

## DOCKETED

<b>Docket Number:</b>	08-AFC-01C
<b>Project Title:</b>	Avenal Energy Project-Compliance
<b>TN #:</b>	203234
<b>Document Title:</b>	Avenal Power Center, LLC's Petition for Post Certification Amendment to Extend the Construction Deadline
<b>Description:</b>	N/A
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<b>Submitter Role:</b>	Applicant Representative
<b>Submission Date:</b>	10/22/2014 9:34:43 AM
<b>Docketed Date:</b>	10/22/2014

**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 PETITION FOR POST CERTIFICATION  
AMENDMENT TO EXTEND THE CONSTRUCTION DEADLINE**

**October 21, 2014**

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**AVENAL POWER CENTER, LLC'S PETITION FOR POST CERTIFICATION  
AMENDMENT TO EXTEND THE CONSTRUCTION DEADLINE**

Avenal Power Center, LLC ("Avenal") respectfully requests an amendment to the Final Commission Decision for the Avenal Energy Project (CEC-800-2009-006-CMF [Dec. 2009] "Decision") to extend the deadline for start of construction ("Amendment"). The current deadline to begin construction is December 16, 2014. As the California Energy Commission ("Commission") is aware, the Prevention of Significant Deterioration Permit to Construct ("PSD Permit") issued by the United States Environmental Protection Agency (EPA) has been tied up in litigation for many years.<sup>1</sup> Just this August the Ninth Circuit District Court of Appeal ("Ninth Circuit") issued a decision revoking the PSD Permit and sending it back to EPA to revise the

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<sup>1</sup> Avenal filed for, and has at all times diligently pursued, a PSD Permit from the EPA for the Project. Avenal submitted its initial application for a PSD Permit in February 2008, just days after filing the AFC for the Project. EPA confirmed Avenal's application for a PSD Permit was complete on March 19, 2008. EPA published a draft permit and its Statement of Basis and Ambient Air Quality Impact Report on June 16, 2009 ("Draft PSD Permit"). EPA closed the comment period on the Draft PSD Permit on October 15, 2009 after extending the comment period by three months. Then, EPA did not proceed with the permitting process. Thus and after waiting almost two years for EPA to act on Avenal's application for a PSD Permit, Avenal decided to act to compel EPA to make a decision on its application. Therefore, on March 9, 2010, Avenal filed a lawsuit against the EPA for failure to grant or deny the Project's PSD permit within the statutory one year timeframe after the date of filing a completed application. On May 26, 2011, the court ordered EPA to issue a final, non-appealable agency action, either granting or denying the PSD Permit application, by August 27, 2011. (Avenal Power Center, LLC v. U.S. Environmental Protection Agency [D.C. Cir. 2010] 787 F.Supp.2d 1, 2.) In early 2011, EPA issued a supplemental PSD Permit analysis for public comments. (See EPA, Supplemental Statement of Basis, PSD Permit Application for Avenal Energy Project [March 2011] at 8.) The public comment period on the supplemental PSD Permit analysis closed in April 2011.

On May 27, 2011, EPA issued the Project's PSD Permit, but several appeals were filed with the EPA's Environmental Appeals Board. The EAB denied all of these appeals, and on September 9, 2011, the EPA published notice of its final agency action on the Project's PSD Permit in the Federal Register. (76 FR 55799.) In early November 2011, three lawsuits were filed against the Project's PSD Permit in the Ninth Circuit Court of Appeals. (Case Nos. 11-73342, 11-73356, and 11-73404.) Although one of these Ninth Circuit appeals was dismissed as untimely, the remaining two appeals were carried through to decision this August.

permit.<sup>2</sup> The Ninth Circuit acknowledged the difficult position in which EPA placed the Project by stating the following, “Finally, EPA relies heavily on the argument that the equities weigh in favor of Avenal Power. In short, we agree. Avenal Power filed its application over six years ago, and endeavored to work with EPA for years, even after filing suit, to obtain a final decision.”<sup>3</sup> Nonetheless given the court’s decision, Avenal has had to rethink the options for the Avenal Energy Project (the “Project”). Avenal would like the opportunity to fully evaluate those options prior to the expiration of the license. The Commission, the Commission Staff, the local community and the Project extended significant effort to complete the environmental review of this Project. Depending upon how the Project will move forward will determine whether the analysis conducted by the Commission and the Staff remains relevant and valid. Avenal requests an additional 9 months to evaluate options and create the necessary filings.

