EVIDENTIARY HEARING

BEFORE THE

CALIFORNIA ENERGY RESOURCES CONSERVATION

AND DEVELOPMENT COMMISSION

In the Matter of:	)	
	)	
Application for Certification	)	Docket No.
for the East Altamont Energy	)	01-AFC-4
Center	)	
_____	)	

TRACY ELKS LODGE # 2031

6400 11TH STREET

TRACY, CALIFORNIA

WEDNESDAY, OCTOBER 16, 2002

10:15 a.m.

Reported by:
Valorie Phillips
Contract No. 170-01-001

COMMITTEE MEMBERS PRESENT

William Keese, Presiding Member

Robert Pernell, Associate Member

HEARING OFFICER AND ADVISORS PRESENT

Major Williams, Jr., Hearing Officer

Scott Tomashefsky, Advisor

Al Garcia, Advisor

STAFF AND CONSULTANTS PRESENT

Lisa DeCarlo, Staff Counsel

Cheri Davis, Project Manager

Lorraine White

John Kessler

Andrea Erichsen
Aspen Environmental Group

Alvin J. Greenberg, President
Risk Science Associates

PUBLIC ADVISER

Roberta Mendonca

APPLICANT

Greggory L. Wheatland, Attorney
Jeffery Harris, Attorney
Ellison, Schneider and Harris

Jim McLucas, Regional Engineer
Steven A. DeYoung, Environmental Project Manager
Calpine Corporation

Alicia Torre, Manager, Project Development
Consultant

APPLICANT

Susan Strachan, Project Manager
Strachan Consulting

Kevin O'Brien, Attorney
Downey, Brand, Seymour & Rohwer

Kris Helm
Consultant to Calpine Corporation

E.J. Koford
Jerry P. Salamy, Air Quality Engineer
CH2MHILL

INTERVENORS

Robert Sarvey

Michael Boyd
Californians for Renewable Energy

ALSO PRESENT

Dave Swanson
Western Area Power Administration

Sandra K. Dunn, Attorney
Andrew M. Hitchings, Attorney
Somach, Simmons & Dunn
representing Byron Bethany Irrigation District

Rick Gilmore, General Manager
Byron Bethany Irrigation District

Gary Nuss, Vice President
CH2M HILL
representing Byron Bethany Irrigation District

Barry Luboviski, Secretary-Treasurer
Building and Construction Trades Council of
Alameda County AFL/CIO

Eric Parfrey, City Planner
Chair, Motherlode Chapter, Sierra Club

Dave Mann, Business Representative
Plumbers and Steamfitters Local #342

ALSO PRESENT

Duane Grimsman, General Manager
TriMark Communities

Eric Teed-Bose, Project Manager
Mountain House Community

Shawn Smallwood

Nick Papadakos, Director
Byron Municipal Council

Louis Galli, Board Member
Independent Natural Water Fremont Irrigation

Sharon Votaw
Homestead Land and Water Alliance

Paula Buenavista
Monica Lowney
Susan Sarvey
Clean Air for Citizens and Legal Equity (CACKLE)

I N D E X

	Page
Proceedings	1
Opening Remarks	1
Introductions	1
Motions/Objections	4
Overview	18
Topics	21
Soil and Water Resources	21
Byron Bethany Irrigation District	21
Opening Statement	21
Witnesses R. Gilmore, G. Nuss	24
Direct Examination by Ms. Dunn	26
Exhibit 8, 8O	26/117
Exhibit 9	35/117
Cross-Examination by Ms. DeCarlo	69
Cross-Examination by Mr. Sarvey	90
Redirect Examination by Ms. Dunn	111
Exhibit 8L	111
Afternoon Session	118
Soil and Water Resources - continued	
Applicant	119
Opening Statement, Kevin O'Brien	119
Applicant witnesses K. Helm, J. McLucas	127
Direct Examination by Mr. Wheatland	127
Exhibit 4D	128/197
Exhibit 4D-1	136/140
Cross-Examination by Ms. DeCarlo	145
Cross-Examination by Mr. Sarvey	188
Redirect Examination by Mr. Wheatland	193
Recross-Examination by Ms. DeCarlo	196
Intervenor Sarvey witness E. Parfrey	198
Direct Examination by Mr. Sarvey	198
Exhibit 6D	199/218
Exhibit 6C	200

I N D E X

Page

Topics - continued

Soil and Water Resources -- continued

Intervenor Sarvey witness E. Parfrey - cont'd
Cross-Examination by Mr. Wheatland 210
Cross-Examination by Ms. DeCarlo 218
Exhibit 6E 220/220

CEC Staff Opening Statement 221
CEC Staff witnesses L. White, J. Kessler 225
Direct Examination by Ms. DeCarlo 225
Exhibits 1, 1E 227/353
Exhibit 1H 267/268
Cross-Examination by Wheatland 269
Cross-Examination by Mr. Sarvey 294
Exhibit 6F 302/307
Cross-Examination by Ms. Dunn 307
Exhibits 10 and 11 321/343

Evening Session 331

Topics - continued 331

Soil and Water Resources - continued 331

CEC Staff witnesses L.White,
J. Kessler - continued 331
Exhibit 1I 331/353
Cross-Examination by Ms. Dunn - continued 331
Exhibit 4D-2 346/349
Redirect Examination by Ms. DeCarlo 350

CEC Staff witnesses D. Grimsman, E.Teed-Bose354
Direct Examination by Ms. DeCarlo 354
Exhibits 354
Cross-Examination by Mr. Wheatland 368
Redirect Examination by Ms. DeCarlo 377
Recross-Examination by Ms. Dunn 377
Recross-Examination by Mr. Sarvey 380

Public Comment 383
Barry Luboviski, Secretary-Treasurer
Building and Construction Trades Counsel
of Alameda County AFL/CIO 384

I N D E X

Page

Topics - continued

Soil and Water Resources - continued

Public Comment - continued

Dave Mann, Business Representative
Plumbers and Steamfitters Local #342 387

Summaries by Public Adviser Mendonca 389

Biological Resources 398

Applicant witness E.J. Koford 398
Direct Examination by Mr. Harris 399
Exhibit 4E 399/473
Cross-Examination by Mr. Boyd 405

CEC Staff witness A. Erichsen 406
Direct Examination by Ms. DeCarlo 407
Exhibit 407/473
Exhibits 1, 1A, 1C 408/473
Cross-Examination by Mr. Sarvey 412
Cross-Examination by Mr. Boyd 420
Redirect Examination by Ms. DeCarlo 428
Recross-Examination by Mr. Sarvey 429

Intervenor CARE witness S. Smallwood 431
Direct Examination by Mr. Boyd 431
Exhibit 7A 432
Cross-Examination by Mr. Harris 456
Cross-Examination by Ms. DeCarlo 468
Redirect Examination by Mr. Boyd 469

Alternatives 473

Applicant witnesses J. Salamy, A.Torre 473
Exhibits 4B 474/500
Direct Examination by Mr. Wheatland 474
Cross-Examination by Mr. Boyd 476

Intervenor Sarvey Opening Statement 497
Exhibit 6G 497/499
Exhibit 6H 497/499

CEC Staff testimony/exhibits 500/501

I N D E X

	Page
Topics - continued	
Hazardous Materials	
Applicant's testimony/exhibit 4F entered by stipulation	502
CEC Staff witness A. Greenberg	503
Direct Examination by Ms. DeCarlo	503
Exhibit	503/533
Cross-Examination by Mr. Wheatland	517
Cross-Examination by Mr. Sarvey	518
Exhibits	532/532
Worker Safety and Fire Protection	506
Intervenor Sarvey exhibit/testimony withdrawn	506
Adjournment	533
Reporter's Certificate	534

1 P R O C E E D I N G S

2 10:15 a.m.

3 PRESIDING MEMBER KEESE: Good morning.

4 We're here this morning to continue the

5 evidentiary hearings on the application for

6 certification for the East Altamont Critical

7 Energy Facility.

8 I'm Bill Keese, Presiding on this case.

9 To my left, far left, is Robert Pernell,

10 Association on this case. My Advisor to my right,

11 Scott Tomashefsky. And Major Williams will be

12 conducting most of the hearing.

13 I think since we have new parties today

14 it's probably good that we go through, why don't

15 we identify ourselves. Mr. Wheatland for the

16 applicant.

17 MR. WHEATLAND: Yes, good morning. I'm

18 Gregg Wheatland, and I'm the attorney for the

19 applicant.

20 MR. HELM: I'm Kris Helm; I'm water

21 resources witness for the applicant.

22 MR. O'BRIEN: Kevin O'Brien, water

23 resources witness.

24 MS. STRACHAN: Susan Strachan,

25 Environmental Project Manager.

1 MR. DeYOUNG: Steve DeYoung,
2 Environmental Project Manager.
3 MS. TORRE: Alicia Torre, Project
4 Development Manager.
5 MR. McLUCAS: Jim McLucas, Project
6 Engineer.
7 PRESIDING MEMBER KEESE: All right.
8 Staff. Ms. DeCarlo.
9 MS. DeCARLO: Lisa DeCarlo, Staff
10 Counsel for the California Energy Commission. To
11 my left is Cheri Davis, Project Manager. To my
12 right are Lorraine White, CEC water analyst, as
13 well as John Kessler.
14 PRESIDING MEMBER KEESE: Thank you. Is
15 Western here?
16 MR. SWANSON: Dave Swanson, Western.
17 PRESIDING MEMBER KEESE: Thank you. San
18 Joaquin Valley Unified Air Pollution Control
19 District? Probably not.
20 CURE? CARE? Mr. Sarvey?
21 MR. SARVEY: Bob Sarvey, and my water
22 witness, Eric Parfrey.
23 MS. MENDONCA: Chairman Keese, Roberta
24 Mendonca, the Public Adviser. I've received a
25 communication that Mr. Boyd will be here this

1 afternoon. So they will be here today, but not
2 this morning.
3 PRESIDING MEMBER KEESE: Thank you.
4 Participating agencies, the Bay Area Air Quality
5 Management District?
6 MR. SPEAKER: Yeah, Dennis (inaudible).
7 PRESIDING MEMBER KEESE: Thank you.
8 Byron Bethany Irrigation District.
9 MS. DUNN: I'm Sandra Dunn; I'm
10 representing Byron Bethany Irrigation District.
11 And with me is Andy Hitchings with Somach, Simmons
12 and Dunn, a witness for Byron Bethany Irrigation
13 District. Rick Gilmore, the General Manager of
14 Byron Bethany. And Gary Nuss with CH2M HILL, the
15 District Engineer.
16 PRESIDING MEMBER KEESE: Thank you.
17 Department of Water Resources. Thank you.
18 You heard from Ms. Mendonca, the Energy
19 Commission's Public Adviser. If any members of
20 the public are interested in participating at
21 anytime, Roberta will be here, just get in touch
22 with her and she'll give you the details of
23 presenting and involving yourself in our process.
24 It is our intention to accept public
25 comment on each of the issues as they come up. So

at the end of the testimony if you're interested in making a comment, just -- blue cards, we try to honor them immediately. And other than that, just let us know.

Major, we're going to start on motions and objections.

HEARING OFFICER WILLIAMS: Yes, Chairman, we will start with motions. We have several preliminary matters. While I'm thinking about it, Byron Bethany, I sent you an email about getting electronic version of your prehearing conference statement. If you could send that to me.

MS. DUNN: I sent one to you --

HEARING OFFICER WILLIAMS: Okay, good.

MS. DUNN: -- I believe it was either Monday or -- I believe it was Monday.

HEARING OFFICER WILLIAMS: What you have in the exhibit list is a partial exhibit list updated from yesterday, and as proceedings go along I will be updating that. Some of the exhibits, for example, Byron Bethany's exhibits, are not filled out completely. But if you have a copy of their prehearing conference statement you'll see a list of all of their exhibits.

1 I just hadn't had a chance to totally
2 fill in our list. All I've done essentially is
3 renumber them so that each party present has a
4 number. And I'll just fill out the exhibit list
5 based upon the prehearing conference statements
6 and what we have offered into evidence in these
7 proceedings.
8 MS. DUNN: Mr. Williams, I do need to
9 correct one thing. We don't have, in electronic
10 form, all of the exhibits, like for instance Mr.
11 Gilmore's testimony. We are in the process of --
12 what I sent to you was their written testimony in
13 the prehearing conference statement.
14 HEARING OFFICER WILLIAMS: Right.
15 MS. DUNN: We will be putting those
16 other exhibits in PDF form and get them to you.
17 HEARING OFFICER WILLIAMS: Yeah, that's
18 fine. We put over till today several motions that
19 required BBID's presence. And CARE was not here
20 yesterday, either. And we anticipated that CARE
21 would be here this morning. And to the extent
22 that we cover matters and CARE's not here to -- or
23 not present to state its position, to repeat
24 yesterday, then they're in a position where
25 they've probably waived their right to state a

1 position, having been fully informed of our
2 proceedings and the times and dates and what-have-
3 you.
4 With that said, the first motion that we
5 have that was filed by both CARE and Mr. Sarvey is
6 an objection to BBID's presence, essentially here
7 as a party. At the prehearing conference held on
8 October 7, the Committee informed the parties that
9 it would allow BBID as a necessary party to
10 participate in these proceedings in the area of
11 water resources.
12 For the record, the Committee will
13 restate its ruling that BBID is a local agency
14 under California law. BBID is a necessary party,
15 and it has primary jurisdiction over the delivery
16 of water to a development within its geographical
17 area, such as East Altamont Energy Center.
18 And part of the Energy Commission's
19 statutory obligation is to solicit information
20 from local agencies. Traditionally the Energy
21 Commission has allowed local agencies to
22 participate in its proceedings without formal
23 intervention when the local agency has primary
24 jurisdiction over a permitting element or a
25 critical aspect of the project.

1 With that said, the Committee will
2 receive argument on CARE's -- well, CARE is not
3 here, but we will certainly hear from Mr. Sarvey
4 and we'll hear from -- we heard a little bit from
5 applicant yesterday, so we fully understand that
6 applicant is in agreement with the Committee on
7 this point.
8 Staff certainly is free to voice its
9 position. And BBID is welcome, as well, to state
10 its position.
11 So, Mr. Sarvey, do you want to be heard
12 on this?
13 MR. SARVEY: Sure. My objection is
14 actually threefold, but the first part of it is
15 that Byron Bethany Irrigation District has not
16 formally intervened. I do not object to their
17 testimony, but I think it requires a sponsor by
18 Commission rules. All other interested agencies
19 have been sponsored, and I feel that intervenor
20 status is privileged. It comes with a lot of
21 responsibilities.
22 And I will admit that they have been
23 present at a lot of the meetings, but they have
24 not formally intervened. And I feel that with
25 some of the complications that come with

1 intervention and some of the problems that have
2 occurred in this particular siting case in
3 relation to intervention, although they've been
4 resolved by the Committee favorably, I feel that
5 without the benefit of a sponsor, I have no
6 objection to their testimony, I just feel they
7 should be sponsored and go through the formal
8 intervention process, as we all have to.
9 And this is basically just an objection,
10 not to their testimony, but to the form that it's
11 coming in. That's the first part.
12 HEARING OFFICER WILLIAMS: Do you want
13 to continue, Mr. Sarvey?
14 MR. SARVEY: I think the rest of it
15 would go to staff's argument, so it's probably
16 best to let staff present their position. And
17 that's basically the testimony of attorneys. And
18 probably you want to hear them first, and then
19 I'll just follow them in their objection in that
20 respect.
21 HEARING OFFICER WILLIAMS: Well, I'd
22 rather just go through these. We'll get to
23 staff's motion --
24 MR. SARVEY: Okay.
25 HEARING OFFICER WILLIAMS: -- in time.

1 MR. SARVEY: Well, basically my motion
2 dealt with their intervention and I never did file
3 a motion opposing them having attorneys as
4 witnesses, but I did mention it in the prehearing
5 conference, that I feel that's inappropriate.
6 I'd asked my attorney to represent me in
7 these proceedings as a witness -- not represent me
8 but be a witness and he directly told me that
9 attorneys were not allowed to testify in
10 evidentiary hearings. So that's pretty much what
11 the feeling in the people who practice in this
12 area, Steven Volker is my attorney, and he said
13 that his testimony would not be accepted because
14 it's legal opinion.
15 And I would have really have liked to
16 have had him here to represent me on a couple
17 issues, or I mean testify for me on a couple
18 issues, but he indicated that wasn't possible
19 since he was an attorney.
20 So I feel a little bit at a disadvantage
21 because my understanding of the rules were
22 attorneys -- opinions were subject of prehearing
23 conference statements, legal briefs, but not
24 testimony.
25 HEARING OFFICER WILLIAMS: Staff, do you

1 want to speak to this issue of BBID's
2 participation?
3 MS. DeCARLO: No, staff originally --
4 well, I've got a couple of comments. Staff
5 originally objected to BBID's participation due to
6 their non-intervenor status; however staff does
7 understand that the Committee needs to hear from
8 all interested agencies regarding the proposed
9 project. And so it does not object to BBID's
10 participation in these proceedings.
11 However, our motion still remains and I
12 believe we will hear that a little bit later with
13 regard to the legal testimony.
14 HEARING OFFICER WILLIAMS: Yeah, if we
15 could move to the issue of your objection to the
16 introduction of legal opinion as testimony.
17 The Committee is inclined to have the
18 testimony considered in the nature of legal
19 argument at the time of briefing rather than use
20 valuable hearing time to weigh issues of legal
21 opinion.
22 Now, Mr. Sarvey, just for your
23 information there is generally no prohibition on
24 attorneys testifying in these proceedings. Just
25 as there is no general prohibition, for example,

1 on attorneys serving as jurors. Certainly they're
2 like everybody else. Now, their legal training
3 certainly would put them in a position to perhaps
4 be better informed, or maybe less informed, on the
5 law. But simply put, attorneys are put in the pot
6 like everybody else.
7 Now, if the substance of their testimony
8 relates to a legal conclusion, then it certainly
9 may be objectionable on that basis. But, there is
10 no general prohibition on attorneys participating
11 as witnesses in these proceedings.
12 Now, would the -- does any party have
13 any objection to the Committee's inclination to
14 receive the testimony as legal argument in
15 briefing?
16 MR. WHEATLAND: I won't state this as an
17 objection, but just simply to provide additional
18 information. I mentioned yesterday that the
19 Commission has routinely accepted legal opinion,
20 or testimony by an attorney in a Commission
21 proceeding for consideration of the question of
22 whether certain LORS are applicable. And to guide
23 the Commission in the interpretation.
24 We, for example, can cite to you the
25 example of the Morro Bay case in which case the

1 applicant submitted the testimony of Ronald van
2 Buskirk, who practices at law in the area of land
3 use. And offered testimony without objection by
4 the staff on the question of the applicable LORS
5 and their interpretation.
6 Now, I know Ms. DeCarlo will argue, as
7 she has in her brief, her motion on this that this
8 hasn't happened in the water area; I think that
9 was her argument. But that isn't true, either.
10 In the case of the Elk Hills Power
11 project Peter MacGlagan, that's M-a-c-G-l-a-g-a-n,
12 who is an attorney testified specifically on the
13 applicability of section 13550, as to its legal
14 history and its interpretation.
15 So there's clear precedent before this
16 Commission accepting testimony on the very points
17 that are being offered by the parties here today.
18 And we would suggest that to be consistent with
19 prior Commission practice, you should allow the
20 testimony of these witnesses that have been
21 offered.
22 And if there is a concern about undue
23 time in the hearing today, that we would agree to
24 appropriate limits on the cross-examination of all
25 of these witnesses, but we think the testimony is

1 vital and would urge that it be received.
2 HEARING OFFICER WILLIAMS: Are the
3 witnesses here?
4 MR. WHEATLAND: Yes, they are. Our
5 witnesses are here.
6 MS. DUNN: As well as Byron Bethany
7 Irrigation District.
8 HEARING OFFICER WILLIAMS: Staff?
9 MS. DeCARLO: Staff would just submit,
10 and I admit that I'm not wholly familiar with the
11 Elk Hills proceeding, so I can't speak to that;
12 however in the area of land use, generally
13 attorney testimony has been limited to the sole
14 issue of whether a project is consistent with
15 LORS, not necessarily whether LORS are applicable.
16 The purpose of evidentiary hearings is
17 to accept evidence necessary to resolve factual
18 issues in order for the Committee to make findings
19 required by Public Resources Code 25523(d).
20 I believe that the limited amount of
21 time that we have available for hearings should be
22 devoted to the introduction into the record of
23 testimony regarding factual issues. And that
24 legal opinions should be reserved for briefing, as
25 it is done in most instances.

1 The legal issues involved in this case
2 are very complex. The applicant and BBID believe
3 that certain statutes do not apply to the project.
4 Staff feel that there are two sets of applicable
5 LORS, so to speak.
6 One which requires that a consistency
7 determination be found by the Committee. And
8 another that applies not necessarily to the
9 project, itself, but to the Commission, such as
10 CEQA or the constitution.
11 Staff believes that both types of LORS
12 apply in this instance, and intends to fully brief
13 the matter. However, delving into those issues
14 during evidentiary hearings, I believe, is a waste
15 of time, since obviously no resolution will come
16 here, and we'll ultimately be forced to brief the
17 issues.
18 HEARING OFFICER WILLIAMS: Mr. Sarvey.
19 MR. SARVEY: Yeah, I just wanted to
20 point out that Mr. Wheatland, when he spoke of the
21 Morro Bay case and the other case, those attorneys
22 were sponsored. There is no sponsor in this case.
23 And two, once again I think that I agree
24 with staff that their attorneys' information
25 should be contained in their legal brief. I think

1 Mr. Gilmore and anyone else who's a non-attorney
2 should be allowed to present the facts. I think
3 it's important to the case.
4 But, once again, these gentlemen have
5 not been sponsored, and I feel that that's kind of
6 a prejudicial application.
7 (Pause.)
8 HEARING OFFICER WILLIAMS: Okay, CARE
9 and Mr. Sarvey's motion to reschedule topics is
10 denied. CARE and Mr. Sarvey's objection to BBID's
11 participation without formal intervention is
12 denied.
13 And here's what we're going to do on the
14 introduction of legal opinion as testimony. We're
15 going to allow the parties to make opening
16 statements on the water issues. And they can
17 briefly outline the parties' position, what the
18 legal arguments are.
19 And we will then expect that the parties
20 will provide the legal opinion as to the
21 application of the various LORS in their legal
22 briefs.
23 MR. SARVEY: Mr. Williams.
24 HEARING OFFICER WILLIAMS: Yes.
25 MR. SARVEY: I'm the only party here

1 that's not represented by an attorney --
2 HEARING OFFICER WILLIAMS: Right.
3 MR. SARVEY: -- so I feel that I'm being
4 put at an extreme disadvantage by this format.
5 HEARING OFFICER WILLIAMS: Well, you can
6 certainly outline -- is water one of your issues?
7 MR. SARVEY: Oh, yes.
8 HEARING OFFICER WILLIAMS: It is? And
9 you have a witness present?
10 MR. SARVEY: Yes, I do.
11 HEARING OFFICER WILLIAMS: Well, you're
12 certainly free to outline, give us whatever
13 presentation that you want to give. I understand
14 that you're at a disadvantage, but --
15 PRESIDING MEMBER KEESE: We're not going
16 to have legal argument here.
17 MR. SARVEY: Okay, well, I just really
18 hadn't prepared an opening statement or anything,
19 and everybody here at the table sitting here with
20 staff --
21 PRESIDING MEMBER KEESE: We're going to
22 take advantage of this forum, which is an
23 evidentiary hearing, to hear the parties outline
24 what they're going to say the case is. And I
25 think this will be beneficial to the Committee.

1 It'll be beneficial to you to hear the parties
2 tell you what their case is.
3 But we're not going to go into debating
4 it at all.
5 MR. SARVEY: Okay, I just wanted to
6 state my objection. I'll be quiet now.
7 PRESIDING MEMBER KEESE: Yeah, you're
8 just going to hear. As far as your concern about
9 Byron Bethany not being sponsored, essentially the
10 Committee is sponsoring. We have determined that
11 Byron Bethany is an essential party to this case,
12 and so if you want to -- technically if you're
13 asking who's sponsoring, the Committee is
14 sponsoring, because we've asked them to come. We
15 said we can't do it without you, so --
16 MR. SARVEY: I'd be willing to sponsor
17 them, I just have seen no formal sponsor
18 announced.
19 PRESIDING MEMBER KEESE: Well, --
20 MR. SARVEY: And I think their testimony
21 is critical, and I think you're making the right
22 decision there. I'm just --
23 PRESIDING MEMBER KEESE: In essence the
24 Committee is the sponsor.
25 MR. SARVEY: Understood. Okay. Thank

1 you, Chairman.

2 HEARING OFFICER WILLIAMS: Okay.

3 Evidentiary hearings are formal in nature, similar

4 to court proceedings. The purpose of the hearings

5 are to receive evidence, including testimony, and

6 to establish the factual record necessary to reach

7 a decision in this case.

8 Applicant has the burden of presenting

9 sufficient and substantial evidence to support the

10 findings and conclusions required for

11 certification of the proposed facility.

12 Today all of our topics are contested,

13 and we will hear them as set forth in our topics

14 agenda that was previously distributed.

15 Witnesses will testify under oath or

16 affirmation. During the hearings the party

17 sponsoring a witness shall provide the witness'

18 qualifications to the extent that the party deems

19 necessary. And ask the witness to summarize the

20 prepared testimony. Relevant exhibits should be

21 offered into evidence at that time.

22 At the conclusion of the witness' direct

23 testimony, the sponsoring party should move in all

24 relevant exhibits to be received into evidence.

25 The Committee will next provide the

1 other parties an opportunity for cross-examination
2 followed by redirect and recross-examination, as
3 appropriate. Multiple witnesses may testify as a
4 panel. The Committee may also question the
5 witnesses.
6 Upon the conclusion of each topic area
7 we will invite members of the public to offer
8 unsworn public comment. Public comment is not
9 testimony and a Committee finding cannot be based
10 solely on such comments. However, public comment
11 may be used to explain evidence in our record.
12 The order of presentations on testimony
13 throughout the day will be taken as follows:
14 applicant, which, of course, has the burden of
15 proof; staff; BBID; Mr. Sarvey and CARE.
16 I think then that we will now begin
17 testimony on the topic of water resources. And,
18 again, the parties are invited to give us a brief
19 opening statement as an outline, a roadmap, if you
20 will, of their positions.
21 Yes, Mr. Wheatland.
22 MR. WHEATLAND: If I could make a
23 suggestion, please, as to the order of
24 presentation. The East Altamont Energy Center is
25 proposing to receive its water from the Byron

1 Bethany Irrigation District, which is a public
2 agency, under the terms and conditions that would
3 govern the operation of that agency.
4 So we believe that a necessary
5 foundation for our testimony is for the Committee
6 to understand the nature of that agency and how it
7 will serve us. Byron Bethany Irrigation District
8 has prepared a PowerPoint presentation to provide
9 an overview of how they will serve our project.
10 And we would suggest that for the
11 purposes of water testimony that you would permit
12 Byron Bethany to first give it's PowerPoint
13 presentation, and then to take its witnesses under
14 oath, followed by the applicant, and then the
15 other parties as appropriate.
16 But we think that that would set the
17 best foundation and the best order for
18 understanding these issues.
19 HEARING OFFICER WILLIAMS: Any
20 objection?
21 MS. DeCARLO: Staff has no objection.
22 MR. SARVEY: No objection.
23 HEARING OFFICER WILLIAMS: Okay, that's
24 fine. What about the opening statement? Are you
25 prepared to do that?

1 MR. WHEATLAND: No, I do not have an
2 opening statement. When it comes to the
3 presentation of our testimony, you've asked for
4 opening statement with respect to some of the
5 legal issues that are discussed in our testimony,
6 and --
7 HEARING OFFICER WILLIAMS: Yes.
8 MR. WHEATLAND: -- we would be pleased
9 to provide that preceding the presentation of our
10 witnesses.
11 HEARING OFFICER WILLIAMS: Very well.
12 BBID.
13 MS. DUNN: Okay, well, thank you. I'm
14 Sandra Dunn. I'm representing Byron Bethany
15 Irrigation District. And I will just make a brief
16 opening statement.
17 There's been a lot of discussion with
18 regard to BBID's role in this proceeding, and I
19 think it's important to emphasize that Byron
20 Bethany Irrigation District is an independent
21 public agency with an obligation to serve its
22 customers with water in the most efficient and
23 effective and reliable manner that it can.
24 Its interests are really not represented
25 by any of the parties in this proceeding. It's

1 not represented by the applicant; it's not
2 represented by the CEC Staff. And I think it's
3 important for Byron Bethany to participate in this
4 proceeding to make sure that its own interests are
5 fully represented.
6 And in that respect I think one of the
7 concerns that BBID has is that the CEC, by its
8 action in this proceeding, not inadvertently
9 interfere with BBID's ability to perform its
10 duties, its statutory duties to provide water
11 service to all of its customers, including East
12 Altamont Energy Center.
13 With regard to the legal testimony that
14 Byron Bethany was prepared to present today, I
15 would just say that it is Byron Bethany's position
16 with regard to water code section 13550 that it
17 does not mandate that the CEC -- it does not
18 require the CEC to mandate the use of recycled
19 water.
20 What it does is it sets forth a
21 procedure for the State Water Resources Control
22 Board to go through an evidentiary and procedural
23 process to determine whether recycled water is
24 available for use for power plants, or for other
25 uses where potable water -- where it would be

1 better to use recycled water than using potable
2 water.
3 Here we're not talking about potable
4 water, we're talking about raw water that has not
5 been treated. And we are not talking about an
6 evidentiary proceeding that the State Water
7 Resources Control Board has gone through where
8 they have determined the availability of recycled
9 water for this project.
10 Having said that, however, I think that
11 our testimony will demonstrate that Byron Bethany
12 is in the process of trying to develop recycled
13 water as a resource to supplement its existing
14 fresh water supply. And it wants to be able to
15 develop recycled water so that it can serve all of
16 its customers, including East Altamont Energy
17 Center, where it's appropriate to use recycled
18 water.
19 And we would not want the Commission to
20 interfere in any way with Byron Bethany's ability
21 to make decisions that are in the best interests
22 of the district in the use of that recycled water
23 throughout its district.
24 With that, I would like to present our
25 witnesses. And what we have done is we have

1 prepared a PowerPoint presentation which is in
2 essence a summary of the testimony that we have
3 prepared and submitted to the Energy Commission.
4 I did have served last week, last
5 Friday, copies of that PowerPoint presentation to
6 everyone. And I did bring extra copies that were
7 on the table in case people didn't receive those.
8 So if I might start with Mr. Gilmore.
9 Do you have before you a copy of your testimony?
10 HEARING OFFICER WILLIAMS: Yes, yes.
11 MS. DUNN: Yeah, I'm sorry, we did not
12 do that yet.
13 HEARING OFFICER WILLIAMS: Swear the
14 witness, please.
15 MS. DUNN: Should we swear in all of the
16 witnesses?
17 HEARING OFFICER WILLIAMS: Swear the
18 panel; yeah, can we swear the panel.
19 (Parties speaking simultaneously.)
20 Whereupon,
21 RICK GILMORE and GARY NUSS
22 was called as a witness herein, and after first
23 having been duly sworn, was examined and testified
24 as follows:
25 MS. DUNN: And I believe, Mr. Williams,

1 did you mark, remark our exhibits, or do you want
2 us to --
3 HEARING OFFICER WILLIAMS: Yeah, BBID is
4 under exhibit 8, so it'll follow your chain, but
5 just switch the numbers to 8.
6 MS. DUNN: Eight.
7 HEARING OFFICER WILLIAMS: Eight.
8 MS. DUNN: Okay.
9 HEARING OFFICER WILLIAMS: It'll go 8A,
10 B, C, D all the way through, and then AA.
11 MR. SARVEY: Can I ask a point of order.
12 I think I misunderstood your instructions. I
13 thought we were all going to give a prestatement
14 before any witnesses testified, and maybe I
15 misunderstood.
16 HEARING OFFICER WILLIAMS: No, we
17 changed the order based upon applicant's request.
18 MR. SARVEY: So the applicant won't be
19 presenting witnesses then?
20 HEARING OFFICER WILLIAMS: Yes, they're
21 going to follow BBID.
22 MR. SARVEY: Okay, thank you.
23 HEARING OFFICER WILLIAMS: It's going to
24 be BBID now, and then applicant, staff and then
25 you'll conclude.

1 MR. SARVEY: Sorry to interrupt.
2 HEARING OFFICER WILLIAMS: No, that's
3 quite all right, Mr. Sarvey.
4 DIRECT EXAMINATION
5 BY MS. DUNN:
6 Q All right, Mr. Gilmore, do you have your
7 testimony in front of you?
8 MR. GILMORE: Yes, I do.
9 MS. DUNN: And I believe that's been
10 marked exhibit 8. Was this testimony set forth in
11 exhibit 8 prepared by you or at your direction?
12 MR. GILMORE: Yes, it was.
13 MS. DUNN: And does exhibit 8 contain
14 your qualifications?
15 MR. GILMORE: Yes, it does.
16 MS. DUNN: Do you have any additions,
17 corrections or clarifications that you'd like to
18 make to exhibit 8?
19 MR. GILMORE: No, I do not.
20 MS. DUNN: Is the testimony that you're
21 providing and the facts contained herein true to
22 the best of your knowledge?
23 MR. GILMORE: Yes.
24 MS. DUNN: Do the opinions represent
25 your best professional judgment?

1 MR. GILMORE: Yes, they do.
2 MS. DUNN: Do you adopt exhibit 8 as
3 your testimony in this proceeding?
4 MR. GILMORE: Yes.
5 MS. DUNN: Would you briefly summarize
6 your qualifications and your testimony.
7 MR. GILMORE: Yes, thank you. My name
8 is Rick Gilmore. I'm General Manager for the
9 Byron Bethany Irrigation District. And prior to
10 becoming the General Manager of the District I
11 served as the District Superintendent and as the
12 District's Watermaster. And I have 19 years
13 experience with the District.
14 With respect to the overview of my
15 testimony I'm going to provide the Committee with
16 some background on the District; review the
17 District's water supply and the District's
18 commitment to serve the East Altamont Energy
19 Center.
20 And also address the use of recycled
21 water made available from the Mountain House
22 Community Services District via Byron Bethany.
23 And also address, later on address some proposed
24 revisions to conditions of certification regarding
25 soil and water-5 and 6.

1 Regarding the District's background,
2 Byron Bethany is a multi-county special district
3 encompassing approximately 19,000 acres, with
4 lands in Alameda, Contra Costa and San Joaquin
5 Counties.
6 The District is a public agency
7 operating under the California water code with an
8 elected board of directors.
9 As illustrated here with the District
10 map, it shows the project area, East Altamont
11 Energy Center, within the Alameda County portion
12 of the District.
13 And with respect to the District's point
14 of diversions, our diversions were originally
15 located on Italian Slough back in 1914. And as a
16 result of the construction of the State Water
17 Project, diversions were relocated to the State
18 intake channel by agreement with the Department of
19 Water Resources.
20 And basically we have two pumping plants
21 off the intake channel which is downstream from
22 the State Skinner fish screen, and basically
23 showing the diversions within the location in
24 Alameda County of the East Altamont Energy Center.
25 The District's water supply is based on

1 a pre-1914 water right. The original posting was
2 dated May 18, 1914 for approximately 40,000 miners
3 inches, which was measured under a four-inch
4 pressure. And the intended use was for both
5 irrigation and domestic purposes.
6 Back in the '60s the District identified
7 that there would be reasonable beneficial use of
8 approximately 60,000 acrefeet of water. And that
9 after extensive rehabilitation measures were taken
10 in the late '60s to the District facilities, we
11 resulted in some major water conservation efforts.
12 And currently ongoing conservation within the
13 District is occurring.
14 As mentioned you can see by looking at
15 the map the unique relationship between the
16 Department of Water Resources and BBID. The
17 proximity of our facilities has provided for
18 ongoing coordination of operations with the
19 Department, both at the Delta field division
20 level, and in Sacramento with the State Water
21 Project Analysis Office.
22 Ongoing coordination regarding these
23 operations led to formalizing an agreement
24 defining the relative rights and responsibilities
25 of both the Department and the District.

1 With respect to the terms of that
2 agreement, the agreement recognizes the District's
3 ability to divert water year-round at a rate of
4 300 cubic feet per second for all beneficial uses
5 which includes the East Altamont Energy Center.
6 The uses of water made by the District
7 will not be disturbed or challenged by the
8 Department of Water Resources.
9 And in exchange for this operational
10 certainty the District has agreed to limit its use
11 to 50,000 acrefeet per year diverted out of the
12 intake channel.
13 With respect to this particular
14 agreement I would also like to mention that this
15 morning we received a call from the Department of
16 Water Resources. We anticipated an executed
17 agreement on Monday. We have not received that
18 yet. However, I'm assured that the Director of
19 the Department of Water Resources will execute
20 that today. And hopefully by the close of
21 business today we will receive a fax copy with the
22 fully executed agreement.
23 PRESIDING MEMBER KEESE: I'm sorry, that
24 referred to the agreement you showed on the
25 previous slide?

1 MR. GILMORE: That's correct.
2 PRESIDING MEMBER KEESE: This agreement?
3 MR. GILMORE: That's correct.
4 PRESIDING MEMBER KEESE: Thank you. The
5 District is also committed to provide a water
6 supply to the East Altamont Energy Center. BBID
7 has an obligation to furnish water to East
8 Altamont Energy Center as a landowner within the
9 District.
10 The District provided a will-serve
11 letter in January 2001 stating that BBID has
12 sufficient supplies.
13 In light of the new DWR agreement, the
14 District reevaluated this water supply and
15 demands, and also reviewed changes in proposed
16 projects. The results of the revised water supply
17 analysis concluded sufficient supplies exist
18 without having to augment existing supplies with
19 recycled water.
20 The District also considered potential
21 impacts to the Delta. As in the previous slide,
22 water diverted by the District is screened by the
23 State Water Project Skinner fish screen facility.
24 As a result BBID's diversions do not result in any
25 impacts to threatened or endangered species. And

we've identified the -- I believe that would be now 8H, exhibit 8H, which would be that the National Marine Fisheries Service has concurred with those findings.

As the District's committed to provide the water supply to East Altamont, we're also promoting the use of recycled water. The District completed a recycled water feasibility study which is included in my testimony; and in November 2001 the District adopted a recycled water policy to promote the beneficial use of recycled water within the District. That policy establishes that the District will be the sole provider of recycled water within the service area.

The District also intends to provide recycled water to the East Altamont Energy Center. Consistent with the recycled water policy the board of directors adopted, East Altamont Energy Center and the District executed a memorandum of understanding on July 9, 2002, which is included in my testimony.

That MOU states that the District will attempt to reduce water raw demands by providing recycled water to East Altamont as it becomes available within the community of Mountain House.

1 Once East Altamont Energy Center is
2 licensed, BBID will negotiate with the Mountain
3 House Community Services District. The Mountain
4 House Community Services District is solely in
5 control and responsible for the discharge and
6 recycling of water within the community.
7 The master developer of Mountain House
8 has no role in the management of recycled water --
9 of future recycled water supplies.
10 As mentioned, an agreement between the
11 MHCSD and BBID is required. As part of my
12 testimony we have included here an excerpt from
13 Paul Sensibaugh, General Manager of the Mountain
14 House Community Services District, his letter
15 basically indicating that in order to provide
16 recycled water to an industry within BBID service
17 area, Mountain House Community Services District
18 must contract with BBID for such distribution.
19 With respect to the proposed soil and
20 water conditions certification 5 and 6, BBID has
21 the statutory duty to develop its water resources
22 and allocate these water resources among its
23 customers in an equitable, efficient and
24 environmentally sound manner.
25 Presently, conditions 5 and 6 will usurp

1 the District's authority. Later on in our
2 overview of our testimony I will provide the
3 Committee with some revised conditions.
4 MS. DUNN: Next I'd like to have offered
5 the testimony of Gary Nuss --
6 HEARING OFFICER WILLIAMS: Before we do
7 that, counsel, let's admit as 8-O the PowerPoint
8 slide presentation.
9 MS. DUNN: Okay, 8-O?
10 HEARING OFFICER WILLIAMS: O.
11 MS. DUNN: Okay.
12 HEARING OFFICER WILLIAMS: Any
13 objection? It's the presentation that we've just
14 seen, and it's been previously provided, as I
15 understand it, to the parties.
16 MR. SARVEY: Will we be cross-examining
17 these witnesses individually or as a panel?
18 HEARING OFFICER WILLIAMS: You can
19 cross-examine them as a panel, but I'm just
20 talking about what you just saw.
21 MR. SARVEY: Sure, no objection.
22 HEARING OFFICER WILLIAMS: Okay, so
23 that'll be 8-O.
24 MS. DUNN: Okay, thank you.
25 HEARING OFFICER WILLIAMS: It's entered.

1 MS. DeCARLO: Staff doesn't have any
2 objection as long as the legal opinions contained
3 therein are not entered in as testimony, but
4 merely as legal opinions.
5 HEARING OFFICER WILLIAMS: Okay.
6 MS. DUNN: If we could proceed with the
7 testimony of Gary Nuss, then.
8 HEARING OFFICER WILLIAMS: Yeah, we'll
9 mark that, his testimony, as exhibit 9.
10 MS. DUNN: Exhibit 9? Okay.
11 HEARING OFFICER WILLIAMS: Yes.
12 MS. DUNN: Do you have a copy of what's
13 been marked as exhibit 9, Mr. Nuss?
14 MR. NUSS: Yes, I do.
15 MS. DUNN: Was this testimony set forth
16 in exhibit 9 prepared by you or at your direction?
17 MR. NUSS: Yes, it was.
18 MS. DUNN: Does exhibit 9 contain your
19 qualifications?
20 MR. NUSS: Yes, it does.
21 MS. DUNN: Do you have any additions,
22 corrections or clarifications that you'd like to
23 make to exhibit 9?
24 MR. NUSS: No, I do not.
25 MS. DUNN: Is the testimony that you're

1 providing and the facts contained therein true to
2 the best of your knowledge?
3 MR. NUSS: Yes, it is.
4 MS. DUNN: Do the opinions represent
5 your best professional judgment?
6 MR. NUSS: Yes, they do.
7 MS. DUNN: Do you adopt exhibit 9 as
8 your testimony in this proceeding?
9 MR. NUSS: Yes, I do.
10 MS. DUNN: Would you briefly summarize
11 your qualifications and your testimony?
12 MR. NUSS: I'd be happy to. Mr.
13 Chairman, my name is Gary Nuss; I'm a Vice
14 President with CH2M HILL, senior water resources
15 engineer. I'm licensed to practice civil
16 engineering in the States of California and
17 Nevada.
18 My academic background is in the field
19 of agricultural engineering. I've been the
20 District Engineer at Byron Bethany Irrigation
21 District since 1995. And our firm has served as
22 the District's Engineer since the mid 1960s.
23 A brief overview of my testimony follows
24 on this slide. I'd like to focus on four areas in
25 my testimony. One, the evaluation of the

1 District's water supplies and demands, paying
2 particular attention to the focus on the recent
3 evaluation that's been completed with regard to
4 the applicability to provide supply to the Energy
5 Center.
6 I'd like to speak briefly about how we
7 might incorporate recycled water into the District
8 supply. I'd like to talk about one of the
9 conditions of certification, SW-6, and then just
10 quickly summarize the tables that we updated in
11 the final staff assessment as exhibits for the
12 Committee.
13 As Mr. Gilmore noted in his testimony,
14 BBID has continuously examined its water resources
15 throughout the practice of its general management
16 of the District. For example, in the mid 1990s
17 the District participated in the east County water
18 supply and management study.
19 In that study the District participated
20 with entities in east Contra Costa County, one of
21 the fastest growing counties in the state. And
22 looked at how the water supplies might be best
23 served throughout the entire County area over the
24 next 40 to 50 years.
25 Then following in 1999 the District was

1 approached with the annexation of the Tracy Hills
2 area into the District. And through that
3 annexation they reevaluated their water supplies
4 and demands.
5 And then here recently the District has
6 continued to reevaluate its water supplies and
7 demands, paying particular attention to the, as
8 Mr. Gilmore noted, the new agreement with the
9 Department of Water Resources, and looking at how
10 the Energy Center would fit within the overall
11 water supply and demands that the District
12 controls.
13 As summarized in my written testimony,
14 BBID can supply water supply to the East Altamont
15 Energy Center. The testimony shows that they have
16 sufficient supplies to meet the demands of the
17 existing and projected customers, including the
18 East Altamont Energy Center.
19 In addition, more specifically the
20 analysis shows that it does not require the
21 development of recycled water supplies to mitigate
22 impacts that might be associated with supplying
23 the East Altamont Energy Center.
24 These supplies, I'll go into some
25 detail, are sufficient both in an average year and

1 a dry hydrologic year, and both under normal and
2 peak power production conditions.
3 This exhibit is now exhibit 9B, and it
4 is a summary of the analysis that looks at the
5 average annual supply and demand for the District.
6 And I'd like to just walk through this briefly for
7 the Committee.
8 First column here shows the supply and
9 demand type that's included within the District.
10 And then there are subsequent columns showing
11 years from 2000 out through 2040.
12 And the table, itself, is broken into
13 two primary sections. A section that deals with
14 total water supply, and then a section that deals
15 with total demands for water within the District.
16 Comment quickly on the total water
17 supply; as Mr. Gilmore has noted, the District has
18 a water right for water. And through agreement
19 with the Department of Water Resources for
20 operational certainty they've agreed to limit that
21 diversion to 50,000 acrefeet per year.
22 The District is also planning on
23 incorporating supplies for recycled water within
24 the overall water resources mix that the District
25 has, and we've shown from the District's

1 feasibility study a total maximum amount of
2 recycled water of about 5900 acrefeet. And we've
3 used the ramp-up schedule that was provided by Mr.
4 Sensibaugh in his letter to the staff on how that
5 might develop. We concur with that potential
6 ramp-up schedule.
7 Focusing then briefly on the demand
8 section of the table, there are three types of
9 demands: predicted additional MNI uses, which are
10 shown here in red on the screen; identified
11 municipal and industrial uses, which are shown in
12 green; and then the agricultural uses which are
13 shown in blue.
14 As my testimony goes into more detail,
15 the written testimony, the predicted addition MNI
16 uses are really placeholders that the District
17 maintains throughout the course of its operation
18 of the District to look forward as to how the
19 District might develop in certain areas.
20 For example, Unimin is a current
21 industrial user within the District. They use a
22 very small amount of water in the District's
23 terms, 125 acrefeet. But they say they might use
24 more water in the future. So for planning
25 purposes the District assumes that they may use

about 500 acrefeet.

Similarly there's been discussions in this area in the past about how the airport there might be developed to serve as a major transportation corridor for east Contra Costa County. And if that airport was developed, it may also need water from the District since it resides within the District's boundaries.

So the District has set aside some water based on discussions with those groups and their evaluation of what the airport may need of about 500 acrefeet, and a maximum of say 1000 acrefeet in 2040.

And then finally the community of Byron currently resides within the boundaries of the District. Their primary water supply is groundwater, but if that community continues to develop in the future, it may also require additional water supplies. And the District has estimated it may need a maximum of 600 acrefeet in 2040.

Turning our attention quickly then to the identified municipal and industrial uses, these are planned developments that are occurring in the near term within the District.

1 For example, the water supply required
2 for the East Altamont Energy Center is shown in
3 this table that's provided by the applicant. Also
4 the water supply for the Mountain House community,
5 which is a planned development that's currently
6 being built out, is provided in this table, using
7 the data that the developer and Mountain House has
8 provided to the District for their water supplies.
9 And then finally, I mentioned earlier
10 about the Tracy Hills community that may develop
11 in the future. That is shown as an identified
12 municipal and industrial use. And the developer's
13 engineer for Tracy Hills has provided updated
14 values with regard to the water supply they
15 project for that development out through 2040.
16 The most significant use of water within
17 the District is the agricultural use of water, and
18 that is the last demand component I'd like to
19 briefly comment on.
20 It shows that the District currently in
21 the year 2000 delivered about 31,000 acrefeet of
22 water to its agricultural customers. As we
23 updated this supply and demand analysis, we looked
24 at each irrigable area within the District and
25 identified its potential water use. And then we

took into account which of those areas might be developed by the Mountain House development, for example, and show that as that development came into fruition, the agricultural lands would basically be converted to domestic use, and their demands would then be shown in the domestic category of this identified municipal and industrial use.

We looked at the historic cropping patterns within the District and looked at each type of water supply that each crop might use, and projected that out into the future to develop this total amount.

Now, how this data -- Mr. Chairman, do you --

PRESIDING MEMBER KEESE: Yes. So the 35,400 is essentially full development of all agricultural potential in the District?

MR. NUSS: It is. And then as it decreases you'll notice that it goes to 31,000 acrefeet; and that reflects the build-out of the Mountain House community. Because in 2020 Mountain House will be built out in theory, and all of the irrigable lands that will have converted to domestic use would now no longer

1 receive water on the ag side, but they'll receive
2 it on the Mountain House side.
3 PRESIDING MEMBER KEESE: And Tracy Hills
4 is an area that is not under agricultural
5 development?
6 MR. NUSS: Correct, Tracy Hills is an
7 annexed area to the District, and it's not under
8 agricultural supplies for the District. It would
9 purely receive a raw water supply for domestic
10 use.
11 PRESIDING MEMBER KEESE: So one could
12 assume then that today at 31,400 most of the
13 irrigable land is being irrigated?
14 MR. NUSS: Yes, it's about -- there's
15 about 12,300 acres of total irrigable land, and
16 they irrigated about 9500 acres in the year 2000.
17 This column 2000 does reflect actual measured
18 data; and then 2020 --
19 PRESIDING MEMBER KEESE: Okay, and the
20 2010, 35,4000 is if everything --
21 MR. NUSS: Yes, it is, sir. With one
22 small exception, and that is an amount of acreage
23 that is fallowed. In any given year farmers make
24 decisions about how much land they won't irrigate
25 on their individual field, and we've assumed a

very small amount of about 50 acres. And all the rest of the irrigable land has been assumed to be provided water supply under this analysis.

