

DOCKET

09-AFC-4

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State of California
State Energy Resources Conservation and Development Commission

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

BIOLOGICAL RESOURCES

The Lange's Metalmark Butterfly is on the brink of extinction, and nitrogen emissions from the Oakley Generating Station and other industrial sources are pushing the species over the edge. The Butterfly's population at the Antioch Dunes National Wildlife Refuge, declined to only 28 butterflies in 2009.¹ The annual operating budget of the Antioch Dunes Preserve is approximately \$385,000 and includes money for non-native plant removal/fire prevention, sand acquisition, grazing management, butterfly propagation, and rare plant propagation.²

The mitigation proposed by Staff and applicant is related to the staff's calculation of its nitrogen deposition impacts compared to the total regional nitrogen deposition that is occurring at the Dunes. That calculation is used to determine what percentage of the Dunes operating budget should be paid for by the applicant. The piece that the applicant and staff are missing is that the current operating budget for the preserve is not sufficient to prevent the extinction of the Metalmark Butterfly. Despite significant efforts in 2006, 2007, 2008, and 2009 to manage invasive weeds, invasive weed populations continue to

¹ Nagano USFWS RT 3-15-11 Page and Exhibit 30 page 4.2-43

² Exhibit 300 Page 4.2-45

thrive throughout the refuge (USFWS 2009a; USFWS 2009b).³ The population of the butterfly continues to plummet to a point where only 28 butterflies remain. That is why the payment of \$5,000 a year is not adequate to mitigate the project's proportional impact.

The applicant argues that 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 problem is that the fund is not adequate to achieve the restoration of the species as the record reflects and it does not achieve the desired mitigation.

Section 21081.6 of the Public Resources Code requires all state and local agencies to establish monitoring or reporting programs whenever approval of a project relies upon a mitigation measures to prevent an adverse impact identified in an environmental impact report (EIR). The monitoring or reporting program must ensure implementation of the measures being imposed to mitigate or avoid the significant adverse environmental are successful. Providing \$5,000 a year without some reporting or tracking whether the funds are being appropriately used and the mitigation is being achieved does not meet these requirements.

The project owner will be PG&E and Radback Energy is merely the project developer. The project will not be a merchant power project but will be utility owned generation. The project area is in a corridor of PG&E power plants. The newest Project the Gateway Generating Station began operation in 2009 without a PSD permit. By avoiding a PSD permit the project avoided a nitrogen deposition impact study and escaped any mitigation that should have been contributed to prevent destruction of the Antioch Dunes. From June 2009 to June 2010 the Gateway Facility emitted over 70 tons of NOx which impacted the Dunes preserve without mitigation. The amount of ammonia emission is unknown.

³ Exhibit 300 FSA Page 4.2-44

Gateway Generating Facility
Antioch, CA
Facility (Units GT1 and GT2) Mass Emission 12-Month Rolling
May 2010 12-Month Rolling

Month	NOx tons 12-Month Rolling Total	CO tons 12-Month Rolling Total	PM tons 12-Month Rolling Total	SO2 tons 12-Month Rolling Total
Jun 2009	58.1	12.8	7.9	2.9
Jul 2009	65.8	14.2	9.7	3.6
Aug 2009	73.5	15.7	11.3	4.2
Sep 2009	81.6	16.9	13.2	4.8
Oct 2009	88.6	18.0	15.2	5.6
Nov 2009	88.8	15.7	16.5	6.1
Dec 2009	77.7	13.9	17.5	6.4
Jan 2010	78.2	13.7	18.5	6.8
Feb 2010	80.2	13.4	19.7	7.2
Mar 2010	79.9	12.3	20.3	7.5
Apr 2010	77.1	11.2	20.0	7.3
May 2010	77.3	11.6	20.1	7.4

The Contra Costa 6 & 7 units were constructed by PG&E and sold to Mirant in 1999 after PG&E operated the project for 40 years. One of PG&E's largest natural gas terminals is adjacent to the project site emitting ground level nitrogen emissions. Significant cumulative environmental degradation has occurred through the use of the project area by PG&E for energy production and yet PG&E is unmoved by the biological devastation they have caused.

