impacts to "anyone". Since minority or low income populations would clearly be a subset of "anyone", no minority or low income population would be subjected to significant direct, indirect, or cumulative impacts, let alone disproportionate ones. Therefore, environmental justice has been properly analyzed.

CONCLUSION

CCGS LLC thanks the Committee for the opportunity to submit this Reply Brief. As described above, with the incorporation of the Conditions of Certification as they are currently reflected in the evidentiary record the OGS will comply with all applicable LORS and will not result in significant environmental impacts.

Dated: April 6, 2011

/ original signed /

_____

Scott A. Galati
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APPLICATION FOR CERTIFICATION
FOR THE *OAKLEY GENERATING STATION*

Docket No. 09-AFC-4
PROOF OF SERVICE
(Revised 4/5/2011)

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DECLARATION OF SERVICE

I, Marie Mills, declare that on April 6, 2011, I served and filed copies of the attached CCGS LLC'S REPLY TO INTERVENOR SARVEY'S OPENING BRIEF, dated April 6, 2011. 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:

[http://www.energy.ca.gov/sitingcases/contracosta/index.html]. The documents have 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:

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I declare under penalty of perjury that the foregoing is true and correct, that I am employed in the county where this mailing occurred, and that I am over the age of 18 years and not a party to the proceeding.

Marie Mills