PRESIDING MEMBER KEESE: Thank you.

MR. NUSS: You're welcome. I'd like to summarize with respect to the East Altamont Energy Center all of that data in the previous slide in perhaps a little bit simpler format in this slide. And this is really a summary of the water supply and demand testimony that's included in my written testimony.

And this table does have a lot of numbers on it, as well, so I'll try and describe it in some detail for the Committee.

First of all, it focuses only on conditions in 2040, which is the maximum build-out and development of all the potential uses within District.

And then it segregates the type of hydrologic year into two conditions. An average year condition on one column, and a dry year condition in the other column.

Also the analysis looks at two types of power use conditions, or water supply by East Altamont, since that's the instant question we're

1 facing. One is a normal power condition use, and
2 the second is a peak power condition use.
3 I took this approach because it's not
4 necessary that you would have a peak power
5 condition that would occur in a dry hydrologic
6 year. You may have a peak power condition that
7 would occur in a normal hydrologic year. My
8 written testimony goes into some detail as to why
9 it's not absolutely necessary that the two would
10 align. So we need to look at them in this matrix
11 format.
12 So if we do that we focus first on the
13 average year conditions. The demand of 50,165
14 acrefeet is the summary from the previous slide
15 for total demand within the District. And the
16 supplies are shown in two types of supply; one at
17 50,000 acrefeet with just the fresh water supply,
18 and then the addition of the recycled water supply
19 that the District intends to use within the
20 overall part of the District.
21 Under normal power demands there's a
22 total demand of 50,165 acrefeet; and under peak
23 power conditions that demand would grow, as
24 provided by the applicant, to about 52,500
25 acrefeet, 52,549 exactly.

In my testimony my opinion states that in both these conditions this supply of 50,000 acrefeet is adequate to meet this demand. In the first instance of the normal power conditions, 165 acrefeet is less than .3 percent of the total amount. Back and out in 2040 conditions you just can't project that far ahead with that degree of accuracy.

Also under the peak power conditions the difference between 50,000 and 52,500 is about 2500 acrefeet. That's also less than 5 percent of the total projected demands out in 2040.

There are some other reasons why this particular demand is conservative, and so I'd like to cover that in the second slide. So we'll hold that thought for a moment while I briefly summarize the dry hydrologic year conditions in this table.

Turning then to the dry hydrologic year conditions, we look at the supply components. They are the same under both average and dry hydrologic year. This is because the District has outstanding water rights and pre 1914 conditions. They had never experienced a reduction in their water supply for hydrologic conditions, and

because they are the most senior water right in that section of the state, they won't experience a reduction in water supply under the driest of hydrologic conditions.

Similarly, it's common water resources planning to assume that recycled water supplies are basically drought free. So for this example I've included that we would basically have the benefit of full recycled water supplies, as developed by Mountain House, in a dry hydrologic year.

Now, we focus on the demand aspects of this table. Under normal power conditions the demand goes up for the applicant -- I'm sorry, for normal power conditions it's the normal demand that they've provided, but we've reduced the total demand in the District by some urban uses.

Both our main urban customers within the District, Tracy Hills, as developed, and Mountain House have committed to reducing their demands in a dry hydrological year by 10 percent. So that's about 1200 acrefeet. So we've just done the math in this table and reduced it by 1200 acrefeet.

Similarly under peak power conditions we've reflected the same type of reduction in

urban use, but also shown that the applicant has a higher demand under peak power conditions.

So in normal conditions the demand drops to 48,900 acrefeet, which is less than the 50,000; and under peak power conditions the demand drops to 51,000 acrefeet, which is marginally greater than 50,000, in the range of less than 3 percent.

Why did I state previously that the water supply and demand analysis is conservative? There's really four main points.

The first point, the analysis has reserved a water supply for standby agricultural lands. I mentioned earlier, Mr. Chairman, your question that the District irrigates now about 9000 acres out of about 12,300. That difference is really what we call standby agricultural lands. And we've reserved water supply for those lands, but if you examine the historic record, in no instance have all of the lands been irrigated at one time within the District. So the District has an ability to make decisions with regard to managing its water supply up to and including 3000 acrefeet of water supply; it's in effect a safety factor that they have available to them in managing.

1 We've also taken no reduction in unit
2 water demands that are likely for increased
3 improvements to irrigation efficiency in the
4 future. When we inspect the cropping pattern
5 within the District, we see that there's more
6 grapes growing in the District. They use less
7 water. There's just within the District a culture
8 to try and conserve water in that part of the
9 state.
10 It's been our observation that the
11 customers within the District do a very good job
12 of conserving water, and that they plan to
13 continue to do that in the future. We haven't
14 taken any credit for that in this analysis. We've
15 assumed that the same per unit, per farm unit
16 demand that occurs today will occur in 2040.
17 The analysis I mentioned earlier assumed
18 a very small amount of fallowing within the
19 District, only 50 acres. In fact, that actual
20 number's probably in the 500 to 1000 acres that
21 actually occurs. But because we wanted to make
22 sure that we maximized our reserve account for
23 agricultural lands in the standby category, we
24 minimized the amount of land we assumed that would
25 be fallowed in any one year.

1 And finally, just the overall concept of
2 precision of the long-term projections. When we
3 look out at the 2040 we're dealing with numbers at
4 the 50,000 acrefeet of all our supply, that we're
5 within 5 percent at the worst case conditions to
6 meet their water supply demands.
7 And as a professional practicing in this
8 area, it's my opinion that that is within the
9 precision that you can project out in the 40-year
10 planning horizon.
11 If, for example, there was even a
12 difference in the growth of the District, a
13 difference in the demand of how some of these
14 urban areas might develop, the District, through
15 its ability to make decisions on how it manages
16 its total water supply, is able to manage its
17 supply such that there are no impacts within the
18 District customers.
19 So maintaining that ability for them to
20 manage their water resources, I believe, is an
21 important aspect for the District.
22 Turning then briefly to how we
23 incorporate recycled water supply into the
24 District supply. I'm going to focus on two items.
25 The source of the recycled water supply for the

1 District, and then how those supplies might be
2 used within the District.
3 As Mr. Gilmore noted, recycled water is
4 an important part of the District's supply. And
5 as it urbanizes, they do fully intend to use it
6 within the District.
7 Let's talk briefly about the sources.
8 When we completed the feasibility study for the
9 recycled water supply we looked at multiple types
10 of sources within the surrounding area.
11 And our conclusion through the analysis
12 was that the Mountain House Community Services
13 District is the only feasible source of recycled
14 water supply for the District.
15 Sources of recycled water that are
16 external to the District boundaries bring with
17 them increased institutional issues associated
18 with the development bringing water back and forth
19 across District boundaries. Also, those sources,
20 because they're external are distant. And they do
21 have a fairly significant cost associated with
22 them for their development. So they're cost-
23 prohibitive to develop for the District.
24 We talked about the uses of recycled
25 water within the District. Mr. Gilmore has noted

that the District, itself, is the appropriate entity to make those decisions on how water is allocated within the District. And as such, it has obligations to meet the demands of all its customers in a water supply manner that's most efficient from all their perspectives. Not only the customers that are served raw water from agricultural uses, but also the raw water customers of Mountain House; and then ultimately East Altamont, if this Energy Center is certified.

How might allocation of recycled water to East Altamont be determined by the District? Well, first of all, it's the District's opinion and my opinion that the use of recycled water within Mountain House should be considered. The demands that we have for Mountain House assume that there's virtually no use of recycled water.

It makes planning sense to use recycled water in the area it's developed, in greenbelts, parks, golf courses. So we would probably focus on using recycled water within Mountain House, because that reduces the amount of raw water that we show in our table that would have to be delivered down to Mountain House. Basically those two water supplies would be passing themselves in

1 two pipelines if it were mandated.
2 Also by having Mountain House use
3 recycled water, it increases the urban
4 conservation within the Mountain House community.
5 Use of recycled water in an urban environment is a
6 best management practice recognized by the State
7 of California for using recycled water. And they
8 are emphasizing the development of urban water
9 conservation within all new developments in the
10 state. So recycled water would be favorably
11 looked at from their standpoint.
12 Also the final staff assessment makes
13 the assumption that all the recycled water could
14 be used by the Energy Center if it was available.
15 And my analysis shows that that's not possible
16 with the planned facilities. This next slide goes
17 into some detail on that.
18 The Energy Center has a demand for water
19 that's in a different alignment with how water is
20 produced at that Mountain House. Wastewater
21 generally follows a hydrologic cycle. More water
22 is available in the winter than in the summer.
23 And if there's any recycling done with the
24 purveyor of use it occurs primarily through
25 irrigation which uses the water in the summer.

1 The peak power demand or increased
2 cooling needs is necessary when under high heat
3 load conditions in the summer. So we have a high
4 need for cooling in the summer, but if we're
5 recycling water there's a lower availability of
6 recycling water in the summer. And in the winter
7 months there's less need for cooling and there's
8 more water available for recycled water in the
9 winter.
10 I've tried to graphically illustrate
11 that in this slide. This is taking data from the
12 recycled water feasibility study, which was one of
13 the exhibits that Mr. Gilmore commented on. And
14 in this slide you can see that we show available
15 Mountain House supply being 600 acrefeet a month
16 in January and it decreases as there is less
17 infiltration and inflow into the sewers. And also
18 that there's some recycling within Mountain House,
19 itself, in the summer.
20 Likewise, the applicant has provided
21 some information on how they might use water in
22 their cooling needs. Lower demands in the winter;
23 higher demands in the summer.
24 So you can see that there's a period
25 here when there's no recycled water available to

1 use for the cooling. And also there's substantial
2 amounts of recycled water that occurs in the
3 winter that, absent some large storage reservoir
4 to hold it until it can be used in the summer,
5 would have to be discharged or used in some other
6 manner other than the Energy Center. So its use
7 does not lend itself to all of the water being
8 supplied to the Energy Center, itself.
9 I want to comment on one of the proposed
10 conditions of certification for recycled water
11 infrastructure, that's condition number SW-6. In
12 my opinion it's inappropriate the way it was
13 worded in the final staff assessment, and
14 inconsistent with sound water resources planning.
15 And basically that condition requires
16 the construction of this pipeline in advance of
17 the startup of operations of East Altamont. In my
18 opinion that requirement's premature. And I'd
19 like to -- some may even say it's almost
20 impossible to do that right now, given some of the
21 uncertainties that are still existing.
22 This slide goes into what would be
23 considerations for infrastructure planning of this
24 type. And my written testimony provides more
25 detail. But I'd just like to highlight these four

1 points.

2 If you were to actually go through

3 planning, design and construction of an

4 infrastructure of this type these are the types of

5 things you'd want to know.

6 The actual amount and the monthly

7 distribution of that recycled water, as

8 illustrated in my example. What is the recycled

9 water quality and its potential need for

10 additional treatment. Today there's no recycled

11 water produced from Mountain House.

12 Our analysis looked at recycled waters

13 within the surrounding area, and said that it

14 would be suitable for this type of use. But until

15 the development really occurs, we don't know what

16 additional treatment might be necessary for its

17 use.

18 Appropriate peaking factors. How might

19 we make the pipeline larger to take into account

20 operational differences that may occur within the

21 recycled water plant.

22 And then finally, just the alignment of

23 the pipeline, itself. We would want to try and

24 select an alignment of that pipeline that

25 maximizes the ability to use recycled water within

1 the Mountain House community. Because then,
2 again, as I mentioned earlier, allows us to reduce
3 our delivery of raw water to Mountain House.
4 So, without knowing how the community is
5 developed, we may locate a pipeline in an area
6 where there isn't a street today, or where a golf
7 course or park may not be located to take the
8 maximum use of that pipeline.
9 Again, since the customers within the
10 District include not only their ag customers, but
11 ultimately the raw water customers in Mountain
12 House, any additional costs that Mountain House
13 incurs because of misalignment of the pipeline is
14 ultimately borne by the District's customers.
15 I'd just like to summarize some of the
16 updated water related tables as in the final staff
17 assessment. We did this in our written testimony
18 so that it would be easier to see how the revised
19 water supply demand analysis that was provided by
20 the District integrates into the staff analysis.
21 And there are three BBID exhibits,
22 exhibit 9D, 9E and 9F. I'll just quickly
23 summarize those. 9D is a revised exhibit number
24 10. This basically summarizes my testimony from
25 previously that shows how, although we've updated

this exhibit to show that there's no use of recycled water, and so you can see that we have the 50,165 acrefeet that I mentioned. And then the 52,549. And consistent with the staff's approach we have shaded those cells where the number is technically greater than the 50,000 acrefeet.

This exhibit is soil and water table 11, and it summarizes again the staff's table where they looked at essentially no recycled water use. So we have the same numbers of 51, 65 and 52,549 in the year 2040.

And this is table 13; it's the staff's exhibit that shows how the use of recycled water might be used within the District. We've used their assessment of additional raw water provided by the District. But this table is based upon the assumption that all of the recycled water produced in Mountain House would be used by East Altamont. And earlier in my testimony I believe that's a faulty assumption for this particular analysis.

And that summarizes my testimony.

HEARING OFFICER WILLIAMS: Counsel, it's on my mind, also, anticipating that the final agreement from DWR will be received, we will

1 include that as -- I think you have a draft
2 already in there, it's 8D.
3 MS. DUNN: Well, let me just clarify.
4 It's not really a draft. It is the agreement that
5 DWR presented to BBID for execution. So it is the
6 final. There will not be any change in the terms
7 and conditions. We just don't have a signed,
8 executed copy of the agreement.
9 HEARING OFFICER WILLIAMS: We'll just
10 plug that in as 8P-1 then, when it comes.
11 MS. DUNN: And before we open the panel
12 to --
13 HEARING OFFICER WILLIAMS: Counsel, also
14 the Chairman has some questions.
15 PRESIDING MEMBER KEESE: Let me ask two
16 questions. There is an interplay between
17 agricultural use and residential use when it goes
18 out of agriculture and into residential, you lose
19 some of the demand for agricultural water and you
20 wind up with a demand for residential.
21 Is there a factor you would suggest? Or
22 is it case-by-case?
23 MR. NUSS: It's somewhat case-by-case,
24 but the analysis that we're seeing is that there's
25 less water used in the urban uses than the

1 agricultural uses. Primarily because there's more
2 paved areas in urban use. There's more use of
3 water conservation measures that are appropriate
4 with urban use.
5 And so we're seeing that there's a
6 general reduction in going from urban -- going
7 from agricultural to urban use. But it is more of
8 a case-by-case analysis.
9 PRESIDING MEMBER KEESE: Okay, is there,
10 of the acres that are not -- in agricultural use
11 today, is there potential for additional use of
12 them for agriculture? Let me just, say you have
13 some open fields on which you have cattle grazing.
14 Is there a likelihood you're going to see grapes
15 there in 10 or 20 years?
16 MR. NUSS: I don't think that there is
17 that likelihood because of the types of soils that
18 are generally in the non-irrigable lands.
19 Irrigability of lands are defined basically by the
20 character of the soils, the development,
21 themselves, the topography and the character.
22 PRESIDING MEMBER KEESE: Okay, so you're
23 not -- the irrigable lands, acres is not going to
24 increase, okay.
25 MR. NUSS: Correct.

1 PRESIDING MEMBER KEESE: Let me, without
2 delving into the issue that we're probably going
3 to get into later, I hear you saying that Mountain
4 House has control over all recycled water -- I'm
5 sorry, BBID has control over all recycled water in
6 the BBID territory?
7 MR. NUSS: Once BBID signs an agreement
8 with Mountain House --
9 PRESIDING MEMBER KEESE: Okay, and
10 Mountain House --
11 MR. NUSS: -- they would have control.
12 PRESIDING MEMBER KEESE: -- doesn't --
13 MR. NUSS: I'm sorry, what?
14 PRESIDING MEMBER KEESE: So BBID is the
15 sole -- would be the sole purveyor --
16 MR. NUSS: Within its boundaries.
17 PRESIDING MEMBER KEESE: Within its
18 boundaries.
19 MR. NUSS: That's the board policy --
20 PRESIDING MEMBER KEESE: But until
21 there's a deal with Mountain House, you don't have
22 a right to the Mountain House water. Mountain
23 House would have an obligation to get rid of it
24 somehow or other?
25 MR. NUSS: That is correct. They're --

1 PRESIDING MEMBER KEESE: The only place
2 they can get rid of it is to you, so this is going
3 to be a negotiation that will take place somewhere
4 down the line?
5 MR. NUSS: Yes, it is a negotiation --
6 PRESIDING MEMBER KEESE: I mean that's
7 you -- I'm not trying to get a legal argument
8 here, but that's your --
9 MR. NUSS: Yes, and --
10 PRESIDING MEMBER KEESE: -- the
11 structure of your presentation.
12 MR. NUSS: -- and I'm familiar with
13 Mountain House's discharge permit, the National
14 Pollution Discharge Elimination System, NPDES
15 permit that they have. They have a permit that
16 has two tiers to it. One, it's near-term use,
17 near-term development; and two, it's out-year
18 development.
19 In the near term Mountain House is
20 required to re-use any wastewater that's developed
21 within the community, itself. And their out
22 years, they have -- but they have an ability,
23 recognizing the permit, to discharge that water to
24 the Delta through a discharge permit.
25 But in the out years their permit states

that they will need to go through an analysis to show the Regional Water Quality Control Board, the controlling entity of that permit, that they don't have an ability to recycle water.

And so they'll look at the cost effectiveness and the tradeoffs, and they'll be discussing with the District how they can use that recycled water within the District.

So they have an ability to discharge, but they have to show that they have no ability to recycle water.

PRESIDING MEMBER KEESE: To your knowledge have there been any negotiations between Mountain House and the District to date?

MR. NUSS: I'd let Mr. Gilmore comment on that.

PRESIDING MEMBER KEESE: Okay.

MR. GILMORE: Yes, Chairman Keese, to date there has not. We've had -- myself, personally, have had numerous conversations with Mr. Sensibaugh, General Manager of the CSD. We have not been in any discussion with formal negotiations for numerous reasons. One of which, the governing board of directors' opposition to the East Altamont Energy Center at this time.

PRESIDING MEMBER KEESE: Thank you.

MS. DUNN: Before I --

HEARING OFFICER WILLIAMS: Excuse me, I think Commissioner Pernell has --

COMMISSIONER PERNELL: Yes, I just had a couple --

MS. DUNN: We're not quite done with the testimony, that's the only reason why I --

COMMISSIONER PERNELL: Okay, that's fine. But may I ask my questions?

MS. DUNN: Sure.

COMMISSIONER PERNELL: BBID, at this point, has no recycled water facilities, is that correct?

MR. NUSS: That is correct.

COMMISSIONER PERNELL: And on your chart you show increments of ten years. Is there any -- can you narrow that down when you'll have the ability to have recycled water?

MR. NUSS: It would be defined by first the development of recycled water by Mountain House. They've provided an estimate of their, for lack of a better phrase, their ramp-up schedule for developing recycled water. Today there is no recycled water produced at Mountain House because

there are no homes in Mountain House that are occupied today.

So, as the community develops they will begin to produce wastewater; they will treat it and create recycled water. So the timing of when it would be available is dependent upon first it's production, which is a function of the growth of the community, itself. Then second, successful negotiation between BBID and Mountain House Community Services District to the terms of delivery and the conditions of that delivery.

We've shown in our exhibits the ramp-up schedule of development, i.e., how the community will grow, as provided to us by Mr. Sensibaugh, the General Manager of the Mountain House Community Services District. And that, in effect, assumes that there will be successful negotiations in a timely manner such to allow recycled water on that schedule to be used within the District.

Does that address your question?

COMMISSIONER PERNELL: Well, yes, it appears that it's really not BBID's -- it's not in your court in terms of when you will be able to distribute recycled water.

MR. NUSS: That's right, right now.

1 It's a condition precedent on the development of
2 the community; and then the negotiation of an
3 agreement between BBID and Mountain House.
4 COMMISSIONER PERNELL: But you're
5 assuming in your slides that it will be within ten
6 years?
7 MR. NUSS: Yes.
8 COMMISSIONER PERNELL: Okay. So then --
9 MR. NUSS: Let me quickly correct one
10 point. We assume in our slides that it would be
11 fully available within 20 years, by 2020. It's
12 approximately half available or so by 2010. So
13 it's not fully available in ten years, the full
14 total amount that might be made available by
15 Mountain House, because the community will take
16 about 20 years to develop. That's the estimate we
17 received.
18 COMMISSIONER PERNELL: Right. And then
19 it is your estimation that even without recycled
20 water that BBID has the capacity to serve the
21 Energy Center?
22 MR. NUSS: Absolutely. That is my
23 testimony.
24 COMMISSIONER PERNELL: Thank you, Mr.
25 Williams.

1 HEARING OFFICER WILLIAMS: Thank you.
2 You may continue.
3 MS. DUNN: Okay. We had -- Mr. Gilmore
4 had mentioned in his testimony that he had some
5 suggestions with regard to the soil and water
6 conditions 5 that we would like Mr. Gilmore to
7 further testify as to.
8 MR. GILMORE: Thank you. Mr. Williams,
9 basically with respect to soil and water condition
10 5, we have proposed some suggested language. And
11 that language is highlighted in this slide.
12 Basically that the project owner shall
13 use 100 percent tertiary treated water available
14 from the MHCSD wastewater treatment plant as
15 allocated by BBID, and as supplemented by any
16 other tertiary treated water sources that may be
17 developed.
18 Then moving on down reference
19 allocation. Raw water supplied by BBID may be
20 used during periods when daily allocation of
21 recycled water is not sufficient to meet daily
22 cooling and irrigation water demands of East
23 Altamont Energy Center. Those changes are
24 consistent with comments made by Mr. Nuss in his
25 testimony.

1 COMMISSIONER PERNELL: Let me ask you a
2 question on that. Raw water in this context is
3 untreated water?
4 MR. GILMORE: That's correct.
5 COMMISSIONER PERNELL: And not potable
6 water?
7 MR. GILMORE: That's correct.
8 COMMISSIONER PERNELL: Okay.
9 MS. DUNN: I believe that concludes our
10 direct testimony.
11 COMMISSIONER PERNELL: Well, I have no
12 questions --
13 HEARING OFFICER WILLIAMS: Okay. Staff,
14 do you have questions?
15 MS. DeCARLO: Yes, staff has some, a few
16 cross-examination questions.
17 CROSS-EXAMINATION
18 BY MS. DeCARLO:
19 Q Mr. Gilmore, you mentioned that you have
20 not engaged in any formal discussions with
21 Mountain House Community Services District. Have
22 you attempted such negotiations?
23 MR. GILMORE: We've had discussions with
24 the general manager of the Mountain House
25 Community Services District just in the last

1 couple of weeks, and indicated what it would take
2 to get some type of an MOU, basically an
3 understanding between the two Districts.
4 Basically the comments that were made was that
5 regarding that, given the board of supervisors'
6 current position regarding the project, and that
7 Mr. Sensibaugh quite, in fact, did not have the
8 time to spend to dedicate working on an MOU, quite
9 frankly because he's got some staffing problems
10 and he's also trying to get a new community
11 online.
12 He said he had other pressing matters.
13 So Mr. Sensibaugh indicated, he said, well, Rick,
14 he said, if the project gets approved, you know,
15 we can move forward and we can start, you know,
16 we'll work on getting an MOU. But at this point
17 we have not done so in a formal fashion.
18 MS. DeCARLO: At this point have you
19 identified any specific customers other than East
20 Altamont Energy Center that specifically requested
21 recycled water?
22 MR. GILMORE: During the preparation of
23 the recycled water feasibility study I did
24 approach some growers in the Alameda County area,
25 indicated trying to get some interest from the ag

1 community that we were looking at potential
2 recycled water from the Mountain House community.
3 We did receive some interest from some
4 growers with respect to use on certain crops,
5 pasture and so forth, but quite frankly they were
6 concerned of costs and these other types of
7 things, which at that time we were in the process
8 of doing the study. We don't have real costs on
9 what the costs would be.
10 So our main focus at that point, based
11 on our discussions with some of the growers in the
12 area, was focusing on East Altamont.
13 MS. DeCARLO: Do you intend to purchase
14 power from East Altamont Energy facility?
15 MR. GILMORE: We do not intend, as an
16 agency, intend to directly purchase power from
17 East Altamont Energy Center, no, we do not.
18 MS. DeCARLO: Have you received a formal
19 request from the East Altamont Energy Center
20 pursuant to the Water Recycling Act of 1991 to
21 provide East Altamont with recycled water?
22 MR. GILMORE: Not to my knowledge.
23 MS. DeCARLO: Did the recycled water
24 feasibility study conclude that an assortment of
25 recycled water supplies potentially exist in a

1 wide geographical area around the District?
2 MR. GILMORE: Yes.
3 MS. DeCARLO: Do you believe that
4 providing recycled water to East Altamont will
5 prohibit you from obtaining additional recycled
6 water supplies to serve any additional demand that
7 you may encounter?
8 MR. GILMORE: Could you repeat that?
9 MS. DeCARLO: Sure. Do you believe by
10 agreeing to provide East Altamont Energy Center
11 with recycled water, that it would prohibit you
12 from obtaining additional sources of recycled
13 water in the future if the demand in your District
14 for recycled water exceeded the supply available
15 solely from Mountain House?
16 MR. GILMORE: Obtaining additional
17 recycled water supplies within the District?
18 MS. DeCARLO: Or --
19 MR. GILMORE: Or outside the District?
20 MS. DeCARLO: Either.
21 MR. GILMORE: I think we concluded in
22 the recycled water feasibility study that it
23 really doesn't make a whole lot of sense for us to
24 bring recycled water outside the District in. And
25 that's one of the reasons why we focus that

1 recycled water within the District. And I think
2 that's one of the reasons why we -- when we do
3 bring recycled water in as part of the resource
4 mix that we're going to allocate that accordingly
5 as the District sees fit.
6 We would also, in the event of any
7 additional development within the District, we
8 would look to using recycled water in those areas.
9 But the geographical layout of the District, we
10 would probably use recycled water within those
11 particular areas, and not have it all concentrated
12 in just the one particular user.
13 MS. DeCARLO: Do you anticipate any
14 specific industrial development to occur within
15 the District in the near future?
16 MR. GILMORE: No, we do not. I do not
17 know what type of major industrial development
18 will occur. Within the Mountain House community
19 the District currently has a water services
20 agreement to provide the Mountain House Community
21 Services District with up to 9413 acrefeet.
22 That's our contractual obligation.
23 If that particular community needed
24 additional water demands over and above that, they
25 would have to seek additional supplies.

1 With respect to any additional
2 development in Alameda County, I can't speak to
3 that, if there's going to be any additional
4 industrial type development or not.
5 Contra Costa County, right now with the
6 urban limit lines, 65/35 plan, I don't foresee any
7 major industrial type of development occurring in
8 that area.
9 MS. DeCARLO: Is BBID a public agency?
10 MR. GILMORE: Yes, BBID is a public
11 agency operating under California water code.
12 MS. DeCARLO: Okay. Mr. Nuss. In your
13 testimony on page 9 you state that conveyance
14 costs for recycled water from the City of Tracy
15 would be $20- to $25 million. What is this figure
16 based on?
17 MR. NUSS: This figure is based on some
18 preliminary numbers I prepared; and also looking
19 at the -- what's the right phrase -- the document
20 that the applicant prepared looking at various
21 costs for bringing recycled water into the -- for
22 their use within the Energy Center. AFC, I think,
23 is the correct phrase for that document.
24 But it's primarily looking at my
25 assessment of water supplies from the City of

1 Tracy, from Brentwood, Discovery Bay, Byron and
2 the size of pipeline that might be required, and
3 the length, the cost for various pipeline
4 facilities, pumping stations.
5 So there are approximate ranges of
6 costs. No detailed estimates.
7 MS. DeCARLO: Now, also in that table
8 you state that there are institutional issues
9 associated with developing that recycled water
10 supply. Can you explain what these institutional
11 issues are?
12 MR. NUSS: Sure. Some of those issues
13 would be completion of CEQA documentation
14 associated with removing recycled water, removing
15 recycled water that's currently being discharged
16 to receiving streams. The State Water Resources
17 Control Board has some actions that they've taken
18 with regard to El Dorado Hills, City of Thousand
19 Oaks in the recycled water cases where they looked
20 at the replacement of the diversion of recycled
21 water that's been planned on in the base receiving
22 water streams with fresh water supplies.
23 So it's an institutional issue that
24 requires evaluation by the State Board and a
25 determination of whether they can move water

that's being discharged, currently discharged to receiving streams.

So it's things like that.

MS. DeCARLO: Would that apply to new water that is -- that will be coming forward due to the expansion of the City of Tracy that is currently not being relied on by downstream users?

MR. NUSS: I think it's -- well, I would be speculating on how the state board, State Water Resources Control Board would reach that determination. They would need to go through their hearing process and receive data and testimony and decide that.

So, I think it's more of a case-by-case basis than I could comment with any degree of certainty on growth within the City of Tracy, itself.

MS. DeCARLO: You also list as a factor in the analysis the fact that the City of Tracy is external to the District. Why is this a factor?

MR. NUSS: Well, its distance to the District, itself. And then also this issue of the institutional resources developing an agreement between Tracy and the District, it's just more institutional arrangements that would need to be

1 developed.

2 Since Mountain House is currently within

3 the District, they are a logical association for

4 the District to develop first and foremost for

5 their water supplies.

6 MS. DeCARLO: Do you have any indication

7 from the City of Tracy that they're unwilling to

8 potentially negotiate the provision of recycled

9 water to BBID?

10 MR. NUSS: I don't have any.

11 MS. DeCARLO: Are you aware that the

12 Mountain House Community Services District

13 wastewater treatment plant has already been

14 constructed?

15 MR. NUSS: I'm sorry, would you repeat

16 that question?

17 MS. DeCARLO: Sure. Are you aware that

18 the Mountain House Community Services District

19 wastewater treatment plant has already been

20 constructed?

21 MR. NUSS: I'm aware that the plant

22 recently completed construction.

23 MS. DeCARLO: And are you aware that

24 1000 homes will be completed in the Mountain House

25 community in 2003?

1 MR. NUSS: I'm not.

2 MS. DeCARLO: Are you aware that current

3 projections show that the recycled water will

4 become available in 2003 to 2005?

5 MR. NUSS: I'm not aware of that.

6 MS. DeCARLO: Are you aware that East

7 Altamont Energy Center will likely not begin

8 operation until 2005 or 2006 at the earliest?

9 MR. NUSS: I am not aware of their

10 operation schedule.

11 MS. DeCARLO: Can you please explain to

12 me why the monthly distribution of water

13 availability needed for -- I'm sorry -- why is the

14 monthly distribution of water availability needed

15 for making decisions on infrastructure?

16 MR. NUSS: Because we would look at how

17 much -- the monthly availability of water is

18 necessary for infrastructure, because without

19 certain types of infrastructure, sizing of pumping

20 plants and storage reservoirs, we wouldn't know

21 how large to make them.

22 So if we have water that was not going

23 to be stored or used, we wouldn't size facilities

24 for those types of uses.

25 MS. DeCARLO: Doesn't the MOU between

1 BBID and East Altamont Energy Center specify the
2 size of the pipeline?
3 MR. NUSS: It may specify that; it may
4 specify, I believe, diameter for the pipeline,
5 itself.
6 MS. DeCARLO: In your projection of
7 supply and demand in one of the tables you use
8 East Altamont Energy Center's average water use
9 estimate of 46-16 (sic). Are you aware that the
10 applicant is objecting to being limited to this
11 amount on an average basis?
12 MR. NUSS: I'm not specifically aware of
13 their limitations to that.
14 MS. DeCARLO: Now, in your testimony you
15 stated that it is not necessary to have peak power
16 demand in a dry hydrologic year. Is it possible?
17 MR. NUSS: Certainly.
18 MS. DeCARLO: And do you have any
19 particular knowledge with regard to potential
20 electricity demand on the East Altamont Energy
21 Center?
22 MR. NUSS: No, ma'am, I don't.
23 MS. DeCARLO: In your testimony
24 regarding the variability of supply and demand of
25 recycled water for the East Altamont Energy

1 Center, what were your numbers regarding East
2 Altamont Energy Center demand on a monthly basis
3 based on?
4 MR. NUSS: Based on some information
5 that was provided, I believe, by the applicant in
6 just what their potential demands may be on a
7 month-to-month basis.
8 MS. DeCARLO: And do you know if those
9 were based on the average or peak year estimates?
10 MR. NUSS: I believe they were based on
11 the average. I'd have to go back into that
12 detailed analysis to determine.
13 MS. DeCARLO: Are you aware that the
14 applicant has already proposed two specific routes
15 for the recycled water pipeline in their AFC?
16 MR. NUSS: I am aware that there are
17 some routes that they projected so they can assess
18 impacts associated with a pipeline route.
19 MS. DeCARLO: And do you have any
20 specific objections to those proposed routes?
21 MR. NUSS: No, not at this time.
22 MS. DeCARLO: Now, in your numbers
23 regarding supply and demand, are these numbers
24 exact?
25 MR. NUSS: Which numbers are you

1 referring to?
2 MS. DeCARLO: The numbers, your
3 projection --
4 MR. NUSS: In the table?
5 MS. DeCARLO: -- for -- exactly.
6 MR. NUSS: No, they're not exact.
7 They're not -- there is some range around each
8 number that's within normal planning assumptions,
9 so the numbers that are shown for agricultural
10 use, for example, wouldn't reflect the actual
11 amount that was delivered in that year because of
12 the standby land set aside in the fallowing
13 amounts.
14 So there is some variability if you
15 compare my table to what would be measured in the
16 future.
17 MS. DeCARLO: And do you know the likely
18 variability that may be expected based on
19 historical variability?
20 MR. NUSS: Based on historical
21 variability I think that the standby lands of
22 about 3000 to 3500 acrefeet of water that's not
23 being diverted to agricultural lands would
24 probably maintain that same degree in the future.
25 So, the lands -- the water supply

1 diverted to agriculture would probably be about
2 3000 to 4000 acrefeet less than what my table
3 shows.
4 My table, I believe, is conservative, as
5 I testified, in that it represents assuming all
6 the lands would get water diverted to them.
7 Which, if you explore the record of the District's
8 diversions, that is an extraordinary occurrence.
9 MS. DeCARLO: Why does the District use
10 5 percent in your discussion of reasonable
11 variability?
12 MR. NUSS: I think the 5 percent that
13 you're referring to is my professional assessment
14 that projecting a demand and supply comparison in
15 the year 2040, given where we are today, is within
16 the precision that that analysis can be completed
17 given all the potential variabilities that may
18 occur with the growth of communities within the
19 District, the growth of demands, the factors
20 associated with irrigation use, so that projecting
21 from a water resources planning perspective
22 projecting out 40 years, it's my professional
23 opinion that something within 5 percent is
24 adequate.
25 And particularly given the degree of

1 management control that the District has in the
2 decision that they'll be able to use with regard
3 to -- be able to do with regard to their
4 allocation of water in 2040, that I have no
5 professional concerns that they would not be able
6 to deliver water to their customers using just
7 their supply of water.
8 MS. DeCARLO: Doesn't historical demand
9 show a variability of 30 percent during dry years?
10 MR. NUSS: The historical demand may
11 show that there's a variability of 30 percent
12 within dry years, which would indicate in my
13 written testimony I talked about that in dry years
14 there's actually less land that's irrigated, more
15 conservation that occurs within the District,
16 itself. So there'd be less water diverted.
17 That just goes to my point as to why
18 this is a conservative analysis that I provided
19 for the Committee.
20 MS. DeCARLO: On page 7 in the third
21 paragraph of your testimony under dry hydrologic
22 year conditions, you state that in a dry
23 hydrologic year water conservation will occur
24 within the District boundaries. Based on the
25 planning assumptions of the developers for the two

1 new urban areas within the District water demands
2 will be reduced by a minimum of 10 percent from
3 the values shown in BBID exhibit number 2B.
4 What would require the Mountain House
5 Community Services District to reduce its water
6 demands below its full allotment?
7 MR. NUSS: What would -- I'm sorry, what
8 would require Mountain House to reduce its water
9 demands below its full allotment?
10 MS. DeCARLO: Correct.
11 MR. NUSS: Well, their commitment in
12 their letter to the District, for one point, shows
13 that they will have urban conservation of 10
14 percent. But, again, my analysis looks at what if
15 they didn't reduce that demand. The District
16 would still be able to provide their water
17 supplies. Because of the reliability of the
18 District's water supply hydrologically, there's no
19 reduction in the District's water supply in a dry
20 year condition.
21 So in my analysis the worst case
22 condition is a peak power demand under an average
23 year condition. Because the water supply
24 basically is the same.
25 MS. DeCARLO: Does BBID currently have

1 mandatory water conservation requirements that it
2 requires of its customers?
3 MR. NUSS: I'm not aware of any. Mr.
4 Gilmore?
5 MR. GILMORE: No.
6 MR. NUSS: No.
7 MR. GILMORE: No, they do not.
8 MS. DeCARLO: On page 7 of your
9 testimony under dry hydrologic year conditions you
10 state some reduction of agricultural demands from
11 the values shown in BBID exhibit 2B is expected in
12 dry hydrologic year conditions, even though the
13 per acre crop demand is expected to increase in a
14 dry year condition reflecting a reduced amount of
15 stored soil moisture from the winter rains, less
16 acreage is typically brought into production in
17 these conditions, as reflected by past experience
18 at the District.
19 What action of the District prompts the
20 agricultural customers to fallow their land?
21 MR. NUSS: My testimony goes on to
22 comment on the lands that are fallowed, and lands
23 that are applied to standby. And it's rarely
24 actions of the District that incentivize their
25 customers to do that. It's more actions in the

1 marketplace, decisions that they make to fallow
2 land.
3 The District doesn't, to my knowledge,
4 increase their charges for water in dry years
5 because they have such a firm water supply. So
6 it's predominately just decisions within the --
7 that the farmers, themselves, make in watching
8 their water supplies more closely, in putting less
9 water into production, and just in the market
10 conditions that they foresee.
11 MS. DeCARLO: And is there any economic
12 incentive for agricultural customers to fallow
13 their land?
14 MR. NUSS: There is some. The economic
15 incentives for an individual farmer are based upon
16 the conditions that that farmer foresees. But it
17 is normal agricultural practice to fallow land
18 periodically to in a way let the land restore, to
19 do other maintenance practices that may be
20 pertinent to the land.
21 That's, of course, associated with
22 annual crops. There are some permanent crops like
23 orchards, grapes, that you don't really fallow
24 those lands. So, the individual economic
25 incentives of an individual farmer will vary from

1 case to case. But there are good agronomic
2 practices associated with fallowing land on an
3 annual basis.
4 MS. DeCARLO: And does your estimation
5 of the land being fallowed take into consideration
6 market conditions?
7 MR. NUSS: No, it doesn't. And from
8 that perspective we've tried to minimize the
9 assumptions with regard to how much land would
10 actually be fallowed. We've only assumed 50 acres
11 within the District would be fallowed at any one
12 instance, any one year.
13 So, again, that goes to the conservatism
14 of this analysis.
15 MS. DeCARLO: What has been the
16 historical range of increase above average for
17 water in per acre crop demand experienced by the
18 District during dry hydrologic conditions?
19 MR. NUSS: I'm just going from memory,
20 but I think we might see a 5 to 10 percent
21 increase historically on a per acre basis. It
22 varies by crop, as well. So, it's hard to really
23 pin down any specific number.
24 MS. DeCARLO: Back to Mr. Gilmore. On
25 page 8 of your testimony you state that the

1 recycled water feasibility study recommended that
2 the District pursue the development of recycled
3 water program using recycled water from Mountain
4 House Community Services District for use by an
5 industrial user such as East Altamont.
6 Do you consider the feasibility study to
7 be a determination of feasibility for BBID
8 developing recycled water to East Altamont Energy
9 Center?
10 MR. GILMORE: I think that the
11 conclusion and recommendation in the recycled
12 water feasibility study was that the District
13 continue to develop the direct industrial use
14 alternative as the initial alternative for
15 consideration of using recycled water.
16 By focusing the initial development on
17 East Altamont Energy Center opportunity, the
18 District will be able to start with a single major
19 customer and potentially build a program in the
20 future.
21 I believe that's what the recommendation
22 is in the report.
23 MS. DeCARLO: And do you agree with all
24 the conclusions and recommendations contained in
25 the report?

1 MR. GILMORE: Yes. The board of
2 directors did approve the report.
3 MS. DeCARLO: Do you agree with the
4 statement contained in the report that is as
5 follows, on page 13: It is believed that unless a
6 specific landowner expresses interest in obtaining
7 the recycled water supply instead of District
8 supplies, this alternative is not implementable.
9 The alternative being direct agricultural re-use.
10 MR. GILMORE: I believe when the board
11 approved the report they based their
12 recommendation on the recommended alternative,
13 which I believe was alternative three.
14 (Pause.)
15 HEARING OFFICER WILLIAMS: Let's go off
16 the record.
17 (Off the record.)
18 PRESIDING MEMBER KEESE: Let's take our
19 seats, please.
20 Okay, counsel, do you want to --
21 MS. DeCARLO: Staff is actually done
22 with cross-examining BBID.
23 (Pause.)
24 HEARING OFFICER WILLIAMS: Staff (sic),
25 I'm assuming that you don't have any questions --

1 MR. WHEATLAND: That's a correct
2 assumption.
3 HEARING OFFICER WILLIAMS: Okay. Mr.
4 Sarvey, are you ready to go?
5 MR. SARVEY: Yes, I am.
6 HEARING OFFICER WILLIAMS: You may
7 proceed.
8 MR. SARVEY: Start with the opening
9 statement here or direct -- oh, we're going to
10 questioning, I'm sorry, Mr. Williams.
11 HEARING OFFICER WILLIAMS: Do you want
12 to make a --
13 MR. SARVEY: I got --
14 HEARING OFFICER WILLIAMS: -- statement?
15 MR. SARVEY: No, I got lost -- yeah, I
16 will when I present my witness. But right now
17 I'll just go ahead with my questions here.
18 CROSS-EXAMINATION
19 BY MR. SARVEY:
20 Q Mr. Gilmore, how are you today, sir?
21 MR. GILMORE: Good. How are you?
22 MR. SARVEY: Can you identify who the
23 members of your board of directors are?
24 MR. GILMORE: Absolutely. Would you
25 like me to do that for you?

1 MR. SARVEY: Please.
2 MR. GILMORE: Charles Banaford,
3 President; Tim Massiore, Vice President; Gerald
4 Tennant; Brant Gilbert; Mark Frango.
5 MR. SARVEY: Thank you, sir. What is
6 your relationship with the Plainview Water
7 District?
8 MR. GILMORE: My relationship with the
9 Plainview Water District, I currently serve as
10 General Manager for the Plainview Water District
11 under contract between the Byron Bethany
12 Irrigation District and the Plainview Water
13 District.
14 MR. SARVEY: So does the Plainview Water
15 District have a separate allocation from Byron
16 Bethany, or do they derive their allocation
17 directly from you?
18 MR. GILMORE: No, totally separate. The
19 Plainview Water District is a CVP contractor,
20 Central Valley Project contractor; has a contract
21 with the Bureau of Reclamation for water supply,
22 the Delta-Mendota Canal. And Byron Bethany
23 Irrigation District is not a contractor.
24 MR. SARVEY: You indicate in your
25 testimony that the Mountain House Community

1 Services District is controlled by the San Joaquin
2 County Board of Supervisors, and that the water
3 may not be available to you, is that correct?
4 MR. GILMORE: Well, the first part of
5 that question is that the -- currently that the
6 San Joaquin County Board of Supervisors acts as
7 the governing board, governing body of the
8 Mountain House Community Services District until
9 such time the community reaches, I think, 1000
10 registered voters or 1000 voters. And then those
11 voters can elect to have their own independent
12 body absent the board of supervisors at that time.
13 What was the second part of that
14 question?
15 MR. SARVEY: Well, one of your exhibits
16 indicated that the board of supervisor,
17 particularly Dr. Marenco, I believe, had sort of
18 directed the Mountain House Community Services to
19 come in line with their position on East Altamont.
20 MR. GILMORE: I think what you may be
21 referring to is a minutes summary as part of my
22 testimony from the board of supervisors meeting
23 having Dr. Marenco referencing some comments made
24 with respect to a letter that the general manager
25 of the CSD sent to the CEC Staff. I believe

1 that's what you're referencing.
2 MR. SARVEY: So your testimony is that
3 while this body is under control of the board of
4 supervisors is that you feel that the proposed
5 recycled water is speculative?
6 MR. GILMORE: Well, I wouldn't say that
7 the recycled water is speculative. What I would
8 say is that developing an agreement between the
9 two public agencies at this time is difficult.
10 MR. SARVEY: Do you expect the board to
11 change its position on this matter at all?
12 MR. GILMORE: I would assume that at
13 some point that the board could potentially change
14 their position; or, if, in fact, the project was
15 approved, that their opposition would no longer
16 interfere with an understanding between the two
17 districts in the future with respect to recycled
18 water.
19 MR. SARVEY: Your PowerPoint
20 presentation states that BBID has an obligation to
21 furnish water to East Altamont, a landowner within
22 the District.
23 By your analysis you've committed all
24 your supplies till 2040. What about landowners
25 within the District that will be requiring water

1 besides what you have identified? And how will
2 you meet your legal requirement to provide them
3 with water?
4 MR. GILMORE: Well, as Mr. Nuss
5 illustrated in his testimony, based on the
6 agricultural demands, those numbers that were
7 derived is irrigating every acre, irrigable acre
8 in the District, with the exception of 50 acres.
9 As Mr. Nuss has indicated, historically
10 that has never happened. Typically we've had
11 anywhere from 1000 to 2000 acres fallow, which
12 we've had water available. So, based on the
13 analysis that Mr. Nuss has provided the District,
14 we have to realize that the board of directors has
15 a responsibility to provide sufficient water
16 supplies to the District. All of the directors
17 are water users, they're agricultural water users.
18 So I do not think that they would want the
19 agricultural community shortchanged in any way.
20 Therefore I think that the water demand
21 analysis that was completed is sufficient to meet
22 all projected demands at this point that have been
23 identified within the District.
24 MR. SARVEY: So there may be some
25 demands that perhaps the District has not

identified at this point? I mean, 40 years is a long period of time to be requiring something like that.

MR. GILMORE: I don't think so. We've taken exhaustive measures. You know, we're a multi-county District. We've got the San Joaquin County portion of the District which is urbanizing.

Alameda County, not much growth is going to occur; it's probably going to stay agriculture for quite some time. Those demands will probably be steady.

Contra Costa County, I don't see if there is any urbanization there, that's where the ag MNI component kicks in, as Mr. Nuss indicated earlier in his testimony in response to a question from Chairman Keese.

So, again, we think that we've done a pretty good job of analyzing our demands and we feel pretty confident with the numbers.

If the District did not feel confident in those demand analysis numbers the District would not have entered into an agreement with the Department based on 50,000 acrefeet.

MR. SARVEY: Do you anticipate any

1 increase in demand, population of the State of
2 California, demand for agricultural land and food
3 production?
4 MR. GILMORE: There's always going to be
5 an increase in urban growth. There's always going
6 to be a demand. The District is doing its part in
7 trying to enhance agriculture, preserve
8 agriculture within the District. And the board is
9 striving to develop ways to provide relatively
10 inexpensive water to its agricultural customers to
11 keep agriculture viable within the District.
12 MR. SARVEY: Has BBID been approached by
13 let's say the City of Brentwood or any other
14 cities in east Contra Costa, or major developers,
15 to provide water?
16 MR. GILMORE: Several years ago in the
17 early '90s the District was approached by the City
18 of Brentwood in looking at regional type effort on
19 water supplies along with the East Contra Costa
20 Irrigation District. This, of course, was prior
21 to the formation of the East County Water
22 Management Association, where BBID and ten other
23 agencies put together an East County Water
24 Management study to take a look at regional
25 supplies.

1 Also, I believe it was in the mid '90s
2 the District was approached by a developer in the
3 unincorporated area of Brentwood. The District
4 did enter into a water services agreement with
5 that developer, and an option. And also that
6 agreement no longer exists.
7 MR. SARVEY: So you have experienced
8 other parties coming in and asking for water?
9 MR. GILMORE: Absolutely.
10 MR. SARVEY: Okay. Your annual usage,
11 average usage has hovered around 31,000 acrefeet
12 per year, is that correct?
13 MR. GILMORE: That sounds --
14 MR. SARVEY: 31-, 32,000?
15 MR. GILMORE: Yeah, that sounds about
16 right.
17 MR. SARVEY: Okay. And you will now be
18 using, well, by projections, 50,000 acrefeet per
19 year?
20 MR. GILMORE: Well, based on our
21 projections we're looking at those projected
22 demands.
23 (Pause.)
24 COMMISSIONER PERNELL: Are we waiting on
25 something?