We note that Avenal had requested an extension due to the PSD litigation over two years ago. On March 5, 2012 Avenal filed a petition for an extension to the construction based upon concerns about the impact of the ongoing litigation.<sup>4</sup> At the request of California Energy Commission (“Commission”) Staff, Avenal deferred Commission consideration of that request on October 23, 2012.<sup>5</sup> In 2012 Commission Staff communicated their feeling that the request was premature. Given the license expires in December, the request for an extension is no longer premature. Extending the deadline to start construction would simply require the modification of one provision in the Commission Adoption Order. Extending the deadline for construction does not require changes to any other Conditions of Certification.

This request for an extension of the deadline to begin construction does not change the scope of the Project as licensed by the Decision or create new adverse environmental impacts. Furthermore, an extension of the deadline for construction does not change the ability of the Project to comply with applicable laws, ordinances, regulations and standards (“LORS”).

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<sup>2</sup> Sierra Club et al v. U.S. Environmental Protection Agency, United States Court of Appeals, Ninth Circuit Nos. 11-73342 and 11-73356 (Filed August 12, 2014).

<sup>3</sup> Id at 26 (slip opinion).

<sup>4</sup> Avenal Power Center, LLC’s Petition for Post Certification Amendment to Extend the Construction Deadline, Allow Construction and Operation as Minor Source and Make Minor Modifications to Air Quality Conditions dated March 5, 2012 (Docket No. 08-AFC-1C).

<sup>5</sup> Letter from Jane E. Luckhardt to Camille Remy Obad dated October 23, 2012, regarding Avenal Power Center, LLC’s Petition for Post Certification Amendment of March 5, 2012 (Docket No. 2008-AFC-1C).

By way of short review, the Project is located in Kings County near the intersection of Interstate 5 and Avenal Cutoff Road. The Project is a nominal 600-megawatt gas fired power plant configured with two General Electric Model 7241FA gas turbines, each of which exhausts into a fired heat recovery steam generator. The facility will occupy 34 acres of a quarter-section in a predominately agricultural area approximately six miles from the urban center of the City of Avenal.

This Amendment is filed pursuant to Title 20 of the California Code of Regulations Section 1769(a).

**I. PETITION FOR EXTENSION OF CONSTRUCTION DEADLINE**

Pursuant to Section 1720.3 of the Commission’s regulations, Avenal hereby requests an extension of the deadline to commence construction on the Project. As discussed above Avenal has at all times been diligent in its permitting and litigation efforts relating to the Project’s PSD Permit. Nevertheless, it took over three and a half years to obtain a final PSD Permit from the EPA. Then, the Ninth Circuit vacated the PSD Permit in August.

Due to the action by the Ninth Circuit, Avenal is taking this opportunity to revisit the Project’s configuration. Therefore, Avenal respectfully requests the Commission to extend the deadline to commence construction for 9 months. The following is a discussion of the law applicable to such a time extension, and the reasons why the circumstances surrounding the Project warrant such an extension.

**A. Applicable Law**

Section 1720.3 of the Commission’s regulations provides the legal standard applicable to a request to extend the deadline for construction:

Construction Deadline. Unless a shorter deadline is established pursuant to § 25534, the deadline for the commencement of construction shall be five years after the effective date of the decision. Prior to the deadline, the applicant may request, and the commission may order, an extension of the deadline for good cause.

In its decision on the Tesla Power Project’s Petition for Extension of the Construction Deadline (September 23, 2009), the Commission listed three main factors to be considered in

determining whether good cause exists to grant an extension of time to start construction. These factors are:

1. Whether the project owner was diligent in seeking to begin construction, and in seeking the extension;
2. Whether factors beyond the project owner's control prevented success; and
3. A comparison of (a) the amount of time and resources that would have to be spent by the project owner, the Commission, and interested persons in processing any amendments to the license if the extension is granted; with (b) the amount of time and resources that would have to be spent in processing a new AFC, if the extension is denied.

