State of California — California Natural Resources Agency

Memorandum

To: Commissioners
Docket No. 08-AFC-1C

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Subject: **Response to Comment letter from Center on Race, Poverty, & the Environment (CRPE) regarding the Amendment to the Avenal Energy Project**

I. INTRODUCTION

The California Energy Commission (Energy Commission) is scheduled to consider an amendment to the existing license for the Avenal Energy Project (Avenal) at the January 9, 2013, business meeting. The license was originally issued by the Energy Commission in December 2009. The amendment would allow the owner to either operate AEP as a major source (December 2009 Decision) or a minor source (current amendment). The amendment would add new conditions for the minor source option that significantly *reduce* the annual emissions of oxides of nitrogen (NOx) and carbon monoxide (CO) so that all criteria pollutant emissions allowed by the Avenal license would be below the threshold limits that require a federal Prevention of Significant Deterioration (PSD) permit. Avenal has received the federal PSD permit from the Environmental Protection Agency (EPA), but that permit is currently being litigated in the federal Ninth Circuit Court of Appeals, and it is unclear when that litigation will result in a decision.[1]

The Energy Commission licensed Avenal several months before EPA issued a new, much more stringent "one-hour" ambient air quality standard for nitrogen dioxide (NO_2). The CRPE comment letter requests, among other things, that the Energy Commission delay its decision so that the Energy Commission might further analyze compliance with the federal NO_2 standard and hold hearings on that issue. This request is in turn based

[1] The PSD permit was issued more than three and one-half years after it was applied for, and then only after a federal court ordered EPA to issue it within a set time period. That permit has since been appealed to EPA's Environmental Appeals Board, which rejected the appeals, and subsequently appealed to the Ninth Circuit Court of Appeals.

on a 2010 letter from EPA to the Avenal owner raising questions about how Avenal had shown compliance with the standard in early 2010, before EPA had issued clarifying guidance on how that analysis should be performed.

The CRPE request should be rejected for three reasons: (1) As stated above, the amendment imposes more stringent requirements on Avenal, requiring *reductions* in criteria pollutant emissions; (2) the San Joaquin Valley Air Pollution Control District (SJVAPCD) has performed an analysis of NO_2 emissions impacts demonstrating compliance with the new federal standard, and Staff has independently reviewed and confirmed the validity of that analysis; and (3) the CRPE request in essence seeks to create a separate state forum in which to re-litigate issues already raised and resolved in the original proceeding, or to litigate the issues it has raised with regard to the federal PSD permit on issues that are outside the State's purview, and that can only be resolved by the federal courts.

II. THE AVENAL AMENDMENT CAN ONLY RESULT IN LOWER EMISSIONS THAN WOULD OCCUR WITH THE CURRENTLY LICENSED PROJECT.

Avenal can currently be constructed and operated consistent with the terms of its current license. The existing license allows significantly higher emissions than permitted under the limits the owner now requests. The owner proposes to meet the more stringent permit requirements by, among other things, limiting Avenal's total hours of operation. Other reductions could be achieved by increasing the removal efficiency of emissions control systems. The amendment would not allow minor source emissions to exceed 100 tons per year of any criteria pollutant. Accordingly, the project would be a minor source for criteria pollutants under federal law and not subject to federal PSD requirements.

Lower emissions equal lower potential environmental impacts. As such, the proposed amendment cannot result in any significant adverse environmental impact, making it eligible for the "common sense" exemption from the California Environmental Quality Act. (Cal. Code Regs., tit. 14,§ 15061, subd. (b)(3) ["CEQA applies only to projects which have the potential for causing a significant effect on the environment."].)

Accordingly, the amendment would not result in a disproportionate impact to low income or minority populations.

III. AVENAL MEETS THE NEW FEDERAL NO_2 STANDARD.

When the Avenal application for a state license was before the Energy Commission, the more stringent one-hour NO_2 standard was not yet effective, and not an applicable law. Thus, there was no analysis of the new NO_2 standard in the original licensing proceeding. However, the SJVAPCD has subsequently performed an analysis of Avenal's "minor source" amendment proposal and concluded that the project will conform to the federal NO_2 standard. Staff has reviewed the air district modeling and

confirmed its validity. CRPE's comments on Avenal's initial one-hour NO_2 modeling, and its alleged deficiencies, are not relevant.[2]

CRPE argues that the new, lower annual emissions levels are not verifiable or enforceable. CRPE is incorrect. The annual emissions limit becomes no less enforceable by lowering it. Avenal will have continuous emissions monitoring (CEM) for CO and NO_2, and both hourly and annual emissions can be monitored and confirmed. Such CEM monitoring is subject to specific protocols, and will reveal any impending violation of the more stringent emissions limits. Although CRPE suggests that a tighter annual emissions level could compromise compliance with the one-hour standard, and local health, this is also incorrect. The restrictions on maximum one-hour emissions are unchanged, and any impact to public health can only be smaller than pursuant to the existing license.

IV. CRPE RAISES ISSUES THAT WERE ADDRESSED IN THE ORIGINAL AEP LICENSING PROCEEDING.

CRPE participated in the Energy Commission's original licensing proceeding, and raised air quality and public health issues that the Energy Commission has already considered and resolved. The Energy Commission Decision found that the project had no significant adverse impacts to air quality or public health, directly or cumulatively, and in the context of local conditions and community health. Federal guidelines, including those of EPA for environmental justice and Title VI of the Civil Rights Act, require a significant impact before a claim in these areas can have any traction. A lower allowable emissions level cannot resuscitate claims from CRPE that have already been considered and rejected.

In essence, CRPE seeks a state forum for its federal litigation in the Ninth Circuit regarding the EPA's issuance of the federal PSD permit. The Energy Commission has no purview over this federal permit, and cannot determine its validity. Ultimately, though not quickly, the federal courts will provide the answer to those issues. Approval of this amendment by the Energy Commission will have no impact on resolution of the federal litigation or any subsequent action required of EPA, contrary to claims by CRPE.

V. CONCLUSION

The conditions of certification proposed by Energy Commission staff, including continual emissions monitoring, monthly calculation on a 12-month rolling basis, and quarterly reporting, are sufficient to ensure the both the approved project, and the project as amended, would comply with the emissions limits. Therefore, the Energy Commission should reject CRPE's assertions and adopt the proposed amendment.

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[2] The new federal one-hour standard was issued without federal guidance, and Avenal's early efforts to show compliance with the federal standard did not have the benefit of such guidance. EPA's letter (attached to the CRPE letter) announced the issuance of guidance for the new standard.