1 MR. SARVEY: I thought I was waiting for
2 an answer. I guess I wasn't.
3 (Laughter.)
4 MR. SARVEY: So you'll increase usage by
5 18,000 acrefeet per year? That's the answer I was
6 looking for, and I guess you said yes, but I
7 didn't hear it.
8 MR. GILMORE: Well, if you take a look
9 at the projected demands, we've identified
10 agricultural use ranging anywhere from -- have
11 projected uses ranging from 2010 to 35,400
12 acrefeet, to 2040 of 31,000 acrefeet. And then we
13 have some identified municipal/industrial uses of
14 which the Mountain House demands are conversion
15 from ag to MNI. And then we have additional
16 demands for the East Altamont Energy Center and
17 Tracy Hills, and some additional predicted
18 demands.
19 So, based on this analysis, we have
20 additional water use.
21 MR. SARVEY: Of approximately 18,000
22 acrefeet per year, is that correct?
23 MR. GILMORE: I haven't done the math,
24 so.
25 MR. SARVEY: Okay. Where will this

18,000 acrefeet per year -- where will you get that water, and who will have to sacrifice water for you to have that water?

MR. GILMORE: Well, here again I'm going to reference our agreement with the Department of Water Resources, and the fact that the District's a senior water right holder pre 1914 water rights.

I do not know if anybody is going to suffer. The Department of Water Resources has agreed that they would not test the District's diversion of 50,000 acrefeet. We could have diverted a lot more water if the demand called for it within the District based on our existing water rights. So, that's what I have as a comment regarding that.

MR. SARVEY: So your bottomline is if BBID uses another 18,000 acrefeet per year, other irrigations will be asked to sacrifice that water?

MR. GILMORE: Other irrigations?

MR. SARVEY: Other irrigation districts water users, et cetera. Well, someone will be affected, is what I'm getting at.

MR. GILMORE: Well, based on the existing water rights, we're operating under current water law.

1 MR. SARVEY: Oh, yeah, I understand that
2 no one within your District will be impacted.
3 MR. GILMORE: Yeah.
4 MR. SARVEY: I'm speaking of people
5 outside your District. If you use 18,000 acrefeet
6 per year, obviously that water's going to come
7 from somewhere. We have a finite amount of water,
8 so I mean it's -- maybe I shouldn't even be asking
9 that question because the answer's yes no matter
10 what, so I'll move on.
11 There was a representative for water
12 districts in here, Homestead Land and Water
13 Alliance, and a couple others, and they would have
14 liked to have given some comment, but
15 unfortunately they're not available to express
16 their displeasure with this.
17 And I have a public comment from one of
18 them. I don't know if it's acceptable to read
19 that, or have Roberta read it later. But, --
20 HEARING OFFICER WILLIAMS: We'll take it
21 during public comment.
22 MR. SARVEY: Okay. And I'd like to
23 reserve the right to have the other districts
24 submit their documents, as well, if possible.
25 HEARING OFFICER WILLIAMS: Absolutely.

1 MR. SARVEY: Okay, thank you, Mr.
2 Williams.
3 COMMISSIONER PERNELL: Mr. Sarvey, other
4 districts, are you talking about adjacent water
5 districts?
6 MR. SARVEY: Yes, yes. In particular
7 the Homestead Land and Water Alliance, and there's
8 several other districts, as well, that felt that
9 if 18,000 acrefeet are removed from the overall
10 system, no matter where it comes from, they'll be
11 asked to sacrifice. So they're objecting to that.
12 COMMISSIONER PERNELL: Okay.
13 MR. SARVEY: And it's just a public
14 comment. I don't have them here as witnesses to
15 attest to it or anything, but I will provide you
16 with public comments from each district. I just
17 wanted to reserve the right, or keep the record,
18 or however you handle that situation, because I'm
19 a little novice at this.
20 Are you aware that the CEC has powers to
21 override your rules and regulations?
22 MR. GILMORE: Is that a question for me,
23 Mr. Sarvey?
24 MR. SARVEY: That's probably a general
25 question for anybody.

1 MS. DUNN: I think I object to the
2 question as calling for a legal conclusion. I'm
3 not sure Mr. Gilmore is really knowledgeable with
4 regard to what the CEC's legal rules and
5 responsibilities are.
6 HEARING OFFICER WILLIAMS: Could you
7 rephrase the question or ask another one, Mr.
8 Sarvey?
9 MR. SARVEY: I'll ask another one.
10 Are you aware that the CEC Staff's
11 testimony is not hearsay?
12 MS. DUNN: I object on the same basis.
13 I'm not testifying here, so I don't think the
14 question should be directed to me.
15 HEARING OFFICER WILLIAMS: Yeah, --
16 MR. SARVEY: I'll ask another --
17 HEARING OFFICER WILLIAMS: -- ask
18 another one. Try it again.
19 MR. SARVEY: -- question, thank you.
20 I'd like to ask Mr. Nuss a couple of
21 questions. You stated that Mountain House
22 Community Services District is the only feasible
23 source of recycled water within your District, is
24 that correct?
25 MR. NUSS: That's my opinion, yes, sir.

1 MR. SARVEY: Okay. And you feel that
2 it's possible that the BBID will not receive the
3 benefits of the Mountain House Community Services
4 District recycled water, is that correct?
5 MR. NUSS: No, I don't think my
6 testimony reflected that.
7 HEARING OFFICER WILLIAMS: As I recall
8 the testimony I think the testimony is that the
9 District is hopeful that, and expect that the
10 recycled water will be available from Mountain
11 House.
12 MR. SARVEY: Okay. So it's hopeful
13 that -- what would your analysis be if you did not
14 have that recycled water available to --
15 MR. NUSS: Could you be a little bit
16 more specific when you say what would my analysis
17 be? I testified on a number of points. What
18 specific --
19 MR. SARVEY: Right.
20 MR. NUSS: -- point would you be
21 interested in?
22 MR. SARVEY: Do you feel that you have
23 adequate supplies without the recycled water?
24 MR. NUSS: I think my testimony
25 attributes that it is my opinion that the District

has adequate water supplies within their water rights to deliver to all their customers including East Altamont, absent the recycled water.

MR. SARVEY: Okay. Are you familiar with power plant cooling needs? Is that part of your --

MR. NUSS: Not directly, that's not part of my expertise.

MR. SARVEY: In drought years would you expect the average temperature to be higher or lower?

MR. NUSS: I would expect it to be higher.

MR. SARVEY: And are you familiar with the -- well, you said you weren't familiar. Do you understand that the hotter the temperature the more water will be required to cool this plant?

MR. NUSS: That's intuitively.

MR. SARVEY: Okay, because -- would that go against your supposition that in a dry year condition that the demand for East Altamont's water usage would be less?

MR. NUSS: No. I think my testimony tries to delineate between a normal power demand and a peak power demand in an average and dry

1 hydrologic year. And I've tried to address the
2 conditions of a peak power demand, which sounds
3 like it's the maximum amount of power demand, the
4 7000 acrefeet, and whether there's adequate
5 supplies, in my opinion, to meet that demand both
6 in a dry hydrologic year and in an average
7 hydrological year.
8 So, I've tried to kind of book-end that
9 analysis.
10 MR. SARVEY: So my assumption, you're
11 saying that the demand for water for East Altamont
12 would be less in a drought year is incorrect? Is
13 that what your testimony stated?
14 MR. NUSS: I don't think that's my
15 testimony. My testimony doesn't try and reduce
16 the demand for East Altamont in a drought year.
17 The demand being how much water East Altamont
18 would need in a drought year.
19 My testimony looks at in a drought year
20 or in a dry year, the analysis of the availability
21 of water supplies within the District, both under
22 normal power conditions and peak power conditions
23 for East Altamont. I don't make any comment on
24 how, other than those two points, how the water
25 supplies -- how the water demands for East

1 Altamont would vary.
2 MR. SARVEY: Okay. In your illustration
3 of monthly variability you have available Mountain
4 House supply and East Altamont demand.
5 MR. NUSS: Um-hum.
6 MR. SARVEY: In the --
7 HEARING OFFICER WILLIAMS: What are you
8 reading from, Mr. Sarvey?
9 MR. SARVEY: It's from the PowerPoint
10 display.
11 MR. NUSS: He's looking at the slide.
12 HEARING OFFICER WILLIAMS: Okay.
13 MR. SARVEY: And from that analysis it
14 indicates that East Altamont Energy Center's
15 demand will be the highest in June, July, August
16 and September. And the available Mountain House
17 Community Services District's supply will be
18 lowest at those times, is that correct?
19 MR. NUSS: That's what that slide
20 illustrates, as an example, of my testimony.
21 MR. SARVEY: So essentially the
22 testimony is that the supply does not match the
23 demand?
24 MR. NUSS: That's right, I --
25 MR. SARVEY: Would that be correct?

1 MR. NUSS: -- think I made that point.
2 Yes.
3 MR. SARVEY: Thank you. Are you
4 familiar with the comments delivered by the Contra
5 Costa Water District to Cheri Davis, January 18th,
6 on the preliminary staff assessment?
7 MR. NUSS: Are you asking me?
8 MR. SARVEY: Yes.
9 MR. NUSS: I can't recall specific
10 familiarity with those comments, no.
11 MR. SARVEY: Okay. So you would be
12 familiar with their proposed objections to BBID?
13 MR. NUSS: I'm not, in detail, familiar
14 with --
15 MR. SARVEY: Okay. Would you like a
16 copy of it?
17 MR. NUSS: Sure.
18 (Pause.)
19 MR. SARVEY: How many acres would 7000
20 acrefeet irrigate?
21 MR. NUSS: It's going to depend on the
22 crop. So, I'll provide some book-ends for the
23 Committee. Grapes typically would use 12 to 18
24 inches of water per acre, so take 7000 and divide
25 it by 1.5. Alfalfa would typically take,

depending again on where it's irrigated, four to five, maybe even six acrefeet per acre, so take 7000 and divide by five as an average.

COMMISSIONER PERNELL: What's the typical crop that's grown in the County?

MR. NUSS: In the County, or perhaps more specifically in the District, the more typical crops within the District are pasture alfalfa crops. There is -- the District's seeing an increase in orchards and grapes as those irrigable lands are being converted to a different cropping type due to market conditions in that industry.

And I believe the District's cropping pattern would hold pretty similar for the County. As you move up into Contra Costa County, in the Brentwood area, there's more orchards and vineyards in that area. Although there's a significant urbanization occurred in the Brentwood area. If you're familiar with that, you've seen lots of homes being built in that area. So those orchards are being taken out for homes.

HEARING OFFICER WILLIAMS: Mr. Sarvey, do you want to follow up on the document that you gave Mr. Nuss?

MR. SARVEY: I will later, yes.

HEARING OFFICER WILLIAMS: Okay.

MR. SARVEY: Thanks, Mr. Williams. So there is a general trend to moving from -- into grape growing and such in the area, is that correct?

MR. NUSS: I think -- I commented in response to the question that there is -- the District is seeing some increase in grapes, although it's not a very large amount right now. I think there's less than 1000 acres in grapes in the District, itself.

MR. SARVEY: And the grapes take two to three times as much water as what you normally experience with the type of crops that are being grown in the area?

MR. NUSS: Actually that's not accurate. The grapes use much less. Normal crop four to five to six acrefeet; grapes one to one and a half acrefeet.

MR. SARVEY: In your analysis of the removal of the -- or your increased usage of 18,000 acrefeet, do you have any biological impacts identified in that?

MR. NUSS: My testimony doesn't go to

1 the biological effects of the District using its
2 water supply up to its full and beneficial use. I
3 believe Mr. Gilmore's testimony addressed the
4 biological effects of that and the agreement with
5 National Marine Fisheries that the District's
6 diversions are downstream of the Skinner fish
7 screen, so they have no impact on the biological
8 resources.
9 MR. SARVEY: Mr. Williams, will we be
10 allowed to address water questions during the
11 biological that related to biological species?
12 Will that be covered under --
13 HEARING OFFICER WILLIAMS: Yes. Yes.
14 MR. SARVEY: Well, then I'm through,
15 thank you.
16 HEARING OFFICER WILLIAMS: But these
17 witnesses will not be available, so --
18 MR. SARVEY: Right.
19 HEARING OFFICER WILLIAMS: -- okay.
20 Thank you. Staff, do you have anything, any
21 recross?
22 MS. DeCARLO: No, no, we're done.
23 HEARING OFFICER WILLIAMS: Okay, with
24 that, then, I think we can --
25 MS. DUNN: Could I have an opportunity

1 to do some redirect?

2 HEARING OFFICER WILLIAMS: Yeah, first

3 of all, Mr. Sarvey, did you want to make a

4 statement, a summary --

5 MR. SARVEY: Am I going before staff, or

6 isn't staff going next?

7 HEARING OFFICER WILLIAMS: Right. Okay,

8 BBID.

9 REDIRECT EXAMINATION

10 BY MS. DUNN:

11 Q I just had a couple of questions to ask

12 on redirect. These questions really go to Mr.

13 Gilmore.

14 Mr. Gilmore, could I get you to take a

15 look at what is marked as exhibit 8L in your

16 testimony.

17 MR. GILMORE: Okay, I have it.

18 MS. DUNN: And can you describe to me or

19 tell me what that exhibit is?

20 MR. GILMORE: This exhibit is a

21 memorandum of understanding between the Byron

22 Bethany Irrigation District and East Altamont

23 Energy Center, LLC, for the provision of recycled

24 water to the East Altamont Energy Center dated

25 July 9, 2002.

MS. DUNN: And if you would look at paragraph three of that agreement, can you indicate whether or not that agreement specifies the diameter of the pipeline that needs to be constructed?

MR. GILMORE: The MOU does not speak to specific diameter. The MOU speaks that the facilities shall be designed so as to provide a maximum rate of recycled water to be delivered from BBID to the project of 5900 gallons per minute.

MS. DUNN: Okay, also with regard to exhibit 8I, I believe that's the recycled water feasibility study. Can you tell me what assumptions were made in the feasibility study with regard to recycled water?

More specifically, does the feasibility study assume any recycled use within Mountain House Community Services District?

MR. GILMORE: Yes. Based on when we took a look at the potential available supplies we received a facsimile communication from Ecologic Engineering, and at that time in preparation for the report, they identified approximately 1155 acrefeet of community needs within Mountain House.

1 So we based our available supplies based
2 on those community uses.
3 MS. DUNN: Mountain House Community
4 Services District is entirely within the
5 boundaries of Byron Bethany Irrigation District,
6 is that correct?
7 MR. GILMORE: Yes, that's correct.
8 MS. DUNN: Also, with regard to BBID's
9 use of water, has BBID ever used water
10 historically in excess of 50,000 acrefeet of
11 water?
12 MR. GILMORE: Yes.
13 MS. DUNN: And if I am correct, if there
14 are unidentified uses of water within Byron
15 Bethany Irrigation District, is it the assumption
16 that was made by the District that existing uses
17 of water, say existing agricultural uses of water
18 will be converted to those other new uses?
19 MR. GILMORE: Yes, that's correct.
20 MS. DUNN: That's all the redirect that
21 I have.
22 COMMISSIONER PERNELL: A couple of just
23 clarifying questions for me. Who makes up the
24 governing board of BBID? The policy-setting
25 board?

1 MR. GILMORE: Yes, Mr. Pernell,
2 basically the structure of the board of directors
3 of the Byron Bethany Irrigation District currently
4 has five divisions. Three divisions in Contra
5 Costa County; one division in San Joaquin County;
6 one division in Alameda County.
7 All voters within the District elect the
8 board of directors. It's not an appointed board,
9 it's elected by the registered voters in the
10 District.
11 COMMISSIONER PERNELL: So it's an
12 elected board made up of -- elected by the voters
13 in various districts, and they set policy for
14 BBID?
15 MR. GILMORE: That's correct.
16 COMMISSIONER PERNELL: That's correct.
17 And, Mr. Nuss, in your testimony you analysis, at
18 least the chart I've seen, gave ten-year
19 increments. And we talked about this a little
20 earlier.
21 With the information that has come out
22 that says that -- that was stated that from three
23 to five years that there will be reclaimed water
24 and et cetera, does that cause you to revisit your
25 chart?

1 MR. NUSS: Not really. The chart is
2 based on some just planning assumptions looking at
3 ten-year increments as a reasonable planning
4 increment for this particular analysis.
5 If there's additional data on how water
6 might be made available, the timing of how
7 recycled water might be made available. But we
8 could get into more specifics of how things might
9 be implemented.
10 But for the purposes of just looking
11 more broadly at the planning aspects of allocation
12 water supply, it's not unusual to go in a ten-year
13 increment, as was demonstrated in that chart.
14 COMMISSIONER PERNELL: Okay. And there
15 was also some mention of the infrastructure for
16 the size of the pipe and et cetera. And if, in
17 fact, the three to five years, as was stated, is
18 reasonable, then you would be revisiting that
19 earlier than the ten-year increment, correct?
20 MR. NUSS: I would think so. And the
21 question would then be how large do you make the
22 pipeline for the first three to five years,
23 recognizing that the full development doesn't
24 really occur over some extended period of time.
25 Now I don't believe the community will

1 develop entirely in three to five years, so
2 there's some --
3 COMMISSIONER PERNELL: Right, but when
4 you do infrastructure you do infrastructure --
5 MR. NUSS: Right, for a --
6 COMMISSIONER PERNELL: -- I would assume
7 for --
8 MR. NUSS: -- for a larger size, that's
9 right.
10 COMMISSIONER PERNELL: -- the build-out.
11 Yes. Okay.
12 HEARING OFFICER WILLIAMS: Any followup
13 questions from applicant or --
14 MS. DeCARLO: No, staff doesn't have
15 any.
16 HEARING OFFICER WILLIAMS: Mr. Sarvey,
17 are you done?
18 MR. SARVEY: Yes, I'm done, thank you.
19 HEARING OFFICER WILLIAMS: Counsel, do
20 you want to move your exhibits?
21 MS. DUNN: Yes, I'd like to move exhibit
22 8 and 9 into evidence.
23 HEARING OFFICER WILLIAMS: Yes, and 8
24 will be the testimony of Mr. Gilmore, followed by
25 the appendices as set forth in the prehearing

1 conference statement. And 8O will be the
2 PowerPoint slide presentation, which is the
3 additional exhibit.
4 Exhibit 9 will be the testimony of Mr.
5 Nuss with the associated appendices as set forth
6 in the prehearing conference statement.
7 Any objection? Okay, those are admitted
8 into evidence.
9 At this point I think we're ready to
10 proceed with the applicant.
11 MR. WHEATLAND: Very well. What we will
12 do, first --
13 HEARING OFFICER WILLIAMS: We were just
14 presented with a motion for lunch.
15 (Laughter.)
16 MS. DeCARLO: Are we allowed to second
17 that?
18 HEARING OFFICER WILLIAMS: I think
19 that's probably the first order of business at
20 this point.
21 So we'll adjourn for lunch.
22 (Whereupon, at 12:45 p.m. the hearing
23 was adjourned, to reconvene at 1:15
24 p.m., this same day.)
25 --o0o--

1

2 AFTERNOON SESSION

3 1:18 p.m.

4 PRESIDING MEMBER KEESE: Thank you,

5 Major. Before we get started here, let me just

6 mention that we have a few more topics. We're on

7 water resources; we have biological resources,

8 hazmat, worker safety and fire protection and then

9 alternatives. That's our agenda for today. It's

10 pretty aggressive. So I think everybody should

11 keep in mind that it could be a long day. But

12 let's see how fast we can make it. Water

13 resources.

14 HEARING OFFICER WILLIAMS: Thank you,

15 Mr. Chairman. Okay, I think we had left off with

16 applicant and --

17 MR. WHEATLAND: Good afternoon.

18 Pursuant to the Committee's direction this

19 morning, what we'd like to do --

20 HEARING OFFICER WILLIAMS: Before you

21 start, let me just welcome Mr. Boyd, who has

22 appeared this afternoon, Mr. Michael Boyd and CARE

23 is an intervenor in these proceedings. And he has

24 been absent until this afternoon. So, we welcome

25 you, Mr. Boyd.

1 MR. BOYD: Thank you. I apologize for
2 being unable to attend before now. And I'd like
3 to apologize to the Commission Members, as well,
4 for the --
5 HEARING OFFICER WILLIAMS: Okay.
6 Applicant.
7 MR. WHEATLAND: What I'd like to do is
8 begin this afternoon by asking Mr. Kevin O'Brien
9 to provide an oral statement regarding those
10 portions of the applicant's direct testimony to
11 which he was prepared to testify.
12 And then once he has presented his
13 statement, we will rearrange the seating here
14 briefly and then present our two panel members,
15 swear them in, conduct the direct, and then make
16 them available for cross-examination.
17 So, with that, I'd like to turn it over
18 to Mr. O'Brien.
19 MR. O'BRIEN: Thank you. Good
20 afternoon. My name is Kevin O'Brien. I am a
21 partner with the Sacramento lawfirm of Downey,
22 Brand, Seymour and Rohwer. I specialize in water
23 rights law. I think my r,sum, was included in the
24 exhibits.
25 I have about 22 years of experience in

1 water law. I have taught water law at the
2 University of California Davis and at University
3 Extension.
4 I'd like to just take a few minutes; I
5 know you have a lot of topics to cover this
6 afternoon, I'm just going to take a few minutes to
7 address some of the legal issues relating to water
8 supply that came out of the staff's testimony and
9 which I was prepared to testify to prior to the
10 Hearing Officer's ruling.
11 The first issue I'd like to address is
12 just the legal adequacy of the BBID water rights
13 to serve the project. And I'm not going to
14 belabor this, but I would like to underscore Mr.
15 Nuss' statement earlier this morning that the BBID
16 water rights are really quite outstanding in the
17 sense that they both are very low in priority and
18 they are obviously well documented in terms of the
19 historical use of those rights.
20 In my experience it's fairly rare in
21 California water matters to have a situation like
22 this where the only legal user of water who
23 potentially would be affected by this proposed
24 water use, in this case the Department of Water
25 Resources, has essentially signed off on the

1 project and has indicated it is not objecting to
2 the proposed use. That is a truly unusual
3 circumstance. These are truly exceptional water
4 rights. And I think they provide a very solid
5 basis for the water supply for this project.
6 Second point I'd like to address just
7 briefly is water code section 1254. We provided
8 some excerpts from the California water code.
9 Hopefully you have those in front of you. I'm
10 just going to walk through some of these
11 provisions which were cited in the staff
12 testimony.
13 Section 1254 was cited by the staff, and
14 this is referencing page 5.14-31 of the testimony.
15 Staff indicated that it believes that this guiding
16 policy, as set forth in 1254, codifies a
17 fundamental determination by the state for
18 reserving the highest quality water for the
19 highest uses, namely domestic and irrigation,
20 particularly in reserving water suitable for
21 potable use for domestic purposes.
22 Well, I think the staff has fairly badly
23 taken this provision out of context, and I think
24 it's important for the Commission to understand
25 that this provision relates to situations where

1 you have competing water right applications that
2 have been filed before the State Water Board.
3 And if you look at the title of that
4 provision, policy guiding action on applications,
5 that refers to applications to appropriate water.
6 We don't have an application to appropriate water
7 in this case, and we will not need one in this
8 case.
9 So what this provision is saying is that
10 in situations where the State Water Board is
11 acting upon competing applications to appropriate,
12 that in that instance and that instance alone, the
13 Board has the ability to essentially prioritize
14 based on this priority set forth in this
15 provision.
16 This is not a generally applicable
17 provision that allows the Board in other types of
18 water controversies to say that we're going to
19 protect domestic use to the exclusion of so-called
20 lower uses, such as irrigation or industrial uses.
21 And, in fact, if that were the law, the Water
22 Board in numerous situations throughout the state
23 would simply protect in all instances the domestic
24 and municipal users, which they do not do
25 routinely.

1 Typically the key issue is the priority
2 of the water right. And that's exactly what the
3 point that's being made in this proceeding, is
4 that BBID has a very senior water right priority.
5 The fact that it's going to be used for industrial
6 use is simply irrelevant from a water rights
7 standpoint.
8 The next provision I'd like to discuss
9 is section 13550. The staff, in support of its
10 proposed condition number five, has relied on that
11 provision. There's a couple points I'd like to
12 make about 13550.
13 Number one, from a procedural standpoint
14 it is a provision that is applied by the State
15 Water Board in a very specific type of proceeding.
16 And if you read through subdivision (a) you'll see
17 that there's at first a general declaration of
18 legislative intent that the use of potable
19 domestic water for nonpotable uses is a waste or
20 an unreasonable use if there is another water
21 supply available as determined by the State Board
22 after notice to any person or entity who may be
23 ordered to use recycled water.
24 So there's a hearing process and
25 procedure that's utilized to enforce this

1 provision.

2 On a more substantive level the first

3 point is that this applies to situations where

4 potable domestic water is proposed to be used for

5 a nonpotable use.

6 In this case BBID will provide water to

7 the project that it diverts from the Delta. That

8 water will not be run through a treatment plant.

9 And it does not constitute potable domestic water

10 under definitions contained in California law. So

11 this provision substantively is inapplicable in

12 this proceeding.

13 Finally, if you look at subdivision

14 (a)(2) there's a provision there that indicates

15 that the recycled water, as one of the conditions,

16 must be furnished for the uses at a reasonable

17 cost to the user. And if you read a little

18 further it says in determining reasonable cost,

19 State Board shall consider all relevant factors

20 including but not limited to the present and

21 projected costs of supplying, delivering and

22 treating potable domestic water for these uses,

23 and the present and projected costs of supplying

24 and delivering recycled water for these uses. And

25 shall find that the cost of supplying the treated

1 recycled water is comparable to or less than the
2 cost of supplying potable domestic water.
3 In this case, to my knowledge, there has
4 been no finding or determination that the cost of
5 providing recycled water is comparable to or less
6 than the cost of providing the raw water that BBID
7 will provide.
8 Moving on, the next provision that was
9 cited is 13580.7. The staff, in condition 6, has
10 proposed that the applicant be directed to make a
11 request to BBID, as the retail water supplier, to
12 enter into an agreement pursuant to this
13 provision.
14 A couple points I'd like to make here.
15 First, in my opinion, this provision does not
16 apply to a retail water supplier that does not
17 currently have a recycled water supply available
18 to it. And as we heard this morning, that process
19 of securing that supply is still in process.
20 Secondly, and maybe more importantly, if
21 you look down at subdivision (e) of this provision
22 you'll see that you have the same type of cost
23 analysis that must occur before this service is
24 provided that you would have under 13550. So that
25 it says, in fact, that if recycled water service

1 cannot be provided at a rate comparable to or less
2 than the rate for potable water, the retail water
3 supplier is not required to provide the recycled
4 water service unless the customer agrees to pay a
5 rate that reimburses the retail water supplier for
6 the cost described in subdivision (c).
7 So, I think just as a general comment, I
8 think the staff in a couple instances has taken
9 these statutory provisions and attempted to apply
10 them in this proceeding where I really don't think
11 the context warrants that. And clearly the
12 statutes do not apply from a legal standpoint.
13 The other provision that's referred to
14 in the staff testimony is the State Board's
15 resolution 7558, which is cited as policy guidance
16 for the Commission. There have been a number of
17 Commission decisions that have dealt with this,
18 and I'm not going to spend a lot of time
19 discussing that. We'll address that in our legal
20 briefs.
21 But it is clear that even under the 7558
22 the State Board had in mind that there would be an
23 economic analysis as to the feasibility of using
24 recycled water. And in a number of decisions by
25 this Commission, in fact, raw water has been

1 approved as a source of water for new power plants
2 based on findings that there is not an
3 economically viable option available in the way of
4 recycled water, or other water supplies.
5 So, I think the notion that this policy
6 statement from the State Board can be applied in
7 some mechanical way to require recycled water in
8 every instance is simply not the law, in my
9 opinion.
10 That's all I have.
11 HEARING OFFICER WILLIAMS: Thank you, we
12 appreciate that presentation. Applicant, do you
13 want to continue with --
14 MR. WHEATLAND: Yes, if the Committee
15 has no questions then we'll continue with the next
16 portion.
17 First may I have the witnesses sworn,
18 please.
19 Whereupon,
20 KRIS HELM and JIM McLUCAS
21 were called as witnesses herein, and after first
22 having been duly sworn, were examined and
23 testified as follows:
24 DIRECT EXAMINATION
25 BY MR. WHEATLAND:

1 Q First would you each state your name for
2 the record, please.
3 MR. HELM: Kris Helm.
4 MR. McLUCAS: Jim McLucas.
5 MR. WHEATLAND: And do you have before
6 you a copy of the applicant's water resources
7 testimony which has been identified as exhibit 4D?
8 MR. McLUCAS: Yes.
9 MR. WHEATLAND: And to each of you was
10 this testimony set forth in exhibit 4D prepared by
11 you or at your direction?
12 MR. HELM: Yes.
13 MR. McLUCAS: Yes.
14 MR. WHEATLAND: And does exhibit 4D
15 contain your qualifications?
16 MR. HELM: Yes.
17 MR. McLUCAS: Yes.
18 MR. WHEATLAND: Mr. McLucas, could you
19 please summarize your qualifications?
20 MR. McLUCAS: My name's Jim McLucas and
21 I'm the Project Engineer for Calpine on this
22 project. I'm a mechanical engineer registered in
23 the State of California with over 21 years of
24 experience in the fields of energy, water and
25 wastewater.

1 And my responsibilities on this project
2 include basically anything that's engineering
3 related.
4 MR. WHEATLAND: Okay, Mr. Helm, would
5 you please summarize your qualifications?
6 MR. HELM: Yes, I'm a professional
7 consultant with more than 20 years experience in
8 water resources. My background is primarily
9 public agencies for 16 years. And I have
10 experience in negotiation with numerous agreements
11 between public agencies and between public and
12 private agencies. And unique experience in the
13 development of recycled water for industrial
14 applications and successful implementation
15 agreements.
16 MR. WHEATLAND: Do you have any
17 additions, corrections or clarifications that
18 you'd like to make to exhibit 4D?
19 MR. HELM: No.
20 MR. WHEATLAND: Mr. McLucas?
21 MR. McLUCAS: No.
22 MR. WHEATLAND: Okay. Is the testimony
23 that you are sponsoring and the facts contained
24 therein true to the best of your knowledge?
25 MR. HELM: Yes.

MR. McLUCAS: Yes.

MR. WHEATLAND: And do the opinions represent your best professional judgment?

MR. HELM: Yes.

MR. McLUCAS: Yes.

MR. WHEATLAND: Do you adopt exhibit 4D as your testimony in this proceeding?

MR. HELM: Yes.

MR. McLUCAS: Yes.

MR. WHEATLAND: Okay, Mr. Helm, would you please summarize the testimony?

MR. HELM: Yes, thank you. As the Committee and members of the public have seen the preceding testimony from Byron Bethany Irrigation District, East Altamont Energy Center will be dependent upon Byron Bethany Irrigation District for its water supply and to meet its needs.

Very early in these proceedings BBID provided a will-serve commitment to the East Altamont Energy Center for a maximum supply of 7000 acrefeet a year, which corresponds to the peak demand of the power plant.

This commitment is based on BBID's determination that it has adequate water supplies today and will in the future have adequate water

supplies to meet the needs of East Altamont and its other customers during the life of the project, with or without recycled water development.

Due to the unique nature of BBID's water rights, the exercise of those water rights to serve East Altamont Energy Center has no specific impact and does not lead to a cumulative impact.

In addition to its fresh water sources BBID is actively pursuing the development of future recycled water supplies from sources within its boundaries and with particular focus on the immediate Mountain House Community Services District, a publicly owned treatment plant.

BBID provided estimates today concerning its planning estimates of how much recycled water will be available based upon the results of its feasibility evaluations and the information that they presented from others.

BBID has also adopted policies intended to promote recycled water development with a system providing a context for the planning for that projections. In our memorandum of understanding with BBID, BBID is committed to develop recycled water for the East Altamont

1 Energy Center to the maximum extent feasible.
2 The Energy Center will be designed and
3 constructed to utilize recycled water when and as
4 it becomes available from BBID. The planned use
5 of recycled water is combined with an onsite zero
6 liquid discharge system that will treat and
7 reclaim internal wastewater streams and eliminate
8 the discharge of wastewater from this power plant.
9 The use of zero liquid discharge
10 technology and the preplanning by the applicant
11 and the BBID towards the future use of recycled
12 water are demonstrative of Calpine's leadership in
13 the development of water supplies in an
14 environmentally beneficial manner.
15 I've worked with Calpine on the
16 development projects in California including
17 Metcalf Energy Center, the Russell City Energy
18 Center, the Inland Empire Energy Center, Delta
19 Energy Center, the Central Valley Energy Center,
20 and Pastoria Energy Center. The water solution
21 for this project is consistent with the
22 environmental stewardship Calpine has demonstrated
23 in all of its development here in California.
24 Even though no recycled water presently
25 exists within BBID, the applicant described the

1 future facility to serve recycled water with its
2 original application, looking forward our public/
3 private partnership with BBID is a model for
4 responsible water development.
5 The applicant's approach insures future
6 recycled water development in an environmentally
7 sound and economically efficient manner when and
8 as future development actually generates supplies
9 of recycled water.
10 Over the past 15 months there's been a
11 lot of discussion between the parties regarding
12 the water supply issues. As a result of these
13 discussions, the issues have really narrowed. We
14 find the staff's proposed water conditions -- the
15 conditions of certification in water to largely be
16 acceptable, but we do suggest modifications to
17 soils and water 5, 6, and 7.
18 And I have a handout that shows what is
19 in the staff's supplement or addendum or whatever
20 we're calling it, the errata. And I've red-lined
21 to show the changes that we believe are necessary
22 in those conditions. And let me walk through,
23 first, four substantive changes that we believe
24 should be made to soils and water condition 5 and
25 6.

First, consistent with the suggestion of Byron Bethany Irrigation District earlier, we believe that condition 5 should provide that the project owner will use 100 percent of the tertiary treated water which is made available to East Altamont from Mountain House, rather than all of the recycled water produced by Mountain House.

I think Gary Nuss addresses in his testimony the appropriateness of using recycled water -- plumbing landscaped areas in new development, and how that meets the District's objectives to maximize the development of recycled water in an environmentally efficient and sound manner.

And we believe that those are sound bases. And as mentioned in our testimony we do not want this condition to actually interfere with the development of the recycled water by providing an incentive to withhold the recycled water as a means of preventing the project from being built.

Since Mountain House and BBID are both apparently committed to the full utilization of recycled water in the manner which meets their best collective interests, the condition as proposed by the staff is an entirely arbitrary

1 allocation, and preempts BBID.
2 So, that's the first substantive change,
3 is to instead of making it all the water produced
4 by the POTW, we would use all the water that's
5 available to us from BBID, which we believe is
6 consistent with our commitments.
7 Second, condition 5 should provide that
8 recycled water will be utilized for cooling tower
9 makeup and landscape irrigation requirements,
10 rather than referring to all nonpotable water
11 requirements.
12 While we have designed the project to
13 utilize the recycled water in the cooling process,
14 we have not designed the project to produce
15 processed steam that is required in excess of that
16 produced by the zero liquid discharge system.
17 The zero liquid discharge system will
18 provide the predominant amount of steam makeup
19 that we need. To modify the design of the
20 facility to allow recycled water will cause us
21 additional capital and fixed operating costs of
22 the plant to add micro-filtration equipment and
23 increase the size of reverse osmosis on this
24 process train. And based upon the planning
25 projections it has no potential increased water

1 use within -- to increase recycled water use
2 within BBID or at the project.
3 So it's a requirement that staff has not
4 explained to us or given us an analysis to
5 support, but are now -- it not our proposal, and
6 it does not appear to have merit.
7 Also we believe that in condition 5
8 there's a sentence, "Water used by EAEC shall not
9 adversely impact water supplies to municipal or
10 agricultural customers of BBID." We believe
11 that's a factual statement and should be moved to
12 the findings of fact.
13 Fourth, and finally, the specified peak
14 flow in condition 5 should be 9.2 MGD, and that's
15 consistent with our description of the project in
16 supplement B to our application for certification.
17 And that summarizes, I believe, the
18 changes we would show by red-line on condition
19 number 5.
20 HEARING OFFICER WILLIAMS: We'll mark
21 this as applicant's 4D-1 for identification.
22 MR. HELM: Okay, moving on for a moment
23 to soils and water condition 6. The applicant
24 supports language which require the project owner
25 to enter into a definitive water supply agreement

with BBID setting forth rates and conditions for water supply.

We would support a condition which would require this contract specify that BBID shall develop recycled water supplies to the maximum extent feasible. And the project owner shall use the recycled water BBID makes available, subject, of course, to the power plant actually operating and having a demand.

And we also agree that the contract with BBID should be executed prior to the construction of the power plant or any related facilities.

However, we disagree with those portions of condition 6 which restrict the authority of BBID to manage its water supplies. Those restrictions include a requirement that EAEC must be given first priority for allocation of recycled water from the Mountain House even if such priority adversely affects other BBID customers.

Similarly, staff's proposed condition 6 would require BBID and the project owner to enter into a contract for recycled water and even specify the terms for recycled water pipeline even if Mountain House and BBID are not prepared to enter into such a definitive agreement at the time

arbitrarily set in condition 6.

Finally, I have proposed some changes to condition number 7. Again, first consistent with our description in condition 5, we believe that the term processed water should be deleted to make this condition with the project as proposed by the applicant.

Second, if it is necessary to specify the size of the recycled water pipeline, we believe the condition should simply state that it should be an 18-inch pipeline, at a minimum. And that approval of the final design of the recycled water supply system by the CPM shall be obtained prior to the start of construction of the recycled water pipeline.

Similarly, verification should state that at least 60 days prior to the start of construction of each component of the water system described in condition 7, the project owner shall submit to the CPM its design demonstrating compliance with the condition.

Approval of the final design of the water supply and treatment system by the CPM shall be obtained prior to the construction of those systems.

1 So with these modifications to condition
2 7 we believe the requirements for sizing and
3 approval of the pipeline are simple and
4 understandable and insure the pipeline will be
5 constructed when it's needed, but not before it
6 can be utilized.
7 In summary, our testimony demonstrates
8 that the project, as proposed by the applicant, is
9 consistent with all applicable LORS, will have no
10 significant adverse impacts. It's designed to use
11 both raw and recycled water.
12 BBID, Mountain House and the applicant
13 will be working together to bring recycled water
14 to the project as soon as it's feasible to do so.
15 No restrictions on the authority or discretion of
16 BBID and Mountain House to serve the project are
17 necessary or desirable.
18 That's the summary of --
19 MR. WHEATLAND: Thank you, Mr. Helm.
20 I'd like to ask you one additional question, which
21 is a followup from what Mr. Sarvey raised a little
22 bit earlier, because this is an issue also
23 addressed in your testimony.
24 Does the diversion of water by BBID
25 pursuant to its water rights reduce available

supply to other agricultural users?

MR. HELM: No. And it's a terribly over-simplistic representation of how the Delta and the diversions from the Delta are managed to just say that if you are serving water within one are, you're limiting water to another area. It simply is not as simple as that.

MR. WHEATLAND: Thank you. The panel is available for cross-examination.

HEARING OFFICER WILLIAMS: Is there any objection to 4D-1 coming in as the applicant's proposed revisions to the conditions of certification?

MR. SARVEY: I only object to that last statement. I don't object to the document.

HEARING OFFICER WILLIAMS: It's coming in as their proposal.

MR. SARVEY: That's fine.

MR. HARRIS: So, --

MS. DeCARLO: No objection from staff.

HEARING OFFICER WILLIAMS: -- we'll admit that.

PRESIDING MEMBER KEESE: Okay, I have a question here. You've attempted to comply with BBID's suggestion regarding jurisdiction, except

that I read in condition 6 that one of the conditions would be that BBID shall develop recycled water supplies to the maximum extent feasible.

Are you intending to bind them? I mean is this proposed condition binding? Are you suggesting that we bind BBID to do that?

MR. HELM: No. I guess we don't have objection to that provision because it's consistent with the provisions of our memorandum of understanding with BBID where they have agreed to do that.

So I -- my lawyer to answer whether we're being preempted or something else, but --

PRESIDING MEMBER KEESE: Well, I'll --

MR. HELM: But that's the basis of that suggestion.

PRESIDING MEMBER KEESE: That issue has been opened previously about how far we go in this proceeding to make BBID do anything.

MR. HELM: In all honesty, --

PRESIDING MEMBER KEESE: Yeah, this may be moot because I know we have absolute statements that Mountain House is obligated to go forward, and BBID -- to go forward, and you have indicated

that you're going to go forward.

So maybe we're talking semantics here, but I hesitate to see language that implies authorities that we don't have.

MR. HELM: Understood. We are -- I guess I should preface the remarks on marking up these conditions of certification that we are offering this in sort of a spirit of compromise, trying to meet the staff on the intent of their conditions, as our original testimony presented. We don't think conditions 5 and 6 are necessary at all.

PRESIDING MEMBER KEESE: I'm sure we'll do further on that. The other question I would have is in soil and water 7, you suggest 18 inches diameter size at a minimum.

So, I guess -- I mean tell me what 18 inches is. If the decision of Mountain House is -- if the Bethany decision is if Mountain House can use two-thirds of the water in the District, and it would be a 12-inch line, then it can't be built, right?

I mean if a 12-inch line was --

MR. HELM: Yeah, --

PRESIDING MEMBER KEESE: -- efficient

1 line, under this condition it couldn't be built.
2 MR. HELM: I think we agree 100 percent
3 with you on a matter of theory. And so when we
4 look at it hypothetically the possibilities are
5 exactly as you've described.
6 We did, though, in an effort again to
7 try and craft a condition of certification that
8 would meet the staff's intent where there was an
9 interest in seeing the size of the pipeline, I
10 asked Jim McLucas to look at appropriate size for
11 the pipeline. And, Jim, maybe you want to address
12 that.
13 MR. McLUCAS: Yeah, there was a lot of
14 discussion on the condition, trying to put, you
15 know, bounds on what the pipeline would be
16 designed for. And I think one of the last
17 versions we saw from staff had to do with sizing
18 it for a capacity that was the maximum recycled
19 water production from Mountain House at build-out,
20 which was, you know, somewhat open-ended.
21 So we were just trying to look for a way
22 to tie a number down. And so what we did is we
23 looked at 18-inch, 18-inch meets what would be
24 sufficient to convey the amount of water that BBID
25 haws indicated would be available based on the

1 numbers they've received from Mountain House.
2 In addition, it would be of sufficient
3 size for the full 9.2 MGD, if that's what needed
4 to happen.
5 PRESIDING MEMBER KEESE: Okay, so this
6 is --
7 MR. HELM: So we think the 18 inches of
8 flexible --
9 PRESIDING MEMBER KEESE: -- and both of
10 these indicate --
11 MR. HELM: -- size is probably the right
12 size pipe.
13 MR. McLUCAS: And the reasoning for
14 putting minimum on there is BBID may choose to
15 make it 20 inches. I think in the AFC we
16 represented 20 to 24 inch from the purposes of
17 size of trench and all that sort of stuff, to
18 represent kind of a worst case from an impact
19 standpoint.
20 PRESIDING MEMBER KEESE: Thank you.
21 MR. WHEATLAND: The witnesses are
22 available for cross-examination.
23 HEARING OFFICER WILLIAMS: Thank you,
24 sir. Staff?
25 MS. DeCARLO: Yes, staff has some cross.

1 CROSS-EXAMINATION

2 BY MS. DeCARLO:

3 Q There are numerous assertions throughout

4 the applicant's testimony about BBID's intentions

5 regarding the recycled water supply and

6 allocation, among other things.

7 Are any of you representatives of BBID?

8 MR. HELM: No.

9 MR. McLUCAS: No.

10 MS. DeCARLO: Have you ever been

11 employed by BBID?

12 MR. HELM: No.

13 MS. DeCARLO: So that all the statements

14 contained in your testimony regarding BBID's

15 intentions pertaining to recycled water are

16 hearsay, is that correct?

17 MR. WHEATLAND: I object to the question

18 because it calls for a legal conclusion on the

19 part of the witness, and we've excluded our

20 legal --

21 HEARING OFFICER WILLIAMS: Sustained.

22 MS. DeCARLO: Your knowledge regarding

23 BBID's intentions was only obtained by what BBID

24 has told you, is that correct?

25 MR. HELM: I've observed BBID's

intentions in the form of adopted policy resolutions of their board of directors; adopted memorandums of understanding with the applicant with the board of directors; feasibility study adopted by BBID's board of directors; and direct conversations and representations by the BBID general manager.

MS. DeCARLO: In your testimony you state that conditions requiring the use of recycled water are unnecessary because you are, quote, "committed to developing recycled water to the extent feasible."

Have you committed to use any specific amount of recycled water?

MR. HELM: We have committed to use the amounts of recycled water that BBID makes available to us.

MS. DeCARLO: Has there been any elaboration on what amounts those would be?

MR. HELM: Yes. We provided the staff with data responses concerning the likely availability of recycled water from the Mountain House community. The total -- and so those estimates of how much water we would use are based upon our monthly demand, and the monthly forecast

of the availability of recycled water, and the potential mix between those.

So those are the estimates that we have developed in cooperation with BBID and have provided the Commission Staff.

MS. DeCARLO: But you have not committed to using recycled water according to those estimates, is that correct?

MR. HELM: We -- yes, we have committed to use the recycled water that BBID actually makes available, and recognize that the water may be more or less than our estimate. In I believe it's data response 109 that asked of our willingness to use all the recycled water that BBID makes available, as in the MOU we've indicated that we are willing to use all of the recycled water.

MS. DeCARLO: In your testimony you state that conditions requiring BBID to enter into a water service agreement with Mountain House Community Services District are premature because there are, quote, "practical impediments to negotiating such a contract at this time."

Can you please explain what these practical impediments are?

MR. HELM: Okay. In the first place,

1 the process that we're in is already interfering
2 with the potential to negotiate that agreement.
3 As long as the offer or ability to control the
4 supply of recycled water to BBID is a means to
5 hold up the development of the project,
6 essentially giving discretionary approval to
7 another agency to deny our project. That's a
8 powerful motivation, it becomes very political
9 then whether those waters should be offered or
10 made available.
11 And as Mr. Gilmore testified, that is,
12 in fact, happening. The board of supervisors of
13 the County of San Joaquin apparently sees the
14 opportunity to withhold recycled water as a
15 potential means of preventing the power plant from
16 being built.
17 MS. DeCARLO: And --
18 MR. HELM: But -- excuse me. This is
19 the first impediment that I'm trying to explain.
20 It is that we're giving discretion to someone and
21 preventing them from working what are in their
22 best interests.
23 If the power plant is licensed and
24 approved for water use, we believe that Mountain
25 House will be motivated by their self interests in

managing the recycled water and the interests that they've expressed in developing a recycled water supply. But if it's a club, or a switch that can be turned on or off and prevent the Energy Center from being built, that could very well interfere with the negotiations.

The other portion, when we think about a deal between Mountain House and BBID, we have to think about a complete deal, where there would be agreement as to the availability of water from Mountain House, that total volume that's available, the quality of water, what price it will be available at, what term would we have, what priority relative to other use, what default provisions would be in.

There's generally a lack of sufficient information available to make those determinations. There's no certainty, there's acceptance and agreement between the applicant, BBID and ourselves about the likely future development. Many phases of this development are currently in environmental review.

There is a tremendous amount of uncertainty and certainly no one has an ability to commit this recycled water.

1 Mountain House doesn't have information
2 yet regarding its costs to provide water BBID
3 would require, nor does it have hard data
4 concerning its alternative costs.
5 And so there are a number of sources of
6 uncertainty about the future quality and quantity
7 of Mountain House, the alternatives to develop and
8 use the water within Mountain House, the economic
9 consequences of those alternatives, and the cost
10 effectiveness of offering the water to BBID. So
11 those are among the impediments that exist today.
12 MS. DeCARLO: And what direct knowledge
13 do you have that San Joaquin Board of Supervisors
14 or Mountain House Community Services District sees
15 this as an opportunity to prevent the project?
16 MR. HELM: I observed the minutes of the
17 meeting, and reviewed the discussion between Mr.
18 Sensibaugh and the board of supervisors where the
19 board was apparently very concerned that Mr.
20 Sensibaugh's preliminary indication of partial
21 terms upon which he might potentially, under
22 certain circumstances, offer the water prompted
23 the board of supervisors to reiterate to the
24 Commission they're opposed to the project.
25 And specifically in that the supervisors

said they wanted to review very carefully what Mr. Sensibaugh had said to make sure that no offer had been made inconsistent with the board's position that they oppose the project.

That knowledge and Mr. Gilmore's explanation of representations made to him by Mr. Sensibaugh about that.

MS. DeCARLO: But you have not been directly told by either the board of supervisors or MHCSD of your proposed --

MR. HELM: No, we've not heard directly from them. This is a very similar circumstance, though, that we've seen before in other Commission proceedings.

MS. DeCARLO: Are you aware of the provisions contained in the Water Recycling Act of 1991 setting forth the procedure whereby a customer can request recycled water from a retailer?

MR. HELM: This is an area where our witness who was prepared to provide specific answers on this has been excluded.

HEARING OFFICER WILLIAMS: He hasn't been excluded. You can swear him.

MR. WHEATLAND: Mr. O'Brien?

HEARING OFFICER WILLIAMS: Yeah, and if he's the person who has the knowledge --

MS. DeCARLO: Actually the staff isn't asking for a legal opinion, we're just asking applicant's witnesses if they, themselves, are aware of the particular Act.

MR. WHEATLAND: I don't have any objection to that question.

MR. HELM: I'm not aware of the provisions by their reference to their enacting, so the provisions of the 1991 law I cannot relate to what provisions of code that provides.