**B. Analysis**

The following discussion addresses each of the factors supporting a time extension.

1. Avenal was diligent in seeking to begin construction, and in seeking the extension.

The procedural history discussed above regarding Avenal's PSD Permit demonstrates that Avenal has been extremely diligent in pursuing its PSD Permit so that it may begin construction. As noted above, Avenal filed an application for a PSD permit within days of filing its AFC with the Commission. Avenal responded in a timely manner to EPA's requests for additional analysis and modeling. Avenal eventually had to resort to filing a lawsuit to compel EPA to act on its PSD Permit application.

Furthermore, Avenal has been diligent in defending the litigation against the Project's PSD Permit, and has sought expedited briefing schedules with the other parties to the litigation. Unfortunately, those parties were unable to accept an expedited briefing schedule. The litigation over the PSD Permit created a cloud over the Project such that it could not proceed to construction. Avenal has also been diligent in seeking the requested extension, Avenal initially requested an extension in March of 2012 explaining construction within the original five year period approved in the Decision would likely be impossible. At this point it is impossible for Avenal to begin construction prior to the December 16<sup>th</sup> deadline.

2. Factors beyond Avenal's control prevented success.

Many factors beyond Avenal's control have prevented Avenal from commencing Project construction. The Project's PSD Permit took over three and a half years to obtain, despite

Avenal's timely application to EPA for a PSD Permit and Avenal's timely responses to EPA's requests for additional analysis. Avenal submitted its initial application for a PSD Permit in February 2008. EPA confirmed Avenal's application for a PSD Permit was complete on March 19, 2008. EPA published the Project's Draft PSD Permit on June 16, 2009. EPA closed the comment period on the Draft PSD Permit on October 15, 2009 after extending the comment period by three months. In early 2011, EPA issued a supplemental Draft PSD Permit analysis for public comments. (See EPA, Supplemental Statement of Basis, PSD Permit Application for Avenal Energy Project [March 2011] at 8.) The supplemental public comment period closed in April 2011.

In light of the EPA's significant delay in issuing the Project's PSD Permit, on March 9, 2010, Avenal filed a lawsuit against the EPA for failure to grant or deny the Project's PSD permit within the statutory one year timeframe after the date of filing a completed application. On May 26, 2011, the court ordered EPA to issue a final decision on the Project's PSD Permit application by August 27, 2011. (*Avenal Power Center, LLC v. U.S. Environmental Protection Agency* [D.C. Cir. 2010] 787 F.Supp.2d 1, 2.)

On May 27, 2011, EPA issued the Project's PSD Permit, but several appeals were filed with the EPA's Environmental Appeals Board ("EAB"). The EAB denied all of these appeals, and on September 9, 2011, the EPA published notice of its final agency action on the Project's PSD Permit in the Federal Register. (76 FR 55799.)

In early November 2011, three lawsuits were filed against the Project's PSD Permit in the Ninth Circuit Court of Appeals. (Case Nos. No. 11-73342, 11-73356, and No. 11-73404.) Although one of these Ninth Circuit appeals was dismissed as untimely, the remaining two resulting in the Ninth Circuit vacating the PSD Permit this August.

3. The amount of time and resources involved in processing any amendments to the license if the extension is granted are minimal compared to those required to process a new AFC, if the extension is denied.

Avenal believes that allowing the five year commencement of construction deadline to lapse (thereby requiring Avenal to file a new AFC) would represent a tremendous waste of time and resources. The original Project AFC licensing proceeding was extremely thorough, and required a great deal of time, resources, and effort from the Siting Committee, Commission Staff,

all interested parties and Avenal. From start to finish, the process took nearly two years. Replicating the analysis that went into the Decision would likely take a comparable amount of time, particularly since the AFC was filed nearly four years ago. In addition, the Project's Interconnection Agreement with the California Independent System Operator ("CAISO") would be put in jeopardy, placing the Project at risk of starting over in the CAISO interconnection process that also takes several years to complete.

For all of these reasons, Avenal requests the Commission approve the requested extension.

