

**State of California**

State Energy Resources Conservation and Development Commission

In the Matter of: )  
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Oakley Generating Station )  
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Docket # 09-AFC-04  
PMPD Comments  
Robert Sarvey

<b>DOCKET</b>	
<b>09-AFC-4</b>	
DATE	_____
RECD.	05/17/11

Introduction

The Oakley Project and the agency deliberations on it represent the complete failure of the Long Term Procurement Process (LTPP) which was designed to ensure that the proper level and types of generation are sited by the State. Due to the enormous influence of PG&E who is the owner of this project PG&E ratepayers will be subject to 1.5 billion dollars of unneeded expenditures for a project that by the Energy Commissions own forecasts is not needed. The **only final** decision by the CPUC on the approval of the Oakley PSA is D.10-07-045. Conclusion of Law number 13 states in D. 07-12-045, **“The Oakley Project is not needed at this time.”**<sup>1</sup> This project emphasizes the failure of this Commission and the CPUC to adequately plan and implement the States procurement process to the detriment of the State of California and its residents.

The Committee established in this proceeding a hearing and briefing schedule that was expediated and inadequate. For example reply briefs were due two days after the opening briefs. The sole purpose of the rush to judgment in this proceeding was performed to satisfy PG&E’s desire to avoid the new Federal Greenhouse Gas standards that are effective July 1, 2011. It’s ironic that the state agency that is primarily responsible for reducing greenhouse gases is cooperating with PG&E to avoid Federal

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<sup>1</sup> D. 10-07-045 Page 54 [http://docs.cpuc.ca.gov/word\\_pdf/FINAL\\_DECISION/121605.pdf](http://docs.cpuc.ca.gov/word_pdf/FINAL_DECISION/121605.pdf)

Greenhouse Gas Regulations. The applicants December 3, 2010 request for scheduling order states:

*“It is imperative for the OGS to begin construction in late May of 2011 in order to qualify for a current grandfathering exemption contained in the Prevention of Significant Deterioration (PSD) Tailoring Rule. Currently, because the OGS’s emissions are below regulatory thresholds, it is not required to obtain a federal PSD Permit. The PDOC reflects this determination. EPA adopted the Tailoring Rule which applied PSD requirements to Greenhouse Gas Emissions, which were previously not regulated by the PSD process. The Tailoring Rule allows projects such as OGS, which prior to the Tailoring Rule were not required to obtain a PSD Permit, an exemption if the OGS has begun “actual construction” by July 1, 2011. “Actual construction” under the current EPA Guidance would require physical permanent construction of an emitting unit, such as pouring foundations. Unfortunately, contracting, engineering or grading would not constitute “actual construction” under the current guidance. The purpose of the exemption was to allow projects that had already commenced the air permitting process to avoid being caught in a regulatory change that would require it to start over. The reasoning behind the exemption was to allow sufficient time for air permitting that had begun to be completed. CCGS filed its AFC and air permit application in June, 2009.”<sup>2</sup>*

Further this committee disregarded the comments of USFWS and the California Department of Fish and Game which explained that the mitigation proposed for nitrogen deposition was wholly inadequate to offset the OGS’s impact to wildlife species at the Antioch Bay Dunes Preserve.

The Commission also failed in its duties to perform an environmental justice analysis. The analysis performed relied on 2000 census data that is no longer representative of the project areas demographics. A simple request to the States Department of Finance Demographics Unit could have supplied the necessary information to conclude that the project area is majority minority.

In the alternatives analysis the committee ignored unchallenged testimony based on Energy Commission forecasts that the Oakley Project is not needed for reliability. Instead the committee relied on speculative testimony that if the OGS was not constructed some other power plant would be sited on the parcel which is complete speculation. The project as proposed does not even meet half of the project owner’s objectives. The project is not a fast start facility because it has 90 minute start time. The

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<sup>2</sup> CCGS, LLC’S REQUEST FOR SCHEDULING ORDER Page 2

project has a minimum output of over 150 MW limiting its usefulness in backing up intermittent renewables and the project is not being sited on a brownfield site.