MS. DeCARLO: So you have not taken advantage of this provision to formally request recycled water from BBID?

MR. HELM: Apparently you're referring to section 13580.7 of the water code?

MS. DeCARLO: That is correct.

MR. HELM: We've entered into a memorandum of understanding with BBID, which details our understanding of the procedures and the future actions that both of us will take to secure water from an outside agency.

Whether this constitutes a request under this water code section, I'd like to ask Kevin

1 O'Brien to answer that question.
2 MS. DeCARLO: Well, I'm sure you can --
3 HEARING OFFICER WILLIAMS: Well, that
4 would call for a legal conclusion. I think staff
5 has indicated tat they are more interested in
6 finding out the facts underlying the applicant's
7 actions with respect to that provision.
8 MS. DeCARLO: Are you opposed to a
9 condition that would require you to formally
10 request recycled water pursuant to this provision?
11 MR. WHEATLAND: Can I ask, I'm going to
12 object on the basis the question's not clear. Are
13 you talking about 15580.7 in its entirety? Or are
14 you talking simply about the provisions of
15 13580.7(a), excluding all the other provisions of
16 this Act?
17 MS. DeCARLO: I'm referring to the Water
18 Recycling Act of 1991 in general, the revisions
19 contained therein.
20 MR. WHEATLAND: Well, my objection is
21 that the question's unclear. Unless she can
22 specify whether it's to the Act in its entirety or
23 simply 13580.7(a).
24 HEARING OFFICER WILLIAMS: Can you
25 rephrase it, counsel?

1 MS. DeCARLO: Sure, if you'd just give
2 me a second.
3 (Pause.)
4 MS. DeCARLO: Specifically the condition
5 requiring the applicant, pursuant to 13580.7, to
6 request in writing a retail water supplier, which
7 would be BBID, to enter into an agreement or adopt
8 recycled water rates in order to provide recycled
9 water service to the customer.
10 MR. HELM: We have such an agreement in
11 place. We have a memorandum of understanding with
12 BBID. Again, whether that is a request provision
13 to this water code section, I would ask my other
14 member of the panel who's been excluded, to answer
15 that.
16 PRESIDING MEMBER KEESE: I have
17 difficulty understanding the question. If they
18 have the agreement, why would they ask for the
19 agreement?
20 MS. DeCARLO: Well, I don't want to
21 testify here, but let me, if I can ask some
22 followup questions it might make it more clear.
23 PRESIDING MEMBER KEESE: Okay. But it
24 would seem if they have the agreement --
25 MS. DeCARLO: Well, our position is that

the agreement really doesn't do much, the MOU; whereas, this section sets forth the specific framework that BBID has to respond to.

MR. HELM: As stated in the FSA --

HEARING OFFICER WILLIAMS: I don't think there's a question pending, so you're going to have to --

MR. HELM: All right.

HEARING OFFICER WILLIAMS: -- wait.

MS. DeCARLO: I'll get to the MOU in a bit. I'll just proceed with the questions as follows.

On page 2.15-7 you state that the East Altamont Energy Center will use 4600 acrefeet of water in, quote, "in a typical year." Unquote.

What do you consider to be a typical year?

MR. HELM: I'm going to ask Jim McLucas to describe the basis of that estimate.

MR. McLUCAS: Actually, Kris, can you come back?

(Laughter.)

MR. McLUCAS: I printed out two of the same sheet here. You got the calculation? Oh, no, this is it, I'm sorry.

1 What I did is I looked at the water
2 balances that we had for -- we gave you two water
3 balances. One was for an average temperature day
4 with baseload operation, and that did not include
5 any duct firing or power augmentation via steam
6 injection. And then a second one that was at a
7 high temperature day with full peaking capacity
8 with all-out duct firing and power augmentation
9 via steam injection.
10 Then what I did is I took the flows from
11 those two balances, and then applied them to
12 various numbers of hours of assumed operation.
13 So, what I did is looked at peaking in
14 the months of June, July, August and September.
15 And that would be peaking at 12 hours per day for
16 six days per week. And then in the other months
17 would be more baseload operation.
18 And then what I did was assigned a
19 capacity factor to each month based on
20 realistically, you know, with the highest demands
21 being in the summer and lower in the spring and
22 winter.
23 Overall it's an 84 percent capacity
24 factor in terms of operating hours at either
25 baseload or full load. The total number of hours

of peaking for that assumption is 1255. The baseload hours is 6084.

And again, it's a relatively simplistic assumption, and that's just using those two data points. Where, in fact, the water demands are different for every temperature.

MS. DeCARLO: You also state that in peak demand years water use could be as high as 7000 acrefeet per year. What do you consider to be peak demand years?

MR. HELM: And I'll ask Jim McLucas to describe the operations of the facility that lead to a 7000 acrefoot demand.

MR. McLUCAS: It was a similar calculation for 7000. Based on that I made an assumption of 16 hours per day of peaking, six days per week for every week of the year. And then assigned a capacity factor that was again lower in the winter, higher in the summer, for an overall capacity of duct fired and peak use of 89 percent.

The peak hours consistent with what we've got in our air permit application is 5000 hours. And our baseload hours, 2770 hours.

So this is a pretty extreme case.

MS. DeCARLO: And how much electricity have you committed to provide DWR on a yearly basis?

MR. WHEATLAND: I'm going to object to that question. I think it assumes that there is a commitment to provide electricity to DWR.

HEARING OFFICER WILLIAMS: Sustained.

MS. DeCARLO: Is it your testimony, Mr. McLucas, that the superior efficiency and reliability of the proposed project could result in the retirement of less efficient and reliable generators?

MR. McLUCAS: I mean that's basically an opinion based on the market and the way the market would work in that plants that are more efficient would be able to bid lower prices into the market. And that, just by market forces, would tend to retire, over time, the less efficient units.

MS. DeCARLO: And how frequent do you anticipate these peak years being?

MR. McLUCAS: Pardon me?

MS. DeCARLO: How frequent do you anticipate these peak demand years you've identified being? How often do you think they'll occur, where the plant will reach that capacity?

MR. McLUCAS: That's really not my area of expertise in terms of forecasting future electrical demands, but just looking at it from an engineering perspective, I'd have to think they would be relatively infrequent. Because if you look at that 16 hours per day of peak operation, with duct burners six days a week, is very extreme. We don't have plants doing that these days.

MS. DeCARLO: But the generation of the East Altamont Energy Center would be dependent upon market conditions, isn't that correct?

MR. McLUCAS: That's correct.

MS. DeCARLO: So if this project ended up resulting in the retirement of older generators, the efficiency of this project could result in it being used to a greater extent than other projects, isn't that correct?

MR. McLUCAS: Actually that's not correct. The way the duct burning works, or the way we look at the dispatch of these things is that the baseload has the best efficiency, okay.

When you add the duct firing that's got an incremental heat rate that is not as good as the baseload efficiency.

1 So if everything was being bid into the
2 market, let's say, all at the same time the duct
3 firing would not be as efficient as somebody
4 else's similar plant's baseload capacity. But
5 would be more efficient than others, perhaps
6 simple cycle capacity, for older generation that's
7 even less efficient.
8 And then the power augmentation, which
9 is the next step of peaking on top of duct firing,
10 is even less efficient than the duct firing.
11 So, likewise, the duct firing and the
12 power augmentation would generally only be used
13 when there wasn't market forces that would provide
14 more economic or more efficient generation
15 available.
16 MS. DeCARLO: And yet you oppose a
17 condition proposed by staff that would limit the
18 project on an average basis to the average water
19 use identified by the applicant?
20 MR. HELM: We understood from the errata
21 that the staff is no longer proposing that. Is
22 that incorrect?
23 MS. DeCARLO: No, that's correct. I'm
24 just trying to figure out how reasonable --
25 MR. HELM: So, I think your question is

in error. It's not proposed by the staff.

MS. DeCARLO: It was opposed originally by the applicant, was it not?

MR. HELM: There was a condition of certification which, again we don't know what we're talking about, but in an earlier draft an errata had said it was a mistake. Or has changed it. But, yes, we would be opposed to a five-year rolling -- or a five-year average which could arbitrarily limit the flexibility and operation of the Energy Center.

MS. DeCARLO: Is there any averaging period over which you would agree to the imposition of the 4616 figure?

MR. HELM: I don't know.

MS. DeCARLO: In your testimony you say that BBID is actively pursuing the development of recycled water. Can you please explain what actively pursuing means?

MR. HELM: They have done substantial preplanning for the development of recycled water. And they have done planning estimates of availability of water from Mountain House. Have adopted policies to promote recycled water use. Have entered into an agreement with the applicant

to develop recycled water in the future to the maximum extent. Those are the examples that I would cite off the top of my head.

MS. DeCARLO: But they have stopped short of actively actually negotiating the provision of recycled water, is that not correct?

MR. HELM: I don't think that anyone has testified BBID has stopped short.

MS. DeCARLO: Has there been testimony that no negotiations have taken place so far?

MR. HELM: That's correct.

MS. DeCARLO: You state that in the future BBID intends to supply recycled water. Has this date been determined?

MR. HELM: No.

MS. DeCARLO: Is there a range that's been identified about approximately when the provision of recycled water will occur?

MR. HELM: We think that the provision of recycled water could occur within the next five years.

MS. DeCARLO: But nothing definite has been said?

MR. HELM: That's correct.

MS. DeCARLO: You say that upon full

development of Mountain House Community Services District up to approximately 2860 acrefeet of recycled water could be supplied to East Altamont Energy Center which would amount to approximately 62 percent of East Altamont Energy Center's total water needs.

Can you please tell me how you arrived at these figures?

MR. HELM: Yes.

MS. DeCARLO: It's page 2.15-8.

MR. HELM: Yeah, I'm going to go back to our data responses that describe the estimated monthly diversion of water, the estimate of monthly production of water from Mountain House.

MS. DeCARLO: And who were these numbers provided by?

MR. HELM: These are numbers from the applicant that have been provided to the Energy Commission in data response --

MS. DeCARLO: No, I mean how did the applicant get the numbers? Did you get them from Mountain House Community Services District?

MR. HELM: We got the projection of total water supply from BBID. We understand that that is the same projection of the total

1 wastewater generation that has been forecast by
2 Mountain House. And is in the staff's FSA.
3 We have projected the use of -- the
4 monthly pattern of use was projected by BBID. The
5 use of effluent within the Mountain House
6 community was from the BBID feasibility study
7 which BBID, I believe, gave a source for the
8 original estimate. But we took it from a
9 feasibility study.
10 And then the monthly pattern of use at
11 the Energy Center was estimated by the applicant.
12 MS. DeCARLO: Okay, thanks. Is the
13 will-serve letter of February 6, 2001, still
14 valid?
15 MR. HELM: Yes.
16 MS. DeCARLO: And all the requirements
17 contained therein? Specifically with regard to
18 shouldering the cost of the linear facilities.
19 MR. HELM: The cost of fresh water
20 facilities to serve East Altamont will most likely
21 be borne by the applicant. The memorandum of
22 understanding does provide some flexibility in
23 determining that. So we have not determined
24 precisely the method by which those --
25 MS. DeCARLO: And what about the

recycled water infrastructure? Has any determination been made on that?

MR. HELM: Again, we don't know what the cost of the recycled water infrastructure is between just the two parties. Just between BBID and ourselves.

MS. DeCARLO: Didn't you generate estimates?

MR. HELM: We provided estimates of the cost of a facility to Mountain House all the way to the publicly owned treatment works. And there's some uncertainty as to the scope of what pipelines would be borne by BBID, what pipelines would be borne by Mountain House.

Seems to be implied in the letter from Paul Sensibaugh that Mountain House would pay for facilities within Mountain House. So we don't really know, but we estimated the total costs, the opportunity costs of those facilities, if you will, society's total costs for those facilities.

We have not estimates how many of those costs would be paid by BBID, and then how many would be paid by the applicant.

MS. DeCARLO: You state that the manner in which BBID chooses to allocate recycled water

1 supplies among its customers would be in an
2 equitable, efficient and environmentally sound
3 manner.
4 Has BBID specified exactly how it
5 intends to allocate the recycled water?
6 MR. HELM: No, they have not made a
7 final determination.
8 MS. DeCARLO: How then can you conclude
9 that it would be in an equitable, efficient and
10 environmentally sound manner?
11 MR. HELM: Certainly from BBID's
12 testimony.
13 MS. DeCARLO: You state that the
14 projections for availability of wastewater
15 contained in the final staff assessment do not
16 account for the seasonal fluctuations in supply
17 and demand of recycled water, and the effect of
18 such fluctuation on facility sizing.
19 Can you please explain what you mean by
20 this statement?
21 MR. HELM: Yes. I think Gary Nuss
22 provided sort of a nice graphic which shows the
23 monthly pattern of diversion or of water
24 availability from Mountain House, a monthly
25 pattern of use.

1 And so there are periods when wastewater
2 production will be in excess of demands of the
3 Energy Center. And then there will be periods
4 where there's not sufficient water available to
5 meet the needs of the Energy Center.
6 And so there are just a number of
7 factors that go into, as the Committee was
8 referencing, the determination of what size and
9 the future use of facilities to achieve some
10 effective use, and efficient, if you will, load on
11 the capital that you put into place.
12 There are just a number of both
13 conceptual and then physical options to develop
14 facilities to use recycled water. And I've seen
15 them, you know, up and down the state, in a lot of
16 different configurations.
17 So, I think the notion that the annual
18 production of wastewater in some way generates the
19 availability of water on an instantaneous basis to
20 East Altamont is a gross over-simplification.
21 MS. DeCARLO: Do you use the seasonal
22 fluctuations to determine the pipeline size for
23 recycled water?
24 MR. HELM: We think that the appropriate
25 size for the pipeline is 18 inches. But the water

that would go through the pipeline and the expected use and projected demand would be useful to size the pipeline, yes.

MS. DeCARLO: On page 2.15-9, you have a statement that starts with, "Under the terms of the MOU," and then goes on to say, "applicant agrees to use recycled water to the maximum feasible extent."

Can you please show me in the MOU where this statement is located?

(Pause.)

MR. HELM: Provision 2A of the MOU states that "consistent with existing policies on the use of recycled water, BBID will annually review what recycled water availability with the intent of maximizing the availability of recycled water to EAEC, and to other customers. To the extent recycled water is not available, raw water will be delivered to the project in quantities necessary to meet the water project requirements."

And then it says in provision 5 that "the project shall be designed in a manner that will allow all cooling tower to be supplied with recycled water of appropriate quality." And two, "the project shall operate and preferentially

1 utilize available recycled water for the cooling
2 tower makeup and the landscape irrigation."
3 MS. DeCARLO: But there is no statement
4 that the applicant agrees to use recycled water to
5 the maximum feasible extent, is there?
6 MR. HELM: I think that those provisions
7 do provide that the applicant will use it. There
8 is not a statement that says those words
9 precisely, I don't think.
10 MS. DeCARLO: What does preferentially
11 use mean?
12 MR. HELM: Well, in the context of ours
13 it means a valve will open on the recycled water
14 to the cooling towers before the valve will open
15 to supply raw water.
16 It can be an automatic control sequence
17 on a float valve.
18 MS. DeCARLO: Does the MOU provide for
19 the furnishing of recycled water at a reasonable
20 cost to East Altamont Energy Center?
21 MR. HELM: Yes.
22 MS. DeCARLO: On page 2.15-10 of your
23 testimony you state that Mountain House Community
24 Services District would be reluctant to agree to
25 terms without seeing whether the CEC would require

1 BBID to bear a greater burden, or otherwise assume
2 logical obligations of Mountain House Community
3 Services District.
4 Isn't this your opinion?
5 MR. HELM: Yes.
6 MS. DeCARLO: You've not been
7 specifically told this by Mountain House Community
8 Services District, is that correct?
9 MR. HELM: That's correct.
10 MS. DeCARLO: Have you been specifically
11 told by Mountain House Community Services District
12 that they need to have, quote, "experience with
13 the wastewater operations" unquote before
14 negotiating a contract to provide recycled water?
15 MR. HELM: No.
16 MS. DeCARLO: On page 2.5-10 of your
17 testimony you state that the Mountain House
18 Community Services District does not understand
19 its own obligations to use recycled water.
20 Can you please explain what you mean by
21 this statement?
22 MR. HELM: Yes. The permit for the
23 recycled water from the Mountain House is a step-
24 up permit; it's associated with current phases of
25 the development. And is articulated criteria that

1 Mountain House will have to come back for later
2 permit amendments to allow additional elements of
3 the development to proceed.
4 And those require that Mountain House
5 identify all reasonable opportunities for
6 wastewater re-use, and I don't believe that any of
7 those studies or evaluations have been completed.
8 MS. DeCARLO: In your testimony on page
9 2.15-12 you state that BBID, along with DWR, has
10 primary authority for enforcing LORS related to
11 water use and supply.
12 Can you please tell me which LORS these
13 would be in relation to BBID?
14 MR. HELM: It would be state and federal
15 statutes.
16 MS. DeCARLO: Does BBID, itself, impose
17 any specific regulations on the East Altamont
18 Energy Center?
19 MR. HELM: Yes.
20 MS. DeCARLO: And what would those
21 regulations be?
22 MR. HELM: Generally they would be the
23 conditions of service, water service regulations.
24 MS. DeCARLO: And are those regulations
25 codified?

MR. HELM: I don't know.

MS. DeCARLO: Can you please explain what specific LORS DWR found the East Altamont Energy Center in compliance with?

MR. WHEATLAND: Could I have the question restated -- or just repeated, please?

MS. DeCARLO: Sure. Can you please explain what specific LORS DWR found East Altamont Energy Center in compliance with? I believe on page 2.15-12 there's a statement to the effect that DWR found LORS compliance.

"DWR confirmed that the water service, as proposed, is consistent with BBID's water rights, and otherwise complies with all applicable state laws."

MR. HELM: Right. I'm just basing that statement on Dan Flores' statement that they have reviewed the project thoroughly; found that it does not have a significant impact; and it's consistent with their water rights and historic operations.

MS. DeCARLO: So that doesn't apply specifically to the East Altamont Energy Center; it applies to BBID's appropriation of water, is that correct?

1 MR. HELM: No, that applied to the East
2 Altamont Energy Center. That was statements that
3 he made concerning the review of this project by
4 DWR; and if you recall way back in December when
5 the issue of whether DWR was okay with this came
6 up, we waited several months while DWR reviewed
7 this and considered their position.
8 And so it was after that period of
9 review about five months that DWR came out with
10 those statements that irrespective of the
11 agreement that they've reached with BBID, the
12 Energy Commission could proceed with their
13 evaluation of this project without awaiting that;
14 that there would be no objection by DWR to this
15 proceeding. That they had reviewed it; it would
16 not have an impact on them. And it was consistent
17 with BBID's water rights.
18 So, that's -- and it was for this
19 project and this application that those statements
20 were made.
21 MS. DeCARLO: And in what document is
22 that located?
23 MR. HELM: That's in the transcript, I
24 believe, of the May 10th scheduling conference.
25 MS. DeCARLO: Okay.

1 MR. HELM: Also there's a record of
2 conversation that I think your staff filed about a
3 meeting that was held with DWR and NMFS. We
4 weren't at that meeting, despite assurances that
5 there would be a meeting where we attended.
6 MR. SARVEY: I can offer a copy of that
7 if anyone would like one. Would you like a copy?
8 That's the document he's referencing.
9 MS. DeCARLO: Now wasn't the National
10 Marine Fisheries Service's review of the East
11 Altamont Energy Center limited to analysis of
12 potential biological impacts resulting from the
13 use of water?
14 MR. HELM: Yes.
15 MS. DeCARLO: Did you propose a recycled
16 water pipeline as part of the project in the AFC?
17 MR. HELM: Yes.
18 MS. DeCARLO: Are you willing to submit
19 to a general condition that the applicant must
20 construct a recycled water pipeline capable of
21 conveying recycled water to the project prior to
22 start of operation?
23 MR. HELM: I've offered testimony of
24 what we're willing to agree to, and, no. The
25 condition that we've specified we are willing to

1 stipulate to would not require the construction of
2 a pipeline potentially long before it's --
3 MS. DeCARLO: Isn't it true in the AFC
4 you stated that recycled water could be made
5 available to the project by 2005?
6 MR. WHEATLAND: Could we have a
7 reference, please to that page. Otherwise we'll
8 have to go back and find it.
9 MR. HELM: I believe that statement is
10 consistent with the statements I made here.
11 MS. DeCARLO: That's fine, you don't
12 need to --
13 (Pause.)
14 MS. DeCARLO: Have you, in your AFC,
15 proposed specific routes for the recycled water
16 pipeline?
17 MR. HELM: Yes.
18 MS. DeCARLO: And you identified a
19 preferred alternative among these routes?
20 MR. HELM: Yes.
21 MS. DeCARLO: And did you identify the
22 recycled water line in the project description?
23 MR. HELM: Well, there's been a little
24 controversy about that. We did propose that the
25 project be reviewed as part of our project

1 description. We got correspondence from the
2 Energy Commission that it would not be considered
3 as part of our project description. And that it
4 was too speculative.
5 And I believe to the extent that we were
6 able to, we have consistently endeavored to
7 evaluate the potential impacts associated with
8 building this project as part of the evaluation of
9 our project.
10 There may be some instances where that
11 was not consistently applied because of the
12 confusion that was created in our staff when the
13 Energy Commission Staff told us they would not
14 evaluate the project.
15 MS. DeCARLO: And didn't the Energy
16 Commission Staff reverse that opinion several
17 weeks later?
18 MR. HELM: I presume so, yes.
19 MS. DeCARLO: The recycled water
20 pipeline that was identified in the AFC, did it
21 extend from Mountain House Community Services
22 District to the East Altamont Energy Center?
23 MR. HELM: We identified a pipeline
24 route all the way from the wastewater treatment
25 plant well within Mountain House to the Energy

1 Center.

2 MS. DeCARLO: Seeing that you proposed

3 such a recycled water pipeline can you please then

4 explain your testimony that the development of

5 MHCSD could possibly affect the route of a

6 recycled water pipeline from Mountain House

7 Community Services District to East Altamont

8 Energy Center?

9 MR. HELM: Yes. We identified the

10 potential routes and preferred routes for the

11 recycled water pipeline to insure that no adverse

12 impacts from recycled water or unanticipated

13 impacts from the development of that would be

14 encountered.

15 We wanted to develop the best

16 assessments we had of the potential routes for

17 evaluating their environmental impact. And

18 whether the construction of these linear

19 facilities which could be interpreted as under the

20 "but-for" test -- we sort of thought, gee, they

21 would not be built to East Altamont if the power

22 plant is not built.

23 They could be built within the next five

24 years, within the period under which the Energy

25 Commission was doing the environmental review.

1 So we did our best to identify potential
2 routes and the impacts associated with their
3 construction.
4 One of the impractical matters
5 associated with designing the installation of
6 where pipelines will go now really relates to the
7 development within Mountain House. And if the
8 pipelines are put in outside of dedicated streets,
9 and the streets have not been dedicated, it can
10 lead to a need to relocate the pipeline in the
11 future to avoid interference with the development
12 of the Mountain House community, itself.
13 So, in the one hand we were trying to
14 take the best information we had about the routes
15 for the pipelines and identify them for
16 environmental review.
17 On the other hand we recognized that in
18 designing specific places for the centerline of
19 the pipelines to go, there's going to have to be
20 future work within Mountain House to identify
21 where the streets are, and where the green areas
22 are. Those type of situations.
23 MS. DeCARLO: So, in effect, you
24 proposed a route that you did not intend to abide
25 by, is that correct?

1 MR. HELM: We proposed a route that was
2 based on the best information we had available at
3 the time. And I think we've consistently
4 represented to the Commission Staff our dilemma
5 associated with this, our concerns on this.
6 And, so, yes, we identified the best
7 route that we could identify.
8 Jim, you have any other thoughts on
9 routing, pipeline routing?
10 MS. DeCARLO: So, if you, in the future
11 when you do construct this pipeline, choose a
12 different route, are you intending to come back to
13 the Commission for amendment?
14 MR. HELM: There's been some confusion
15 about whether we are proposing to construct the
16 pipeline or not. The application -- our
17 application does make it very clear that the
18 pipeline construction, who is going to construct
19 it and what routes are effective, so the
20 presumption that we have said we will construct
21 the pipeline, I'm not sure that that's necessarily
22 the case.
23 MS. DeCARLO: But if you're proposing to
24 use recycled water then necessarily a recycled
25 water pipeline is a part of the project, is that

1 not correct?

2 MR. WHEATLAND: I'd object to the

3 question because it calls for a legal conclusion

4 on the part of this witness' -- Chairman Keese

5 knows from the Russell City proceeding there's

6 quite a bit of discussion that goes on as to

7 whether an appurtenant facility that's not

8 constructed by the applicant is a part of the

9 project for the purposes of CEQA, or a part of the

10 process for the purpose of permitting.

11 The applicant provided the information

12 regarding the pipeline to insure full CEQA

13 compliance and permitting requirement, if

14 necessary. But to ask this witness the legal

15 requirements of whether or not it's a project, I

16 think would be inappropriate.

17 HEARING OFFICER WILLIAMS: Do you want

18 to restate your question, counsel?

19 MS. DeCARLO: Sure, I'll follow a

20 different line of questioning.

21 Has BBID proposed to construct this

22 pipeline if East Altamont Energy Center were not

23 built at the proposed site?

24 MR. HELM: My understanding is no, they

25 would not build a pipeline if the East Altamont

1 Energy Center were not built.
2 MS. DeCARLO: Thank you. On page 8.14-
3 14, of the AFC, I believe, you state that recycled
4 water use would have a net positive impact on
5 water resources by reducing the volume of
6 discharges to the San Joaquin River and
7 implementing the State Board's policy 7558 for re-
8 using water to the greatest extent practicable.
9 Yet in your testimony of October 1,
10 2002, you state that a condition requiring the use
11 of recycled water would be inconsistent with 7558.
12 I'm having trouble figuring out how the
13 project's proposed use of recycled water could be
14 consistent with 7558, and yet staff's proposal to
15 condition its proposed use would be inconsistent.
16 Can you explain your testimony?
17 MR. HELM: Would you refer me to where
18 in my testimony, again? I've got the AFC --
19 MS. DeCARLO: The AFC, --
20 MR. HELM: -- I've got that in front of
21 me.
22 MS. DeCARLO: -- page 8.14-14.
23 MR. HELM: I've got that one.
24 MS. DeCARLO: And then this testimony,
25 page 2.15-13.

1 MR. HELM: I don't see the statement
2 that you refer me to making as 2-15-13. Can you
3 point me to the statement that I'm supposed to
4 have made here?
5 MS. DeCARLO: Sure. It's actually 8.14-
6 14.
7 MR. HELM: I've got that. I'm looking
8 at the staff testimony that you --
9 MS. DeCARLO: Oh, I'm sorry.
10 MR. HELM: -- that in my testimony where
11 you say I said something?
12 MS. DeCARLO: Let's see -- it's the
13 second full paragraph, the staff's proposed
14 conditions of certification soil and water 5 and 6
15 are inconsistent with this policy.
16 MR. HELM: I've got a different page
17 number, I guess.
18 So you want me to reconcile --
19 MS. DeCARLO: The two apparently
20 inconsistent statements, yes.
21 MR. WHEATLAND: Well, I object to the
22 characterization of inconsistence. What I hear is
23 that there's one statement that the project is
24 consistent with policy. And I'm reading a second
25 statement here --

1 HEARING OFFICER WILLIAMS: Where are you
2 reading from, counsel?
3 MR. WHEATLAND: I'm reading from 2.15-
4 13, which states that the staff's proposed
5 conditions would instead mandate a specific
6 priority of use based on a specific timetable and
7 from a specific source regardless of BBID's
8 evaluation of the factors identified in resolution
9 7558.
10 And counsel, I think, is suggesting that
11 there's an inconsistency --
12 MR. HELM: I just can't find the
13 inconsistent statement to resolve. So, I'm having
14 some trouble here trying to figure out how to
15 resolve the two statements. I don't find anything
16 inconsistent between them.
17 MS. DeCARLO: I'll move on then. Is
18 East Altamont Energy Center physically capable of
19 using 100 percent recycled water for cooling
20 purposes?
21 MR. HELM: I'm not sure I understand the
22 question. You know, the East Altamont Energy
23 Center does not exist, and so I'm just having a
24 little trouble understanding what it is you're
25 trying to drive at.

1 Is the East Altamont Energy Center to be
2 designed such that it can use recycled water
3 preferentially for cooling tower makeup, based on
4 the quality of water that we've seen from Mountain
5 House? Yes.
6 MS. DeCARLO: One hundred percent use of
7 recycled water?
8 MR. HELM: For cooling tower makeup.
9 MS. DeCARLO: Okay, thank you. Now in
10 the AFC your project proposal was that the
11 recycled water pumps and pipeline would be sized
12 to supply 350 acrefeet per month to meet the
13 requirements of the project.
14 And, in fact, in the project description
15 contained in the AFC you propose a recycled water
16 pipeline capable of conveying from 350 to 700
17 acrefeet per month.
18 Yet in your testimony on staff's
19 condition 7 you offer a pipeline with a capacity
20 of only 300 acrefeet per month.
21 Can you please explain why you have
22 decreased the amount of the pipeline capacity?
23 MR. HELM: First of all, your condition
24 suggests that there's some inconsistency here,
25 which I don't think exists. On the pipeline that

we propose in condition 7 is an 18-inch pipeline. And, Jim, how much water will that convey?

MR. McLUCAS: Don't make me get out my calculator. Would you like me to do that?

MR. HELM: But it would be capable of providing at least 6500 GPM or so?

HEARING OFFICER WILLIAMS: Let's go off the record for about five minutes.

(Brief recess.)

PRESIDING MEMBER KEESE: Conclude with some of staff's questions.

(Laughter.)

MS. DeCARLO: Yes, I promise, only a few more.

HEARING OFFICER WILLIAMS: Yeah, promise us anything.

(Laughter.)

PRESIDING MEMBER KEESE: We're ready.

(Pause.)

HEARING OFFICER WILLIAMS: Okay, Mr. Sarvey has a witness he needs to leave by 4:00 did you say, Mr. Sarvey?

MR. SARVEY: Yeah.

HEARING OFFICER WILLIAMS: So we're going to have to take his presentation out of

order to accommodate the witness, if that's okay with the applicant and --

MR. WHEATLAND: Ms. DeCarlo indicated she had two more questions --

PRESIDING MEMBER KEESE: As soon as we finish up here.

HEARING OFFICER WILLIAMS: Yes, as soon as --

MR. WHEATLAND: Okay, that's fine.

HEARING OFFICER WILLIAMS: Yeah, okay.

MS. DeCARLO: Ready? Are all of your numbers regarding the availability of recycled water derived from BBID?

MR. HELM: No. As I indicated, some of the numbers to match come from us. But BBID is the basic source of the availability estimates, yes.

MS. DeCARLO: But none of them come from Mountain House Community Services District?

MR. HELM: Mountain House's availability estimates are consistent with BBID. They are the same numbers.

Just so the Committee understands, Mountain House and BBID agree on the total production of wastewater. The difference in the

1 numbers pertains to excess supply that may exist
2 in the winter above our demand, and uses within
3 Mountain House for the water.
4 The projections of the total amount of
5 wastewater produced by Mountain House are commonly
6 used by everyone in this proceeding, the
7 applicant, BBID, Mountain House and the staff.
8 MS. DeCARLO: Can you please turn to
9 page 8.14-17 from the AFC. This page contains a
10 table. Can you please read the title of the
11 table?
12 MR. HELM: Laws, ordinances, regulations
13 and standards applicable to EAEC.
14 MS. DeCARLO: And can you please read
15 the last item on this page?
16 MR. HELM: California water code 13550,
17 et seq., and resolution 7558.
18 MS. DeCARLO: Thank you. That's all for
19 staff.
20 HEARING OFFICER WILLIAMS: Okay. Then,
21 counsel, do you want to present your witness
22 before you do --
23 MR. SARVEY: I'll question him and then
24 present my witness, that's fine. I'll try to be
25 brief.

1 HEARING OFFICER WILLIAMS: Let's do
2 that, then.
3 MR. SARVEY: Okay.
4 CROSS-EXAMINATION
5 BY MR. SARVEY:
6 Q This is a general question to the
7 applicant. Earlier the staff asked whether you
8 had a contract with the Department of Water
9 Resources for this electricity. I'd like to ask
10 that question again.
11 Do you have a contract with the
12 Department of Water Resources for this plant?
13 MR. HELM: I'm sorry, I don't know the
14 answer to that question.
15 MR. SARVEY: Mr. --
16 MR. WHEATLAND: That's beyond the scope
17 of this witness' testimony.
18 MR. SARVEY: I believe you stated that
19 you did not have a contract. And exhibit 27 of my
20 testimony is your contract with the Department of
21 Water Resources for this plant.
22 MR. WHEATLAND: We did not say that we
23 did not have a contract; we said -- I was
24 questioning whether there was a foundation for the
25 question. The contract requires us to provide a

specific level of power.

HEARING OFFICER WILLIAMS: And the objection was sustained on that basis.

MR. SARVEY: Understood, thank you.

You projected the Mountain House Community Services District can only supply 60 percent of your water needs and that at build-out they can only provide 2860 acrefeet, is that correct?

MR. HELM: That's the estimate of the water that would be available to East Altamont from Mountain House, that's correct.

MR. SARVEY: Okay. If you use 7000 acrefeet then this is only 40 percent of your recycled needs for the year, is that correct?

MR. HELM: We could use slightly more water than that at the 7000 acrefoot demand than we would at the 4600. Much of the additional demand in the above-normal years comes in these shoulder and offpeak periods when there would be available recycled water to meet the demand.

So some portion of that demand could be supplied from available water from Mountain House apparently.

MR. SARVEY: And your testimony is that

1 the FSA overstates the production of recycled
2 water, is that correct?
3 MR. HELM: No. The FSA apparently
4 correctly states the total production of recycled
5 water, overstates the extent to which that water
6 would be available to serve East Altamont.
7 MR. SARVEY: And your testimony is that
8 you feel that the availability of Mountain House
9 Community Services District water is contingent on
10 the San Joaquin County Board of Supervisors
11 approving that arrangement?
12 MR. HELM: Not necessarily. The San
13 Joaquin County Board of Supervisors currently
14 serves as the governing board for Mountain House.
15 As BBID indicated in their testimony, over time,
16 as Mountain House gets populated, Mountain House
17 can petition to have their own governing board
18 made up of residents of the community.
19 MR. SARVEY: So from that statement then
20 until such time that they establish their own
21 board then you are subject to the whims of the San
22 Joaquin Board of Supervisors as far as the
23 Mountain House Community Services water?
24 MR. HELM: We don't anticipate a direct
25 service relationship with Mountain House. We

1 expect to receive services from BBID.
2 MR. SARVEY: And you stated that the San
3 Joaquin County Board of Supervisors oppose this
4 project until such time as you satisfy their
5 concerns?
6 MR. HELM: No, I don't think that's my
7 testimony. I think our testimony was that the
8 condition of certification which would require
9 Mountain House to provide all of their effluent to
10 BBID for the project to be in compliance would
11 create an opportunity for them to have
12 discretionary approval of the project moving
13 forward.
14 And that given their apparent opposition
15 it seems likely they would use that discretion to
16 prevent the project from being built.
17 MR. SARVEY: Do you plan at any point in
18 time on satisfying the board of supervisors'
19 concern related to this project?
20 MR. HELM: I'll have to defer to others.
21 MR. SARVEY: Okay.
22 MR. HELM: I don't understand the full
23 scope of the dispute with the board of supervisors
24 and the extent to which this proceeding will
25 address their questions, and the extent to which

1 additional questions will be necessary to answer
2 their questions.
3 MR. SARVEY: Has the applicant had
4 meetings with them to discuss their concerns
5 particularly in the area of water?
6 MR. HELM: I have not had any meetings
7 with them.
8 MR. SARVEY: Okay. Can you tell me what
9 the cost of the water for BBID is stated in the
10 MOU?
11 MR. HELM: The MOU does not state a cost
12 of water. It does say that the cost will be based
13 on BBID's cost of providing it.
14 MR. SARVEY: The cost of providing it.
15 MR. HELM: Yeah, water's free here in
16 California. You just pay for the facilities to
17 get it to you.
18 MR. SARVEY: On page 2.5-16 of your
19 testimony you state that to the extent that BBID's
20 diversion pattern is shifted to increase
21 diversions in winter months and reduce diversions
22 in summer months, the water available for
23 diversion in the Delta by the Southwest Project
24 and the CVP is increased, and the need to draw
25 down south of the Delta storage is reduced.

1 Wouldn't the delivery of that water to
2 East Altamont provide even greater benefits in
3 this area if East Altamont Energy Center used dry
4 cooling?
5 MR. HELM: Dry cooling would eliminate
6 98 percent of the water use at East Altamont.
7 MR. SARVEY: Thank you.
8 HEARING OFFICER WILLIAMS: Do you have
9 redirect?
10 MR. WHEATLAND: Three questions.
11 HEARING OFFICER WILLIAMS: Okay.
12 REDIRECT EXAMINATION
13 BY MR. WHEATLAND:
14 Q Mr. Helm, staff counsel asked you
15 several questions regarding your knowledge
16 concerning DWR's position relative to this project
17 in this proceeding. And I believe you mentioned a
18 record of conversation that was filed by the
19 Commission Staff relating a meeting that they had
20 with Dan Flore of DWR, is that correct?
21 MR. HELM: That's correct.
22 MR. WHEATLAND: Would you please briefly
23 identify the record of conversation and read from
24 that portion of it to which you were referring?
25 MR. HELM: Yes, this is a record of

1 conversation that was filed May 28th, which was
2 right after our May 10th scheduling conference.
3 At the bottom of it it says, "Mr. Flore,
4 DWR, provided a brief status of the draft
5 agreement with BBID and indicated DWR believes the
6 parties are very close to agreement. Because
7 EAEC's proposed fresh water use does not have the
8 potential to injure State Water Project
9 contractors DWR is willing to have the CEC move
10 forward in processing the AFC."
11 MR. WHEATLAND: Also Ms. DeCarlo asked
12 you questions regarding the staff's position
13 concerning the pipeline that was proposed in the
14 AFC. And you indicated staff's initial indication
15 to the applicant from the staff.
16 Could you please refer to the
17 communication originally from staff regarding the
18 pipeline and read from the relevant portion?
19 MR. HELM: Yes, this is an email from
20 Cheri Davis to Steve DeYoung and Susan Strachan,
21 with a copy to Alicia Torre.
22 It says relative to recycled water, "I
23 want to share with you our strategy for analyzing
24 the water portion of the AFC. Due to the highly
25 speculative nature of the proposal to use recycled

1 water from the Mountain House Community Services
2 District wastewater treatment plant, we will not
3 be including an analysis of this potential water
4 source in our PSA. We do not think there's
5 sufficient information, nor do we think that we
6 could possibly obtain sufficient information to
7 conduct an analysis at this time."
8 "Based on Calpine's responses to our
9 data request 89, it looks as if we have
10 concurrence on this matter. Still, I wanted to
11 make sure that it was understood that we were not
12 going to pursue this area of analysis."
13 MR. WHEATLAND: And then finally you had
14 indicated in response to a question where Ms.
15 DeCarlo indicated that the staff had later
16 reversed their position that the pipeline was too
17 speculative, and you answered yes. Did you answer
18 yes because you assumed that they had reversed
19 their position, or were you aware of a specific
20 communication in which they did so?
21 MR. HELM: You know, I assumed that the
22 staff had reversed their position, but I'm not
23 aware of any specific correspondence from the
24 staff where that position was reversed.
25 MR. WHEATLAND: That completes the

1 redirect, thank you.

2 MS. DeCARLO: A couple recross, please.

3 RECROSS-EXAMINATION

4 BY MS. DeCARLO:

5 Q Does the ROC that you referred to state

6 anywhere within it any conclusion by DWR that the

7 East Altamont Energy Center is in compliance with

8 all LORS?

9 MR. HELM: No.

10 MS. DeCARLO: Okay, thank you. Did

11 staff analyze the project's proposed use of

12 recycled water in the preliminary staff

13 assessment?

14 MR. HELM: There was some analysis

15 presented, yes.

16 MS. DeCARLO: And did any supplements

17 filed by the applicant, did you formally remove

18 the recycled water pipelines from your definition

19 of project?

20 MR. HELM: To my knowledge, no.

21 MS. DeCARLO: Okay. Thank you.

22 HEARING OFFICER WILLIAMS: Does that

23 conclude the presentation?

24 MR. WHEATLAND: We have no further

25 redirect.

1 HEARING OFFICER WILLIAMS: Do you have a
2 question, Mr. Boyd?
3 MR. BOYD: Yeah, I had some questions
4 and I did note in my prehearing conference
5 statement that we were disputing water resources
6 on page 17.
7 So I don't know if it's appropriate.
8 You tell me.
9 HEARING OFFICER WILLIAMS: Well, in
10 light of the fact that you missed a substantial
11 portion of the testimony, I don't really think
12 it's appropriate.
13 MR. BOYD: It's your call. I accept the
14 record as it currently stands, if that's a
15 problem.
16 HEARING OFFICER WILLIAMS: Thank you.
17 Are you prepared to move your exhibits?
18 MR. WHEATLAND: Yes, thank you. I'd
19 like to move exhibit 4D into evidence.
20 HEARING OFFICER WILLIAMS: Any
21 objection?
22 MS. DeCARLO: No objection.
23 MR. SARVEY: No objection.
24 HEARING OFFICER WILLIAMS: Admitted.
25 So at this point I guess we'll take --

1 Mr. Sarvey, we'll take your presentation out of
2 order to accommodate your witness.
3 MR. SARVEY: Thank you very much.
4 Would you state your name for the
5 record, please.
6 MR. PARFREY: Eric Parfrey.
7 HEARING OFFICER WILLIAMS: Sir, could
8 you spell that for the court reporter?
9 MR. PARFREY: Yes, Parfrey last name is
10 P-a-r-f-r-e-y, Eric with a "c".
11 MR. SARVEY: Can you briefly summarize
12 your qualifications?
13 Yeah, he has to be sworn in first, I'm
14 sorry.
15 Whereupon,
16 ERIC PARFREY
17 was called as a witness herein, and after first
18 having been duly sworn, was examined and testified
19 as follows:
20 DIRECT EXAMINATION
21 BY MR. SARVEY:
22 Q Could you briefly summarize your
23 qualifications?
24 A I'm a resident of Stockton; I'm a City
25 Planner by profession. I previously worked at

1 Contra Costa County Community Development
2 Department as a senior planner. I was also
3 employed by San Joaquin County as a senior
4 planner.
5 I have a masters degree in city and
6 regional planning from University of California at
7 Berkeley. I'm also an active member of the
8 California Sierra Club, currently the Chair of the
9 Motherlode Chapter of the Sierra Club. I'm also a
10 member of several planning professional
11 organizations, the American Planning Association,
12 the Environmental Professionals Association. And
13 I'm certified by the American Institute of
14 Certified Planners.
15 Q Did you prepare or did you supervise the
16 preparation of the direct testimony of Eric
17 Parfrey submitted by Intervenor Sarvey 9/30/02?
18 A I did.
19 Q Do you have any changes or additions to
20 add to that testimony?
21 A I do. Third paragraph of my brief
22 testimony there's a correction. I stated I'm not
23 representing the Sierra Club or any other
24 organization. And the Sierra Club is not taking a
25 position on this project.

1 That has changed. The San Francisco Bay
2 Chapter, the Executive Committee on last Monday
3 night, took a position on this project to oppose
4 it. So I am now representing that position on
5 behalf of the Sierra Club. And we will enter in
6 the resolution of that action taken by the San
7 Francisco Bay Executive Committee into the record
8 as soon as I get a copy of it.
9 HEARING OFFICER WILLIAMS: We'll put a
10 placeholder there as your next in order, Mr.
11 Sarvey, which would be 6B-C -- excuse me, 6C, I'm
12 sorry. That will be the Sierra Club resolution
13 for identification.
14 MR. PARFREY: I had two other minor
15 corrections in my testimony. Third full paragraph
16 under the heading water supply and use in the
17 area, should be about page 2, towards the bottom.
18 There's a reference to a water supply deficit of
19 approximately 2000 acrefeet per year as projected
20 by the City. That's the City of Tracy. And the
21 reference to the year should be not 2005 to 2006;
22 the reference should be 2004/2005. Which will
23 become even greater if the south County water
24 project currently under litigation does not begin
25 to deliver supplies to the City in the year 2006,

not 2007, as my written testimony indicated.

HEARING OFFICER WILLIAMS: What page is that on?

MR. PARFREY: I'm sorry, it's towards the bottom of page 2, third full paragraph under the heading water supply and use in the area. The paragraph begins, "The latest water inventory report."

So I'm correcting the range of years there. And the anticipated year when the south County water project would arrive in the City of Tracy based upon more recent documents I reviewed from the City of Tracy.

The other minor correction I would make, under the heading water rights of BBID, which is on the third page of my testimony, second full paragraph under water rights of BBID, second sentence of the second paragraph, however it is not clear whether the location of the power plant is within or outside the district boundary.

I'm correcting that, obviously the project is within the BBID district boundary.

And those are my three corrections to my testimony.

MR. SARVEY: Can you briefly summarize

1 your testimony for the record, please.
2 MR. PARFREY: I have been very active in
3 analyzing water supply issues in the City of Tracy
4 and south San Joaquin County and the entire San
5 Joaquin County for the Sierra Club for the last
6 four or five years.
7 I have offered this testimony to give a
8 general background as to the availability of water
9 for the project, exclusive of BBID. I don't
10 believe my testimony has offered any new evidence
11 of the availability of water from BBID. However,
12 I have recited the water supply situation with the
13 City of Tracy immediately adjacent to the project.
14 The City of Tracy has a very aggressive
15 growth plan. The City's obviously growing at a
16 very rapid rate. They are running out of water.
17 There have been numerous -- not numerous -- there
18 have been several lawsuits that the Sierra Club
19 has filed challenging specific water transfers
20 related to the City of Tracy, and challenging the
21 certification of certain environmental impact
22 reports for development projects in the City of
23 Tracy based upon our finding that the inadequate
24 water supplies were documented under the
25 California Environmental Quality Act.

1 The latest water inventory report issued
2 by the City of Tracy indicates that the City is
3 running out of water in the year 2004, 2005.
4 Prior to when the anticipated south County water
5 project would arrive in the City in the year 2006.
6 The City is investigating water
7 recycling; and in fact, the City Planning
8 Commission just approved, one week ago, a 535-acre
9 business park which relies almost exclusively on
10 recycled water that is yet to be plumbed in the
11 City. There are no purple pipes yet in the City.
12 The first purple pipes are actually being built
13 now.
14 So the purpose of my testimony, I guess
15 in a nutshell, is to indicate that there is no
16 water or recycled water from the City of Tracy to
17 be provided to this project.
18 As a Senior Planner for San Joaquin
19 County I've worked on the Mountain House project.
20 I also worked on the project for a brief period as
21 a private consultant on the last environmental
22 impact report prepared for the master plan.
23 The master plan and the specific plan
24 for the first portion of Mountain House, as I
25 recall from almost ten years ago, contained

1 policies that encouraged water recycling on site.
2 I'm generally familiar with the
3 discharge permit that Mountain House has been --
4 received from the Regional Board. As the previous
5 testimony indicated, Mountain House has a two-tier
6 permit. In the short term they're required by the
7 Regional Board to discharge to land, not to
8 discharge to the Old River, or to otherwise use
9 the water without a discharge in the Old River.
10 And the second tier of that, as the
11 project begins to reach the second half of the
12 build-out, again as previous testimony indicated,
13 the Regional Board required them to investigate
14 all feasible sources of water reclamation. But
15 perhaps the most important aspect of that tier
16 permit requires Mountain House to do extensive
17 diffusion studies to indicate whether or not
18 discharge of effluent, treated effluent into Old
19 River could be effectively disseminated throughout
20 the south Delta waterways.
21 The end of my testimony addresses
22 cumulative impacts of this proposed water
23 transfer, and gets at some of the issues that
24 regional planners are concerned about in the south
25 Delta area.