C. **The Information Was Not Known by Avenal During the Certification Proceeding**

Avenal requests the changes in this Amendment based on information obtained after the Decision. Avenal did not anticipate the extensive process to obtain and then have the Ninth Circuit vacate the PSD Permit.

D. **The Extension Would Not Change or Undermine the Assumptions, Rationale, Findings, or Other Bases of the Decision.**

The time extension request does not change or undermine the assumptions, rationale, findings or other bases of the Decision. No changes are proposed to the Project that would impact the environment.

E. **The Extension Will Not Create Significant Adverse Impacts on the Environment**

The extension does not change the Project's impacts on the environment. Thus, this request will not create a significant adverse impact on the environment.

F. **The Extension Would Not Impact the Project's Ability to Comply With LORS**

Because the extension does not change the Project, it does not change the Project's ability to comply with LORS.

**G. The Amendment Will Not Impact the Public**

As discussed above, the Extension will not create any new adverse environmental impacts, and will not result adverse impacts to the public from the Amendment.

**H. The Amendment Will Not Impact Nearby Property Owners**

Avenal has included a list of nearby property owners in Attachment 1. As discussed above, the practical impacts of Amendment are very small.

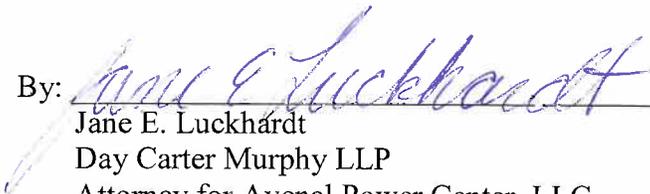
**II. AVENAL REQUESTS THE COMMISSION STAFF RECOMMEND AND THE COMMISSION APPROVE THE EXTENSION**

In light of the foregoing, Avenal respectfully requests that the Commission approve the proposed extension of the construction deadline. The requested extension of the construction deadline is warranted given the extreme delays that the Project has been subject to (through no fault of its own) in obtaining a PSD Permit. The extension does not change the Project's environmental impacts nor does it cause the Project to be out of compliance with LORS. Finally, Avenal also believes it is good public policy to allow a Project time to decide how to proceed after litigation is concluded.

Avenal thanks the Commission in advance for its consideration and the Commission Staff for its analysis of this request for extension of the timeframe to begin construction.

DATED: October 21, 2014

DAY CARTER MURPHY LLP

By:   
Jane E. Luckhardt  
Day Carter Murphy LLP  
Attorney for Avenal Power Center, LLC

ATTACHMENT 1

LIST OF PROPERTY OWNERS WITHIN 1000 FEET OF THE PROJECT SITE

APN	Name	Address
036-170-018-000	City of Avenal	919 Skyline Blvd, Avenal CA 93204
036-170-031-000	City of Avenal	919 Skyline Blvd, Avenal CA 93204
036-170-030-000	D & M Farms Inc.	2363 S Cedar Ave, Fresno CA 93725
036-170-033-000	D & M Farms Inc.	2363 S Cedar Ave, Fresno CA 93725
036-170-013-000	Dalena Family Farms PTP	7636 Road 34, Madera CA 93638
036-170-017-000	Dalena Family Farms PTP	7636 Road 34, Madera CA 93638
036-170-025-000	Dalena Family Farms PTP	7636 Road 34, Madera CA 93638
036-170-026-000	Dalena Family Farms PTP	7636 Road 34, Madera CA 93638
036-170-012-000	Donaghy Sales, Inc	2363 S Cedar Ave, Fresno CA 93725
036-170-027-000	Kochergen, John A Properties Inc.	8163 W McKinley Ave, Fresno CA 93722
036-170-036-000	Kochergen, Mike J	P O Box 11006, Fresno CA 93711
036-170-037-000	Kochergen, Mike J	P O Box 11006, Fresno CA 93711
036-170-038-000	Kochergen, Mike J	P O Box 11006, Fresno CA 93711
036-170-002-000	Scott, Richard Farms Inc.	P O Box 10132, Fresno CA 93745
036-170-020-000	Westlands Water District	3130 N Fresno St, Fresno CA 93703