### Biological Resources

On April 21, 2011 the Commission posted a letter from the California Department of Fish and Game (DFG). This letter was posted over a month after the close of the record and two weeks after the PMPD was published. The letter was dated February 11, 2011 and provided the DFG comments on the Preliminary Staff Assessment. The final decision must explain why this letter was not posted or given to the Committee for consideration. In the Marsh Landing Decision this Commission expressed disappointment in the USFWS comments which it claims were received a day or two before the full Commission approval of the project. As the Commission stated in the Marsh Landing final decision, *“A day or two before we adopted this Decision we received letters commenting on the PMPD from two sister agencies and others. To the extent those comments present facts not previously contained in the record, they are improper. (See Cal. Code Regs., tit. 20, §§ 1751, subd. (a), 1754, subd. (b).)”*<sup>3</sup> It is equally improper for this Commission to withhold agency comments for two months that have a material bearing on the impact of this project. To comply with due process, Cal. Code Regs., tit. 20, §§ 1754, subd. (b), requires that the record must be reopened to receive these comments and additional hearing time is necessary for consideration of the DFG comments.

Just like the Marsh landing preceding the USFWS has provided comments that the mitigation provided for nitrogen deposition impacts from the OGS is wholly inadequate. The comments from DFG reinforce the Wildlife services position.<sup>4</sup> Additionally the

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<sup>3</sup> Marsh Landing Generating Station Commission final decision Page 3  
<http://www.energy.ca.gov/2010publications/CEC-800-2010-017/CEC-800-2010-017-CMF.PDF>

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*“The Staff Assessment does not clearly indicate how the proposed mitigation for nitrogen deposition impacts (Mitigation Measure BI0-19) will address and fully mitigate expected project impacts. The analysis does not describe the management activities that are needed to offset the project's impact; therefore, it is unclear whether the proposed financial contribution will be sufficient to address such management needs. If the current mitigation proposal does not adequately anticipate the future costs of management,*

comments of DFG raise two issues which have not been addressed by the PMPD or the FSA The first is that:

***“The CESA "jeopardy" clause [Section 2081(c)] prohibits issuance of an incidental take permit if "issuance of the permit would jeopardize the continued existence of the species." Permits issued under CESA must demonstrate a finding that the Project will not put species at risk of extinction based on "best scientific and other information that is reasonably available" regarding "(1) known population trends; (2) known threats to the species; and (3) reasonably foreseeable impacts on the species from other related projects and activities."***

***CESA also requires "full mitigation" for any act that would result in take of a state-listed species [CESA Section 2081(b)]. Full mitigation means that no net loss of listed species may occur as the result of a proposed action. Under CESA, impacts include direct, indirect and cumulative effects. Neither DFG nor any other public agency may issue a CESA incidental take permit for unavoidable and/or unmitigated impacts to listed species.<sup>5</sup>***

The second issue not addressed in the PMPD or the FSA is;

***Finally, proposed mitigation does not take into account loss or degradation of habitat on private lands. Without management, invasive species spread will likely result in local species extirpations within these patches of isolated***

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*labor, supplies, transport, utilities, etc. necessary to address the project's contribution to increased nitrogen deposition, management activities at Antioch Dunes NWR may not be able to control the spread of invasive species. The resulting impact on listed species would be an avoidable residual impact, which is not allowable under CESA. DFG recommends that the CEC consult with USFWS to determine what resources are necessary for management of invasive species and whether the current operating budget of the Antioch Dunes NWR is an appropriate baseline for calculation of mitigation fees.*