1 There are approximately 100,000 housing
2 units which are being proposed in the short term,
3 that's in the next 10 or 15 years for construction
4 around the south end of the Delta. And this is
5 represented in the adopted general plan for the
6 City of Tracy, for San Joaquin County and Mountain
7 House, for the City of Manteca, City of Lathrop,
8 City of Stockton, Discovery Bay, City of
9 Brentwood, City of Oakley, City of Antioch.
10 Most of these cities rely on Delta water
11 for potable water supplies for all its new growth.
12 There is a question in my mind, as a regional
13 planner who has observed rapid urbanization in
14 this area over the last 15 years, as to whether
15 there will be enough water to serve this amount of
16 suburban sprawl that's planned in all these
17 cumulative general plans.
18 I conclude that the only way this amount
19 of growth could be served under the existing water
20 delivery scheme is if there's a major shift of
21 water rights and water transfers from agricultural
22 use to urban uses.
23 And then even beyond that there's a
24 question in my mind as a regional planner, as to
25 whether this amount of urbanization around the

1 south Delta could be successfully accomplished,
2 just in terms of the wastewater treatment and
3 disposal.
4 That's the end of my testimony.
5 HEARING OFFICER WILLIAMS: Mr. Parfrey's
6 testimony has been marked as exhibit 6D.
7 BY MR. SARVEY:
8 Q Mr. Parfrey, in your professional
9 opinion do you feel that the transfer of this
10 water to the East Altamont Energy Center will
11 affect other users of water in the Delta area and
12 the surrounding area?
13 A Perhaps we should clarify. I believe
14 the possibility that recycled water will be pumped
15 to the project from the Mountain House site is
16 highly speculative. I believe pumping of an
17 additional 18,000 acrefeet per year, as earlier
18 testimony seemed to indicate as being planned by
19 BBID under its recently consummated DWR contract,
20 could have adverse impacts to other irrigation
21 districts that rely on CVP supplies, as well as
22 other urban areas that are served by Delta water.
23 I do believe there is a finite amount of
24 water in the Delta, especially during certain
25 times of the year. And if one irrigation district

1 or one water agency draws more water than they've
2 historically used, then others will probably
3 suffer.
4 MR. SARVEY: The witness is available
5 for cross-examination.
6 PRESIDING MEMBER KEESE: May I ask one
7 question here.
8 MR. PARFREY: Yes, sir.
9 PRESIDING MEMBER KEESE: I gather --
10 were you saying that the Tracy is going to have a
11 problem disposing of recycled -- they're going to
12 be obligated to recycle water and have a problem
13 disposing of it? Is that -- was I hearing that?
14 MR. PARFREY: I didn't say that
15 specifically, but I would answer yes. The City of
16 Tracy is at a crossroads literally right now.
17 They are seeking a permit from the Regional Board
18 to do the next upgrade to their wastewater
19 treatment plant, which would be an upgraded
20 tertiary treatment.
21 They are negotiating with the Board as
22 to whether that discharge of tertiary treatment
23 would be into the Old River, as it has
24 historically been; or whether there'll be a
25 combination of land disposal reuse of water on

1 green areas, including soccer fields within the
2 City, as well as some additional disposal --
3 PRESIDING MEMBER KEESE: And you
4 suggested something like the same thing for
5 Mountain House. And I gather what you were saying
6 is there is this possibility that they will not be
7 allowed to discharge into the Old River, either
8 Mountain House or Tracy, in the future?
9 It would be better environmentally if
10 they didn't, let's say. But it's a cheaper way of
11 handling it now, is that --
12 MR. PARFREY: I indicated that the
13 Regional Board permit, the discharge permit that
14 Mountain House received, required that they look
15 at all feasible use of recycled water.
16 But the second portion of that
17 requirement, that discharge permit, was that they
18 do a very expensive, extensive diffusion study --
19 PRESIDING MEMBER KEESE: If they're
20 going to continue to use --
21 MR. PARFREY: Yes, --
22 PRESIDING MEMBER KEESE: -- the river as
23 a disposal?
24 MR. PARFREY: -- if they plan to
25 continue to use water discharged into the Old

1 River to prove that the flushing action of the
2 south Delta would make it work.
3 And I think there's a question as to
4 whether they can reach that bar.
5 PRESIDING MEMBER KEESE: In your mind
6 there's a question of whether Tracy could use as
7 much reclaimed water as might be produced if they
8 weren't using Old River for disposal?
9 MR. PARFREY: If the Gateway Business
10 Park, which is this very large business park
11 approved by the planning commission last week, is
12 approved by the city council later this month,
13 then the City has committed to plumbing the entire
14 City with purple pipes so that specific project
15 can move ahead.
16 So the effluent treated by that project
17 will be used to irrigate all the City parks. That
18 will remove the opportunity for any other projects
19 to come along to use treated effluent that way,
20 and to receive potable water back as part of the
21 savings.
22 PRESIDING MEMBER KEESE: Thank you.
23 MR. PARFREY: Yes.
24 HEARING OFFICER WILLIAMS: When you make
25 a reference to a purple pipe, I assume -- is that

a term of art?

MR. PARFREY: It's a recycled water pipe.

HEARING OFFICER WILLIAMS: It's a colloquial term for --

PRESIDING MEMBER KEESE: It is purple.

HEARING OFFICER WILLIAMS: It is purple?

MS. DeCARLO: It is purple.

(Parties speaking simultaneously.)

MS. DAVIS: It's actually violet, but they didn't want to use the term violet.

HEARING OFFICER WILLIAMS: Okay.

MR. SPEAKER: You don't want to drink out of it.

MR. SARVEY: Don't drink the water.

MS. DAVIS: If you see a purple pipe, you know what it is.

MR. HELM: Purple fire hydrants, too.

MS. DAVIS: Yes, purple fire hydrants.

HEARING OFFICER WILLIAMS: Okay. Applicant.

CROSS-EXAMINATION

BY MR. WHEATLAND:

Q Mr. Parfrey, I'm Gregg Wheatland; I'm the attorney for the applicant.

1 I want to start with your
2 qualifications.
3 A Yes, sir.
4 Q You've stated your qualifications as a
5 planner.
6 A Yes.
7 Q Could you please state your
8 qualifications to testify in the area of water
9 resources?
10 A I have prepared dozens of environmental
11 impact reports over the last 20 years. I
12 occasionally write sections of water resource
13 sections of environmental impact reports in
14 conjunction with engineers.
15 I work for a private consulting firm
16 that has engineers on the staff. So I am involved
17 professionally with insuring the adequacy of EIR
18 sections especially related to recent case law and
19 recent legislation at the state level, such as
20 Senate Bill 221, which requires a much more
21 extensive water supply analysis for major
22 development projects.
23 Q Have you done environmental impact
24 statements relating to power plant projects?
25 A I have not, no.

1 Q Have you done environmental impact
2 statements regarding large industrial facilities
3 that use water?
4 A Environmental impact reports, I've done,
5 not statements --
6 Q You have, reports.
7 A Yes, yes.
8 Q Which reports are those?
9 A I recently, two years ago, completed an
10 extensive negative declaration for a private
11 telecommunications facility in downtown Oakland.
12 Q Which facility?
13 A It was -- I don't know what it's being
14 marketed as now, it's down in Jack London Square.
15 It was a huge telecommunications center at 8th and
16 Jackson, as I recall.
17 Q And did it use a significant amount of
18 water?
19 A It used a significant -- a moderate
20 amount of water from the existing purveyor, East
21 Bay MUD.
22 Q And did that environmental assessment
23 that you prepared analyze the issue of recycled
24 water?
25 A No, it did not.

1 Q Have you prepared an environmental
2 impact report, impact statement, environmental
3 assessment or negative declaration that is
4 reviewed the availability or the issue of recycled
5 water?
6 A I'm trying to recall if I've prepared
7 such, I've been involved in the preparation of
8 such a water section, involved with recycled
9 water. Not recently.
10 Q Well, awhile back?
11 A We touched upon the issue, obviously, in
12 the Mountain House environmental impact report,
13 which I was a part of as a County staff person.
14 And also in my role as a private consultant.
15 Q All right, we'll talk in a minute about
16 the Mountain House project, --
17 A Yes.
18 Q -- but in your role as a private
19 consultant, which reports have you prepared or
20 participated in preparing that have discussed the
21 issues of recycled water?
22 A As I said, the Mountain House project.
23 Q Okay.
24 A Yeah.
25 Q Now I think you testified that you

1 graduated in 1982.
2 A I did.
3 Q And what did you do between 1982 and
4 '85?
5 A I worked for a consulting firm in the
6 Bay Area.
7 Q Which one?
8 A A consulting firm called Reimer
9 Associates, an engineering firm.
10 Q All right. And then you began as a
11 senior planner for Contra Costa County in 1985?
12 A I did.
13 Q And then you've testified that you also
14 worked for San Joaquin County and you participated
15 in the development of environmental documentation
16 for the Mountain House project, is that correct?
17 A I was involved in some of that study,
18 yes.
19 Q Now, regarding Mountain House, what
20 provisions or conditions were placed on this
21 project regarding the use of recycled water within
22 the Mountain House community?
23 A As I recall, and this is going back to
24 the original drafts of the master plan for the
25 planned community, which dates back to 1993, as I

1 recall there were policies in there that
2 encouraged the use of recycled water within the
3 project.
4 Q But not required, is that correct?
5 A I would have to consult that document.
6 I don't know if the policies have shifted over the
7 last ten years --
8 Q Have you --
9 A -- by vote of the board of supervisors.
10 Q I'm sorry, I didn't mean to interrupt.
11 Have you been involved in the planning of Mountain
12 House community more recently?
13 A No. As my testimony indicated, my other
14 testimony, I have had no relationship with
15 Mountain House since 1994.
16 Q Okay. And now you work for a private
17 consulting firm in Emeryville, is that correct?
18 A That is correct.
19 Q And what's the name of that firm?
20 A That's Baseline Environmental
21 Consulting.
22 Q Now, you also make a point at the bottom
23 of your statement about thousands of attorneys in
24 this state that derive their income from
25 advocating in this area.

1 And so since you've raised the question,
2 are you deriving any income from advocating in
3 this area?
4 A I am not. I wish I was, but I'm not.
5 MR. SARVEY: He's unpaid, Mr. Wheatland.
6 (Laughter.)
7 MR. PARFREY: No, it's a legitimate
8 question. All my work with the Sierra Club
9 obviously is by volunteer.
10 BY MR. WHEATLAND:
11 Q And I just have finally questions on one
12 paragraph that I hope you can help me understand,
13 on page 3. Under the subject of water rights of
14 BBID. And you're talking here about BBID's
15 requesting an annexation of land into the
16 District.
17 Do you understand that the East Altamont
18 project is located within BBID?
19 A I do, I do. I had received some
20 previous correspondence which I misinterpreted as
21 being a request to annex this project site in.
22 Q All right, and so does that in any way
23 change your testimony here on page 3?
24 A Well, I corrected that particular --
25 MR. SARVEY: He corrected it at the

1 beginning --
2 BY MR. WHEATLAND:
3 Q Well, the next sentence says, "If an
4 annexation is not required, the environmental
5 assessment prepared by staff should further
6 analyze." You'd agree that that further analysis
7 is not required?
8 A Apparently not if the DWR contract has
9 already been approved.
10 Q And the next sentence says, "The
11 environmental assessment should also analyze the
12 issue of recycled water use." Would you agree
13 that that is not required?
14 A Well, I think the environmental
15 assessment is glowing on that, is it not? I mean
16 there's been many questions and responses related
17 to that question.
18 Q So you're satisfied with the level of
19 assessment that's been provided to date?
20 A It sounds like this project is the only
21 project within BBID that has a potential to use
22 recycled water. So that's the answer to your
23 question, I guess.
24 MR. WHEATLAND: Well, thank you very
25 much.

MR. PARFREY: Thank you.

MR. WHEATLAND: No further questions.

HEARING OFFICER WILLIAMS: Thank you. Staff, do you have questions?

MS. DeCARLO: One, one cross.

CROSS-EXAMINATION

BY MS. DeCARLO:

Q Mr. Parfrey, are you aware that the City of Tracy has made an offer to provide recycled water to the East Altamont Energy Center?

A I'm not aware of that.

MS. DeCARLO: Thank you. That's it.

HEARING OFFICER WILLIAMS: Okay. Do you want to move your exhibits?

MR. SARVEY: Yeah, I'd like to move the exhibits, please.

HEARING OFFICER WILLIAMS: Okay. Any objection?

MR. WHEATLAND: Well, you had identified the Sierra Club resolution. That was marked for identification and we would object to the admission of that into evidence pending its receipt. I'd like to look at it and determine whether it's appropriate to be received into evidence.

1 HEARING OFFICER WILLIAMS: That's fair
2 enough. Mr. Sarvey, you'll have to provide that
3 at the point that you get it. You'll have to
4 provide copies to the parties, and we'll have to
5 take a look at it.
6 Mr. Sarvey, what is this document here?
7 I have the direct testimony as 6D, --
8 MR. SARVEY: Right, and the other --
9 HEARING OFFICER WILLIAMS: -- but
10 there's another document --
11 MR. SARVEY: -- document is my exhibit
12 number 22, Contra Costa -- I believe staff's
13 already entered it in -- has not entered it in as
14 evidence, but I believe they listed it as evidence
15 in -- as an exhibit, as well.
16 HEARING OFFICER WILLIAMS: Okay, it's
17 been docketed, but I would ask, applicant, have
18 you --
19 MR. SARVEY: I can give them a copy.
20 HEARING OFFICER WILLIAMS: Okay, would
21 you give them a copy. Staff, have you seen this?
22 MS. DeCARLO: No.
23 HEARING OFFICER WILLIAMS: Do you want
24 to take a look?
25 MS. DeCARLO: Yes.

(Pause.)

PRESIDING MEMBER KEESE: The question was whether staff put that in as an exhibit already.

MS. DeCARLO: No, we didn't offer it in as an exhibit.

HEARING OFFICER WILLIAMS: Do you have any objection to it?

MS. DeCARLO: No, not at all. And actually, we have an indication today that Contra Costa Water District has submitted an additional letter, so we would just request to leave the record open to allow potentially that letter to come in, as well.

HEARING OFFICER WILLIAMS: Okay. We'll mark this as 6E. Applicant, do you have any objection to 6E?

MR. WHEATLAND: No objection.

HEARING OFFICER WILLIAMS: Okay, it'll come in as 6E.

Okay, with that, I think we can excuse Mr. Parfrey.

MR. SARVEY: Thank you very much.

HEARING OFFICER WILLIAMS: And we thank you for participating today.

1 Staff.

2 MS. DeCARLO: Yes.

3 HEARING OFFICER WILLIAMS: Are you ready

4 to proceed?

5 MS. DeCARLO: Yes. I will give a short

6 opening statement and then I'm anticipating having

7 staff give their testimony; and we are also

8 sponsoring the testimony of Mr. Eric Teed-Bose and

9 Duane Grimsman, but there is not enough room on

10 the table to support both testimonies at once, so

11 I would just propose that we offer staff's

12 testimony, offer it up to cross-examination; and

13 then bring in the testimony of --

14 HEARING OFFICER WILLIAMS: Fine.

15 MS. DeCARLO: Okay.

16 HEARING OFFICER WILLIAMS: We'll do it.

17 (Pause.)

18 MS. DeCARLO: In addition to staff's

19 determination of significant impact under CEQA,

20 staff believes that the Commission has the

21 authority to require recycled water based on state

22 statutes and policies.

23 Public Resources Code 25008 states that

24 it is the policy of the state and intent of the

25 legislature to promote all feasible means of

1 energy and water conservation, and all feasible
2 uses of alternative energy and water supply
3 sources.
4 The Warren Alquist Act expressly
5 authorizes the CEC to make findings and take
6 related actions regarding a proposed project's
7 conformity with one, standards adopted by the
8 Commission pursuant to section 25216.3; two,
9 public safety standards; three, applicable air and
10 water quality standards; and four, other relevant
11 local, regional, state and federal standards,
12 ordinances or laws.
13 If any of these referenced LORS can be
14 reasonably read to require a non-potable water,
15 where feasible, standard, then the Commission has
16 the legal authority to impose this requirement as
17 part of its LORS compliance responsibilities.
18 Additionally, the California
19 Constitution states that the general welfare
20 requires that the water resources of the state be
21 put to beneficial use to the fullest extent of
22 which they are capable. And that the waste or
23 unreasonable use of water be prevented.
24 In deciding whether a proposed power
25 plant project will satisfy this constitutional

1 standard, the Commission must answer the following
2 question: Would the use of potable water for
3 nonpotable power plant applications put such water
4 to beneficial use to the fullest extent capable,
5 or would it instead constitute a waste or
6 unreasonable use of the potable water.
7 Staff believes, in this instance, that
8 the use of raw water is a waste, when recycled
9 water from Mountain House Community Services
10 District or other potential sources is available.
11 PRESIDING MEMBER KEESE: A followup to
12 that sentence. So raw water and potable water are
13 the same thing?
14 MS. DeCARLO: There does need to be a
15 determination made, and staff believes that we can
16 make the determination that the raw water provided
17 is --
18 PRESIDING MEMBER KEESE: You used them
19 interchangeably there in your statement.
20 MS. DeCARLO: We don't mean to make them
21 the same, but however, we will establish facts
22 showing that they can be, in this instance. That
23 the water provided can be made to be potable
24 sufficiently to comply with this requirement.
25 In addition, water code section 13146

1 states: "State offices, departments and boards,
2 in carrying out activities which affect water
3 quality, shall comply with state policy for water
4 quality control unless otherwise directed or
5 authorized by statute, in which case they shall
6 indicate to the State Board in writing their
7 authority for not complying with such a policy."
8 Thus, under state statute all state
9 agencies, including the Energy Commission, are
10 required to comply with water quality control
11 policies of the state unless otherwise directed or
12 authorized by statute.
13 We believe that section 13550, policy
14 7558 and the other statutes identified in staff's
15 testimony fall under this umbrella of water
16 quality control policies which the Commission must
17 insure are addressed.
18 In conclusion, the Energy Commission is
19 expressly required by statute to make certain
20 findings and related rulings concerning whether
21 proposed power plant projects comply with
22 applicable water quality standards and other
23 relevant local, regional, state and federal
24 standards, ordinances or laws.
25 From the discussion above it is clear

that several relevant and/or applicable provisions of the California Constitution, the California Water Code, and existing state water policy expressly or impliedly require that proposed power plant projects meet a nonpotable water where feasible standard.

Hence, the Commission has the legal authority to impose this standard as part of its LORS compliance responsibilities.

And that's it for my opening statement. We will proceed to the testimony of Lorraine White and John Kessler in the area of soil and water resources. And they both need to be sworn in.

Whereupon,

LORRAINE WHITE and JOHN KESSLER were called as witnesses herein, and after first having been duly sworn, were examined and testified as follows:

DIRECT EXAMINATION

BY MS. DeCARLO:

Q Ms. White, can you please state your name for the record?

MS. WHITE: Lorraine White.

MS. DeCARLO: Was a statement of your qualifications attached to your testimony?

1 MS. WHITE: Yes.
2 MS. DeCARLO: What is your job title?
3 MS. WHITE: I'm currently a Planner II
4 with the California Energy Commission working in
5 the soil and water resources division -- unit.
6 MS. DeCARLO: Could you briefly state
7 your education and experience as it pertains to
8 soil and water resources?
9 MS. WHITE: I have a degree in
10 biochemistry. I worked as a lab technician doing
11 soil and water analysis for the Department of
12 Agriculture for several years.
13 Proceeded to work in the Legislature
14 related to the development and implementation of
15 legislation. Move on to the California Energy
16 Commission where I worked on energy policy
17 specifically related to energy facility
18 development.
19 And then in the last five years have
20 been working on power plant licensing and have
21 worked on in excess of ten power plants in the
22 soil and water area.
23 MS. DeCARLO: Did you assist in
24 preparing the testimony entitled, soil and water
25 resources, in the final staff assessment exhibit 1

1 and errata marked as exhibit 1E?
2 MS. WHITE: Yes.
3 MS. DeCARLO: And do the opinions
4 contained in your testimony represent your best
5 professional judgment?
6 MS. WHITE: Yes.
7 MS. DeCARLO: Mr. Kessler, can you
8 please state your name for the record.
9 MR. KESSLER: John Kessler.
10 MS. DeCARLO: Was a statement of your
11 qualifications attached to your testimony?
12 MR. KESSLER: Yes.
13 MS. DeCARLO: What is your job title?
14 MR. KESSLER: I'm a water resources
15 consultant to the Energy Commission.
16 MS. DeCARLO: Could you briefly state
17 your education and experience as it pertains to
18 soil and water resources?
19 MR. KESSLER: I have a bachelors in
20 civil engineering from UC Davis; I'm a licensed
21 civil engineer in California. I've been
22 practicing in water supply and power generation
23 field for about 23 years, initially in the utility
24 sector; and then in the public agency sector. And
25 then more recently as an independent consultant.

MS. DeCARLO: Did you assist in preparing the testimony entitled, soil and water resources in the final staff assessment exhibit 1, and errata marked as exhibit 1E?

MR. KESSLER: Yes, I did.

MS. DeCARLO: Thank you. Do you have any changes to your testimony?

MS. WHITE: We have, in response to the summary of dispute in reference to soil and water 7, we would like to make a modification reflective of what is contained in the application for certification related to the actual facility size of the wastewater -- recycled water pipeline.

And also contained in the feasibility study. The reference is a 24-inch pipeline. There is also a reference to capacity in the MOU of 5900 GPM. We mistakenly put in 4000 GPM in our errata. We would like to have an inclusion on soil and water 7D, after 2020, instead of saying or 4000 GPM, we say 24-inch diameter pipeline with a capacity of 5900 GPM, whichever is greater.

And we expect that would bring this in line consistent with the application for certification and subsequent agreements signed by the applicant.

1 HEARING OFFICER WILLIAMS: Counsel, at
2 some point you'll do a written --
3 MS. DeCARLO: Yes, we'll provide that in
4 writing.
5 BY MS. DeCARLO:
6 Q Okay, can you please describe the
7 project that you analyzed as proposed by the
8 applicant?
9 MS. WHITE: Specifically you can turn to
10 the executive summary where the applicant defines
11 the EAEC project on page 1-1, which included a
12 recycled water pipeline, a raw water pipeline, the
13 power plant, itself, pump stations, things like
14 that.
15 In the section 7 it discussed the
16 capacity required to operate the facility;
17 subsequent documentation talked about the volumes
18 on the order of 4600 annual average, 7000 peak
19 demand. The AFC addressed raw water use to meet
20 this demand with an eventual phase-in of recycled
21 water.
22 Staff's original position was based on
23 the information available at that time. Such
24 recycled water was speculative. The applicant,
25 other agencies provided evidence to staff which

1 changed our mind. Essentially commitments by
2 Mountain House that water could be made available
3 to the project. The applicant's assertion that
4 they were committed to the use of recycled water.
5 The feasibility study as presented by BBID, which
6 not only identified that it was feasible for the
7 District to do so, but in their best interests to
8 do so. And that they had explicitly identified
9 EAEC as the focus single user on which to develop
10 their program.
11 MS. DeCARLO: And did you inform the
12 applicant that you were once again intending to
13 analyze the proposal for the recycled water
14 pipeline and the use of recycled water?
15 MS. WHITE: In our workshop discussions,
16 in our data requests we continued to pursue the
17 issue of recycled water use; alternatives to that
18 recycled water use; and raw water use.
19 So, implicit in those data responses and
20 subsequent discussions in our workshops, yes, it
21 was clear we were looking at that. We also
22 included the analysis of that in our preliminary
23 staff assessment.
24 MS. DeCARLO: And at any time did the
25 applicant inform you that they were withdrawing

the proposal for the recycled water pipeline or use of recycled water from their project proposal?

MS. WHITE: No. In fact, their continual assertion that that would be done so only supported our decision to continue to analyze those options.

MS. DeCARLO: Now the project is -- the peak project water use for the project is estimated to be about 7000 acrefeet per year by the applicant. Can you please put this into context for us?

MS. WHITE: I'm going to ask John Kessler to address that.

MR. KESSLER: This would be enough to serve about 9- to 14,000 homes, which would be equivalent to about 27,000 to 42,000 residents.

MS. DeCARLO: And what percentage of BBID's current and future demand will this proposed project represent?

MS. WHITE: If you look at the -- right now we're looking at BBID's usage on the order of 31,000 acrefeet. If you look at the proposed annual average of approximately 4600 acrefeet a year, that's about 14 percent. If you look at their peak it's more on the order of like 25.

As the community develops and BBID service territory builds out toward their maximum allotment of 50,000 acrefeet, those numbers are reduced slightly. But more on the order of -- it would be like 10 percent to 15 percent. It's a significant amount of BBID's service area.

MS. DeCARLO: What were your findings with regard to the project's proposed use of water?

MS. WHITE: If you don't mind, we're going to do this in tandem. We wrote the testimony together.

MR. KESSLER: We found that the use of only fresh water by the project for nonpotable needs would result in a significant adverse impact by diminishing local water supply, potentially depriving BBID's other customers of fresh water, resulting in inadequate supplies to the East Altamont project, itself.

We also found and determined that East Altamont's proposed use of high quality, fresh, inland water for cooling, process water and other nonpotable uses, when recycled water is available, is a wasteful and unreasonable use or unreasonable method of water use.

1 Our determination that recycled water
2 use be maximized by East Altamont is supported by
3 statutory and policy guidance.
4 MS. DeCARLO: Have you seen the revised
5 projected average annual demands recently
6 submitted by BBID?
7 MS. WHITE: Yes, we have.
8 MS. DeCARLO: Do these revisions change
9 your conclusion?
10 MS. WHITE: They do not change our
11 conclusion that the raw water supplies within
12 BBID's territory are exhausted within the life of
13 this project if the project were to use 100
14 percent raw water. Particularly when you look at
15 peak demands.
16 I refer the Committee to Mr. Nuss'
17 revised table 11 in which it's clear that there's
18 an exceedance of the 50,000 acrefeet, particularly
19 during peak demands.
20 Our projections were that that
21 exceedance would occur somewhere between 2010 and
22 2020, where, in fact, this is, particularly when
23 you're talking about peak demand, dry year, that
24 could occur around 2020, 2030.
25 So, staff is still concerned that the

use of the project raw water supply could restrict raw water supplies to other users within BBID's service territory.

MS. DeCARLO: And has the applicant agreed to be limited to a number below its peak demand at any time?

MS. WHITE: No.

MS. DeCARLO: Did you analyze alternatives to the project's proposed use of water?

MR. KESSLER: Yes, we did.

MS. DeCARLO: Could you please summarize?

MR. KESSLER: Sure. We looked at four alternatives, and we also analyzed the proposed project under two extreme cases. One where only fresh water would be used as supplied by BBID; and also --

PRESIDING MEMBER KEESE: I'm sorry, I'm getting confused by the use of the terms here. Can we -- I have fresh water, I have raw water, I have potable water. Can we get some -- unless you're going to create a distinction later, let's get some consistency here.

MS. WHITE: Okay. In terms of the water

that is referred to as fresh, it's usually fresh surface water coming through things like rivers and stuff like --

PRESIDING MEMBER KEESE: Is that the same as raw?

MS. WHITE: That's the same as raw.

PRESIDING MEMBER KEESE: Okay.

MS. WHITE: Okay. The difference between raw and potable is in this particular case minor treatment, primarily disinfection, that allows it to be consumed.

PRESIDING MEMBER KEESE: Okay.

MS. WHITE: Okay, this is --

PRESIDING MEMBER KEESE: So, all right, if fresh and raw are the same, then --

MS. WHITE: Yeah.

PRESIDING MEMBER KEESE: -- you've helped me out here.

MS. WHITE: Sorry. In this particular case the raw water is of fairly high quality. Its TDS levels, which is pretty indicative of water quality, range between 97 to 295 mg/liter.

Drinking water standards have a TDS level maximum at 500 mg/liter. So this quality of water is pretty high when considering other

1 sources.
2 The only thing that --
3 PRESIDING MEMBER KEESE: I was just
4 concerned that we were introducing another term
5 here.
6 MS. WHITE: No, it doesn't take much to
7 make it potable --
8 PRESIDING MEMBER KEESE: Okay.
9 MS. WHITE: -- is the bottomline.
10 PRESIDING MEMBER KEESE: And you're
11 using fresh and raw as interchangeable?
12 MS. WHITE: Yes. And the question of
13 what kind of treatment would be required to make
14 it potable, we're going to let Mountain House
15 address. They're the ones that would run the
16 water treatment facility.
17 PRESIDING MEMBER KEESE: Okay. I'm
18 sorry to --
19 MR. KESSLER: No, I'm glad you asked.
20 MS. DeCARLO: -- clarify.
21 MR. KESSLER: Please do that, whenever
22 needed.
23 We analyzed two extremes under the
24 proposed project, one using raw water entirely;
25 the other using the maximum available amount of

1 recycled water as projected by Mountain House,
2 along supplemented with fresh water, as needed.
3 As alternatives we also looked at water,
4 recycled supply from Discovery Bay Community
5 Services District, supplemented with Byron Bethany
6 Irrigation District's raw water.
7 We also looked at a combination of
8 recycled water from Mountain House and Discovery
9 Bay supplemented with fresh water as needed.
10 We also looked at the City of Tracy's
11 recycled supply, which we believe is adequate to
12 avoid use of fresh water entirely.
13 Then we also looked at dry cooling,
14 which would minimize and overall accomplish the
15 greatest conservation of raw water. And that
16 would be on the order of 98 percent.
17 The results of our analysis, if we
18 compare the two extreme cases, under the proposed
19 project were that economically they're about the
20 same. We found that from a present value basis of
21 looking at both capital and the structure costs,
22 and operating costs over time, that if we look at
23 that total present value of all those costs on a
24 net present value basis, the difference was about
25 5 million, or 83 or about 84 million versus almost

1 79 million, rounded off.
2 And if we look at the -- if we break out
3 those costs to an annual cost of what is the cost
4 to the applicant per year, it works out to about
5 $400,000 additional per year to use the combined
6 recycled water and fresh water system as they
7 proposed.
8 If we look at the effect on their power,
9 cost of producing power, that incremental cost of
10 400,000 per year additional boils out to about
11 .006 of a cent per kilowatt hour.
12 We also analyzed dry cooling. And the
13 cost without taking into account the effects of
14 lost power production show that the net present
15 value cost is on the order of about 87 million,
16 which is not 8 million more than the raw water
17 supply, as proposed. And the effect on the cost
18 of power production would be about .01 of a cent
19 toward their costs of production.
20 We also looked at the cost of the
21 incremental decs, if you do take into account lost
22 power generation with the dry cooling, and this
23 added -- we assumed a value at $30 a megawatt hour
24 for that lost power. And this changes the net
25 present value to an increase of about 87 million

to about 118 million. And this changes the unit rate on their cost of production to about .13 or .14 of a cent per kilowatt hour.

We can also point out that the agencies of both Discovery Bay CSD and City of Tracy came forth in this case and offered their water supply to BBID should they choose to make this available as part of the recycled water program.

We understand that they made this offer through conveying that to the CEC. We're not aware in particular of contacts that were made directly with BBID.

PRESIDING MEMBER KEESE: Made available to BBID, you mean they would collect it, improve it, and deliver it in pipelines to BBID? Is that --

MR. KESSLER: There is a --

PRESIDING MEMBER KEESE: Made available, are you saying that they would make it available to BBID to build a pipeline down there and build a facility to do tertiary recovery?

MR. KESSLER: Those general terms were varied by the supplier. In the case of Discovery Bay they needed to improve from secondary to tertiary treatment in order to be used for cooling

1 water makeup. And they did not identify who would
2 be responsible for building the pipelines.
3 There's really two primary elements of cost that
4 weren't identified as to who would take on that
5 responsibility.
6 In the case of City of Tracy they have
7 plans to improve their wastewater to recycle,
8 tertiary treated. And their deputy public works
9 director indicated that he'd be willing to propose
10 to their city council that they would make the
11 water available for purchase at no cost. But the
12 means of conveyance of that water supply to BBID
13 for delivery was not identified, and left open.
14 So, as we consider these alternatives we
15 assume that those unidentified costs would be part
16 of the cost of developing that supply by the
17 applicant. And those are figured into our
18 numbers.
19 PRESIDING MEMBER KEESE: So you're
20 suggesting that those transactions would not take
21 place in the normal course of events. That it
22 would be unless the -- Tracy won't sell it to BBID
23 unless the applicant pays for the infrastructure,
24 is that what you're --
25 MR. KESSLER: Well, --

1 PRESIDING MEMBER KEESE: If this power
2 plant were built, and BBID has indicated they'd
3 like to -- it's economically to their benefit to
4 substitute recycled water completely for this
5 power plant, the incentives would not be there for
6 Tracy or the other communities to make the deal
7 with BBID unless the applicant pays for the
8 infrastructure? Is that --
9 MR. KESSLER: The City of Tracy's
10 general offer was dependent on the applicant or
11 BBID covering that cost of infrastructure. And we
12 assume that would be the burden of the applicant
13 in our analysis.
14 Our findings are that we found that
15 alternative 5, dry cooling, was a reasonable
16 alternative. And the one in our preferred respect
17 to accomplishing the greatest amount of water
18 conservation.
19 But as we were understanding earlier on
20 that the applicant's intent was to make the
21 maximum use of recycled water, and we understood
22 that they intended to commit to that, we had tried
23 to look at how that recycled supply to its maximum
24 use to East Altamont from Mountain House could be,
25 how that could work to avoid these impacts.

1 And we believe that if that was fully
2 implemented, that would mitigate the significant
3 adverse impacts on BBID's water supply.
4 HEARING OFFICER WILLIAMS: If what was
5 fully implemented?
6 MR. KESSLER: If the utilization of the
7 Mountain House recycled supply by use in East
8 Altamont was implemented, that that would mitigate
9 the significant adverse impact on BBID's fresh
10 water supplies to its other customers.
11 MS. DeCARLO: Has the applicant proposed
12 to construct the East Altamont Energy Center so
13 that it is physically capable of using recycled
14 water?
15 MR. KESSLER: Yes.
16 MS. DeCARLO: And are there any physical
17 constraints that would bar the use of 100 percent
18 recycled water for cooling tower purposes at the
19 plant?
20 MR. KESSLER: Not that we're aware of.
21 MS. WHITE: And I just want to point out
22 that currently there's no infrastructure in place
23 to serve either raw water or recycled water to the
24 project.
25 Those conveyance facilities and pump

1 stations were included as part of facilities
2 defined as EAEC. So staff at least ruled out a
3 conveyance constraint related to getting water to
4 the project once it's produced by Mountain House
5 or as an increased diversion by BBID.
6 So physical constraints were taken into
7 consideration, but since a part of the proposal we
8 found that there were no environmental problems
9 associated with those, those have been analyzed;
10 they're consistent with LORS; and they would
11 accomplish what the applicant has suggested.
12 MS. DeCARLO: And who would be producing
13 the recycled water?
14 MS. WHITE: The Mountain House Community
15 Services District wastewater treatment facility.
16 MS. DeCARLO: Do you have any indication
17 of how much water they're willing to supply to the
18 East Altamont Energy Center?
19 MR. KESSLER: They have indicated
20 they're willing to supply 100 percent, and they're
21 also entitled to do that without any regulatory
22 restrictions. They've also given us a projection
23 of that, what they believe will be the
24 availability of those recycled water supplies.
25 These are reflected in our soil and water table

12.

Just generally beginning in 2005 they estimate that 890 acrefeet per year would be available; ramping up to 2010 of an amount on the order of 2372; by 2015, 3855 acrefeet per year; by 2020, 5337 acrefeet per year; by 2025, 5930 acrefeet per year, which is a straight line from then on into the future.

MS. WHITE: Actually we'll have Mountain House also, or TriMark, speak more to that and their permits directly.

MS. DeCARLO: Are there any environmental benefits to using the recycled water at East Altamont Energy Center as opposed to using it for irrigation in Mountain House or for agriculture?

MR. KESSLER: Yes, we believe there are. One of the most significant is we believe there's a higher utilization of the recycled water by the power plant, as opposed to its other potential uses.

As we've heard this morning, there is potential to use that recycled water within for watering irrigation purposes within the Mountain House development, for golf courses, parks and so

on.

There's also a potential to use that elsewhere for agriculture within BBID's service area.

As we look at those types of uses, those are seasonal for the most part, and do not begin to draw on that available supply during the winter months. So we see a great seasonal variation between supply and demand.

We also saw, just for clarity, earlier, a supply/demand chart that was expressing the variability as BBID expressed. And we saw quite a distinction between, particularly in the summer months, demand being up here for the power plant, and supply being down here for Mountain House. And I just want to note that that took into account, or assumed that there would be recycled water use within Mountain House, itself, as opposed to all the water, as Mountain House has indicated, being made available to East Altamont.

If we work from that basis as we have in our staff assessment, as we have the evidence supporting, that supply/demand difference is much closer. And it shows a much more even match than could ever be achieved with irrigation use of

recycled water over the course of a year from January through December.

MS. WHITE: Another point that was brought out in the feasibility study done by BBID, if you were to go with agricultural applications it would require, at times, changing the types of crops that you actually plant to more salt-tolerant crops tan what is currently in place. That's true even with a blended raw water, recycle water supply.

We've seen in other cases where applications of recycled water has raised concerns about increased salinity in shallow groundwater. In this particular case there is shallow groundwater, but it's already a very poor quality. There is also concerns associated with increased salt loading of soils that will build up over time and make agricultural development and irrigation difficult.

All of those impacts are avoided with the industrial use, where you actually don't have any direct land applications.

There's also the impacts associated with the Delta. There's been a lot of talk about how DWR and BBID actually operate and prevent impacts

1 to the Delta. But, overall, we looked at a
2 qualitative point of view that if the power plant
3 did not divert, weren't responsible for diversion
4 of the raw water from the forebay, but actually
5 used recycled water instead, you had a general
6 improvement in the discharge to the Delta, because
7 you had poorer quality being used, while higher
8 quality was remaining in the Delta. Instead of
9 the poor quality being discharged to the Delta,
10 and the higher quality being used by the power
11 plant.
12 MR. KESSLER: And as Contra Costa Water
13 District pointed out, the Delta in that region is
14 the source for water supply, consumptive water
15 supply for over 20 million Californians. And by
16 avoiding or minimizing the discharge of wastewater
17 from Mountain House, even though it's tertiary
18 treated, it still could cause a slight degradation
19 of water quality or contribute to that cumulative
20 impact in the future.
21 To the extent it's utilized, and we
22 believe can be most fully utilized at East
23 Altamont, it helps preserve the water quality in
24 the Delta for those drinking purposes.
25 PRESIDING MEMBER KEESE: You're probably

1 the wrong person to ask this question, but if the
2 water district has a right to 50,000 acrefeet a
3 year, do they lose what they don't take? Or would
4 it be to their benefit to take and sell the excess
5 water?
6 MS. WHITE: They actually have, as some
7 of the testimony provided by the applicant
8 indicates, made agreements to provide their
9 conserved water to adjacent districts.
10 So they are actually engaged in
11 different types of arrangements. The full extent
12 of which we can't give you all the details of.
13 But we have examples where they --
14 PRESIDING MEMBER KEESE: But most likely
15 they'll be using the whole 50,000 acrefeet of
16 their allotment?
17 MS. WHITE: Based on their projections
18 we have no reason to doubt that their growth
19 within the service area will demand that water.
20 MR. KESSLER: And the other agency who
21 was the primary most concerned with their increase
22 in diversions over time, although it was within
23 the limit that BBID felt its water rights and
24 their entitlements, that agency being DWR.
25 We understand from that agreement that

1 DWR has agreed now that there's a cap to 50,000
2 acrefeet per year rather than 60,000, that they
3 will not challenge the use of that water or nonuse
4 over time.
5 PRESIDING MEMBER KEESE: So they'll
6 likely be taking 50,000, and if they recycle that
7 will be in addition to the 50,000 they're going to
8 take?
9 MR. KESSLER: Yes.
10 MS. WHITE: Yes.
11 PRESIDING MEMBER KEESE: Thank you.
12 MS. DeCARLO: In your testimony you
13 indicated projected rate of growth for the
14 Mountain House development. How does this rate of
15 growth affect the water issues we're talking about
16 today?
17 MS. WHITE: Well, one thing we'd like to
18 point out. We've seen a couple of different
19 projections both for water availability to the
20 project, rate of growth for various developments,
21 consumption levels by BBID, demand requirements,
22 so on and so forth.
23 The one thing that we've looked at in
24 terms of all these figures is, as we go through
25 and verify it, is what do the trends show. The

trends show that there's definitely a growth in residential development in the region. Based on what we know, the residential uses have very few options other than the raw water to meet their needs, whereas industrial tends to have a few more options.

You have a -- whether it's in 2020 or 2040, BBID approaching or exceeding their 50,000 raw water limit. Limited information on other resources available for development by BBID, they have looked at Tracy, they have looked at other recycled water sources. Mountain House tends to be the most economic.

They have pointed to Mountain House as being where they want to start their program first. The applicant has suggested that Mountain House has to use a portion of the recycled water they generate. Mountain House has told us they don't. That, in fact, if they could get to a point where an agreement was reached, they could commit to providing all of the water to the project.

And what we have noted is that none of the numbers are exact. They're all estimates and projections. And even though there is a certain

level of speculation about them, the trends are pretty consistent amongst all the sources, that there is going to be a progressive increase in demands on BBID's resources.

And that eventually there will be a shortfall, whether it's 2020 or 2040, in their raw water supplies, and that additional sources will need to be developed.

The consideration that we had is that the East Altamont Energy facility has already proposed to use recycled water. The difficulty we had was making sure that that commitment follows through. And that they use the recycled water to the fullest extent that they have said they are willing to do. And develop conditions which grant a certain level of assurity to the Commission, to the community, to BBID that this facility will, in fact, maximize the use of recycled water.

So we don't want to necessarily quibble about 10 acrefeet or 100 acrefeet. We just would like to point out to people the trends that are indicative of all of the numbers that you see.

And that, in fact, we have commitments from Mountain House that as their facility develops, they are willing to provide all of that

1 resource to BBID for service to East Altamont.
2 Bottomline.
3 MS. DeCARLO: Have you reviewed BBID's
4 will-serve letter to the applicant and the MOU
5 between BBID and East Altamont Energy Center?
6 MS. WHITE: Yes.
7 MS. DeCARLO: Are you confident that
8 these documents are sufficient to insure that the
9 East Altamont Energy Center will use the maximum
10 amount of recycled water possible?
11 MS. WHITE: In particular the will-serve
12 letter explicitly states that the facilities
13 necessary to serve the project are the sole
14 responsibility of the applicant to bear in terms
15 of cost for construction design only.
16 So, since it is part of the application
17 for certification that both the raw water supply
18 line and the recycled water line are necessary to
19 serve the water needs of the project, as they're
20 defined in the AFC, that the District has defined
21 that that is the responsibility of the applicant.
22 We considered that to be enough evidence
23 to show that those facilities, as they're proposed
24 by Calpine, would be developed.
25 Now, the MOU provides a little bit more

1 ambiguity related to what facilities would be
2 developed when. That ambiguity raised concerns on
3 our part in terms of meeting the schedules as
4 proposed by Calpine in the application for
5 certification, and supplemental information, data
6 responses and data adequacy responses.
7 In that information they identified, and
8 I point out water response 86, table 13, that they
9 would be able to use as much as 500 acrefeet of
10 recycled water from BBID delivered to them by
11 Mountain House in 2005.
12 Well, their dispute about our condition
13 asking that those agreements and facilities be put
14 in place before the plant operates raises even
15 more concerns that the applicant may not meet the
16 schedule that they have proposed, even though the
17 water would be available, based on all reasonable
18 projections by Mountain House and BBID and the
19 information supplied by the applicant today.
20 So, the conditions are aimed at trying
21 to be consistent with things like the will-serve
22 letter and the MOU, but provide the agency and
23 community more certainty as to the schedule that
24 the applicant has already suggested in their
25 material filed to the Commission to date.

1 MS. DeCARLO: Now, claims have been made
2 that it would be premature to construct the
3 proposed recycled water pipeline prior to the
4 development of recycled water infrastructure
5 within Mountain House development.
6 Are you aware of any physical
7 impediments to constructing the pipeline prior to
8 completion of Mountain House infrastructure?
9 MS. WHITE: This is a part that we're a
10 little confused on. It's clear in the AFC that
11 they not only provide preferred routes, and
12 alternative route, facility sizing listed as part
13 of the application's project description, and then
14 provide information on recycled water use as early
15 as 2005, and this is the first we're hearing that
16 it's too premature to even suggest that that's an
17 appropriate facility at this point.
18 If you're going to use recycled water,
19 you're going to need the facility. Just like if
20 you're going to use raw water, you're going to
21 need the facility.
22 And based on the schedule that we would
23 like, particularly TriMark to elaborate on, there
24 is no reason why a pipeline should not be built
25 now to try and maximize the utilization of

1 recycled water that could be produced by the
2 sanitation district.
3 MS. DeCARLO: What --
4 HEARING OFFICER WILLIAMS: What do you
5 mean by utilized by the sanitation district?
6 MS. WHITE: Pardon me, Community
7 Services District. They're actually the ones that
8 are operating the --
9 HEARING OFFICER WILLIAMS: You talking
10 about Mountain House?
11 MS. WHITE: Yeah, Mountain House
12 Community Services District will run --
13 HEARING OFFICER WILLIAMS: Oh, okay.
14 MS. WHITE: -- the wastewater treatment
15 facility. And based on --
16 HEARING OFFICER WILLIAMS: Okay.
17 MS. WHITE: -- projections, there's
18 going to be a certain amount produced certainly by
19 2005 --
20 HEARING OFFICER WILLIAMS: Right.
21 MS. WHITE: -- that could be made
22 available to the project. There's nothing that we
23 have seen, evidence in the record or material
24 submitted by any party to date that would suggest
25 that there will be zero water.

1 But nonetheless, --

2 HEARING OFFICER WILLIAMS: No, no, my

3 only confusion was that you're not talking about a

4 separate sanitation district?

5 MS. WHITE: No. And, in fact, we tried

6 to provide in the condition the opportunity to the

7 applicant in the event that things don't work out,

8 based on the schedule that the people have

9 proposed to date, that they could come back to the

10 Commission and explain why they're not utilizing

11 as much water as was anticipated.

12 And there are provisions in the language

13 that allow them to use raw water to make up the

14 difference. So, utilize as much recycled water as

15 is produced, and you make up the difference with

16 raw water.

17 And that would be consistent with what

18 the applicant has already proposed. We're just

19 suggesting that, unlike the schedule proposed by

20 the applicant and the volumes, the actual producer

21 of the recycled water says that there's an ability

22 to use all of it.

23 PRESIDING MEMBER KEESE: Well, we heard

24 something different from BBID. So, I guess we'll

25 have to wait till we hear --

MS. WHITE: Yeah, so there's just a difference of sources of information here. I don't think we have any dispute that recycled water from this facility will eventually be available. And that the power plant will be constructed to be able to use it.

That in the application they proposed the conveyance facilities necessary to get the water to the plant, both raw and recycled. We're just confused if you're saying you're going to use it by 2005 when you start operating, how requiring the pipeline be built is premature.

HEARING OFFICER WILLIAMS: Okay. Can we go off the record.

(Off the record.)

PRESIDING MEMBER KEESE: All right. Major.

HEARING OFFICER WILLIAMS: Okay. We're back on the record then. I think we finished -- well, we were in the midst of staff's, so go right ahead.

MS. DeCARLO: Almost. Okay, thank you. The concern has been expressed that requiring the use of recycled water by East Altamont Energy Center may somehow reduce the amount of water

available to the local farmers. Have you analyzed this potential problem?

MR. KESSLER: Yes, we have. We don't believe there will be any effects to local farmers by requiring the use of recycled water. To the contrary, it will help avoid any impacts of the water supplies.

And furthermore, we point to a couple exhibits here. One is exhibit 9E where BBID, itself, finds shortfalls in its water supply, and only on fresh water supply.

We also point to, in our soil and water table 6, this is on page 5.14-11, and this helps illustrate the variability. We talked earlier about the chart of supply versus recycled water versus the demand on the East Altamont project.

We also want to point out that water supply projections provided by BBID, in our opinion, don't provide for the full variability that the District has experienced historically under dry hydrologic conditions.

And we feel that this can be illustrated by looking in particular at the two driest hydrological years on record, that's 1976 and 1977. In those years there was over 55,000 and

1 over 52,000 acrefeet per year required by BBID's
2 customers, primarily ag.
3 If we look at the use in the years
4 preceding and following that, which were more
5 normal water hydrologic conditions, they're on the
6 order of 41,000 to 40,000 acrefeet per year.
7 And so roughly, because of these extreme
8 dry hydrologic conditions, the District, in our
9 opinion, experienced a rapid increase in demand,
10 rather than a reduction as was provided and
11 testified earlier by BBID of over 30 percent
12 increase in water demands primarily to serve its
13 ag uses.
14 We also have reviewed a water supply
15 agreement between Byron Bethany Irrigation
16 District and Mountain House Community Services
17 District. And I have some copies, at least
18 excerpts of relevant pages, which we can
19 distribute.
20 But on the fourth page of that agreement
21 there is a description of the quantity of water
22 and the basis for determining the quantity of
23 water that would be made available to Mountain
24 House. And this, again, looks back at what the
25 historical use has been for agricultural use

1 between the period 1976 through 1991. And it
2 characterizes as a range from 5900 acrefeet to
3 10,100 acrefeet. This is now on page 4, section
4 3.1, titled, the quantity of water, about halfway
5 down the paragraph.
6 And in assigning the amount of water
7 that would be made available to the Mountain House
8 development, BBID looked back at, as I understand
9 it, what the historical use had been for
10 agriculture. And they represented in this
11 sentence, it says that actual use within the
12 Mountain House project area currently within BBID
13 has ranged from 5900 to 10,100 acrefeet actually
14 for the period 1976 through 1991. And them with
15 emphasis, the period considered representative of
16 historic hydrological and climate conditions.
17 Therefore, we're concluding that there's
18 probably a number of variables, but one of the
19 most significant were the hydrologic conditions,
20 how they varied during this period.
21 And this would also encompass that the
22 two driest years of record, 1976 and 1977, as we
23 captured in soil and water-6, in the annual use by
24 BBID.
25 In conclusion, we just want to emphasize

that we feel it's very important because of its variability to dry hydrologic conditions, that demands, in our view, will increase within the District, not decrease. And it puts even more emphasis and dependency on the development of recycled water for the power plant.

PRESIDING MEMBER KEESE: The District is the Mountain House --

MR. KESSLER: The District I'm referring to is Byron Bethany Irrigation District.

PRESIDING MEMBER KEESE: Okay. You're not indicating that with residential use of the Mountain House area that the water use will go up? I thought --

MR. KESSLER: No, --

PRESIDING MEMBER KEESE: -- they indicated it would go down?