PG&E energy facilities over the last 50 years have negatively impacted the nearby Antioch Dunes Preserve by emitting thousand of tons of NOx and ammonia in close proximity to the preserve. They have provided their own cumulative impact which has lead to the near extinction of sensitive species at the dunes Preserve. The OGS should finish the job.

Hazardous Materials

The applicant and staff wasted a lot of ink in their opening briefs contesting whether my testimony should be accepted as expert testimony. The committee has already made the ruling that, *"the Committee believes that the testimony, Exhibit 408, as well as the exhibits that are supporting Exhibit 408, which would be 410 through 414, are relevant*

*to these proceedings. The Committee will accept Exhibit 408 and Exhibits 410 through 414.*⁴ The Committee asked the parties to respond to seven questions related to PG&E's natural gas lines 400 and 303. My testimony and exhibits are merely an attempt to respond to the seven question that were posed to the parties about PG&E's natural gas line. I did not raise this issue and I did not mention it in my opening brief. Despite this fact the applicant and staff continue to beat the dead horse even after the Committee has accepted the testimony as relevant.

The questions posed by the Committee should have been easily answered by CCGS because as PG&E's project developer they could have easily accessed this information if PG&E actually had it. This lead to two possible conclusions. The first one is that CCGS/PG&E felt that the Energy Commission has no jurisdiction over the pipeline past the first point of interconnection and they didn't think they had to answer. The second possibility is they just plain don't have the information. Either way the outcome is the same. The Committee's questions were not answered and the applicant although fully capable of doing so has not met the burden of proof that these natural gas lines will not impact the reliability of the OGS.

PG&E's facilities on the Baja Path (Line 300) are aging. Most of the facilities on Line 300 are over 50 years old, and portions of Line 300 have required repair. PG&E's facilities on the Redwood Path (Lines 400, 401 and 2) also are aging and many of these facilities are almost 40 years old.

Applicant/ PG&E and staff are basically recommending that we trust the regulatory process and trust PG&E will comply with the integrity management program. The evidence in the record is that PG&E has not complied with pipeline safety regulations in the past and it is doubtful considering their response to this committee that they will in the future. PG&E's non compliance can have serious and even fatal consequences. The applicant has not met the burden of proof although he easily could that the OGS can be operated reliably and safely and therefore the Commission should deny the application.

ALTERNATIVES

⁴ RT 3-25-11 Page 47

The applicant is suggesting that, “Mr. Sarvey is basically contending that the Commission should resurrect its need analysis. The Legislature removed the Commission’s need analysis requirement in 2000.” While I am not trying to institute a need analysis I would argue that SB 110⁵ does not apply to the OGS. The OGS is not a merchant power plant and PG&E as the ultimate owner is not at risk to recover their investment. A. 09-09-021 and the proposed settlement agreement confirm that. The applicant further argues that, “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.” I am not attempting to adjudicate the CPUC issues here at the CEC because I actually agree with the only final decision in a. 09-09-021 which is D. 10-07-045 which finding of fact 18 concludes that, “The Oakley Project is not needed at this time.”⁶ The decision which concludes that Oakley should be approved D. 10-12-050 is not based on any forecast provided by the CEC and is essentially a complete departure from the established procurement framework that was ongoing since 2006. That decision represents what is broken in the LTPP process. That is why it is currently subject to four petitions for modification.

The applicant further states that, “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. Clearly the applicant doesn’t consider that **1,884,810** MTCO₂/MWh of Greenhouse gases is a significant impact. Or that 250 acre feet of fresh water for power plant cooling is a significant impact. The eradication of the Metalmark Butterfly means nothing to PG&E as long as the ratebase continues to be fattened with unneeded power projects. The project is not needed as the evidence in the record demonstrates. The no project alternative is the environmentally superior alternate as the record demonstrates and the OGS application should be denied.

⁵ Regarding need-determination, SB 110 states:

“Before the California electricity industry was restructured the regulated cost recovery framework for powerplants justified requiring the commission to determine the need for new generation, and site only powerplants for which need was established. Now that powerplant owners are at risk to recover their investments, it is no longer appropriate to make this determination.

⁶ D. 10-07-045 Finding of Fact 18 http://docs.cpuc.ca.gov/word_pdf/FINAL_DECISION/121605.pdf