*Preparation of a Property Analysis Report (PAR), a tool used by DFG and USFWS to estimate habitat management costs based on a habitat management strategy, may be useful in this regard. DFG strongly recommends that CEC obtain written concurrence from the USFWS on the mitigation proposal prior to approval of the project. The terms of the mitigation agreement, including financial compensation, must be acceptable to the USFWS, who would bear the burden for management activities. Prior to accepting the proposed mitigation, the CEC should also consult with USFWS as to whether the agency is willing to accept the mitigation burden on behalf of the applicant. Without clear agency consent to this mitigation arrangement, the proposed mitigation transfers responsibility for impact abatement from a private party to a public agency.*

<sup>5</sup> DFG Comments on the Preliminary Staff Assessment Page 2  
[http://www.energy.ca.gov/sitingcases/oakley/documents/others/2011-02-11\\_CDFG\\_Comments\\_on\\_PSA\\_Part\\_B\\_TN-60303.pdf](http://www.energy.ca.gov/sitingcases/oakley/documents/others/2011-02-11_CDFG_Comments_on_PSA_Part_B_TN-60303.pdf)

*habitat. It may be necessary to acquire, conserve and manage additional habitat within the project vicinity to achieve the CESA full mitigation standard.”<sup>6</sup>*

The final decision or the RPMPD must address both of these issues. The PMPD relies on the testimony of two CEC biologists with limited professional experience. The PMPD rejects the opinion of the United States Fish and Wildlife Service, the California Department of Fish and Game who are sister agencies that have provided timely comments and are the experts in the field. Their testimony is supported by Dr. Stuart Weiss who is quoted as a reference by CEC staff six times in their analyses.<sup>7</sup> There is substantial evidence in the record that the mitigation proposed is inadequate and the Final Decision must require the appropriate mitigation or be in violation of CEQA and the Endangered Species Act and the California Endangered Species Act.

#### Environmental Justice

The demographics analysis conducted for this project utilizes the 2000 census data that is 11 years old. The Commission Staff could have easily contacted the State’s Finance Department Demographics Unit and obtained current information. Since the analysis uses data which is no longer relevant the Energy Commission fails to provide an environmental justice analysis which complies with state and federal requirements for environmental justice. The PMPD relying on the aged 2000 census data concludes:

*“Based on this information, we find that the minority population does not exceed 50 percent of the population in the project vicinity. Thus, we conclude that there are no disproportionate impacts on environmental justice populations. The record further shows that the project’s implementation of the Conditions of Certification in this Decision will mitigate all potential health and safety and environmental impacts to levels below significance for any affected population, we conclude that there are no disproportionate impacts on environmental justice populations.*

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<sup>6</sup> DFG Comments on Preliminary Staff Assessment, Part B, Docket 09-AFC-4, Oakley Generating Station, Contra Costa County  
[http://www.energy.ca.gov/sitingcases/oakley/documents/others/2011-02-11\\_CDFG\\_Comments\\_on\\_PSA\\_Part\\_B\\_TN-60303.pdf](http://www.energy.ca.gov/sitingcases/oakley/documents/others/2011-02-11_CDFG_Comments_on_PSA_Part_B_TN-60303.pdf)

<sup>7</sup> Exhibit 402

*Intervenor Sarvey's testimony and post-hearing brief essentially argue that Staff's environmental justice analysis is deficient because it does not rely on the recently released (March 2011) 2010 U.S. Census data and instead relies on the US. Census data available when the AFC was filed and the evaluation was performed. Sarvey submitted no evidence or legal authority establishing that that 2000 census data is unreliable or that the minority population with the six-mile radius now exceeds 50 percent. Nor does Sarvey present any persuasive evidence regarding whether the project might result in a significant adverse impact on a low-income or minority population."*