MR. KESSLER: No. They also provided testimony that, as you bring that up, is that they've agreed to a 10 percent reduction in or conservation measure during dry hydrologic conditions.

As I read this agreement in entirety I see no provision for that. And the gentlemen from TriMark also testified to that effect.

MS. DeCARLO: Now, if the projections for availability of recycled water are too optimistic, are there any provisions for flexibility in the condition staff is proposing to be required?

MS. WHITE: Yes. We provide a provision in soil and water-5 that allows them to come back to the Commission, tell us what the conditions are related to the recycled water, and any reasonable solutions that would address the shortfall in recycled water and/or any impacts that might occur to other users by the use of raw water.

MS. DeCARLO: Are you familiar with the requirements of water code section 13550?

MR. KESSLER: Yes.

MS. WHITE: Yes.

MS. DeCARLO: In your opinion is the source of recycled water of adequate quality for use in the East Altamont Energy Center?

MS. WHITE: Yes.

MS. DeCARLO: Is it available for use in the East Altamont Energy Center?

MS. WHITE: It is currently not available, but it can be reasonably made available. Projections have recycled water

1 production occurring within the next couple of
2 years; certainly within the projected timeframe of
3 2005 provided by the applicant.
4 MS. DeCARLO: And when has the applicant
5 proposed that East Altamont Energy Center might
6 begin operation?
7 MS. WHITE: 2005/2006.
8 MS. DeCARLO: So is it your opinion that
9 there would be some recycled water available when
10 the applicant starts operation?
11 MS. WHITE: It is our opinion that the
12 recycled water would be available and a program
13 could be put in place in time to assure that that
14 recycled water could be used by the project.
15 MS. DeCARLO: Has staff considered the
16 effect of the use of recycled water in lieu of
17 potable water on the generation of hazardous waste
18 and on the quality of wastewater discharges
19 subject to regional, state or federal permits?
20 MR. KESSLER: Yes, we have. And with
21 respect to public health, I know Mr. Greenberg can
22 add more to this, but the recycled water quality
23 will meet the DHS, meaning Department of Health
24 Services, preapproved standards for title 22 for
25 protection of public health.

1 And also the cost has been figured into
2 the additional solids that would be generated from
3 the zero liquid discharge treatment of the
4 wastewater as part of the economics of this
5 project.
6 MS. DeCARLO: And just for clarification
7 purposes, is the author of the public health
8 section Mr. Obed Odoemelam?
9 MS. WHITE: I believe so.
10 MS. DeCARLO: Have you determined that
11 based upon information received during the course
12 of your analysis that recycled water may be
13 furnished for use at the East Altamont Energy
14 Center at a reasonable cost to the East Altamont
15 Energy Center?
16 MR. KESSLER: Yes, we have.
17 MS. WHITE: In addition to that, we also
18 have information from the applicant based on some
19 of their projections for the cost of recycled
20 water which are consistent with what we would
21 expect recycled water would cost.
22 MS. DeCARLO: And have you considered
23 the present and projected costs of supplying,
24 delivering and treating potable domestic water for
25 use at the East Altamont Energy Center, and the

present and projected costs of supplying and delivering recycled water for this use?

MR. KESSLER: Yes.

MS. DeCARLO: And did you determine that the cost of supply and the treated recycled water is comparable to or less than the cost of supplying potable domestic water?

MR. KESSLER: Yes, we did.

MS. DeCARLO: And is it your understanding that staff in the public health section determined that the use of recycled water from the proposed source will not be detrimental to public health?

MR. KESSLER: Yes.

MS. DeCARLO: Did you determine that the use of recycled water for use at the East Altamont Energy Center will not adversely affect downstream water rights, or degrade water quality?

MR. KESSLER: Yes, we did. And that's evidenced by no party in this proceeding has objected to East Altamont's use of recycled water based on loss of water rights. And we also recognize that there's no existing discharge treated wastewater from Mountain House. And therefore there would be no diminution of water

available from the Delta as a result of that lack of discharge.

MS. WHITE: I would just like to make a point of clarification. In our soil and water table 15, the fresh water only costs we considered were not potable, but raw water.

MR. KESSLER: And with respect to water quality, the Central Valley Regional Water Quality Control Board has indicated their support for East Altamont's use of recycled water, considers their use of recycled water in combination with avoiding a new discharge of wastewater by use of the zero liquid discharge system to be favorable from a water quality perspective.

I'd also note that Contra Costa Water District has actively encouraged that the Regional Board require all new wastewater facilities in the Delta -- tertiary treatment to minimize disposal, even with that tertiary treatment, to waterways in consideration of stricter regulations on drinking water and the -- improve water quality.

And Contra Costa Water District has also expressed it strongly opposes the discharge of contaminative wastewater from Mountain House into their drinking water supply for over 20 million

1 Californians.
2 HEARING OFFICER WILLIAMS: Has this
3 document, the water services agreement between
4 BBID and Mountain House, has it been previously
5 introduced?
6 MR. WHEATLAND: No.
7 HEARING OFFICER WILLIAMS: Okay, we're
8 going to mark it staff's exhibit 1H.
9 MR. WHEATLAND: If we are going to
10 identify it, could the staff provide a complete
11 copy of the agreement, rather than excerpts?
12 MR. KESSLER: Certainly.
13 HEARING OFFICER WILLIAMS: Staff, could
14 you --
15 MS. DeCARLO: Yes.
16 HEARING OFFICER WILLIAMS: -- provide a
17 complete copy?
18 MS. DeCARLO: Can we provide that on
19 Monday?
20 HEARING OFFICER WILLIAMS: Yeah, that's
21 fine. Do you need it --
22 MS. DeCARLO: We have one copy with us
23 if you would like to look at it, but for purposes
24 of distributing --
25 MR. WHEATLAND: No, that's -- a complete

1 copy on Monday would be satisfactory.
2 MS. DeCARLO: Okay, thank you.
3 HEARING OFFICER WILLIAMS: Is there any
4 objection to it coming in?
5 MR. WHEATLAND: No.
6 HEARING OFFICER WILLIAMS: Okay, we'll
7 receive it as exhibit 1H, staff exhibit 1H.
8 MS. DeCARLO: And did staff, in the
9 biological resources section, determine the
10 project's proposed use of recycled water would not
11 be injurious to plant life, fish and wildlife?
12 MR. KESSLER: Yes.
13 MS. DeCARLO: Would you like to comment
14 on the quality of the raw water proposed to be
15 used by East Altamont Energy Center?
16 MR. KESSLER: Yes, the very same raw
17 water that is proposed for use by the applicant at
18 the Energy Center is the same water of the same
19 quality as is currently being used by Mountain
20 House for its residential and light industrial
21 development.
22 And it's currently being treated; and
23 their water treatment plant is soon, if not
24 already, served by DHS for potable water service.
25 So the point is that the very same

1 waters of adequate quality in a raw form to be
2 treated and easily used for potable service.
3 MS. DeCARLO: That's all for staff. The
4 witnesses are available for cross-examination.
5 HEARING OFFICER WILLIAMS: Applicant,
6 you may proceed.
7 MR. WHEATLAND: Thank you.
8 CROSS-EXAMINATION
9 BY MR. WHEATLAND:
10 Q Mr. Kessler, let's begin with your last
11 statement. You mentioned the new water treatment
12 plant of Mountain House Community Services
13 District, is that correct?
14 MR. KESSLER: Yes.
15 MR. WHEATLAND: Now, Ms. White just
16 mentioned that in her opinion that raw water could
17 be converted to potable water with, quote, "just a
18 little disinfectant." End quote.
19 Is that all that is done at that water
20 treatment plant, is to add a little disinfectant?
21 MR. KESSLER: No, and I didn't hear her
22 statement as that. I could be mistaken, but I
23 thought she said a little bit of treatment.
24 MS. WHITE: And disinfection.
25 MR. WHEATLAND: So you understood her

1 testimony to be a little bit of treatment, is that
2 correct?
3 MR. KESSLER: I'm not downplaying the
4 rigorous standards to treat that water, okay.
5 MR. WHEATLAND: Well, good. Then please
6 describe for me the processes that are used to
7 treat that water at the new Mountain House
8 Community Services District water treatment plant.
9 MS. WHITE: Would it be possible for us
10 to defer that to TriMark, who is far more --
11 MR. WHEATLAND: No. No, I'd like to
12 know Mr. Kessler's understanding --
13 MS. WHITE: Okay.
14 MR. WHEATLAND: -- of the treatment
15 process.
16 MR. KESSLER: It's a process of adding
17 chemicals to help settle out suspended solids.
18 It's a settlement process. It's a filtration
19 process. It's a chlorination process to yield a
20 quality product water that meets DHS standards.
21 MR. WHEATLAND: And so it's a lot more
22 than just a little disinfectant, is that correct?
23 MR. KESSLER: I don't believe that was
24 our intent to characterize it that way.
25 MR. WHEATLAND: Now it's true, also,

that the Contra Costa Water District also uses that water, is that right?

MR. KESSLER: I know they draw water from the Delta. I don't -- I believe their diversion is from Old River.

MR. WHEATLAND: And are you familiar with their treatment processes for this water?

MR. KESSLER: I'm not specifically familiar with their plants, but I would assume that it would be a similar treatment process.

MR. WHEATLAND: Ms. White, you've stated your qualifications in the FSA, is that correct?

MS. WHITE: I believe my r,sum, is in the FSA.

MR. WHEATLAND: Could you describe for us please your specific qualifications with respect to water issues and water resources?

MS. WHITE: My degree in biochemistry gave me an education in understanding different types of chemical reactions.

My experience working in a lab doing chemical analysis on soil and water gave me an understanding of types of reactions and chemical interactions associated with soils and water that could occur.

1 And in recent years I have been involved
2 in several analyses associated with power plant
3 developments, their water use, impacts and
4 supplies; discharge, in association with
5 wastewater impacts at those facilities. Erosion,
6 sedimentation, different aspects of power plant
7 development.
8 Have participated in the evaluation of
9 at least ten power plants, and worked for the
10 Commission in that capacity.
11 MR. WHEATLAND: Okay, so I'm familiar
12 with the fact that you've been involved with these
13 issues at the Commission for a number of years.
14 But beyond your experience as a lab technician,
15 and your BA in biochemistry, is there any other
16 specific academic training or professional
17 experience you've had in the field of water
18 resources.
19 MS. WHITE: Yes, I've gone through
20 training related to groundwater contaminant
21 transport, which was done through the Commission.
22 I've gone through several training
23 courses related to erosion and sediment control.
24 I've worked with various facilities related to
25 water quality. Currently involved in a water

quality study in Huntington Beach working with Orange County Sanitation District, analyzing bacterial contamination of surf zone.

I've been involved in working with agencies related to evaluation of feasibility of wastewater use in power plants through the Commission.

MR. WHEATLAND: So, again, those are experiences that you've had, but in terms of your actual professional experience and academic training, has -- you've had some in-house training I think --

MS. WHITE: I just said what my professional and academic experience has been.

MR. WHEATLAND: Right. Now, have you actually been in a water treatment plant?

MS. WHITE: Yes. Several.

MR. WHEATLAND: I don't know who this question is directed to, but Ms. DeCarlo asked about how much recycled water Mountain House Community Services District is prepared to provide EAEC, and I think, Mr. Kessler, you answered that the Mountain House Community Services District has said it is prepared to provide 100 percent of the water it produced to East Altamont Energy Center,

is that correct?

MR. KESSLER: Yes.

MR. WHEATLAND: All right, now I would have rather asked these questions of the Mountain House Community Services District, but given Ms. DeCarlo's recent raising the concern of hearsay, but let me ask you this first as a foundation.

Did you notify the Mountain House Community Services District of these hearings?

MR. KESSLER: Yes, I spoke to them.

MR. WHEATLAND: And did you invite them to participate?

MR. KESSLER: They were aware, if they wanted to show up.

MR. WHEATLAND: Did you invite them to participate?

MR. KESSLER: I did not directly invite them to participate, no.

MR. WHEATLAND: Did you offer to sponsor their testimony if they wished to come today and tell us about their desire to sell water to BBID?

MR. KESSLER: I did not ask them that question.

MR. WHEATLAND: And why not?

MR. KESSLER: My understanding, as I

1 indicated earlier, is that there is some
2 sensitivity with San Joaquin County Board of
3 Supervisors with this project.
4 That they, through Mr. Sensibaugh's
5 comments to me that they have taken a position for
6 now that they are not supportive of this project.
7 They have indicated that regardless of the
8 County's support, that the CSD makeup of their
9 board will be changing, and as such, can be
10 elected by members within Mountain House down the
11 road.
12 That's my understanding. And Mr.
13 Sensibaugh has indicated a sensitivity with doing
14 anything that could be considered of a policy
15 nature; that is the responsibility of the board,
16 and not himself, as the general manager of
17 Mountain House CSD.
18 And I can also tell you that when his
19 board challenged his letter to the Energy
20 Commission, they did not at first see the
21 statement in the last paragraph with respect to
22 not trying to counter any of the policies or
23 positions of the County Board of Supervisors, or
24 something to that, like in his statements in
25 response to questions that the Energy Commission

had put forth to him.

MR. WHEATLAND: Thank you for your answer. Did he also indicate to you a preference to negotiate a contract with BBID after the new board was seated?

MR. KESSLER: Yes.

MR. WHEATLAND: And what is the earliest date that such a new board could be seated and be ready to negotiate a contract with BBID?

MR. KESSLER: In reference to the new board I believe he's talking in reference to the one that may come after this November 5th, or after, his other indication was after licensing of this project, should it be licensed.

At that point in time that the posture of the County might be different, to accept the outcome of the Energy Commission's decision. And then to choose to look at what would be the best interests of the CSD.

MR. WHEATLAND: Now, there was also some questions from your counsel regarding the projections of future water supply. And I believe that you testified that there are some projections that water should be -- or would be available by 2005 and 2006, is that correct?

1 MR. KESSLER: You're referring to
2 recycled water?
3 MR. WHEATLAND: Recycled water from
4 Mountain House, yes.
5 MR. KESSLER: My understanding is
6 recycled water will be available next year in
7 2003.
8 MR. WHEATLAND: And at the end of 2003
9 how much water do you understand will be
10 available?
11 MR. KESSLER: The projection we have
12 begins in 2005, based on Mountain House's numbers,
13 and I believe I indicated that. Would you like me
14 to repeat that?
15 MR. WHEATLAND: Well, let me ask -- no,
16 you said you understand that water will be
17 available in 2003, was that your testimony?
18 MR. KESSLER: My point is is that
19 wastewater will be treated to tertiary level
20 beginning in 2003.
21 MR. WHEATLAND: All right, and how much
22 will be discharged in 2003?
23 MR. KESSLER: I don't have an estimate
24 for 2003. I have one for 2005.
25 MR. WHEATLAND: Actually, I'm not asking

for an estimate. I'm asking do you know how much will be discharged?

MR. KESSLER: No, I don't.

MR. WHEATLAND: Do you know how much will be discharged in 2005?

MR. KESSLER: The estimate provided by Mountain House is 890 acrefeet per year.

MR. WHEATLAND: All right. Now, again my question is do you know how much will be discharged in 2005?

MR. KESSLER: That's an estimate.

MR. WHEATLAND: So that's an estimate of how much is produced. Now, how much will be discharged in 2005?

HEARING OFFICER WILLIAMS: Counsel, when you say discharged, do you mean from the treatment plant?

MR. WHEATLAND: Yes, from the treatment plant.

MR. KESSLER: Discharged where?

MR. WHEATLAND: To available to provide water to this project.

MR. KESSLER: My understanding is all of that water, whatever the amount is, and the best estimate at this time is 890 acrefeet for the year

1 could be made available to East Altamont.
2 MR. WHEATLAND: All right, so I
3 understand the word "would" or "could", but my
4 question is will. And if you don't know you can
5 simply say.
6 My question is how much will be
7 discharged and available to this project in 2005?
8 MR. KESSLER: Just as the other
9 witnesses offered on all these projections, as we
10 offer, we cannot give you exact number. These are
11 estimates.
12 MR. WHEATLAND: All right. Can --
13 MR. KESSLER: So I cannot answer that.
14 MR. WHEATLAND: I'm not even asking for
15 an exact number. Can you give me any number of
16 how much will be available to this project in
17 2005?
18 MR. KESSLER: We cannot give you an
19 absolute number, but we can tell you that -- I can
20 tell you that in my professional opinion, what I
21 know about the Mountain House development, that
22 there will be a quantity available in 2005.
23 MR. WHEATLAND: Well, absent our project
24 in 2005, how much will be used within Mountain
25 House community, or discharged into Old River?

1 MR. KESSLER: Whatever's produced will
2 be placed somewhere. The nature of their permits
3 are such that they need to discharge to land, it's
4 my understanding, for initial periods of monitor
5 the quality of the effluent before the Regional
6 Board will allow it to be discharged to Old River.
7 MR. WHEATLAND: Now, condition number 6
8 would require the applicant or the project owner
9 and BBID to enter into a binding contract for the
10 delivery of recycled water by approximately the
11 time that they would commence construction of the
12 project, is that correct?
13 I think the term would be no later than
14 120 days after the project owner has submitted to
15 the CPM an executed supply agreement, and no later
16 than 60 days prior to construction, is that
17 correct?
18 I'm looking at the verification on soil
19 and water-6 on page 5.14-47 of your testimony.
20 MR. KESSLER: I think Ms. White's going
21 to respond to this because she wrote this
22 particular COC.
23 MS. WHITE: Do you want me to answer
24 your question?
25 MR. WHEATLAND: I'd like somebody to,

please.

MS. WHITE: Okay. This provision, based on the applicant's commitment to use recycled water, the provisions in 13580.7 allow a potential customer to request of a public agency service of recycled water, in particular the provisions of 13580.7 and 13580.5 are connected. There does not need to be a determination by the State Water Resources Control Board of availability. And the water could be either water that is available or can be made available.

If, in fact, the applicant is truly committed to the use of recycled water, as they suggest, we felt that they could use this provision to, in fact, assure that recycled water service would be provided to the power plant.

The provisions in that statute --

MR. WHEATLAND: Okay -- wait --

MS. WHITE: -- allow for 120-day timeframes. So we built those into the condition.

MR. WHEATLAND: All right. So my question was does this condition require BBID and the applicant to enter into a water supply service contract?

MS. WHITE: This provision allows the

applicant to make a written request of BBID to provide recycled water service to the project.

MR. WHEATLAND: And does it say that the project owner shall enter into a water supply service contract with BBID?

MS. WHITE: That is consistent with your MOU. That provision is directly out of your MOU.

MR. WHEATLAND: Is that what it says? I'm just asking if that's what it says.

MS. WHITE: Yes.

MR. WHEATLAND: Good. And does it say that that agreement has to be provided as verification within 60 days after project mobilization?

MS. WHITE: Yes.

MR. WHEATLAND: Good.

MS. WHITE: Wait, pardon me. No, has received the request.

MR. WHEATLAND: Right, and then the request has to be resolved within 120 days, correct?

MS. WHITE: Yes.

MR. WHEATLAND: All right, so that would be 60 days after project mobilization, correct?

MS. WHITE: Yeah, 60 days prior to

1 mobilization you will submit a request. 120 days
2 from that you would -- we would expect that you
3 would execute the supply agreement.
4 MR. WHEATLAND: All right, good. And
5 would that supply agreement contain specific terms
6 of service for the supply of recycled water?
7 MS. WHITE: We expect that it would.
8 MR. WHEATLAND: Would it include the
9 rate for the recycled water?
10 MS. WHITE: To the extent that you can
11 as defined in your MOU.
12 MR. WHEATLAND: Only to the extent that
13 we can would be acceptable to the staff?
14 MS. WHITE: Based on your MOU your
15 supply agreement would be addressing reasonable
16 rates, is that not correct?
17 MR. WHEATLAND: I'm going to ask the
18 questions. The service agreement that you specify
19 here, would that need to include the rates for the
20 supply of recycled water?
21 MS. WHITE: Based on your MOU your
22 supply agreement will contain information on
23 rates. So, yes.
24 MR. WHEATLAND: Good. Will it also
25 contain the volume of water to be delivered?

1 MS. WHITE: The MOU specifies that the
2 supply agreement would relate to the actual
3 capacity of the lines.
4 MR. WHEATLAND: Right, but I'm talking
5 about the water supply service contract that you
6 require to be entered into by the time of site
7 mobilization.
8 Would that supply contract be required
9 to include the volumes of water to be delivered?
10 MS. WHITE: We didn't expect anything
11 beyond what is specified in the MOU, which is
12 provisions related to a recycled water pipeline
13 capable of delivering 5900 gallons per minute, and
14 utilization of -- maximal utilization of the
15 recycled water produced.
16 MR. WHEATLAND: All right, so you would
17 like --
18 MS. WHITE: Which could vary by day.
19 MR. WHEATLAND: Okay, this is very
20 helpful. I'm finally understanding now what
21 you're asking for.
22 So one of the things that that service
23 contract would do, it would have to require the
24 construction of a water pipeline that would be
25 capable of conveying 5900 gallons per -- what is

the quantity that you would want it to carry?

MS. WHITE: As specified in your MOU, it needs to be no smaller than a pipeline capable of conveying 5900 gallons per minute.

MR. WHEATLAND: Gallons per minute, okay. And --

MS. WHITE: Would you like me to refer to the --

MR. WHEATLAND: No, actually --

MS. WHITE: -- condition in your MOU that specifies that?

MR. WHEATLAND: No, actually I'd like to go back to Mr. Kessler's testimony regarding the projected available supply. I think he said that there was possible, or there could be how much, Mr. Kessler, by 2005?

MR. KESSLER: I believe it was 890 acrefeet per year.

MR. WHEATLAND: And what would that work out in terms of gallons per minute?

MR. KESSLER: Certainly less than that we're looking at. Specifying that the infrastructure be sized for ultimate capacity. Just as the infrastructure that serves Mountain House in their water treatment plant -- for

1 ultimate capacity. We would seek that those
2 recycled water pipeline provide the ultimate
3 build-out capacity and consistent with what you
4 proposed, yourself.
5 MR. WHEATLAND: So, what would that work
6 out in terms of gallons per minute? The 895
7 acrefeet?
8 MS. WHITE: Is that relevant in terms of
9 what you're actually proposing? I mean you had
10 proposed to build a pipeline 24 inches in
11 diameter, as --
12 MR. WHEATLAND: Remember, Ms. White, --
13 MS. WHITE: -- as signed --
14 MR. WHEATLAND: Ms. White, first of all,
15 I'm asking the questions. And second of all, the
16 question was directed to Mr. Kessler. And so
17 let's let him answer, please.
18 MS. WHITE: Okay.
19 MR. KESSLER: Something on the order of
20 600 GPM.
21 MR. WHEATLAND: Approximately 10 percent
22 of the total capacity of that line as a projected
23 basis, correct?
24 MR. KESSLER: Yes.
25 MR. WHEATLAND: And that capacity is not

1 guaranteed, correct, but merely a projection?
2 MR. KESSLER: Yeah, to get back to your
3 volume question, we don't see that the water
4 supply agreement, the recycled water aspects of
5 that water service agreement necessarily need to
6 spell out an exact schedule. Because we are
7 recognizing that there is -- or we are trying to
8 set conditions that would allow East Altamont to
9 make maximum use of that at times that it could be
10 used by the power plant of the recycled supply.
11 And recognizing the need to supplement with fresh
12 water beyond that point.
13 MR. WHEATLAND: All right. So now, in
14 soil and water-6, it says that the project owner
15 shall submit to BBID a written request pursuant to
16 water code section 13580.7, is that correct?
17 MS. WHITE: Yes.
18 MR. WHEATLAND: Do you have a copy of
19 that section before you?
20 MS. WHITE: Yes.
21 MR. WHEATLAND: All right. I have
22 copies if the Committee wanted to follow along.
23 PRESIDING MEMBER KEESE: We've got a
24 copy.
25 MR. WHEATLAND: Now the actual request

is submitted pursuant to 13580.7B, is that correct?

MS. WHITE: The reference to the request is to have it be consistent with the provisions contained in 13580.7.

MR. WHEATLAND: Well, I know that, but the actual request is spelled out -- the manner in which the request is made is spelled out in 13580.7B, is that correct?

MS. WHITE: Yes.

MR. WHEATLAND: Now are you also proposing to make all of the provisions of 13580.7 applicable to this project through this proposed condition?

MS. WHITE: Repeat that?

MR. WHEATLAND: Are you proposing to make all of the provisions in 13580.7 applicable t this project through your proposed condition?

MS. WHITE: To the extent they're appropriate.

MR. WHEATLAND: All right. Are there any there that are not appropriate?

MS. WHITE: Not that I can see.

MR. WHEATLAND: All right, so just that we're clear, in subsection (e) it provides if

1 recycled water service cannot be provided at a
2 rate comparable to or less than the rate for
3 potable water, the retail water supplier is not
4 required to provide the recycled water service
5 unless the customer agrees to pay a rate that
6 reimburses the retail water supplier for the cost
7 described in subdivision (c).
8 That provision would be applicable, is
9 that correct?
10 MS. WHITE: I would expect so.
11 MR. WHEATLAND: Okay. And the
12 provisions of subdivision (d) which provides that
13 the rate shall not exceed the estimated reasonable
14 cost of providing the service, and any additional
15 costs agreed to by the customer for recycled water
16 supplemental treatment, that also would be
17 applicable to this project, is that correct?
18 MS. WHITE: It is not staff's intent to
19 impose a requirement on the applicant or BBID
20 inconsistent with their will-serve letter.
21 In their will-serve letter they
22 basically state that the costs associated with the
23 facilities to convey water to the project must be
24 borne by the applicant.
25 So, we would have to reconsider this.

1 MR. WHEATLAND: Okay, and just finally,
2 then, if you could reconcile for me if, in fact,
3 recycled water service cannot be provided at a
4 rate comparable to or less than the rate for
5 potable water, how do we reconcile that with the
6 requirement that there must be a pipeline and it
7 must be constructed prior to the start of
8 operation?
9 MR. KESSLER: We believe we've already
10 established that in our economic analysis, that
11 the rate is comparable for recycled supply as
12 compared to fresh water supply only.
13 MR. WHEATLAND: Well, I --
14 MS. WHITE: And actually we've used, in
15 some regards, your numbers. You had provided us
16 information on $48 an acrefoot. We had
17 information from Paul Sensibaugh that it would
18 definitely be competitive.
19 There seems to be no evidence that would
20 suggest the cost of the recycled water would
21 exceed the cost of potable water.
22 MR. WHEATLAND: I'm fully aware of your
23 opinion, but my question was with respect to this
24 code section. All of the terms of which you said
25 are applicable.

1 If BBID and the project owner determine
2 that recycled water service cannot be provided at
3 a rate comparable to or less than the rate for
4 potable water, how do we reconcile that with your
5 requirement that there must be a pipeline, and it
6 must be in place prior to the start of
7 construction of this project?
8 MR. KESSLER: We feel that not only have
9 we, as staff, independently established that cost
10 comparability, but that's also been a finding by
11 you, as the applicant; it's been a finding by BBID
12 in their feasibility study, that all those are
13 reasonable costs.
14 MR. WHEATLAND: Okay, well, I won't ask
15 the question a third time. That's quite all
16 right.
17 I'm going to take just a second and see
18 how many questions I can cross out, if that would
19 be all right.
20 HEARING OFFICER WILLIAMS: Absolutely.
21 (Pause.)
22 MR. WHEATLAND: Okay, I think I have
23 just a couple more questions. And I'm not going
24 to get into any of the legal issues. I'm just
25 going to assume that those are issues that we can

1 brief.

2 PRESIDING MEMBER KEESE: I think you've

3 set a rather firm foundation.

4 MR. WHEATLAND: Yes. Does the FSA set

5 forth your determination that the cost of

6 supplying a treated recycled water to EAEC is

7 comparable to or less than the cost of supplying

8 potable domestic water?

9 MR. KESSLER: Yes.

10 MR. WHEATLAND: All right, point me,

11 please, to that portion of the FSA that makes that

12 determination.

13 MR. KESSLER: We clarify that, your

14 statement, not as potable water, but fresh water

15 that's capable of being used as potable water.

16 Moving to page 29 of our FSA --

17 MR. WHEATLAND: Okay, on page 29, thank

18 you.

19 And finally I was very pleased to know

20 that Ms. White says that the staff doesn't want to

21 quibble. So let me ask you about one word and see

22 whether this is a word in which you want to

23 quibble.

24 In condition 5 you say that -- you're

25 suggesting that this project be required to accept

all of the water that's produced by the Mountain House Community Services District, 100 percent of all the water that's produced, is that correct?

MS. WHITE: Based on the workshop that we had --

MR. WHEATLAND: No, my question is just if you've used the word produced.

MS. WHITE: Agreed.

MR. WHEATLAND: And the --

MS. WHITE: That is accurate in terms of what is contained in our errata.

MR. WHEATLAND: And have you changed your recommendation here today with respect to the word produced?

MS. WHITE: I'm reconsidering it.

MR. WHEATLAND: Well, thank you. And what have you decided?

MS. WHITE: I haven't made a decision yet. I told you I was just reconsidering it. But as it stands right now, this is staff's position.

MR. WHEATLAND: Thank you. That's all the questions I have.

HEARING OFFICER WILLIAMS: Okay, Mr. Sarvey, do you have any cross-examination of --

MR. SARVEY: Yes, I do.

1 HEARING OFFICER WILLIAMS: Okay.
2 CROSS-EXAMINATION
3 BY MR. SARVEY:
4 Q As Mr. Wheatland suggested earlier, has
5 the applicant or BBID provided you with any
6 substantial figures for water usage other than
7 their own estimates?
8 HEARING OFFICER WILLIAMS: Mr. Sarvey,
9 who are you addressing the question to?
10 MR. SARVEY: Staff. Either one.
11 HEARING OFFICER WILLIAMS: Okay, I don't
12 think they were listening.
13 MR. SARVEY: Oh, I'm sorry.
14 MS. WHITE: I beg your pardon, I'm
15 sorry.
16 (Laughter.)
17 MR. SARVEY: That's okay, no problem.
18 MS. WHITE: Mr. Sarvey, I apologize.
19 MR. SARVEY: No problem, I'm used to
20 being ignored. I've got four kids at home, it
21 doesn't bother me at all.
22 (Laughter.)
23 MR. SARVEY: Okay, as Mr. Wheatland
24 suggested, that perhaps estimates were unreliable,
25 has the applicant or BBID provided you with any

1 certainty other than estimates as to the water use
2 that they're projecting?
3 MS. WHITE: No. In fact, that's why we
4 look at them in terms of the trends they indicate.
5 We don't view them as exact.
6 For example, BBID has reevaluated their
7 numbers recently. We spent most of the proceeding
8 looking at a data set that for essentially 16
9 months, when the FSA was published, we had the
10 opportunity to look at a new revision of numbers.
11 And they indicated that they will
12 continually reevaluate their numbers over time,
13 which is reasonable.
14 What you'd want to look at then is what
15 the trends indicate. And as I stated earlier, it
16 just shows that there's a continual growth in
17 residential development and demand. And a rather
18 constant demand in terms of agriculture. And East
19 Altamont, the numbers for East Altamont that were
20 used were the annual average.
21 And a lot of average numbers were used
22 in that projection. And so we take into
23 consideration variability associated with BBID's
24 historic use. We look at the conservative nature
25 of the previous numbers, the conservative nature

of the current numbers. And we're just trying to get an overall feel indicating, of course, that there's going to be a tight raw water supply certainly by around 2020.

MR. SARVEY: BBID representatives presented evidence based on their professional opinion. Have you received any information to verify their professional opinion? Or have you received information that verifies the usage figures that they have provided you?

MR. KESSLER: We've only received what was provided in their testimony.

MS. WHITE: We have no reason to challenge the professional opinion of Mr. Gilmore. In the past few months working with him we feel that he is capable of providing us accurate information.

MR. SARVEY: He's a good representative; I agree with that.

Has the applicant or BBID changed its estimates of supply or usage during the application period?

MS. WHITE: Yes.

MR. SARVEY: Due to the conflicting data on water provided by the applicant, do you accept

the applicant's data as reliable?

MS. WHITE: We have looked at their data in relationship with data from various sources to come to our conclusions and recommendations.

MR. SARVEY: BBID has suggested in their testimony and they revised their testimony that Tracy Hills will use only 3000 acrefeet of water instead of 6000 acrefeet of water. Have you verified that?

MR. KESSLER: We've not personally verified that. But I'll just answer it as that. We do recognize that the projection was 6000 acrefeet per year, or on that order. And now it's on the order of 3000 acrefeet per year.

MR. SARVEY: After the testimony you've heard on the availability of Mountain House Community Services District's water, do you feel delivery of this water is contingent upon the approval of the San Joaquin County Board of Supervisors?

MS. WHITE: Depending upon the timing of when an agreement would be put forward, it may.

MR. SARVEY: Are you relying on a change in the board of supervisors' makeup to make this recycled water available for this project? There

1 was some testimony presented earlier.
2 MS. WHITE: Actually we're relying more
3 on the applicant going to the public agency and
4 making formal request for water service including
5 recycled water, as they have a right to do under
6 the provisions of 13580.7.
7 MR. KESSLER: And as Mr. Sensibaugh, the
8 general manager of the Mountain House Community
9 Services District, has indicated, he believes that
10 once the project is considered by the Commission
11 herein, should they issue certification at that
12 point, that his board would like to be cooperative
13 towards establishing such an agreement.
14 MR. SARVEY: Is it your understanding
15 from the applicant's testimony that the Mountain
16 House Community Services District has an
17 obligation to use half of its recycled water
18 internally?
19 MS. WHITE: Could you repeat that
20 question again?
21 MR. SARVEY: Is it your understanding
22 from the applicant's testimony that the Mountain
23 House Community Services District has an
24 obligation to use one-half of its recycled water
25 internally?

MR. KESSLER: No, that's not our understanding.

MR. SARVEY: Do you believe it's their understanding?

MS. WHITE: It may be.

MR. SARVEY: Have you questioned them why they've included the entire amount of recycled water as a source when they're defining that half of it will be used internally?

MS. WHITE: We are the ones that are saying that 100 percent of the water could be used by the project. The applicant is suggesting that some portion less than.

MR. SARVEY: During dry hydrological conditions you estimate that water use will increase. Do you also agree that the power plant will be needing more water during those time periods of dry hydrological conditions?

MR. KESSLER: We believe that there's a couple of factors that can contribute to that effect; knowing there's less hydropower production in a dry hydrologic year which increases the need for other resources of generation to produce and make up that difference.

And also, as was indicated, that higher

1 temperatures are typically associated with drier
2 water year conditions. And those also can
3 contribute to the need for more power, more load
4 to be produced.
5 So, these factors in just simplistic
6 terms, can result in that effect.
7 MR. SARVEY: You testified that the
8 applicant could use dry cooling and it would only
9 cost him $8 million more than this raw water
10 supply, is that correct?
11 MR. KESSLER: That was in terms of the
12 net present value of the combined capital
13 investment and annual costs, the operating costs,
14 without taking into account the lost power
15 generation.
16 MR. SARVEY: Without the use of recycled
17 water in this plant would you recommend dry
18 cooling as an alternative?
19 MS. WHITE: Our preferred alternative to
20 using 100 percent raw water to mitigate for the
21 potential impacts to other users of that raw water
22 source was dry cooling.
23 MR. SARVEY: Can you briefly state the
24 Contra Costa Water District's position in their
25 response to your PSA on this project and its

1 discharges? Briefly.
2 MR. KESSLER: Well, in very brief terms
3 they were pretty much against the discharge of any
4 new wastewater into the Delta. And they looked at
5 the opportunity for the Mountain House treated
6 wastewater to be utilized, rather than discharged
7 to the Delta, as something that they very much
8 advocate.
9 MR. SARVEY: Has the Contra Costa Water
10 District received the FSA at this point?
11 MS. WHITE: We have not confirmed that.
12 It was, I believe, sent them.
13 MR. SARVEY: Have you received any
14 communications from the Contra Costa Water
15 District concerning this evidentiary hearing and
16 their position?
17 MS. WHITE: I haven't.
18 MR. KESSLER: No, I have not.
19 MR. SARVEY: I'd like to present an
20 email into evidence that I received from Major
21 Williams. I believe it went out to every party,
22 so I think it's probably common knowledge at this
23 point. It's stating the position of the Contra
24 Costa Water District. And I'd like to present it
25 to the parties to see if there's any objections.

HEARING OFFICER WILLIAMS: We'll mark it as your next in order, Mr. Sarvey. It will be 6F.

MR. SARVEY: Can I be allowed to read the contents of this email or should I wait until everyone reviews it?

MR. WHEATLAND: Well, Mr. Sarvey, if I might ask, we've also received a copy of a letter from Mr. Richard Denton, Water Resources Manager, dated October 15, 2002. Have you seen that, too?

MR. SARVEY: No, sir. I'd love to have a copy of it.

HEARING OFFICER WILLIAMS: Didn't we admit that one?

MR. SPEAKER: We just did the January one.

MR. WHEATLAND: Yeah, this is October 15, 2002. We haven't admitted this one, yet. This is addressed to -- delivered by email to Cheri Davis.

And, Mr. Sarvey, the only reason I mention that is just so you have the context of both communications.

MR. SARVEY: Yeah, thank you, Mr. Wheatland.

(Pause.)

MR. WHEATLAND: May we have the letter of October 15th also identified, please.

HEARING OFFICER WILLIAMS: Okay. We had another one similar to -- didn't we leave a placeholder for Contra Costa? Let me see if I can find it.

(Pause.)

HEARING OFFICER WILLIAMS: All right, you may continue. We'll get there.

MR. SARVEY: Okay. Well, my particular email pertains to Contra Costa Water's first stating that they did not receive the FSA. And apparently what Mr. Wheatland's provided me, they did receive it on October 14th, but haven't had a chance to review it.

The email states that they would not object to this project as long as the Mountain House Community Services, or as long as they use 100 percent recycled water by 2020.

And then from my quick reading of Mr. Wheatland's here, I'd have a couple questions, as well.

Has the applicant or the CEC done an analysis of the impacts on the water supply or Delta water quality? To your knowledge.

1 MR. KESSLER: We only characterize it in
2 a qualitative sense.
3 MR. SARVEY: So do you feel that Contra
4 Costa Water District's issues have been resolved
5 related to this project?
6 MS. WHITE: In terms of conducting the
7 modeling analysis that they suggested? Is that
8 what you're specifically getting it?
9 MR. SARVEY: Yes.
10 MS. WHITE: No. We did not conduct the
11 modeling effort they requested.
12 MR. SARVEY: Okay. In your analysis of
13 alternatives did you consider the use of SCONOx
14 for 80 percent recovery of the water from
15 wastestream utilized in the catalyst desorbation
16 process?
17 MS. WHITE: No.
18 MR. SARVEY: And your testimony earlier
19 was that during 1976 and 1977 that water usage in
20 the District jumped from 37,000 to 55,000, about a
21 20 percent increase, is that correct?
22 MR. KESSLER: It's more on the order of
23 30 percent.
24 MR. SARVEY: Thirty percent, thank you.
25 Does that not make the estimates provided by Byron

1 Bethany Irrigation District inconsistent with your
2 findings as far as water usage during a dry
3 hydrological year?
4 MR. KESSLER: This is our opinion and
5 the answer is yes. But we also want to recognize
6 that there's other factors that attribute to the
7 water use in terms of the type of crops, the
8 number of acres being irrigated versus what was
9 historically done almost a quarter century ago.
10 But we do feel that it provides an
11 overall indicator that in dry hydrologic
12 conditions that the likely -- ag uses would not be
13 a decrease in the amount of water demanded, it
14 would be an increase.
15 And one much more sizeable than just on
16 the order of plus or minus 5 percent, as was
17 previously suggested.
18 MS. WHITE: These numbers indicate that
19 there's a tremendous amount of variability in the
20 actual water use. And we just wanted to caution
21 people against perceiving any of the numbers
22 supplied by any source as exact. There is a
23 tremendous amount of variability.
24 Our analysis is done on a more
25 conservative basis, and our concerns, as we

1 indicated, still exist in terms of raw water
2 supplies as you approach 2020 and the actual raw
3 water supplies based on annual average demands are
4 reduced, the availability of excess to the project
5 are reduced.
6 If you take into consideration the
7 amount of variability there is a strong potential
8 for insufficient supplies to be available for the
9 operation of the project, if they used 100 percent
10 raw water.
11 MR. SARVEY: Is it your testimony that
12 without the use of recycled water that this
13 project will result in a significant unmitigated
14 environmental impact to water resources?
15 MS. WHITE: Our position is that it
16 could result in potentially insufficient resources
17 available to serve the project and other users of
18 raw water in BBID's service area, and that it
19 would have an impact on other users.
20 MR. SARVEY: Thank you.
21 HEARING OFFICER WILLIAMS: Is there any
22 objection -- do you want to move this exhibit --
23 MS. DUNN: I haven't been allowed to ask
24 any cross-examination questions in the past, but I
25 would like to ask a few questions of the staff.

1 HEARING OFFICER WILLIAMS: Go right
2 ahead. Well, let's get this exhibit dealt with
3 first. Do you want to move it, Mr. Sarvey?
4 MR. SARVEY: Yes.
5 HEARING OFFICER WILLIAMS: Okay, any
6 objection to 6F, the email?
7 MR. WHEATLAND: No.
8 HEARING OFFICER WILLIAMS: Okay, that
9 will come into evidence as Mr. Sarvey's exhibit
10 6F.
11 Go right ahead.
12 MS. DUNN: I know we've all been here a
13 long time today, so I will try to be brief.
14 CROSS-EXAMINATION
15 BY MS. DUNN:
16 Q I want to make sure that I understand
17 the testimony that you have entered today. Do you
18 dispute that it is BBID's responsibility to
19 determine how to provide water service to its
20 customers?
21 MS. DeCARLO: Objection, calls for a
22 legal opinion. Regarding BBID's legal
23 responsibilities and legal authority.
24 HEARING OFFICER WILLIAMS: Well, if they
25 have an opinion they're free to offer it. So I'll

1 overrule the objection.
2 MS. WHITE: Are you specifically asking
3 in terms of what resources are made available to
4 this project in particular?
5 MS. DUNN: Well, I'm just asking you, I
6 mean it seems to me that your testimony is that
7 BBID is going to have an insufficient water supply
8 to meet the needs of its customers in the future,
9 including this project.
10 And I'm just -- I want to know whether
11 or not you somehow think that BBID is not capable
12 or it's not part of their responsibility to
13 determine how to manage its water supplies so that
14 it can meet the needs of all of its customers.
15 MS. WHITE: I would like to clarify what
16 we have found. That if this project were to use
17 100 percent raw water, that it can potentially
18 have a significant impact on other users of BBID's
19 raw water supply.
20 We are not making a finding of the
21 inability of BBID to do anything. We're making a
22 determination of the potential impacts associated
23 with this project.
24 MS. DUNN: Well, your conclusion assumes
25 that BBID doesn't have any flexibility in terms of

1 how it provides water service to its customers.
2 And my question is that are you aware of how BBID
3 makes decisions with regard to how it allocates
4 water supply to its various customers, and how it
5 meets its demands of its various customers?
6 MS. WHITE: We were provided information
7 based on the historical use of BBID, we were
8 provided information on projections associated
9 with BBID's diversions and current and future
10 demands.
11 And based on that information we made
12 our determination. Now, we have also had the
13 benefit of feasibility study which looks at the
14 options available for developing recycled water
15 supplies in the District.
16 And much, if not all, of that
17 feasibility study staff concurs with. If you look
18 solely at the raw water supplies, information on
19 any other resource available to the District other
20 than raw water under its pre-1914 right, and
21 Mountain House Community Services District
22 recycled water, we are not aware of anything else
23 available to the District.
24 MS. DUNN: There's nothing in the
25 historic record that you have looked at that

1 indicates that BBID has not historically been able
2 to deliver water to all of its customers within
3 its service area?
4 MS. WHITE: When you look at what it is
5 allowed to divert under its pre-1914 right and the
6 information you gave us on historical data, that
7 is true.
8 MS. DUNN: And you don't know the
9 specifics about how much water BBID has reserved
10 for standby uses, or how much water BBID's
11 customers specifically use in a given year?
12 MS. WHITE: Anything related to reserves
13 was, we were first presented that information
14 today in the presentation. Our inquiries about
15 what is available and how BBID manages was limited
16 to this date. So information like the 3200
17 acrefeet reserve for ag was never provided to us.
18 MS. DUNN: So your conclusion was
19 developed without having that specific
20 information?
21 MS. WHITE: And that's why we never
22 viewed any of the numbers as exact, because we
23 knew that there was a tremendous amount of
24 variability in not only BBID's residential
25 demands, but their agricultural demand. And that

there must have been some level of flexibility in order to provide all that raw water service.

But as you look at your projected numbers for demand through 2040, the amount of water that you have to play with starts to decrease significantly, particularly taking into consideration the agreement with DWR, which has a diversion of only 50,000 acrefeet, and not 60.

MS. DUNN: I believe it was your testimony looking at the year 76 to illustrate the variability in water use within BBID for agricultural use?

MS. WHITE: During hydrological dry year in particular.

MS. DUNN: I believe Mr. Kessler referred to '76, '77 period.

MR. KESSLER: Yes.

MS. DUNN: You didn't investigate or you didn't make any sort of determination as to what the cropping patterns were within the District or how that water was being used in those particular years, did you?

MR. KESSLER: No, I did not.

MS. DUNN: And if I were to tell you that the District was double-cropping with

1 tomatoes and lettuce, would you assume that that
2 double-cropping would result in a higher use of
3 water?
4 MR. KESSLER: We would certainly be open
5 to any information like that.
6 MS. DUNN: And I think it was the
7 testimony of BBID today that double-cropping is
8 not presently occurring within Byron Bethany
9 Irrigation District currently, so that is a change
10 in the historic use of water that has been used by
11 agriculture?
12 MR. KESSLER: I believe that's the case,
13 and as we qualified our statement, we tried to
14 take into account that there's other factors that
15 we didn't have specific detailed information to
16 account for.
17 So as we point that these shows under
18 the most extreme hydrologic -- dry hydrologic
19 conditions that we've experience on record, that
20 we're -- the demand increased by over 30 percent.
21 That there's other factors that may have
22 attributed to that increase, also.
23 So we're not trying to say that it's all
24 a result of dry hydrology; we're trying to suggest
25 that there's other factors. But we're -- also

1 believe in our opinion that it's a much greater
2 variability than 5 percent, as was presented
3 earlier.
4 And when you look at that compounding
5 effect of roughly a 4, 5 percent predicted demand
6 in excess of supply, should the District only rely
7 on fresh water supplies, and even taking into
8 account the ability for standby reserves on the
9 order of 3200 acrefeet, that might be able to
10 erase that, that the variability under dry
11 hydrologic conditions is a number much greater
12 than 5 percent.
13 MS. DUNN: Assume in year 2030 that BBID
14 has other beneficial uses within the District for
15 recycled water, would the requirement that 100
16 percent of the recycled water from Mountain House
17 to the East Altamont Energy Center inhibit BBID's
18 ability to use recycled water for those other
19 uses?
20 MR. KESSLER: I believe our goal is to
21 recognizing that the recycled water demand of East
22 Altamont, along with the nature of the supply
23 being fairly constant over the course of the year
24 is a really good match for the two.
25 But it's not to preclude, by our

1 conditions, that recycled water, to the extent
2 that it's, after its priorities, made available to
3 this power plant, that any excess could not be
4 used in other ways beneficial to BBID's customers.
5 Or even within Mountain House's own
6 developed areas.
7 MS. DUNN: But if there was a use for
8 recycled water that was equally beneficial to the
9 East Altamont Energy Center, this condition would
10 preclude BBID from using a portion of that
11 recycled water for that other use, isn't that
12 correct?
13 MR. KESSLER: There's also provisions
14 for any change, any reasonable changes like that,
15 to come back to the Commission and simply explain
16 those. And should they trigger an amendment, that
17 may be one thing. But something like a simple
18 exchange of recycled water, one source for
19 another, but accomplishes the overall intent of
20 that condition.
21 My opinion is it wouldn't trigger an
22 amendment to the project. It would just simply be
23 a clarification and a source as a supply would be
24 recognized in the annual compliance report.
25 MS. DUNN: I believe it was outside your

1 testimony that the Delta -- that you didn't look
2 quantitatively, but qualitatively at the Delta.
3 And that the Delta would be better off if East
4 Altamont uses recycled water because of a portion
5 of the fresh water or raw water would remain in
6 the Delta, is that a correct statement of your
7 testimony? I believe that was Lorraine's
8 testimony.
9 MS. WHITE: Essentially what we looked
10 at is if this project were to result in an
11 increased diversion of raw water from the Delta
12 while simultaneously the recycled water was
13 discharged into Old River.
14 That qualitatively that that works out
15 with an increased loading to the Delta. Whereas,
16 if you were to have the recycled water used by the
17 power plant, particularly as much as they possibly
18 could, then that effluent wasn't discharged to the
19 Delta. And that that loading would not occur.
20 What raw water which isn't needed by the
21 District would then not be diverted. Over time
22 you've already stated that you will end up
23 diverting based on your projections, an additional
24 18,000 acrefeet to accomplish your service
25 requirements to meet growth.

Now, that's not to say that by virtue of this plant using recycled water only, that that development won't occur. It may occur. We just are looking at the impacts associated with this project. And that if this project were to use recycled water rather than raw water, then the discharge from Mountain House could be avoided.

MS. DUNN: So I guess I want to make sure what you're not saying is that BBID would not be fully utilizing their water supply and diverting to the maximum extent of their water right.

MS. WHITE: Or to your demand. We're not saying that BBID would be limited in any way if this project were to use recycled water from meeting your other obligations.

MS. DUNN: It's clearly possible that BBID is using recycled water and still diverting 100 percent of their entitlement from the Delta?

MS. WHITE: But in terms of what this project's impacts would be, recycled water would not be discharged, so that they could use raw water.

MS. DUNN: But isn't it possible that recycled water could be used in some other means

on some other land application within the District that would eliminate the discharge of Mountain House water?

MS. WHITE: The impacts that are discussed in the feasibility study and the limitations, whether institutional, perceptional or otherwise, staff concurred with.

We found that your assessment and feasibility study of both alternative one, where you look at blended raw water and recycled water and the impacts to ag applications or land applications were consistent with what evidence has shown in other areas where you end up having to convert to more salt-tolerant crops.

We also know that it could end up increasing salt concentrations and shallow groundwater, and increase salt loading to soils when compared to raw water applications.

We found your findings would be consistent with what we would find. We also found that your interpretations of the feasibility of alternative two being unimplementable was pretty accurate.

You know the perceptions of your own customers better than us. And if you don't have

1 currently an ag customer asking for that water and
2 trying to convince ag customers to use that water,
3 then we just did not see any reason to question
4 your determination for alternatives one or two in
5 your feasibility study.
6 If the District is able to develop
7 additional recycled water sources to meet growing
8 demands beyond the projections that you've already
9 provided, there's nothing in our condition to EAEC
10 that would preclude you from doing so.
11 MS. DUNN: There's nothing in the
12 recycled water feasibility study that indicates
13 that there are other potential uses of recycled
14 water within the District that may develop in the
15 future.
16 MS. WHITE: We just didn't have
17 information. The only information we were
18 provided with was contained in the feasibility
19 study. If there are, for example, residential
20 applications, we didn't know if any -- the
21 information that was provided showed that there
22 were very limited things that the District has
23 considered over time in terms of recycled water
24 use.
25 MR. KESSLER: We have the opinion that,

you know, there can be a greater utilization of that recycled water by an industrial user like East Altamont in comparison to irrigation use. And we agree with the alternative, the recommended alternative as stated in the conclusions and recommendation of BBID's own recycled water feasibility study.

It says, it is recommended that the District continue to develop and direct industrial use alternative. Alternative three is the initial alternative for consideration of using recycled water.

By focusing the initial development on the EAEC opportunity, the District will be able to start with a single major customer and potentially build a program in the future.

MS. DUNN: That alternative doesn't say that 100 percent of the recycled water will necessarily go to East Altamont Energy Center, though, does it?

MR. KESSLER: No, it does not.

MS. WHITE: No.

MS. DUNN: I believe it was your testimony earlier today that the City of Tracy had offered recycled water to BBID for use for the

East Altamont Energy Center.

Am I correct in characterizing your testimony?

MR. KESSLER: Yes, I believe so.

MS. DUNN: And I have -- Rick is passing around right now a letter dated October 3rd to Mr. Steve Bailey from Byron Bethany Irrigation District.

And if you would, I'd like you to take a look at the third paragraph of that letter. And if you would, read that into the record, please.

HEARING OFFICER WILLIAMS: Well, let's get it marked before we --

MR. SARVEY: Mr. Williams, I'm going to have to object.

HEARING OFFICER WILLIAMS: Okay, well, let's just mark it first.

MR. SARVEY: Okay.

HEARING OFFICER WILLIAMS: Let me get it marked for identification first.

MR. SARVEY: Well, I have an objection.

HEARING OFFICER WILLIAMS: Okay. Let's just get it marked. And BBID, let's see, I believe exhibit -- there are two of them -- we'll do I guess the letter from BBID to Tracy will be

1 10. And 11 will be the response from Tracy. For
2 identification.
3 Okay, Mr. Sarvey.
4 MR. SARVEY: Yeah, from my understanding
5 at the beginning of the proceeding here, the
6 Committee was sponsoring these people for
7 testimony, BBID for testimony. And as such, they
8 don't have the right to cross-examination.
9 And even if we are granting them
10 intervenor status without applying for it, there's
11 nothing in their prehearing conference reserving
12 the right to cross-examine anybody.
13 So I think that this cross-examination
14 should be struck from the record and discontinued,
15 please.
16 HEARING OFFICER WILLIAMS: Yeah, well,
17 to clarify. The sponsoring question is one thing.
18 But as a necessary agency I think our ruling was
19 clear that we were giving them full party status.
20 MR. SARVEY: Okay, they still would have
21 to file in the preconference statement to reserve
22 the right to cross-examine, and it's not there.
23 So I'd like to object.
24 HEARING OFFICER WILLIAMS: Well, no, I
25 mean if they're given party status then that comes

1 with it. I mean it's --

2 MR. SARVEY: I thought we had to

3 identify what areas we were going to cross-examine

4 and reserve the right to cross-examine, was my

5 understanding of the rules and regulations of the

6 Commission. And you can correct me if I'm wrong.

7 HEARING OFFICER WILLIAMS: Well, no,

8 that's not correct. As a party, you know, it's

9 kind of presumed that you will have the ability to

10 cross-examine, particularly on an issue of this

11 import. So they wouldn't have to reserve the

12 right to cross-examine other witnesses.

13 MR. SARVEY: Well, is Mr. Boyd going to

14 now be allowed to cross-examine, as well, or --

15 MR. BOYD: Yeah, Major, I also want to

16 object because earlier on you denied me the

17 opportunity to cross-examine the witness from the

18 staff --

19 HEARING OFFICER WILLIAMS: Right,

20 because you --

21 MR. BOYD: -- because you said I wasn't

22 here earlier. But I am a party, --

23 HEARING OFFICER WILLIAMS: Yeah, but --

24 MR. BOYD: -- and I did file a

25 prehearing statement where I identified this as

one of the issues --

HEARING OFFICER WILLIAMS: No, no, you --

MR. BOYD: -- in dispute.

HEARING OFFICER WILLIAMS: -- didn't.

MR. BOYD: Yes, I did. I can refer you to page 17 where it's titled under noise and water resources, CARE disputes areas for hearing for noise and water resources.

HEARING OFFICER WILLIAMS: Yeah, what I did was --

MR. BOYD: It says right there.

HEARING OFFICER WILLIAMS: -- I looked on the notice that went out, and I looked under --

MR. BOYD: Which notice that went out?

HEARING OFFICER WILLIAMS: The notice of evidentiary hearing.

MR. BOYD: The one on the 15th? There's been several notices that went out on the schedule.

HEARING OFFICER WILLIAMS: Yeah, the notice of evidentiary hearing that was --

MR. BOYD: Dated?

HEARING OFFICER WILLIAMS: -- dated October 2nd. And, you know, there's a list of

1 people there who will be dealing with soil and
2 water. And I clearly have Mr. Sarvey there, but
3 you're not indicated there.
4 MR. BOYD: Okay.
5 HEARING OFFICER WILLIAMS: You're
6 indicated under air quality.
7 MR. BOYD: Okay, this was prepared prior
8 to the prehearing conference. And at the
9 prehearing --
10 HEARING OFFICER WILLIAMS: No, this was
11 prepared -- yeah, you're right.
12 MR. BOYD: Okay, and at the prehearing
13 conference you discussed with me what issues that
14 we were disputing.
15 HEARING OFFICER WILLIAMS: Right.
16 MR. BOYD: And this was one of the ones
17 that I listed.
18 HEARING OFFICER WILLIAMS: Right, I
19 don't recall that --
20 MR. BOYD: And so basically --
21 HEARING OFFICER WILLIAMS: -- being one
22 that you listed.
23 MR. BOYD: -- all I'm saying is you have
24 to judge all parties by the same standard, and --
25 HEARING OFFICER WILLIAMS: Well, I'm

1 trying to do that, but --
2 MR. BOYD: -- if you apply -- if you
3 prevent me from cross-examining --
4 HEARING OFFICER WILLIAMS: You're not on
5 my list. You're not on my list. I mean I
6 didn't --
7 MR. BOYD: They're not a party --
8 PRESIDING MEMBER KEESE: Byron Bethany
9 was not on the list. They're here, you got to --
10 they're participating.
11 MR. BOYD: That's fine, I'm just -- let
12 the record reflect that we object to them. We've
13 already filed a formal letter of objection to them
14 participating as a party.
15 PRESIDING MEMBER KEESE: They're here to
16 try to clarify this issue for us, and they are a
17 very -- it's perfectly obvious from today that
18 they're --
19 MR. BOYD: I'm not disputing --
20 PRESIDING MEMBER KEESE: -- an
21 absolutely necessary party to this discussion.
22 MR. BOYD: I'm not disputing that. I
23 just want them to follow the same rules I have to,
24 that's all I'm saying.
25 HEARING OFFICER WILLIAMS: Yeah, and to

1 the extent that, you know, you were not on the
2 notice as an interested party in terms of soil and
3 water resources or water resources, I mean, you
4 know, you got to let me know. And you haven't --
5 and because you haven't been here, I wasn't --
6 MR. BOYD: Well, as I said earlier, it's
7 part of my prehearing statement, and also I raised
8 it during the prehearing conference. In fact, the
9 transcript for the prehearing conference doesn't
10 even include me, even though I was participating.
11 So, I mean --
12 MR. SARVEY: I'd also like to note for
13 the --
14 HEARING OFFICER WILLIAMS: I haven't
15 seen the transcript.
16 MR. SARVEY: I'd also like to note for
17 the record that Byron Bethany Irrigation District
18 is not even listed as an interested party on the
19 proof of service list.
20 HEARING OFFICER WILLIAMS: I don't think
21 that's accurate. I think they are there. I mean
22 they've always been there.
23 Now, and I just want to clarify that,
24 you know, the only reason that you were not
25 allowed to participate in cross-examination on

1 this issue is that it was my understanding that
2 that was not one of your issues, and you weren't
3 here to tell us that that was.
4 MR. BOYD: Well, when I was here I did
5 tell you I was.
6 HEARING OFFICER WILLIAMS: Yeah, but
7 it's too late.
8 MR. BOYD: Okay, well, that's fine. My
9 objection's part of the record, that's sufficient.
10 HEARING OFFICER WILLIAMS: Okay. So, --
11 MS. DeCARLO: Comment from staff.
12 HEARING OFFICER WILLIAMS: Yes.
13 MS. DeCARLO: Staff -- it's just that we
14 found a later dated letter from the City of Tracy
15 also speaking to the availability of --
16 HEARING OFFICER WILLIAMS: Another one?
17 MS. DeCARLO: Yeah, it was actually
18 dated a couple months later. So if the previous
19 letter you mentioned goes into the record, we
20 would also request that this one go in, as well.
21 HEARING OFFICER WILLIAMS: Well, you
22 know, I know that there was some problems with the
23 proof of service, and apparently Contra Costa --
24 is this the Contra Costa?
25 MS. DeCARLO: No, no, I'm sorry, this

wasn't in regard to Michael Boyd's issue.

HEARING OFFICER WILLIAMS: Oh.

MS. DeCARLO: This was in regard to the City of Tracy letter regarding the availability of recycled water.

HEARING OFFICER WILLIAMS: Oh, okay. Let's --

MS. DeCARLO: I apologize.

PRESIDING MEMBER KEESE: Another Tracy letter?

MS. DeCARLO: Yes.

HEARING OFFICER WILLIAMS: Another Tracy letter. Can we see that?

MS. DeCARLO: Yes, but I apologize, I don't have copies because I wasn't --

HEARING OFFICER WILLIAMS: Can we get some copies?

(Pause.)

MS. DUNN: May I proceed, or are we still trying to --

HEARING OFFICER WILLIAMS: We're going to --

PRESIDING MEMBER KEESE: Let's see, how much more time do you have?

MS. DUNN: Well, I --

1 PRESIDING MEMBER KEESE: We're not
2 limiting you.
3 MS. DUNN: No, I can stay here.
4 PRESIDING MEMBER KEESE: But how many --
5 are you --
6 MS. DUNN: I just can't leave -- I've
7 got to get done today.
8 PRESIDING MEMBER KEESE: I'm seeing that
9 behind you dinner is arriving.
10 MS. DUNN: Yes, I see.
11 PRESIDING MEMBER KEESE: So the question
12 is are you going to go 15 minutes or 20 minutes or
13 something?
14 MS. DUNN: No, no, I have just questions
15 about these letters, and then I'm finished.
16 HEARING OFFICER WILLIAMS: Yeah, that's
17 the problem. I need to get them marked and --
18 PRESIDING MEMBER KEESE: Okay, we'd
19 better look at the third letter --
20 HEARING OFFICER WILLIAMS: And we need
21 to look at them.
22 MS. DUNN: Okay, that's fine.
23 HEARING OFFICER WILLIAMS: Okay?
24 MS. DUNN: That's fine.
25 PRESIDING MEMBER KEESE: So, let's --

1 HEARING OFFICER WILLIAMS: Why don't we
2 go off the record.
3 (Whereupon, at 6:05 p.m., the hearing
4 was adjourned, to reconvene at 6:45
5 p.m., this same evening.)
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1 EVENING SESSION

2 6:45 p.m.

3 HEARING OFFICER WILLIAMS: I've marked

4 the exhibits. We've got BBID's exhibit 10 for ID,

5 and exhibit 11, the Tracy documents.

6 And I think we left off with your --

7 MS. DeCARLO: Major, did you also mark

8 the December 20th Tracy letter, as well?

9 HEARING OFFICER WILLIAMS: December

10 20th. Yeah, I've marked this one as staff's 1I.

11 Can somebody see if they can round up

12 Mr. Sarvey out there someplace?

13 (Pause.)

14 HEARING OFFICER WILLIAMS: So, again,

15 we've got BBID's 10 and 11 for ID, and staff's 1I,

16 all Tracy letters.

17 So, Ms. Dunn.

18 CROSS-EXAMINATION - Resumed

19 BY MS. DUNN:

20 Q Okay, I would refer you to the October

21 3rd letter from BBID to Steve Bailey.

22 HEARING OFFICER WILLIAMS: Yes, exhibit

23 10 for ID.

24 BY MS. DUNN:

25 Q And I'd refer you to the first paragraph

in that letter. And if you wouldn't mind, Mr. Kessler, reading that into the record.

MR. KESSLER: This is the October 3rd BBID letter?

MS. DUNN: Yes, it is.

MR. KESSLER: Okay. "The District is in receipt of the record of conversation between yourself and Mr. John Kessler of the California Energy Commission, dated September 13, 2001. In this record you have indicated that if given the opportunity it would be your recommendation to the city council to pursue supplying recycled water to the EAEC. That statement surprised BBID since the City of Tracy had not previously discussed this interest with the District."

MS. DUNN: And then I would like to refer you to the October 30th letter from the City of Tracy to Mr. Gilmore.

HEARING OFFICER WILLIAMS: Yeah, and that's exhibit -- BBID's exhibit 11 for identification.

MS. DUNN: And if you wouldn't mind reading the third paragraph of that letter into the record.

MR. KESSLER: "I would like to clarify

one aspect of the September 13, 2001 record of conversation between myself and CEC Staff John Kessler. Mr. Kessler specifically asked me to assume the feasibility of providing a recycled water supply to the Energy Center, and based upon that assumption to state whether I would recommend to the city council that the city make available surplus supply of tertiary treated wastewater we expect to have in 2005. I responded affirmatively and would do so again. It is important to recognize, however, that there are a number of questions that need to be answered in order to determine whether a particular water supply is feasible for a particular demand. In accordance with that question presented I assumed economic, physical and legal feasibility in providing my response to Mr. Kessler."

MS. DUNN: So as far as you know, there was no discussion between the City of Tracy and BBID with regard to resolving the economic, physical and legal feasibility of determining whether recycled water could be used from the City of Tracy by BBID for the East Altamont Energy Center?

MR. KESSLER: That's correct, I'm not

aware of any.

MS. DUNN: Just one final question. I believe it was your testimony earlier in my cross-examination that if BBID identified some future use of recycled water that they could come back to the Energy Commission and ask for an amendment of the condition, the soil and water condition that requires 100 percent of recycled water to be made available to East Altamont.

And I guess I just want to get clarified, BBID would have to come back to the Energy Commission to get permission to use recycled water someplace else within their District?

MR. KESSLER: No. It's the applicant that would need to do that. Would need to come back to the Energy Commission and express their desire to use an alternative source of recycled water supply for the power plant.

MS. DUNN: So in other words, BBID would not have the discretion to use the recycled water that's being developed within the District for uses other than East Altamont Energy Center?

MR. KESSLER: In our opinion they would.

MS. DUNN: Well, I think you just

1 testified they couldn't do it without receiving
2 CEC amendment.
3 PRESIDING MEMBER KEESE: Let me try to
4 understand this question. If the initial water
5 went to the power plant, all of it. And then they
6 built a golf course and they decided they wanted
7 to use this water to irrigate the golf course,
8 which would mean substituting raw water for the
9 power plant.
10 BBID can't give Mountain House the water
11 for the golf course, but --
12 MS. WHITE: Can I read the provision of
13 the condition? I think what is trying -- what we
14 had provided in the condition was that if the
15 specified supply is not available, or the
16 specified limits will be exceeded prior to the end
17 of each calendar year, the project owner, not
18 BBID, but the project owner will immediately
19 notify the CPM.
20 The notification must specify the cause
21 and the proposed new source of recycled water,
22 modified cooling technology, or other reasonable
23 solutions subject to approval by the CPM.
24 We are not mandating that BBID do
25 anything. Our condition gets at what the power

1 plant project would be required to do.
2 PRESIDING MEMBER KEESE: But if they
3 don't send them the recycled water they have to go
4 someplace else and find recycled water?
5 MS. WHITE: No. It says if it is not
6 available, then the applicant could come back and
7 talk about either a new source of recycled water,
8 a modified cooling technology, or other reasonable
9 solution.
10 At a future date there might be
11 something else out there that they could do that
12 would not have an impact on raw water supplies and
13 potentially impact other customers.
14 PRESIDING MEMBER KEESE: Okay, but they
15 can't use -- I mean if this doesn't happen it
16 sounds like the raw water is going to be used for
17 irrigating the golf course. And they can't
18 swap -- Byron Bethany can't make that swap. They
19 can't decide instead of putting raw water here,
20 we're going to put it here and use the recycled
21 water where it's closer?
22 MS. WHITE: What we're suggesting at the
23 power plant, and this is based on what we saw in
24 terms of the feasibility study, in terms of the
25 applicant's proposal, in terms of what Mountain

House told us.

There, in the AFC, is a proposal for building a pipeline directly from Mountain House at a capacity sufficient to insure that there's enough water supplied to the plant that would use up whatever they produce, 5900 gallons per minute, it's a lot.

PRESIDING MEMBER KEESE: I'm trying to -- everybody here has said that's what they want to do. I mean Mountain House has said that's what they want, --

MS. WHITE: Yeah, right.

PRESIDING MEMBER KEESE: -- Byron Bethany --

MS. WHITE: And see, our Commission is trying to get --

PRESIDING MEMBER KEESE: -- applicant --

MS. WHITE: -- them doing what they say they're going to do.

MR. KESSLER: Our intent is for the first priority of recycled water made available from Mountain House and provided by BBID be applied to the power plant. To the extent there's water in excess of that, that the power plant needs, --

PRESIDING MEMBER KEESE: But you're not going to tie Byron Bethany's hand as to where they most efficiently and effectively can apply that water.

MS. WHITE: Our condition is intended to address the impacts --

PRESIDING MEMBER KEESE: If it's cheaper for them to deliver the fresh water here and use the recycled water someplace else, they can do it?

MR. KESSLER: Well, we believe our finding is that it's cheapest and the highest utilization of that recycled water is at the power plant first.

PRESIDING MEMBER KEESE: Not on the golf course?

MR. KESSLER: Not on the golf course.

MS. WHITE: No.

MR. KESSLER: Because it's a seasonal use compared to year-round --

MS. WHITE: There's also information in the feasibility study that relates to problems associated with the land application. Staff's position is we concur with those findings. There are environmental consequences that you don't have when utilizing it in a cooling tower that you

1 would have if you used it on a golf course or in
2 an ag field or something like that.
3 So, the findings that we made were
4 consistent with what they made in their
5 feasibility study. There was no evidence to
6 suggest that at sometime in the future this would
7 be something that the District would have to do.
8 If they had a user that could take
9 pretty much all the recycled water, and not impact
10 the raw water supplies, they could use the raw
11 water supplies as they currently are doing so.
12 MS. DUNN: I'm trying to make sure I
13 frame this question correctly. The feasibility
14 study is just that, right, it's a feasibility
15 study? It doesn't go in depth in terms of
16 determining pipeline costs, whether or not -- it
17 doesn't go into the specifics of actually making
18 recycled water available to any particular use, is
19 that correct?
20 I mean it's a feasibility level study?
21 MR. KESSLER: We're talking about BBID's
22 recycled water feasibility --
23 MS. DUNN: Yes.
24 MR. KESSLER: It does include a
25 conceptual cost estimate.

MS. DUNN: But it still is a conceptual -- it's still at a feasibility level --

MR. KESSLER: Yes.

MS. DUNN: -- analysis, correct?

MR. KESSLER: Yes.

MS. DUNN: And it is possible that BBID will identify other uses of recycled water within BBID that were not contemplated in that feasibility study in the next 40 years?

MS. WHITE: I would say it's possible, but I don't know as if I would say it's likely. What we found is that the feasibility study not only looked at estimate of cost, but also what it would take to deliver to East Altamont versus some of these other applications.

And as far as I'm concerned there is all sorts of possibilities, but to speculate on them beyond what was discussed in the feasibility study, I'm not willing to say what's likely or not.

MS. DUNN: Would you disagree that recycled water is part of the resource mix that BBID has to serve water to its customers?

MS. WHITE: I would agree that it's one that you are looking at developing.

MS. DUNN: And so if it is part of the resource mix, then it is part of BBID's operation to determine how best to use its resources to meet the needs of its customers, you wouldn't disagree with that?

MS. WHITE: To be able to answer that question I would have to consider something beyond the scope of what we considered in this analysis, which was --

MS. DUNN: Well, my question really is, is it BBID's responsibility to consider its resource mix and determine how to best utilize that resource?

MR. KESSLER: I think we agree with that. And I think we believe that the studies for the recycled water feasibility on the part of BBID, on the part of the applicant, on the part of ourselves, all point to the feasibility and economic viability and avoidance of other impacts and issues by utilizing that just as have been commonly done by all these sources.

MS. DUNN: But ultimately it's BBID's responsibility to determine how to use its resources to meet its customers?

MS. WHITE: But you also have to realize

1 that --

2 MS. DUNN: All right, that's just my --

3 MS. WHITE: -- it is --

4 MS. DUNN: -- question. It is

5 ultimately BBID's -- isn't it ultimately BBID's

6 responsibility to determine how to use its

7 resources to meet the needs of its customers?

8 MS. WHITE: In this particular case the

9 staff was asked to analyze the potential impacts

10 associated with this project --

11 MS. DUNN: You're still not really

12 answering my question. My question is only isn't

13 it true that it's BBID's responsibility to

14 determine how to meets its customers, taking into

15 consideration its entire resource mix?

16 MS. WHITE: The issue at hand is not

17 what you can or cannot do legally. The issue at

18 hand is what this project's potential impacts are,

19 and what staff's recommendations are to mitigate

20 those.

21 Now if you want to have a legal debate

22 between the jurisdiction of BBID and the

23 Commission, then I'll invite you to have that with

24 Lisa. But I'm not going to engage in one with

25 you.

1 We looked at the impacts associated with
2 this project, associated with the proposal that
3 the applicant put forward, and provided a
4 recommendation for mitigation in regard to those
5 impacts.
6 MS. DUNN: I'll just leave it at that.
7 That ends my cross-examination.
8 HEARING OFFICER WILLIAMS: Thank you.
9 Do you want to move these exhibits, counsel?
10 MS. DUNN: Yes, I would like to move
11 those exhibits into the record.
12 HEARING OFFICER WILLIAMS: Any
13 objection?
14 MS. DeCARLO: No objection.
15 HEARING OFFICER WILLIAMS: Okay, we'll
16 receive BBID exhibits 10 and 11.
17 Staff.
18 PRESIDING MEMBER KEESE: I have two
19 questions here that I do want to ask. We had an
20 earlier discussion on section 13580.7. And as I
21 recall there already is an agreement -- we
22 acknowledge there is an agreement over here
23 between applicant and --
24 MS. DeCARLO: An MOU.
25 PRESIDING MEMBER KEESE: There's an MOU.

1 All right. You're saying that you would prefer
2 they start this process here, that they forget the
3 MOU, make a request under this section. And if it
4 turns out that it would be more expensive to use
5 recycled water than raw water, then they can use
6 raw water.
7 I mean is that what -- because I -- the
8 answer was you want full compliance with this
9 section?
10 MS. WHITE: What we would like is to
11 have the applicant utilize as much recycled water
12 as is made available by Mountain House --
13 PRESIDING MEMBER KEESE: Right, we all
14 want --
15 MS. WHITE: -- to offset the -- okay --
16 PRESIDING MEMBER KEESE: -- we all want
17 that.
18 MS. WHITE: Right.
19 PRESIDING MEMBER KEESE: But do you
20 want --
21 MS. WHITE: However, the way that we
22 have seen the proceeding go so far, we haven't
23 seen a commitment in terms of schedule. We've
24 seen the data related to the applicant's proposal
25 for the pipeline, but now there's ambiguity as to

1 whether or not that pipeline will be built. They
2 challenge us on --
3 PRESIDING MEMBER KEESE: No, let me ask
4 the one -- if you're asking for compliance with
5 580.7, you can brief this, --
6 MS. WHITE: Yes, --
7 PRESIDING MEMBER KEESE: -- it seems to
8 me what you asked is that they ask Bethany, and if
9 the cost is more expensive, then they don't have
10 to do it. That's the way I read 580.7. So if I'm
11 reading it wrong, then --
12 MS. WHITE: And we have no reason to
13 think --
14 PRESIDING MEMBER KEESE: -- then you
15 should --
16 MS. WHITE: -- that it would be more
17 expensive than potable water.
18 PRESIDING MEMBER KEESE: It would be.
19 So, Calpine should wise up and use something
20 that's cheaper than what they're doing. I got it.
21 Let me ask the second question here.
22 You indicated that you would help me out on the
23 difference between fresh, raw, potable, potable
24 domestic.
25 I'm looking at, just because I have it

in front of me, I'm looking at this October 15th letter from Contra Costa Water District.

HEARING OFFICER WILLIAMS: That's applicant's 4D-2 for identification.

PRESIDING MEMBER KEESE: And I'm looking at page 2 and that first major paragraph. And if we take Contra Costa, it says, well, they indicate what the quality of that water is in the Delta, in their opinion. I guess staff has a different opinion, but they're indicating what the quality is.

Does this fulfill the needs for potable domestic water in 13550? You'd indicated to me you were going to give me, explain why this water met the potable domestic water requirement of section 13550.

MS. DeCARLO: Right, and I don't think that's a legal conclusion. I think that needs to be made on a factual basis. And I believe staff could provide some explanation of why they feel that this water --

PRESIDING MEMBER KEESE: Is potable?

MS. DeCARLO: Right. And then we can brief the legal issue.

PRESIDING MEMBER KEESE: Is domestic

1 potable water?

2 MS. WHITE: We're not saying that it's

3 domestic potable water in its raw water state.

4 We're stating that --

5 PRESIDING MEMBER KEESE: Isn't that what

6 13550 says?

7 MS. WHITE: Right, but what we're

8 stating, we used 13550 to provide guidance when it

9 comes to what options are available for cooling.

10 In a situation here you have the power

11 plant potentially impacting raw water supplies

12 resulting in impacts to other users of the raw

13 water supply, as we are required to analyze under

14 the Warren Alquist Act.

15 And in terms of trying to find how best

16 then to proceed in terms of proposing mitigation,

17 we look to established statutes; 13550 states

18 that, you know, that when you can use recycled

19 water for cooling, you do.

20 PRESIDING MEMBER KEESE: Domestic, when

21 you're going to use potable domestic water for

22 these purposes you should consider using recycled.

23 MR. KESSLER: We believe that --

24 PRESIDING MEMBER KEESE: See, we're all

25 in agreement on the principle, to use recycled

1 water instead of. But this --

2 MS. DeCARLO: And we're not using --

3 PRESIDING MEMBER KEESE: -- section

4 applies to -- I mean it looks like a stretch to

5 call raw water potable domestic water.

6 MS. DeCARLO: And we're not using 13550

7 necessarily in its black letter form. We're using

8 it as indication, along with the other statues,

9 that I identified in my opening statement, and

10 will explain further in my brief.

11 We're using it as an indication of state

12 water policy.

13 PRESIDING MEMBER KEESE: Okay, with

14 which we're all in agreement.

15 MS. WHITE: But we're not saying that

16 this project is mandated to use recycled water

17 based on that statute.

18 PRESIDING MEMBER KEESE: Okay.

19 MS. WHITE: What we're saying is it is a

20 reasonable mitigation to address the impacts we've

21 identified, and is consistent with direction

22 provided in existing statutes and policies.

23 PRESIDING MEMBER KEESE: Okay.

24 MS. WHITE: Now, we have to rely on

25 what's there.

PRESIDING MEMBER KEESE: Okay.

MS. DeCARLO: And staff has identified a CEQA impact that they feel requires mitigation.

PRESIDING MEMBER KEESE: But not under 13550?

MS. DeCARLO: Well, this would be a LORS issue. We also feel in addition to the CEQA impact issue, that authority under our interpretation of the LORS to also require recycled water in this instance. So it's a two-pronged approach.

PRESIDING MEMBER KEESE: Okay. Thank you.

HEARING OFFICER WILLIAMS: Applicant, are you going to move 4D-2 for identification in? This is the October 15th.

MR. WHEATLAND: Yes, we'd like to move that into evidence.

HEARING OFFICER WILLIAMS: Okay. It's admitted -- any objections? No?

MS. DeCARLO: No.

HEARING OFFICER WILLIAMS: Okay.

MS. DeCARLO: Staff has some redirect --

HEARING OFFICER WILLIAMS: Yes.

MS. DeCARLO: -- if we can do that now?

1 Okay.

2 REDIRECT EXAMINATION

3 BY MS. DeCARLO:

4 Q Do you have any indications that

5 Mountain House Community Services District is

6 unwilling to negotiate for the provision of

7 recycled water to BBID?

8 MR. KESSLER: No.

9 MS. DeCARLO: Was soil and water-6

10 developed based upon the applicant's proposals and

11 the provisions in the MOU between BBID and East

12 Altamont Energy Center?

13 MS. WHITE: We developed that

14 considering that, in fact, the applicant has the

15 ability to ask for recycled water, which would

16 provide a surety that if the water can be made

17 available it would be served to the project.

18 MS. DeCARLO: And certain provisions

19 within soil and water-6 are in direct response to

20 provisions made in the MOU, is that correct?

21 MS. WHITE: Yes. In fact, the MOU calls

22 for recycled water to be delivered at a reasonable

23 rate, specifies the pipeline. It's consistent

24 with some of the language in 13580.7 related to

25 reasonable rate.

1 There's other provisions after that,
2 that if there are disputes related to conditions,
3 that mediation or arbitration can take place to
4 address rate.
5 MS. DeCARLO: With the new agreement
6 between BBID and DWR, has BBID's supply of water
7 been limited to 50,000 acrefeet per year?
8 MS. WHITE: Could you restate that?
9 MS. DeCARLO: Sure. With the new
10 agreement between BBID and DWR, has BBID's supply
11 of water from the Delta been limited to 50,000
12 acrefeet per year?
13 MS. WHITE: Yes.
14 MS. DeCARLO: And do their own
15 projections show this supply could be exceeded by
16 anticipated demands?
17 MS. WHITE: Particularly if you take
18 into consideration the peak demand of the project
19 of 7000 acrefeet a year. I refer you to Mr. Nuss'
20 testimony.
21 MS. DeCARLO: And have they explained
22 how they would address these exceedances?
23 MS. WHITE: The data provided to us by
24 BBID on the 19th essentially identified the
25 development of Mountain House Community Services

1 District recycled water supply to help augment any
2 shortfall in the raw water supplies.
3 One of the reasons that we felt our
4 conditions were quite consistent with their
5 projections is that this raw water supply would be
6 augmented with the recycled water supplied to make
7 up for any shortfalls.
8 MR. WHEATLAND: I'm going to move to
9 strike the last response. She didn't even answer
10 her own counsel's question.
11 HEARING OFFICER WILLIAMS: Well, I had a
12 question about the date. You mentioned something
13 about the 19th, and you didn't specify the 19th of
14 what, so --
15 MS. WHITE: Oh, I'm sorry. We ended
16 up -- I ended up getting a fax from BBID -- pardon
17 me, an email which showed the updated numbers.
18 And it was on actually the date the FSA was
19 published, the 19th. So I apologize for that
20 reference. It's the same table that's included in
21 the BBID testimony.
22 In there it identified raw water
23 supplies, as well as Mountain House recycled water
24 supply.
25 HEARING OFFICER WILLIAMS: Does that

1 help clear it up, counsel?
2 MR. WHEATLAND: Thank you.
3 MS. DeCARLO: That's all for staff.
4 HEARING OFFICER WILLIAMS: Okay. Staff,
5 you have an exhibit 1I for identification. It's
6 another Tracy letter.
7 MS. DeCARLO: Yes.
8 HEARING OFFICER WILLIAMS: Do you want
9 to move that one in?
10 MS. DeCARLO: Yes, please, in addition
11 to staff's testimony in the final staff
12 assessment.
13 HEARING OFFICER WILLIAMS: Any
14 objection?
15 MR. WHEATLAND: No objection.
16 HEARING OFFICER WILLIAMS: Okay, so we
17 have the staff assessment section on soil and
18 water in its entirety in the record. And we also
19 have staff's 1I in the record.
20 MS. DeCARLO: And also the 1E errata
21 pertaining to soil and water resources.
22 HEARING OFFICER WILLIAMS: Correct.
23 Okay, Roberta, I know it's getting late and
24 there's some public people who, I think it's going
25 to be probably another -- we've got Mountain House

here, to go, testimony. But is there folks that absolutely can't stay, or need to --

MS. MENDONCA: I think most of the people that have talked to me and -- public comment card, don't mind waiting.

HEARING OFFICER WILLIAMS: Okay.

MS. MENDONCA: -- but I'm not sure about other people in here.

HEARING OFFICER WILLIAMS: Okay, well, just let us know if --

PRESIDING MEMBER KEESE: Let Roberta know.

HEARING OFFICER WILLIAMS: Staff, are you going to sponsor --

MS. DeCARLO: Yes. Staff is sponsoring the testimony of Duane Grimsman and Eric Teed-Bose. And they both need to be sworn in.

Whereupon,

DUANE GRIMSMAN and ERIC TEED-BOSE

were called as witnesses herein, and after first having been duly sworn, were examined and testified as follows:

DIRECT EXAMINATION

BY MS. DeCARLO:

Q Thank you for your patience. Mr.

1 Grimsman, can you please state your name for the
2 record.
3 MR. GRIMSMAN: Duane Grimsman.
4 MS. DeCARLO: And was a statement of
5 your qualifications attached to your testimony?
6 MR. GRIMSMAN: Yes.
7 MS. DeCARLO: What is your job title?
8 MR. GRIMSMAN: General Manager of
9 TriMark Communities.
10 MS. DeCARLO: And did you help prepare
11 the testimony entitled, testimony of Duane
12 Grimsman, General Manager, TriMark Communities and
13 Eric Teed-Bose, Project Manager, Mountain House?
14 MR. GRIMSMAN: Yes.
15 MS. DeCARLO: Mr. Teed-Bose, can you
16 please state your name for the record.
17 MR. TEED-BOSE: Eric Teed-Bose.
18 MS. DeCARLO: Was a statement of your
19 qualifications attached to your testimony?
20 MR. TEED-BOSE: Yes, it was.
21 MS. DeCARLO: And what is your job
22 title?
23 MR. TEED-BOSE: Project Manager for
24 TriMark Communities for the Mountain House
25 project.

MS. DeCARLO: Did you help prepare the testimony entitled, testimony of Duane Grimsman, General Manager, TriMark Communities and Eric Teed-Bose, Project Manager, Mountain House?

MR. TEED-BOSE: Yes, I did.

MS. DeCARLO: Now these questions are for either of you, whoever chooses to answer. Can you please describe how development is proceeding in the Mountain House community?

MR. GRIMSMAN: The development is proceeding very nicely. We're completing the first phase of development, what we call neighborhood F or Wickland Village. That neighborhood consists of about 1000 single family lots, about 480 apartment units, approximately 80 acres of industrial/commercial property, office property, village commercial of about 18 acres.

The backbone infrastructure for that portion of the project is almost done. It will be concluded in November.

The in-tract infrastructure to serve our first customer, who is Lennar Homes, will be completed in November, as well.

We recently earlier in the summer finished the sewer and water treatment facility

and a pump station on the California Aqueduct, and a raw water pipeline that brings raw water to our water treatment plant.

All of those facilities are complete. They've been deemed operational. And are currently being used. We are literally treating potable water. We're not, however, treating wastewater at this time because we don't have any occupants within the community.

The water treatment --

HEARING OFFICER WILLIAMS: Excuse me, sir. You said you're treating potable water?

MR. GRIMSMAN: Correct. We are -- the Department of Health Services requires that you operate the plant for 30 days and certify every day that you're meeting state standards for potable water.

HEARING OFFICER WILLIAMS: Thank you.

MR. GRIMSMAN: And we've been running it for about 45 days.

The water treatment plant and the wastewater treatment plant have both been accepted by the Mountain House Community Services District. On Tuesday their board unanimously voted to accept both facilities and the transfer of title will

take place within a few days.

We expect that our first homes will be built, will commence construction in the community in November. Lennar Homes is going to be pulling a building permit next month for approximately 20 model homes. They'll add an additional 12 model homes in the spring.

They expect their first move-ins to occur in March of next year. That will be when we will start generating our first wastewater.

Lennar is fully committed to these lots under a contract. Money has passed through and it sits, it's a done deal.

I think that pretty much summarizes what the current status of the project is.

Oh, we are processing applications for tentative maps for the next two neighborhoods. Those two neighborhoods are currently in process with San Joaquin County. They will consist of approximately 2200 single family lots, and about 40 acres of attached product, townehomes and duplexes.

And we expect to break ground on the backbone infrastructure for those neighborhoods next year.

MS. DeCARLO: Given the rate of development at the Mountain House community, do you believe the projections given in the final staff assessment for recycled water availability are reasonable?

MR. GRIMSMAN: Yes, I do.

MS. DeCARLO: Can you please describe what regulatory requirements, if any, there are for Mountain House community's re-use of the recycled water produced by the Mountain House Community Services District?

MR. GRIMSMAN: Let me give you a little background information. We have two permits that have been issued to us by the Central Valley Regional Water Quality Control Board. You're probably wondering why we have two permits.

One permit is for disposal of wastewater on agricultural property. The other permit is for discharge of 5.4 MGD of wastewater, title 22 tertiary wastewater into Old River.

That, up to this point, has been our ultimate plan for the wastewater. In order to get the green light to discharge into Old River we first had to demonstrate that our water met title 22 standards.

And so on a very short interim period of time we will be putting the wastewater generated in our first phase on our own agricultural properties in a future phase of the Mountain House community.

And once we've been able to demonstrate to the Regional Board that that water is compliant with the basic plan and meets title 22 standards, we will be seeking a discharge into Old River, unless arrangements are made to convey this water to the Calpine project or BBID.

MS. DeCARLO: As of now do you have any intention to put into the infrastructure purple pipe for recycled water use within Mountain House community?

MR. GRIMSMAN: No. As it sits right now, we have no regulatory requirement to install reclamation facilities within Mountain House. We have no map conditions, we have no conditions in our master plan that require us to do that. We have a general understanding with the Regional Water Quality Control Board Staff that we will seek and look for opportunities to reclaim water within the community.

For example, we have golf courses and

parks and things of that nature. That was an understanding that we reached when the permit was issued many years ago. Had an alternative, such as Calpine, been available at that time, we certainly would have sought approval to do that.

If the Regional Board were asked today, and I'm going to quote the opinion of my consultants, Rich Stohl of Ecologic, if they were asked today which would you prefer, using the water at a Calpine-type facility power plant versus reclaiming it on golf courses, the preference or the view would be the highest and best use of that water, would be a Calpine-type facility.

The reason for that is irrigating golf courses and parks does present some risk, albeit low, of ground water degradation. Where utilizing the water at the Calpine facility would not.

Does that answer your question?

MS. DeCARLO: Yes.

MR. WHEATLAND: I'm going to move to strike the portion of that testimony that is quoting the consultant. This party has had ample opportunity to make that consultant available for testimony, and if they think the testimony was

1 relevant, they should have brought the witness
2 here to be cross-examined.
3 And because it isn't included in the
4 written testimony, I would object to it as
5 additional direct.
6 MS. DeCARLO: His quote was merely a
7 representation of his knowledge regarding another
8 agency's proposed requirements to Mountain House
9 community regarding their re-use of recycled
10 water.
11 MR. WHEATLAND: It was second-hand
12 hearsay. It was a consultant's opinion of the
13 water board's opinion of what the uses might be
14 for recycled water.
15 MR. GRIMSMAN: I might mention that this
16 consultant deals --
17 MR. WHEATLAND: Wait, I say -- there is
18 an objection pending. I don't want the witness to
19 testify further on the matter till --
20 HEARING OFFICER WILLIAMS: Let's go off
21 the record.
22 (Off the record.)
23 HEARING OFFICER WILLIAMS: Because the
24 Committee considers you an expert, we're going to
25 allow you to rely on whatever representation that

1 you made, so the objection is overruled.
2 Continue, staff.
3 MS. DeCARLO: Okay. Do you anticipate
4 the imposition of any requirements to re-use
5 recycled water within the Mountain House community
6 in the future?
7 MR. GRIMSMAN: Not at this time.
8 MS. DeCARLO: What does it take to treat
9 the raw water from the Delta-Mendota Canal to
10 potable standards?
11 MR. GRIMSMAN: I'm not an expert on the
12 process of treating raw water to potable water
13 levels, but I've learned a lot --
14 MR. WHEATLAND: I'm going to object to
15 the question then, if he's not qualified as an
16 expert I'd object to his answer. He's not
17 operating the facility, he's the developer, and
18 he's not an expert in these matters.
19 HEARING OFFICER WILLIAMS: Staff.
20 MS. DeCARLO: Can he give his lay
21 opinion as to what it would take?
22 HEARING OFFICER WILLIAMS: What was the
23 question again?
24 MS. DeCARLO: What it would take to
25 treat raw water to potable water standards based

upon his knowledge with the Mountain House community Services District wastewater treatment facility.

HEARING OFFICER WILLIAMS: Well, I don't think he has to be an expert -- if you know the answer. It's certainly subject to cross-examination, so we'll allow it.

MR. GRIMSMAN: You know, working with engineers on a weekly basis, you do pick up some stuff about the technical aspects of operating a water treatment facility.

The treatment facility that we have is -- focuses around a Trident filtration system, package units that are manufactured offsite and hauled in. Those filters are used throughout California and other states, and are tried and true filters for treating raw water and converting it to potable water.

There is chemical processes involved with the treatment process and that is basically my extent of knowledge about how the water is treated.

MS. DeCARLO: Thank you. Are you aware of anything that would prevent Mountain House Community Services District from providing BBID

1 and subsequently East Altamont Energy Center with
2 100 percent of the recycled water developed by
3 Mountain House Community Services District?
4 MR. GRIMSMAN: I am not.
5 MS. DeCARLO: Mr. Gilmore testified that
6 the Mountain House Community Services District,
7 quote, "is solely in control of and responsible
8 for the discharge and recycling of water" unquote,
9 and that the master development of Mountain
10 House -- developer of Mountain House has no role
11 in the management of future recycled water
12 supplies. Are these statements accurate?
13 MR. GRIMSMAN: Not exactly. Trimark, it
14 is true that the Mountain House CSD owns the
15 water. The Trimark communities, when the Mountain
16 House project was approved, entered into a
17 development agreement with San Joaquin County.
18 In that development agreement we
19 obtained a vested right, meaning a right that San
20 Joaquin County could not change without our
21 approval. And that right allows us, at our
22 election, to determine the use of reclaimed water,
23 or treated waste water, generated by the Mountain
24 House project.
25 We also entered into an agreement with

1 the Community Services District. And in that
2 agreement, we and the CSD agreed that they would
3 act, all of their actions would be in strict
4 conformance with the community approvals.
5 Now community approvals is defined as
6 all of the approvals that we've received from San
7 Joaquin County, including our development
8 agreement.
9 So the CSD must act consistent with the
10 development agreement which allows Trimark to
11 determine at its election the use of reclaimed
12 water. So we have a contractual right to, or
13 role, if you will, to participate in where this
14 water is used.
15 It is our position as a company, that we
16 support the use of reclaimed water at the Calpine
17 facility.
18 MS. DeCARLO: Do you believe that
19 sufficient infrastructure has been planned for
20 within the Mountain House community to allow the
21 positioning of a recycled water pipeline by the
22 applicant?
23 MR. GRIMSMAN: Yes, I heard the
24 testimony earlier and I'm a little confused.
25 Mountain House has approved and adopted master

plans for storm water systems, sewer systems, water systems, roadways, road alignments. All of our master backbone infrastructure has been located. We know exactly where it is.

I don't see any problem in Calpine or BBID, however it goes, receiving an alignment that is relatively straight, as the crow flies, through our project. I don't see any interference with proposed infrastructure. I think that those -- the alignment of the pipeline could be done quite simply.

It is the position of our company that we would cooperate in granting easements for the location of that pipeline within the Mountain House community where we control the land.

MS. DeCARLO: Thank you. Do you have any further comments that you'd like to offer the Committee at this time?

MR. GRIMSMAN: No.

MS. DeCARLO: Thank you.

The witnesses are available for cross-examination.

HEARING OFFICER WILLIAMS: Applicant.

MR. WHEATLAND: Thank you.

//

1 CROSS-EXAMINATION

2 BY MR. WHEATLAND:

3 Q My name is Gregg Wheatland and I am the

4 attorney for the applicant.

5 Mr. Teed-Bose, I'll start with you since

6 you haven't had a chance to say anything today.

7 MR. TEED-BOSE: I appreciate that,

8 thanks.

9 (Laughter.)

10 MR. WHEATLAND: You indicate that you're

11 the manager for Mountain House, is that the

12 Mountain House Community Service District, or some

13 other Mountain House?

14 MR. TEED-BOSE: For the Mountain House

15 asset, as owned by Trimark Communities.

16 MR. WHEATLAND: Okay. So you don't --

17 you're not here today to speak for Mountain House

18 Community Service District, is that right?

19 MR. TEED-BOSE: No.

20 MR. WHEATLAND: And is that the same

21 with respect to you, Mr. Grimsman? You're not

22 authorized to speak on their behalf?

23 MR. GRIMSMAN: That is correct.

24 MR. WHEATLAND: Now if I understand your

25 testimony correctly, the first phase of your

development is not dual-plumbed, is that correct?

MR. GRIMSMAN: That is correct.

MR. WHEATLAND: We've been having a lot of talk today about purple pipe. There won't be any purple pipe in the first phase of your development, is that right?

MR. GRIMSMAN: That's correct.

MR. WHEATLAND: So with respect to parks, those will not be provided any recycled water in the first phase, is that right?

MR. GRIMSMAN: That's correct.

MR. WHEATLAND: And that's the same with respect to greenbelts, is that correct?

MR. GRIMSMAN: Correct.

MR. WHEATLAND: Or street landscaping, is that correct?

MR. GRIMSMAN: Correct.

MR. WHEATLAND: What type of water will it receive?

MR. GRIMSMAN: It will receive potable water.

MR. WHEATLAND: Potable water? For the parks, the greenbelts, and the streetscaping, is that right?

MR. GRIMSMAN: That's correct.

1 MR. WHEATLAND: And it's also your plan
2 to provide potable water for those facilities in
3 subsequent phases of your development, is that
4 correct?
5 MR. GRIMSMAN: That has been the plan
6 since day one.
7 MR. WHEATLAND: And the reason for that
8 is that it's not required, is that correct?
9 MR. GRIMSMAN: That is correct.
10 MR. WHEATLAND: Now we've had a lot of
11 talk today about section 13550 of the water code,
12 and it says here the Legislature hereby finds and
13 declares that the use of potable domestic water,
14 and let me stop here. That's what you're using on
15 these facilities, is that right?
16 MR. GRIMSMAN: That's correct.
17 MR. WHEATLAND: For nonpotable uses,
18 including, but not limited to, cemeteries, golf
19 courses, parks, highway landscaped areas, and
20 industrial and irrigation uses is a waste and
21 unreasonable use of water.
22 Why, given 13550, are you not using
23 recycled water for those facilities?
24 MR. GRIMSMAN: Number one, I'm not an
25 attorney and I can't speak to that particular

1 section in the code, I've never read it.
2 I can tell you that our project has been
3 reviewed, ad infinitum, by attorneys, by people
4 like CUA, Contra Costa Water District, and, of
5 course, the County Counsel and their staff. And
6 based on their review of the law and the
7 requirements for reclaimed water use, they
8 approved the project without a requirement or
9 condition to do that.
10 MR. WHEATLAND: Is there any other
11 reason, other than the fact that it's not
12 required, that you have chosen not to do a plumb,
13 any phases of your development?
14 MR. GRIMSMAN: We have a permit for
15 discharge of our water into Old River. We did a
16 feasibility analysis several years ago that
17 determined that it was not feasible to do a dual
18 water system within Mountain House. The most
19 economical feasible use of the water was for
20 discharge into Old River.
21 MR. WHEATLAND: Can you --
22 MR. GRIMSMAN: Return the water to the
23 State of California.
24 MR. WHEATLAND: Can you provide us with
25 a copy of that study?