The PMPD attempts to shift the burden of proof on the intervenor. It is the agencies duty to perform a proper environmental justice analysis not the responsibility of the intervenor. Even assuming that there is no minority majority population the PMPD ignores evidence provided that the minority pockets especially the minority residents of the trailer park<sup>8</sup> 900 feet from the OGS will endure a cancer risk of 52 in a million from the Oakley project and two nearby facilities which is higher than CEQA significance levels.<sup>9</sup> These risks calculated by the BAAQMD do not include the Gateway Project, the Contra Costa 6 and 7 units or the proposed Marsh Landing facility all within 1 mile of the OGS. According to the PMPD, *"for residential receptors located approximately 900 feet southwest of the site, the modeled construction impact for PM10 would be about 40 percent (20 µg/m3) of the limiting standard (50 µg/m3)."*<sup>10</sup> Also according to the PMPD project operational, *"impacts would be about one-half the maximum level (or less than 2.2 µg/m3) for the nearest residences at 900 feet (275 meters) southwest of the site and 2,350 feet (720 meters) east of the site."*<sup>11</sup> Since the existing background 24-hour PM2.5 monitoring data from the nearest monitoring station the Concord Station already equals the Federal standard any PM 2.5 contribution from the project creates an exceedence of the Federal 24 Hour PM 2.5 standards at the trailer park where a minority population resides.<sup>12</sup>

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<sup>8</sup> PMPD Socioeconomics Page 9

<sup>9</sup> RT 3-15-11 Page 93

<sup>10</sup> PMPD Air Quality Page 12

<sup>11</sup> PMPD Air Quality Page 12

<sup>12</sup> RT 3-15-11 Page 90

These are significant impacts under anyone's health based standards but since these are minority residents in a trailer park with no voice the PMPD ignores the impacts in violation of State and Federal Environmental Justice LORS.

#### No Project Alternative

The PMPD ignores that the project as proposed fails to meet half of the projects objectives. The CEC Staff defined the projects objectives as follows;

- Provide efficient, reliable, and predictable power supply capable of supporting the growing power needs of the Bay Area;
- Provide operational flexibility and **rapid-start** and dispatch capability;
- Site the project within the area of electrical demand and near existing infrastructure, thus minimizing the project's linear facilities;
- **Site the project on a brownfield** (previously disturbed) or industrial site.

The OGS would be located in Contra Costa County, within the Oakley City limits. The approximately 22-acre parcel is currently farmed for wine grapes. The California Department of Conservation designates the site as Farmland of Statewide Importance.<sup>13</sup> A (1.6-acre) conservation area exists on site, which includes a 0.62-acre mitigation wetland. The OGS site is not a brownfield site.

The legal definition of a brownfield site is found in Public Law 107-118 (H.R. 2869) - "Small Business Liability Relief and brownfields Revitalization Act" signed into law January 11, 2002, "*The term "brownfield site" means real property, the expansion, redevelopment, or reuse of which may be complicated by the presence or potential presence of a hazardous substance, pollutant, or contaminant.*"<sup>14</sup>

Black's Law Dictionary defines a brownfield site as "[a]n abandoned, idled, or underused industrial or commercial site that is difficult to expand or redevelop because of environmental contamination." The OGS does not meet any of these descriptions and is clearly not a brownfield Site. The OGS site fails to meet one of the projects main objectives and a priority of the State to locate the project on a brownfield site.

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<sup>13</sup> Exhibit 300 Page 6-2

<sup>14</sup> <http://epa.gov/brownfields/overview/glossary.htm>

As mentioned above one of the objectives of the project was to, “Provide operational flexibility and rapid-start and dispatch capability. The CAISO categorizes units with startup times less than 10 minutes as *fast-start* in the report titled, 2010 Integration of Renewable Resources (CAISO 2010).<sup>15</sup> Fast start units are needed to respond to rapid changes in output of renewable generation. The OGS is not capable of starting up in less than 10 minutes. Start up times for the OGS could be as long as 90 minutes.<sup>16</sup> Minimum load for one turbine of the OGS would be over 160 MW which does not provide a great deal of operating flexibility. The ability of the OGS to turndown to low loads does not exist. The OGS technology does not meet one of the projects primary objectives which is to provide low turndown and a startup times of less than 10 minutes. The project fails to meet two of the four basic project objectives defined by the CEC Staff.

The PMPD turns a blind eye to the fact that the Oakley Project is not needed at this time based on the Commissions own supply and demand analysis. One member of the Committee should be intimately familiar with this reality as they are a former member of the Board of Directors of TURN and should be proposing an alternate decision denying the Oakley Project and protecting the public and the ratepayers. TURN’s position on the Oakley Project is;

For Immediate Release: December 13th, 2010 **Proposed Oakley Power Plant Is Not Needed**

The Utility Reform Network, strongly opposes the proposed new PG&E power generating plant in Oakley California. The electricity that would be generated by the plant, which has a \$1.5 billion price tag, is not needed. TURN recommends that the California Public Utilities Commission reject the PG&E scheme, as it has before.

The CPUC originally denied PG&E’s proposal to build the plant in July 2010. The utility requested modification of the order, a request that the Commission’s administrative law judge said should be rejected. But outgoing Commissioner John Bohn wants to overrule the judge’s decision, a parting shot that would allow PG&E to purchase the expensive and unnecessary plant on customers dime.

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<sup>15</sup> Exhibit 300 Page 4.1-85

<sup>16</sup> FDOC Page 18

Nothing has changed that would justify a change in the Commission's July decision, said TURN senior staff attorney Mike Florio. The same criteria and same set of facts that led the Commission to reject this plant the first time still exist.

Florio said Commissioner Bohn's proposal fails to contain requisite findings of need to justify authorizing the project. In order to reverse the finding it made in the earlier decision, the Commission would have to make new findings based on evidence in the record. But nothing in PG&E's petition for modification addressed the company's need for new resources. The bottom line is that this proposal is not justified by customer need, and hence cannot be approved by the CPUC.<sup>17</sup>

The record contains the undisputed testimony that energy efficiency is the superior alternative to the OGS and the OGS should be denied. *"The need for the Oakley Project was determined in the 2006 Long Term Procurement Proceeding. The proceeding resulted in the issuance of D. 07-12-052. D. 07-12-052 authorized 800-1200 MW of procurement for PG&E in its service territory relying on the CEC's 2007 California Energy Demand Forecast. In December of 2009 the California Energy Commission approved the California Energy Demand 2010-2020 forecast a revised demand and peak load forecast. "The current forecast is markedly lower than the forecast in the 2007 California Energy Demand Forecast, primarily because of lower expected economic growth in both the near and long term as well as increased expectations of savings from energy efficiency."<sup>18</sup> The CEC's 2010-2020 Adopted Forecast predicts that peak demand in PG&E's service territory in 2010 will be 810 MW less than the demand for 2010 predicted in the 2007 CEC demand forecast used in the 2006 LTPP.<sup>19</sup> The CEC's latest Revised Short Term Peak Demand Forecast for the 2011-2012 period predicts that*

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<sup>17</sup> <http://www.turn.org/article.php?id=1528>

<sup>18</sup> 2009 IEPR page 3 <http://www.energy.ca.gov/2009publications/CEC-100-2009-003/CEC-100-2009-003-CMF.PDF>

<sup>19</sup> **CALIFORNIA ENERGY DEMAND 2010-2020 ADOPTED FORECAST**

Page 55 <http://www.energy.ca.gov/2009publications/CEC-200-2009-012/CEC-200-2009-012-CMF.PDF>

PG&E's demand in the PG&E service territory for 2012 is 851 MW less than the 2009 IEPR.<sup>20</sup>

*Much of the reduction in demand reflected in these forecasts is related to the states aggressive energy efficiency measures. The Incremental Impacts of Energy Efficiency Policy Initiatives Relative to the 2009 Integrated Energy Policy Report Adopted Demand Forecast is a recent study released by the CEC that serves as a supplement to the 2009 IEPR demand forecast. That study provides estimates of the incremental impacts of prospective CPUC funded energy efficiency programs in the years following 2012. **The study estimates that 56 percent of energy growth from 2008-2020 projected in the 2009 IEPR demand forecast would be eliminated by the estimated incremental uncommitted savings as the low estimate. The high estimate predicts that 74% percent of energy growth from 2008 to 2020 projected in the 2009 IEPR demand forecast would be eliminated by estimated incremental energy efficiency uncommitted savings.**<sup>21</sup> The study provides evidence that the decline in demand in PG&E's service territory for the 2008-2020 period will continue to fall due to the states successful implementation of energy efficiency measures".*

*The cost of the Oakley Project is estimated to be 1.5 billion dollars.<sup>22</sup> This amount of money can provide significant energy efficiency reductions without the Greenhouse Gas emissions and the other environmental impacts of the Oakley Project. Rejection of the no project alternative will prevent the conversion of Farmland of Statewide Importance<sup>23</sup> which is currently used as a vineyard. The no project alternative will prevent further nitrogen deposition at the Antioch Dunes Preserve. The no project alternative will prevent further health impacts in the minority community. Under the existing*

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<sup>20</sup> Table 5 Page 13 <http://www.energy.ca.gov/2011publications/CEC-200-2011-002/CEC-200-2011-002-CTF.PDF> **Table 5: Revised and 2009 IEPR Weather-Adjusted Peak Demand (MW) Forecast by TAC/Load Pocket, 2011 and 2012** 1-in-2 Difference

<sup>21</sup> <http://www.energy.ca.gov/2010publications/CEC-200-2010-001/CEC-200-2010-001-D.PDF>  
**INCREMENTAL IMPACTS OF ENERGY EFFICIENCY POLICY INITIATIVES RELATIVE TO THE 2009 INTEGRATED ENERGY POLICY REPORT ADOPTED DEMAND FORECAST** January 2010 page 2

<sup>22</sup> DRA Annual Report <http://www.dra.ca.gov/NR/rdonlyres/2AFEE10F-0102-4AF0-AD51-972ED9F52131/0/FINALDRAAR11011.pdf> Page 56

<sup>23</sup> FSA Page 6-7

*circumstances without evidence of reliability issues the no project alternative is the superior environmental alternative.*<sup>24</sup>

Title 20 § 1741 (a) states, “that the purpose of an application proceeding is to ensure that any sites and related facilities certified provide a reliable supply of electrical energy at a level **consistent with the need for such energy and in a manner consistent with public health and safety, promotion of the general welfare, and protection of environmental quality.**” By denying the OGS the Commission complies with this directive as the evidence in the record is that the OGS is not needed for reliability and energy efficiency as an alternative will lower demand and eliminate any Greenhouse Gas Emissions, nitrogen deposition and environmental justice concerns from this project. Denying this project also would comply with the States loading order as the evidence demonstrates the OGS is not needed for reliability at this time.

#### Land Use

The Energy Commission’s licensing process is supposed to include findings regarding the conformity of the proposed facility with applicable local, regional, state, and federal standards, ordinances, and laws (Pub. Res. Code § 25523 [d][1]) As the PMPD correctly states, *“If the City had exclusive jurisdiction over the project it would require the project to comply with City’s Conditional Use Process (CUP) and other requirements of the municipal code. As suggested by Intervenor Sarvey in his post-hearing brief, the City would likely require a variance to allow the project’s building height to exceed 200 feet.”* The FSA and the PMPD do not contain the required findings that the City would have to provide to issue a conditional use permit. Hence the PMPD does not comply with Pub. Res. Code § 25523 [d][1]. The Final Decision must contain these findings and provide the public with an opportunity to comment on them.

#### Typographical Errors

Finally, we note that compliance with BAAQMD Condition **AQ-15** will limit ammonia emissions to no more than 5,000 parts per million and thereby reduce

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<sup>24</sup> Exhibit 400 Alternatives Testimony of Robert Sarvey

to less than significant levels any related impacts.<sup>25</sup>

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<sup>25</sup> PMPD air quality Page 22