MR. GRIMSMAN: Certainly can.

MR. WHEATLAND: All right. And when you say it's not feasible, it's not feasible to whom?

MR. GRIMSMAN: Feasibility was looked at, it's been a long time since I've read the study, it was not feasible for Mountain House Community Services District and Trimark to build a dual-pipe system throughout the community.

MR. WHEATLAND: Well, in your agreement with the Community Services District, who is responsible for the cost of infrastructure?

MR. GRIMSMAN: Trimark is.

MR. WHEATLAND: All right, so what does feasibility have to do with Mountain House Community Service District, if you're responsible?

MR. GRIMSMAN: Well, there's issues about maintaining it, operating it; that would be their responsibility.

MR. WHEATLAND: Do you have some agreements as to -- between your mutual responsibilities between Trimark and the Community Services District?

MR. GRIMSMAN: Yes.

MR. WHEATLAND: How many different agreements do you have?

1 MR. GRIMSMAN: That's a good question.
2 MR. WHEATLAND: With respect to recycled
3 water.
4 MR. GRIMSMAN: I don't think we have any
5 that relate to recycled water, other than the
6 agreement that I just mentioned that deals with
7 the CSD acting in conformance with the community
8 approvals.
9 MR. WHEATLAND: Okay, and you can
10 provide us with a copy of that agreement?
11 MR. GRIMSMAN: Certainly.
12 MR. WHEATLAND: Now you also state in
13 your testimony that you have a gentleman's
14 agreement, I think you call it, with respect to
15 your agreement to do a plumb and provide recycled
16 water on golf courses, is that right?
17 MR. GRIMSMAN: Correct.
18 MR. WHEATLAND: Which phases of your
19 development do you propose to construct a golf
20 course?
21 MR. GRIMSMAN: We have a golf course
22 located north of Byron Road. It is planned for a
23 future phase. The notion of a gentlemen's
24 agreement was again --
25 MR. WHEATLAND: Well I'm just asking you

which phase. I haven't asked you anything more than that.

MR. GRIMSMAN: It's a future phase.

MR. WHEATLAND: A future phase. But, you don't know which one?

MR. GRIMSMAN: No, we have the flexibility of moving around depending upon where the market demand is at that time.

MR. WHEATLAND: So, you're under oath, sitting here today, you don't know which phase the golf course is going to be constructed in?

MR. GRIMSMAN: Correct.

MS. DeCARLO: Objection, he answered that question.

HEARING OFFICER WILLIAMS: Sustained.

MR. WHEATLAND: Now who is the gentleman's agreement between specifically? Who are the individuals that are the parties to that gentleman's agreement?

MR. GRIMSMAN: The individual that I spoke of earlier, Richard Stohl, with Ecologic, who negotiated this permit, has informed us that in these permits there is no obligation to use reclaimed water, but there is a gentleman's agreement with the staff to try to use it, and

this was several years ago, to try to use it on the golf course, which happens to be located adjacent to the wastewater treatment plant.

MR. WHEATLAND: Exactly. Which staff?

MR. GRIMSMAN: At the time we were dealing with -- well, Gary Carlton was the director, Greg Vaughn, and who was the other guy? Yeah.

MR. WHEATLAND: All right, and that's what I wanted to ask you about. This golf course that's immediately adjacent to the wastewater treatment plant.

If the Commission were to adopt the staff's requirement, that all of the water from the Mountain -- recycled water from the Mountain House Community Services District would be dedicated to the East Altamont Energy Center, would that relieve you of the responsibility for providing recycled water on that golf course, because no such water was any longer available?

MR. GRIMSMAN: It is our opinion that if 100 percent of the water was committed to the Calpine facility, that the regional board staff would agree that that is a higher and better use for the water than putting it on the golf course.

1 MR. WHEATLAND: I understand that
2 testimony. But would it also allow you to go to
3 them and argue, that water is committed, there is
4 no sense in dual-plumbing the golf course, because
5 we have no recycled water to provide?
6 MR. GRIMSMAN: That's correct.
7 MR. WHEATLAND: So I asked you earlier
8 if there was any other reason, any other reason
9 why you're not dual-plumbing your facilities in
10 any phases of the development. Is one of the
11 reasons why that the developer itself can save
12 money by avoiding this expense?
13 MR. GRIMSMAN: That is one of the
14 factors, you bet.
15 MR. WHEATLAND: And what is the
16 consequence to the customers, to the people who
17 are going to live in that district, of your
18 avoiding the dual-plumbing of their facilities for
19 their community?
20 MR. GRIMSMAN: What is --
21 MS. DeCARLO: Objection.
22 HEARING OFFICER WILLIAMS: What is the
23 basis of your objection, counsel?
24 MS. DeCARLO: Outside the scope of his
25 testimony.

1 MR. WHEATLAND: That's exactly his
2 testimony.
3 MS. DeCARLO: Consequence to the
4 residents of Mountain House?
5 HEARING OFFICER WILLIAMS: We'll allow
6 it.
7 MR. WHEATLAND: Let me ask it --
8 MR. GRIMSMAN: Yeah. Clarify the
9 question and --
10 MR. WHEATLAND: Who is going to pay the
11 water bill?
12 MR. GRIMSMAN: The homeowners and
13 business owners in Mountain House will pay the
14 water bill.
15 MR. WHEATLAND: Thank you very much. I
16 have no further questions.
17 HEARING OFFICER WILLIAMS: Any re-
18 direct?
19 MS. DeCARLO: Yes, one.
20 REDIRECT EXAMINATION
21 BY MS. DeCARLO:
22 Q So is it your testimony that the
23 Mountain House -- your proposal to use potable
24 water in the Mountain House community is not
25 dependant upon whether or not the applicant is

1 required to use recycled water on their facility?
2 MR. GRIMSMAN: That's correct.
3 HEARING OFFICER WILLIAMS: I guess --
4 does BBID have any questions?
5 MS. DUNN: I'd actually like to ask just
6 one question if I could.
7 RECROSS-EXAMINATION
8 BY MS. DUNN:
9 Q Are you in the process of amending your
10 master plan?
11 MR. GRIMSMAN: We are -- from time to
12 time we do amend the master plan. We've amended
13 it several times. But I can tell you this, that
14 all of the amendments that have occurred to date
15 and any amendments that occur in the future, will
16 not affect the density of the project.
17 We may move things around, but we will
18 still have the same number of dwelling units and
19 square footage of office and commercial buildings.
20 MS. DUNN: But you could move a roadway
21 here, and a school there, or there could be
22 changes in the locations of the various facilities
23 that you plan on building?
24 MR. GRIMSMAN: Yes, there could, but I
25 don't anticipate any of those changes affecting an

alignment of a pipeline that would cause a relocation.

MS. DUNN: No further questions.

HEARING OFFICER WILLIAMS: Thank you.

PRESIDING MEMBER KEESE: Quick question. I thought I heard earlier that your permit to dump into Old River was a limited term. Are you --

MR. GRIMSMAN: The permit that we have to discharge onto our own land --

PRESIDING MEMBER KEESE: Is limited term?

MR. GRIMSMAN: It's an interim plan to put it on our land.

PRESIDING MEMBER KEESE: Okay.

MR. GRIMSMAN: We're only doing this until we can generate enough water to demonstrate to the regional board that we can put it in the river.

PRESIDING MEMBER KEESE: Okay. Now is the -- I thought somebody testified earlier that your ability to put it into the Old River had a, I thought I heard five-year life, and then thereafter you'd have to recycle?

MR. GRIMSMAN: It's a 5.4 MGD discharge permit, which is full build-out of the Mountain

House community. That's the estimated effluent generation through full build-out.

PRESIDING MEMBER KEESE: And that's perpetual?

MR. GRIMSMAN: Correct.

PRESIDING MEMBER KEESE: Thank you.

HEARING OFFICER WILLIAMS: Mr. Sarvey, do you have questions?

MR. SARVEY: A couple quick ones.

RECROSS-EXAMINATION

BY MR. SARVEY:

Q You state in your testimony that you're optimistic that you will be able to provide wastewater on schedule. Does the location of the East Altamont Energy Center near your development give you any concern that your demand for homes will weaken?

MR. GRIMSMAN: That's a good question, and that's one that we evaluated in-house, what the impacts would be of a power plant on our marketability.

And we were convinced by the Calpine folks after looking at digitally enhanced photographs that there would be not much of a visual impact from our community. They reviewed

with us, I think it was Alicia Torre, the safety protocols that are engineered into these types of plants today, and that the risk of an explosion was de minimis.

So based on some of the evidence that they've provided to us we're -- as you weigh the pros and the cons, the pros of using reclaimed water versus some of the aesthetic and danger aspects, we think that the pros far outweigh the cons. And we don't think it will affect the absorptions in Mountain House.

MR. SARVEY: If the applicant had showed you this picture here, would that change your opinion?

MR. GRIMSMAN: I can't see it, it has glare on it.

MR. WHEATLAND: Before you show him that picture, could we ask whether in fact that picture has been withdrawn from the staff's testimony? Because I believe that picture that's being show to this witness has been withdrawn by the staff.

HEARING OFFICER WILLIAMS: Let's go off the record.

(Off the record.)

HEARING OFFICER WILLIAMS: Okay.

MR. GRIMSMAN: I don't remember seeing any of these pictures. These pictures, if I'm not mistaken, are taken from locations much closer than Mountain House. The pictures we saw were digitally enhanced to show landscaping and they were much, you know, they were taken from our project and looked to be much farther away than what's shown on these pictures.

HEARING OFFICER WILLIAMS: Does that answer your question, Mr. Sarvey?

MR. SARVEY: It does, and it doesn't, but I'll move on.

HEARING OFFICER WILLIAMS: Okay.

MR. GRIMSMAN: Can I keep this one?

MR. SARVEY: In your opinion, from the testimony that you've heard today, does it sound like the applicant is committed to use your recycled water?

MR. GRIMSMAN: Can I take the Fifth on that?

(Laughter.)

MR. GRIMSMAN: I don't know.

MR. SARVEY: All right. I'm done, thanks.

MS. DeCARLO: Are we done?

HEARING OFFICER WILLIAMS: Anything further?

MS. DeCARLO: Staff has nothing further.

(Parties speaking simultaneously.)

HEARING OFFICER WILLIAMS: Well, I think we're ready for public comment then.

MS. DeCARLO: Yes.

(Laughter.)

HEARING OFFICER WILLIAMS: By the way, thank you, gentlemen, very much for your patience, and coming by and presenting your testimony.

MR. GRIMSMAN: Thank you for the meals.

(Laughter.)

PRESIDING MEMBER KEESE: And if you want to stay for biological resources, hazmat, worker safety, or alternatives, feel free.

First I'll call Louis Galli, if he's still here. Some of these cards came in very early. Mr. Louis Galli, G-a-l-l-i. He's not here.

Nick Papadakos? Mr. Papadakos, Byron Municipal Council? All right.

Barry Luboviski.

MR. LUBOVISKI: That's okay, right?

PRESIDING MEMBER KEESE: That's fine,

1 almost any place with a microphone is perfect.
2 MR. LUBOVISKI: Good, thank you. First
3 let me thank you, Members of the Commission,
4 putting in the long hours. I'm both in admiration
5 for your patience, and in total amazement.
6 (Laughter.)
7 HEARING OFFICER WILLIAMS: Sir, we are
8 going to need a spelling of your name.
9 MR. LUBOVISKI: Certainly, I'll give you
10 that --
11 HEARING OFFICER WILLIAMS: Okay.
12 MR. LUBOVISKI: I'll give you one of my
13 cards --
14 HEARING OFFICER WILLIAMS: That would be
15 great.
16 MR. LUBOVISKI: -- if you'd like,
17 afterwards.
18 PRESIDING MEMBER KEESE: Okay, thank
19 you.
20 HEARING OFFICER WILLIAMS: Thank you.
21 MR. LUBOVISKI: My name is Barry
22 Luboviski; I'm Secretary-Treasurer for the
23 Building and Construction Trades Council of
24 Alameda County. That Council represents 24 local
25 unions that do work in and around Alameda County.

whose members do work in and around Alameda County.

The number of unions, they also represent workers who do work in the surrounding counties. Approximately the Council represents a membership in Alameda County of approximately 40,000 union members and their families.

I'm here in support of the project in general. I'm here on behalf of the affiliated local unions and their membership.

I'm one of the 24 building trades councils in California that support this project, along with the State Building Trades Council. So, I thought it's important to bring up certain other relevant aspects, and although I'm coming in on lengthy discussion on water and will not be commenting on that directly, I want to talk in general about the overview of the project, briefly.

The council's looked at the project, along with the state building trades, and with the review, we feel this project brings significant value to the citizens who live in the community and the communities that both immediately surround the project, and in general, in the Bay Area.

It solves what not too long ago was a major crisis, and that is the energy crisis. It begins to address those kinds of issues.

Most immediately, it means jobs for our membership, and certainly that's one of the reasons I'm here. We see that as this thing peaks over the two-and-a-half years of construction, that there will be between four and five hundred workers who will be working on this project, bringing all the various skills that our folks bring to the projects.

It doesn't represent, at the end, a large total number of jobs once it's complete, but it does bring in jobs when it's complete. Skilled jobs that will continue on for the years that this power plant is in operation. And we think that's also important. During a time of recession, jobs are one of the baselines that people gauge the viability of any society. Power is another one.

In our general review of this project, we see this as a project that not only supplies power, but supplies it in what we saw as an efficient and a clean manner.

So that's basically what I wanted to say. I'm not going to get into a lot of lengthy

1 dialog on it. I think it's important to know that
2 there are a lot of eyes that are viewing the
3 project that are hopeful that it will get built;
4 that see it as an important -- important support
5 mechanism for all of the things that we take for
6 granted that use electricity.
7 So I appreciate your time. Thank you
8 again for your patience.
9 PRESIDING MEMBER KEESE: Thank you, sir.
10 Mr. Dave Mann?
11 MR. MANN: Good evening.
12 PRESIDING MEMBER KEESE: Good evening.
13 MR. MANN: My name is Dave Mann, I'm a
14 Business Representative for the Plumbers and
15 Steamfitters Local 342.
16 I am also speaking in favor of this
17 project. We've built several in Contra Costa
18 County. Looking forward to working with Calpine
19 and whoever their general contractor is. And also
20 being a resident of Livermore, I'm a little tired
21 of the brownouts and the blackouts that we've had.
22 And also my bill that I get once in a while that's
23 a little outrageous.
24 Thank you for your time tonight.
25 PRESIDING MEMBER KEESE: Thank you.

HEARING OFFICER WILLIAMS: Thank you sir.

PRESIDING MEMBER KEESE: Thank you.

MR. SPEAKER: Dave, did you mention -- excuse me, did you mention something about your local union?

MR. MANN: I did.

MR. SPEAKER: Oh, I'm sorry, I didn't know if you mentioned how many people --

MR. SPEAKER: He didn't mention the numbers.

MR. MANN: Oh, excuse me. The Plumbers and Steamfitters Local 342 has a membership of around 3500 members. So there's a lot of people that are looking at this project from the aspect of the jobs that it's going to generate.

PRESIDING MEMBER KEESE: Thank you.

MR. MANN: Thank you.

PRESIDING MEMBER KEESE: Thank you.

Roberta, I gather you have a few more people that left you messages?

MS. MENDONCA: On the topic of water.

PRESIDING MEMBER KEESE: Can you --

MS. MENDONCA: Since it's water --

PRESIDING MEMBER KEESE: Let's try to --

yes, we'll take them up. Can you summarize them a little bit?

MS. MENDONCA: Yes.

PRESIDING MEMBER KEESE: Okay.

MS. MENDONCA: This comment came from Sharon Votaw, and I have given the spelling to our recorder. "BBID commitment of water to the EAEC will negatively impact farmers with riparian rights to water as well as the Whitehall (now Union Mutual) Irrigation District and Fremont Irrigation District. Currently our pumps are sometimes out of water, and the South Delta Improvement Program plan on taking 10,300 cfs more water out of the same area by the year 2007. The Pellegris comment that two districts will be negatively impacted by an extra draw on the water that's available."

There were questions from some of the participants in the audience and so I think maybe, since they are not going to receive answers, they should come in as a comment.

And Paula Buenavista asked, or commented, "Could the lack of sales of homes in the Mountain House community due to the potential of homebuyers not wanting to live next to a

1 powerplant affect the EAEC's ability to use
2 adequate supplies of recycled water? How do you
3 buy recycled water that is not yet available, or
4 even exist? And is it true that the recycled
5 water of Mountain House has already been decided
6 upon to be used for the lawns and the landscapes,
7 greenbelt areas and golf course planned? If this
8 is true, what if any water have they promised to
9 you." I'm assuming that they mean the EAEC.
10 "How can the BBID commit to selling a
11 specified amount of water? What if any provisions
12 have been made if there is a drought? During a
13 drought, do the rights of the EAEC power plant
14 take precedence over the rights of local farmers?
15 And if the power plants need for water during a
16 drought how would local farmers be notified?"
17 "Will an odor be present with the use of
18 recycled sewer water?" Excuse me, these are
19 Monica Lowney's questions. "If so, what radius
20 will the odor be present in? Is the Energy
21 Commission aware that Mountain has already
22 committed most of their recycled water to be used
23 for landscaping on an 18-hole golf course within
24 their community? What makes Calpine believe that
25 they will receive a priority for recycled water

from Mountain House? Has Mountain House committed to the county that their water would be used for their own project?"

"If Mountain House does not grow as planned or generate the recycled water Calpine needs, then where will the water come from? Will farmers or residents be affected by Calpine's need for additional water? Does the Energy Commission have a concern regarding chemicals and pesticides in the Delta water and/or recycled water that may become airborne and affect residents while being used for cooling in the process?"

"With the Alameda County Fire Department being so far from the site with homes and a school so near to the power plant, will Calpine be required to install a water tank onsite to be used to control a fire until the Alameda County Fire arrives?" I guess she means the firefighters arrive. "Are you aware that the San Joaquin Board of Supervisors is formally opposed to your project and can prevent your project from receiving water?"

This is a support letter from the Byron Municipal Advisory Committee, Sharon Marsh, President. She's writing in support of the East

1 Altamont Energy Center, an important new electric
2 generating facility proposed by Calpine
3 Corporation and currently mid-way through the
4 CEC's licensing process. "Far more efficient than
5 the older, existing fossil-fueled plants operating
6 in northern Contra Costa and across the state, the
7 Energy Center will conserve natural gas by using
8 40 percent less fuel than current facilities."
9 "Similar to Calpine's recently
10 commissioned facilities in northern Contra Costa
11 county, the EAEC will generate 60 to 90 percent
12 fewer emissions than California's older plants.
13 Byron and the region have historically supported
14 vital infrastructure projects from early rail
15 lines and petroleum storage and distribution
16 centers built in the 19th and early 20th
17 centuries, to critical canal projects such as the
18 CVP and the Delta-Mendota of the 1960s and 70s."
19 "By citing the facility adjacent to the
20 western substation and near the PGandE gas
21 compressor station, East Altamont fits in with
22 existing infrastructure. Short transmission, gas
23 and water supply, interconnections reduce the
24 project's environmental impacts and minimize
25 disruptions caused by those necessary project

1 components."

2 "We are pleased to note that farming

3 will continue on the site. Regional agriculture

4 will benefit from the EAEC's status as an

5 important customer of the Byron Bethany Irrigation

6 District, augmenting revenues to the District

7 which will help keep agricultural water rates

8 stable. Many of the workers and families who will

9 build and operate the EAEC will live in Contra

10 Costa County, helping the Byron area prosper and

11 grow. California's environmental and licensing

12 standards are the toughest in the nation. We are

13 confident that the CEC will protect public health

14 and safety throughout the licensing process and

15 during the operating life of this needed facility.

16 Sharon Marsh, President, Byron Municipal Advisory

17 Committee."

18 And Susan Sarvey's question was, "Is

19 there any chance of fecal matter being in my air

20 from using recycled water to cool the towers. Can

21 fecal matter of any kind end up in my particulate

22 matter that I am breathing, i.e., prions or any

23 other pathogens?"

24 And that's what I have so far.

25 PRESIDING MEMBER KEESE: Thank you.

1 HEARING OFFICER WILLIAMS: Thank you,
2 Roberta. Those will be submitted for the record?
3 MS. MENDONCA: Yes.
4 HEARING OFFICER WILLIAMS: Yes, thank
5 you.
6 MS. DeCARLO: With regard to soil and
7 water, staff has one request. Given the concern
8 expressed over staff's conditions, we would
9 appreciate the opportunity to go back and look at
10 our conditions and see if there is any way we can
11 change them in response to the concerns expressed
12 by BBID.
13 MR. HARRIS: Excuse me, can we wait for
14 Mr. Wheatland to be back in the room on this --
15 HEARING OFFICER WILLIAMS: Okay.
16 MR. HARRIS: -- important issue related
17 to --
18 (Pause.)
19 HEARING OFFICER WILLIAMS: Do you want
20 to repeat what you just said?
21 MS. DeCARLO: Yes, given the concerns
22 expressed today over certain of staff's conditions
23 of certification, staff would appreciate the
24 opportunity to attempt to go back, look at them
25 again, with -- in light of the specific concerns

1 expressed by the applicant and BBID, and see if
2 there is a way we can modify them to at least
3 partially address the concerns.
4 MR. WHEATLAND: As Mr. Helm indicated at
5 the beginning of his testimony, he thought despite
6 the length of the discussion today, the points of
7 difference are relatively narrow. Anything the
8 staff can do to help to narrow those differences
9 further, we'd appreciate.
10 PRESIDING MEMBER KEESE: I would observe
11 that -- is this red lined, was that your
12 submittal?
13 MR. WHEATLAND: Yes, that is, yes.
14 PRESIDING MEMBER KEESE: I'm looking at
15 the red lined, which I will read one sentence of
16 what applicant submitted, which is: "The project
17 owner shall use 100 percent of the tertiary
18 treated water available from the wastewater
19 treatment plant as allocated by BBID, and is
20 supplemented by any other tertiary water that may
21 be developed by BBID, to the maximum extent
22 possible to meet their needs."
23 Now, it would seem to me that using that
24 as the basis, which I see 100 percent, I see
25 maximum, that somehow or other the needs, the

1 interest of Mountain House to dispose of the
2 water, the interest of Bethany to substitute the
3 use of recycled water so they can use their fresh
4 water, the interest of staff to see that that's
5 what takes place.
6 It would seem to me that some kind of
7 proposal that dealt with that can be crafted to
8 meet most of the objections that we heard here.
9 And it would seem to me that it would be
10 far better for that to be submitted to us
11 collegially than for Major and I to sit and write
12 it, which means that somebody probably will point
13 out that we made a mistake at the end.
14
15 (Laughter.)
16 MS. WHITE: So is your answer to us yes,
17 you'll allow us to work on this?
18 PRESIDING MEMBER KEESE: Absolutely.
19 (Laughter.)
20 HEARING OFFICER WILLIAMS: So I guess
21 that means that we'll keep the record open.
22 PRESIDING MEMBER KEESE: I really think
23 we heard from all the parties today. I mean
24 everybody.
25 MR. WHEATLAND: Mr. Williams, rather

1 than keeping the record open, I would say we
2 should keep the record open for the limited
3 purpose of the staff amending their errata, if
4 they would like to propose a revision to the
5 conditions.
6 HEARING OFFICER WILLIAMS: Yes, and
7 there is another exhibit that was supposed to be
8 coming in on Monday, the full --
9 MS. WHITE: It's the full agreement
10 between Mountain House and BBID. We didn't have a
11 way to copy the complete agreement at this time.
12 HEARING OFFICER WILLIAMS: Okay. So,
13 except for those two matters, then we'll keep the
14 record open for those two matters. Otherwise
15 we'll close it.
16 (Pause.)
17 HEARING OFFICER WILLIAMS: Okay, Mr.
18 Wheatland, before you go, do you --
19 MR. WHEATLAND: I'll stay with you, I'm
20 going to stay with you, but Mr. Harris and I are
21 going to exchange chairs because he will be taking
22 the lead on --
23 PRESIDING MEMBER KEESE: Do I get a
24 relief?
25 (Parties speaking simultaneously.)

1 HEARING OFFICER WILLIAMS: By the 21st
2 do the parties think they can have -- is that
3 enough time?
4 MS. WHITE: We'd be able to work
5 something out, I believe. I still have to go to
6 my management, but I shall do that expeditiously.
7 HEARING OFFICER WILLIAMS: Okay, well
8 we'll address it on the 21st and see where we are.
9 MS. WHITE: We'll definitely try.
10 HEARING OFFICER WILLIAMS: Okay, I think
11 with that we are ready to move to biology.
12 (Pause.)
13 HEARING OFFICER WILLIAMS: Applicant,
14 are you ready?
15 MR. HARRIS: Yes. I'd ask that the
16 witness be sworn.
17 HEARING OFFICER WILLIAMS: We'll swear
18 the witness.
19 Whereupon,
20 E.J. KOFORD
21 was called as a witness herein, and after first
22 having been duly sworn, was examined and testified
23 as follows:
24 MR. HARRIS: This is Jeff Harris for the
25 applicant.

1 DIRECT EXAMINATION

2 BY MR. HARRIS:

3 Q I'd ask the witness to please state your

4 name for the record.

5 A E.J. Koford.

6 Q And what subject matter of testimony are

7 you here to sponsor today?

8 A Biology.

9 Q Were the documents that are sponsored as

10 part of your testimony previously marked as

11 Exhibit E -- excuse me while I grab the exhibit

12 number. 4E.

13 A Yes, they are.

14 Q Do you have any changes, or corrections

15 or clarifications to your testimony?

16 A I have only a minor change, an extra

17 period on page 2.2-5, third paragraph. There is

18 an extra period after the work occur. Normally I

19 wouldn't raise attention to the period, except

20 that it sort of changes the intent of the

21 sentence. And that's the only change.

22 Q Okay, with that one slight correction,

23 were these documents prepared, either by you, or

24 at your direction?

25 A Yes, they were.

1 Q And are the facts stated therein true to
2 the best of your knowledge?
3 A They are.
4 Q And are the opinions stated therein your
5 own?
6 A Yes, they are.
7 Q In terms of your qualifications, can you
8 briefly review your qualifications for the
9 Committee?
10 A I have a master's degree in ecology from
11 UC Davis. I am a certified wildlife biologist of
12 the Wildlife Society. I have a bachelor's degree
13 from UC Berkeley in zoology. Twenty years of
14 experience in studying and evaluating wildlife
15 biology and biological resources for a variety of
16 projects, including about twenty power plants.
17 I've worked for CH2M Hill for the last three years
18 as a senior biologist.
19 Q Thank you. We had some time during the
20 day to sort your testimony, so I'm going to
21 actually ask you to give the short version if you
22 could.
23 Could you please provide a short summary
24 of your testimony.
25 A Beginning in mid-year 2000, I began

1 assisting Calpine in a site selection process
2 looking at a couple of alternative sites for what
3 eventually became the East Altamont site. And
4 evaluating them with respect to locations of
5 sensitive habitats, potential for a sensitive
6 species. And assisted them in selecting or
7 evaluating alternative sites to come up with the
8 East Altamont site.
9 Then in the intervening 20 months we did
10 a variety of field surveys, literature surveys,
11 agency consultations, workshops with the CEC, in
12 support of evaluating that facility.
13 Our surveys focused primarily on the
14 sensitive species that were listed by the Fish and
15 Wildlife Service. Those primary species were the
16 San Joaquin kit fox, red-legged frog, Swenson's
17 hawk, tiger salamander, vernal pool fairy shrimp,
18 tri-colored blackbird, burrowing owl, golden eagle
19 and bats.
20 Literature surveys included the natural
21 diversity database, EIRs such as the Mountain
22 House EIR, the Tracy Hills EIR, as well as lists
23 that were provided to us by the Service.
24 We consulted with the Service, Fish and
25 Game, NMFS, the Corps, and staff from the Counties

1 of Alameda, Contra Costa, San Joaquin, as well the
2 City of Tracy Staff and the CEC Staff.
3 We pursued a section 7 consultation
4 under the Endangered Species Act with the Fish and
5 Wildlife Service, with Western as the lead agency.
6 And Fish and Wildlife Service issued a biological
7 opinion in July of this year.
8 We assisted Calpine in developing a
9 mitigation package and negotiating that with CEC
10 Staff to develop an acceptable mitigation package,
11 as well as do some discipline-specific problem
12 solving workshops.
13 And eventually came up with a mitigation
14 site for compensation habitat that we felt
15 strongly would compensate for adverse impacts, so
16 biology, that being the Gomes Farms.
17 Q Can you talk a little bit about why
18 Gomes Farms is kind of a unique opportunity for us
19 all?
20 A The characteristics of good wildlife
21 habitat I put into five categories. First of all,
22 habitat suitability, connectivity, presence of
23 rare and unique habitat features, habitat of
24 adequate size, diversity of habitats and
25 communities.

1 Gomes Farms is open grazing land, open
2 grassland, short grass prairie that's suitable to
3 support things like burrowing owl, Swenson hawk,
4 kit fox, and possibly red-legged frog and tiger
5 salamander.
6 It connects parcels both to the north
7 and west that are managed by Fish and Game, so it
8 provides the connectivity. It contains some
9 alkaline playa features and wetland features that
10 are rare and possibly unique habitat types in that
11 area.
12 At 151 acres, it's large enough to be --
13 to truly support wildlife species, such as kit fox
14 or burrowing owl that take a little more area.
15 I truly believe that conservation of
16 that property will enhance both the quality of
17 the habitat for species in the region, as well as
18 the quality of adjacent habitats that are managed
19 for preserves.
20 Q So let's turn now to your overall
21 findings. Within terms of potential significant
22 impacts, what were your findings there?
23 A I don't think the project will cause
24 significant adverse impacts, with mitigation.
25 Q Will it result in any potential

1 significant impacts on sensitive species?
2 A I think we've adequately put in
3 avoidance minimization and compensation measures
4 to mitigate for any potential adverse impacts.
5 Q And the Gomes Farms is really the key to
6 that conclusion, is that correct?
7 A A substantial addition to the
8 conservation values of the area; it's a very good
9 property, and more than offsets the impacts of the
10 45 acres that we are on.
11 Q And you've also set forth establishing
12 for an endowment to manage that property, is that
13 correct?
14 A Yeah, negotiating any conservation
15 easements or preservation properties, you have to
16 put aside enough money to take care of it. And
17 our mitigation agreement includes an endowment for
18 protection and management of that site in
19 perpetuity.
20 Q In terms of compliance with LORS, what
21 were your findings there?
22 A We're compliant with all laws,
23 ordinances, regulations and policies.
24 MR. HARRIS: The witness is available
25 for cross-examination.

1 HEARING OFFICER WILLIAMS: Okay. Staff.
2 MS. DeCARLO: Staff has no cross-
3 examination.
4 HEARING OFFICER WILLIAMS: Mr. Sarvey.
5 MR. SARVEY: I'm going to defer.
6 HEARING OFFICER WILLIAMS: Mr. Boyd.
7 CROSS-EXAMINATION
8 BY MR. BOYD:
9 Q The area that you're proposing to
10 mitigate, is that within the zone of deposition --
11 is the proposed mitigation site, is it within the
12 zone of deposition of emissions from this project?
13 A I don't think I'm qualified to answer
14 that.
15 MR. BOYD: Okay, that's all my -- that's
16 my only question.
17 HEARING OFFICER WILLIAMS: Any redirect?
18 MR. HARRIS: No.
19 HEARING OFFICER WILLIAMS: Staff?
20 MS. DeCARLO: Before we proceed to
21 testimony, I just have one minor clarification on
22 the exhibit list. I note that staff's errata was
23 identified as Exhibit 1E on yesterday's exhibit
24 list. And in the record we've been referring to
25 it as 1E. But I notice on today's exhibit list

it's referred to as 1C.

So should we -- does that pose a problem?

HEARING OFFICER WILLIAMS: No, it's so noted.

MS. DeCARLO: Okay, so we'll just identify, from now on, that the errata is 1C.

HEARING OFFICER WILLIAMS: Right.

MS. DeCARLO: Okay.

HEARING OFFICER WILLIAMS: Yeah, I'm sorry I didn't catch that, but we had dropped some of staff's exhibits from yesterday. So things --

MS. DeCARLO: Right, yeah, I just wanted to make sure that the record is clear.

HEARING OFFICER WILLIAMS: -- moved on. But I appreciate the clarification.

MS. DeCARLO: Thanks. Staff's witness for biology is Andrea Erichsen, and she needs to be sworn in.

Whereupon,

ANDREA ERICHSEN

was called as a witness herein, and after first having been duly sworn, was examined and testified as follows:

//

1 DIRECT EXAMINATION

2 BY MS. DeCARLO:

3 Q Can you please state your name for the

4 record?

5 A Andrea Erichsen.

6 Q Was a statement of your qualifications

7 attached to your testimony?

8 A Yes.

9 Q What is your job title?

10 A Associate biologist with Aspen

11 Environmental Group.

12 Q How did you come to review the East

13 Altamont Energy Center facility?

14 A I have been working on contract with the

15 California Energy Commission.

16 Q Can you briefly state your education and

17 experience as it pertains to biological resources?

18 A I have a bachelors of science from

19 Rutgers University in international environmental

20 studies. I have a masters in avian sciences from

21 the University of California at Davis. And a

22 masters of science and ecology from the University

23 of California at Davis.

24 Over ten years of experience in field

25 and laboratory research on ecological systems

1 mainly related to ecotoxicology and agroecology
2 funded through the EPA's Center for Ecological
3 Health Research and the Institute for Toxicology
4 and Environmental Health at UC Davis.
5 And also have experience working on
6 several California Energy Commission projects.
7 Q And did you prepare the testimony
8 entitled, biological resources in the final staff
9 assessment marked as exhibit 1, and the errata
10 marked as exhibit 1A and 1C?
11 A Yes.
12 Q And did opinions contained in your
13 testimony represent your best professional
14 judgment?
15 A Yes.
16 Q Do you have any changes to your
17 testimony today?
18 A Yes, on page 33, just to make sure that
19 it matches with the errata to the conditions of
20 certification. On page 33, under foraging
21 raptors, herons, egrets, and waterbirds, number
22 three should be deleted because it was deleted
23 from the conditions of certification last week.
24 And just as a matter of continuity, that is not
25 part of the applicant's proposed mitigation for

1 biological impacts.
2 Q And does this change -- in any way
3 change the conclusions you reached in your
4 biological resources testimony?
5 A No.
6 Q Can you please summarize your testimony
7 for us?
8 A Yes. Biology staff has focused on
9 evaluating the impacts to special-status species
10 and their habitats and focused on using the best
11 available information from the surveys conducted
12 by the applicant, and also information provided
13 through the permitting agencies, such as the Fish
14 and Wildlife Service, and Fish and Game, and the
15 National Marine Fisheries Service.
16 In evaluating impacts to special-status
17 species, as was mentioned before, and is detailed
18 in table one in our testimony, there are many
19 special-status species that do or potentially do
20 inhabit the project area and would be
21 significantly adversely effected by the project.
22 Especially the San Joaquin kit fox and the
23 California red-legged frog, which were included in
24 the section seven consultation and the biological
25 opinion through the Fish and Wildlife Service.

1 And staff evaluated both impacts --
2 potential impacts to individuals and populations
3 as well as habitats; and worked to determine if
4 those impacts could be mitigated sufficiently.
5 And staff also evaluated indirect impacts and
6 impacts of project construction and temporary
7 impacts to habitats, and found that those were
8 also potentially significant.
9 And those impacts included impacts from
10 air pollution, construction noise, impacts of
11 water use, impacts from lighting. And staff
12 concluded that with the mitigation measures
13 proposed by the applicant to minimize and reduce
14 those impacts, as well as measures that will be
15 required in the U.S. Fish and Wildlife Service and
16 Fish and Game permits.
17 They will also be requiring specific
18 measures to avoid and minimize impacts to species
19 and their habitats. In addition to staff's
20 understanding and consultation with CEC Staff in
21 the sections of air quality and noise, staff
22 believes that with the acceptance of those
23 proposed conditions of certifications for those
24 aspects of the project that adverse impacts to
25 listed or special status species and habitats in

1 the area will be minimized and mitigated to less
2 than significant levels.
3 Staff also -- staff consulted and
4 discussed impacts to special-status species and
5 was concerned about potential impacts to Delta
6 fish, and had extensive discussions with the
7 National Marine Fishery Service about that, trying
8 to insure that there wouldn't be significant
9 impacts to listed fish species. And was satisfied
10 based on discussions with that agency and the
11 testimony that that agency has provided that those
12 concerns are addressed to the best possible level.
13 I would just mention it because I know
14 it was brought up in some comments on the FSA,
15 staff did include and evaluate impacts to bats.
16 There are at least seven species of special-
17 status bats that were discussed in the FSA. It
18 was on page 18.
19 And staff did not include spadefoot toad
20 in the table. Perhaps could have included it. It
21 is not a listed species; it is a federal species
22 of concern, and fully -- is protected in
23 California and is a California species of special
24 concern.
25 However, there is no habitat for that

species onsite; and because of the specific habitat requirements and natural history of that species, it burrows in the ground generally about a meter down in the ground, and has a home range of less than several meters away from its burrows. There were no -- there was no reasonable determination that that species will be impacted by the project at this location, since it has been in agricultural use and rather heavily disturbed for some time.

Q And does that conclude you testimony?

A Yes, that is my quick summary, in the interest of time.

MS. DeCARLO: The staff's witness is available for cross-examination.

HEARING OFFICER WILLIAMS: Applicant?

MR. HARRIS: I have no questions, thank you.

HEARING OFFICER WILLIAMS: Mr. Sarvey?

CROSS-EXAMINATION

BY MR. SARVEY:

Q Yeah, you identified several species of concern, and the mitigation parcel is for -- how many acres is it?

A A hundred and fifty-one.

1 Q And that is essentially to mitigate the
2 impacts to the kit fox?
3 A No, not only. This -- the story of the
4 mitigation parcel goes back quite some time. This
5 parcel, while the kit fox is definitely a primary
6 concern, because there are quite a few experts in
7 the area, especially in the U.S. Wildlife Service
8 who are concerned that this area is very vital and
9 critical to the future survival and recovery of
10 this species.
11 So yes, it did play a big part in the
12 section 7 consultation. But this parcel was,
13 according to the agency's feedback, the best, one
14 of the best possible parcels that they wanted to
15 acquire for protection in this area.
16 And it would benefit many other special
17 status species, including red-legged frog, tiger
18 salamander, burrowing owl, and paserines. It
19 would not just benefit the kit fox. And it would
20 be managed not only to benefit the kit fox, but to
21 benefit as many species as possible.
22 Q So the parcel itself is mitigation for
23 all the species that inhabit the current site,
24 plant site?
25 A Yes.

1 Q Okay. And in your analysis, did you
2 provide any mitigation for the noise of this plant
3 and its impacts on wildlife?
4 A Well, staff discussed and evaluated the
5 potential impacts of noise to wildlife with the
6 agencies; and we were all naturally concerned that
7 this could be problem. But the evaluating the
8 impacts and the noise levels from the project
9 would be sufficiently small and attenuating. I'm
10 not a noise person so I'm not going to go into too
11 much detail here.
12 They didn't continue in their assertion
13 that there would be significant impacts from noise
14 from the project. And I, from my discussions with
15 the noise staff at the CEC, have faith that, and
16 confidence that in their section of the FSA they
17 will be requiring sufficient noise control in
18 addressing noise impacts from the project.
19 So based upon that, biology staff is
20 satisfied that those levels would be minimized
21 below a level of significance to biological
22 resources.
23 Q Does the kit fox have, say, more
24 sensitivity to noise than, say, a human being?
25 A I'm not sure. What do you mean, can you

clarify that?

Q Would, you know, noise that would normally be considered an impact to a human being in a CEC proceeding, would that also be perceived as an impact to a kit fox? Or does a kit fox have less, you know, less threshold for hearing? I'm probably not saying this right, but, I'm hoping you understand what I'm asking. Or maybe I need to restate it.

A Well, the kit fox is nocturnal, and they do hunt --

Q So loud --

A Right, and they do use their sense of sound as well as their sense of sight and smell, but I don't know that there would be a threshold of effect unless they were --

Q So, --

A --supersensitive. But we don't have any evidence that that is the case.

Q So they use their nighttime, or they use their hearing as such for hunting at night and things like that, correct?

A Most likely.

Q In general, would you say most species that would occupy that site have a little bit more

1 sensitive hearing than in, say, human beings, such
2 as myself?
3 A I'm not sure. I'd need to see data and
4 information on what the sound sensitivities and
5 ranges of certain species were.
6 Q So you really haven't done an analysis
7 as far as the plant's noise would affect the
8 special-status species on the site?
9 A Well, there aren't really any studies on
10 the special-status species inhabiting the site, in
11 terms of their responses to power plant noise.
12 I know there are sensitivities of
13 wildlife to noise levels, and there are quite a
14 few published papers on that. And that is a
15 concern, and that's why staff was concerned with
16 it. We want to avoid those impacts at all costs.
17 Q So, you're probably not familiar with
18 the noise testimony that was given the other day,
19 but Calpine has offered to put insulation in
20 windows and housing that is as far away as, I
21 believe, 1400 to 1500 feet, 2000 feet from the
22 project site, because they feel that -- the CEC
23 feels that that's a significant impact on the
24 residents in the area.
25 Do you feel that the animals in that

area are any less sensitive than the human beings that occupy that area?

A I'm not sure how to respond to that. Human beings may be more sensitive, because they know the power plant is there, and they see it, and they don't want it there. Human beings may be more sensitive to certain types of noise. Are you asking about comparing humans --

Q Yeah, I --

A -- to wildlife?

Q I'm just asking about, you know, not being a biologist, I'm asking whether something like the kit fox or something would be more sensitive to a loud noise.

Whether they could hear it further away than I could, or whether it would alter their foraging habits, or anything like that at night, since they are nighttime hunters, and we're talking about 24-hour-a-day noise. I was just wondering -- like I said, I'm not a biologist, I'm asking those questions.

A It's a little challenging, in terms of biological resources, because the regulations are designed to protect humans. And maybe that's why they need to do those measures, because of the

1 regulations protecting humans. But there are no
2 such regulations for wildlife.
3 Q So I forget if I asked you, did you
4 require any mitigation land or any type of
5 mitigation for noise impacts to special status
6 species or wildlife on the project site? I might
7 have asked you that before.
8 A I don't think you did, but not separate
9 from the overall requirement for mitigation for
10 the impacts to the loss of habitat.
11 Q Have you visited the mitigation parcel?
12 A Yes.
13 Q The Gomes Farm?
14 A Yes.
15 Q Were you aware that it was located right
16 next to the Tracy pumping plant?
17 A Part of it is.
18 Q Did you take any noise measurements or
19 anything concerning that parcel?
20 A No.
21 Q Okay. Can you describe -- did you visit
22 there at night, by any chance?
23 A No.
24 Q So you wouldn't be able to describe the
25 lighting that's around that Tracy pump facility.

A No.

Q Okay. Concerning the East Altamont Energy Center, did you provide any mitigation for the nighttime light effects on the special-status species, particularly the kit fox?

A Well, yes, actually staff discussed and required that lighting, any lighting should be minimized. And that any lighting would be down-shielded to avoid unnecessary light pollution. And staff also understands that in the visual section, restrictions on lighting and the types of lighting are also covered.

Q On the adjacent pumping plant to the mitigation parcel, did you examine the lighting on that particular parcel, the nighttime lighting?

A No.

Q Were the additional nine acres that were described in the supplement C to the AFC, was mitigation provided for that laydown area, in terms of the parcel?

A Yes.

Q Okay. Did you examine any biological impacts from the use of 7000 acrefeet of water per year by the East Altamont Energy Center?

A Yes.

1 Q And what did you find?
2 A Well, staff was concerned about it from
3 the beginning, and had been discussing the -- and
4 working with water and soil staff, investigating
5 potential alternative ways of cooling the project.
6 And also consulting, discussing with the National
7 Marine Fisheries Service about their expert
8 opinion on impacts to listed fish.
9 Q Do you have any knowledge of the effects
10 of NOx deposition to the habitat of the red-legged
11 frog?
12 A Yes.
13 Q Have you seen the deposition patterns
14 here from the air quality folks?
15 A Not recently.
16 Q Okay.
17 MR. SARVEY: Thank you.
18 HEARING OFFICER WILLIAMS: Yes, Mr.
19 Boyd.
20 CROSS-EXAMINATION
21 BY MR. BOYD:
22 Q Did you consider the area of deposition
23 of air pollution and the area of water use
24 impacts, or just the laydown area in determining
25 the area that you were going to mitigate?

A The habitat that would be required for mitigation?

Q The habitat required for -- what are you mitigating is what I'm asking. Are you mitigating just the laydown area impact? Or are you also mitigating the deposition of air pollution, the area of deposition, and the area that's impacted by the water use from the plant?

A Okay.

Q Or is it simply just simply confined to laydown area, the 44-and-a-half acres, I guess?

A Well, the laydown area is actually a smaller section. The habitat mitigation is for the power plant footprint, the permanent impacts that result from the loss of that habitat, which is about 45 acres. And then the temporary impacts due to construction of the linears, and the transmission facilities, and the construction laydown area.

The number of acres that was ultimately determined for that habitat mitigation was initially derived on the basis of mitigation ratios, as required and discussed and directed by the U.S. Fish and Wildlife Service and Fish and Game.

1 And the parcel that was finally approved
2 for mitigation was accepted because it's such a
3 high quality parcel; it is so close to the site of
4 impact; it is good quality habitat and has a
5 potential to be better. And is connected to
6 already protected habitats that are also of good
7 quality and will be restored. So it has
8 connectivity.
9 And so that is the basis for that
10 habitat mitigation, that is for impacts to habitat
11 from the project compared to baseline and what is
12 there right now.
13 So, that habitat mitigation does not
14 include impacts of atmospheric deposition in the
15 larger area. But staff was concerned about that,
16 and that is why when staff consulted with air
17 quality staff, and also discussed potential
18 impacts with the agencies, the staff was pleased
19 to find that the air quality staff was pursuing
20 mitigation and reduction of emissions, as well as
21 offsets and locally direct offsets.
22 And that is what staff presumes will
23 enable the impacts to be less than significant for
24 this project.
25 But staff did discuss potential impacts

1 to vernal pools and wetland and known red-legged
2 frog and tiger salamander populations in the area
3 with Fish and Game and Fish and Wildlife service.
4 Q So, what I heard you say, basically, was
5 that you considered it, but you didn't actually
6 include the air pollution. But you didn't really
7 answer on the water impacts as well. So, could
8 you clarify on the water whether -- because the
9 area of water use is going to have a larger impact
10 area, say than -- because you are using 7000
11 acrefeet of ground water as proposed. It's going
12 to be -- or from the irrigation district, since
13 that's going to have an impact on a bigger area
14 than the 44-and-a-half, or the area of
15 construction and the lay-down area, isn't it?
16 And was that mitigated -- was there any
17 mitigation offered up for that, is what I'm trying
18 to find out. You've already clarified with regard
19 to the air pollution.
20 A Okay. Well, the use of the water is not
21 mitigated -- the effects to lands in the Delta,
22 is that what you're saying? The effects of use of
23 water that's coming out of the Delta? And you're
24 saying that that's going to affect --
25 Q The canal --

1 A -- x number of acres of --
2 Q Yeah, I'm asking, was there any
3 consideration given to water, --
4 A Oh, there was consideration --
5 Q -- and was any mitigation offered up to
6 compensate for the impacts?
7 A Well, staff considered it, and was
8 supportive of using alternative cooling
9 technologies to eliminate the need to use fresh
10 water.
11 To avoid impacts whenever necessary, but
12 because that may not be a feasible or preferred
13 direction for parties to take in this situation,
14 staff relies on the expert opinion of the National
15 Marine Fisheries Service which had been drawn into
16 consultation twice because of concerns over water
17 use. And so.
18 Q Did you, by any chance, have an
19 opportunity to review Dr. Smallwood's comments?
20 A Yes, I did.
21 Q Okay. And then my other question is,
22 how did you come to your conclusion on the bats,
23 and where can I find the analysis that you based
24 those conclusions on?
25 Is there something in the staff

1 assessment?

2 A Yes.

3 Q You mentioned something in the staff

4 assessment.

5 A It's on page 17.

6 Q Which is section --

7 A Oh, I'm sorry, 5.2.

8 Q 5.2, 17.

9 A While there are no known nurseries or

10 bat roosts on the project site, or on adjacent

11 facilities. And the bats may indeed forage over

12 the project site, and that is why staff put them

13 in the category of potentially affected. And they

14 will benefit from the mitigation parcel at the

15 Gomes property.

16 Q Okay, now that kind of leads me to my

17 third question, or my other question, which had to

18 do with the mitigation part with the Gomes ranch.

19 First, you said it's close to the site.

20 Right? This parcel. In your opinion, would this

21 site be within zone of deposition of the criteria

22 and other pollutants coming from the power plant?

23 A I'm not an air quality person, but it is

24 possible, that if the wind shifted a certain way.

25 Q Okay, that's fine. You mentioned that

this Gomes ranch will be managed for other species' benefits, in addition to kit fox. Can you describe to me how it will be used to benefit those other species?

A Well, many of the species that -- for instance, the horned lark and the mountain plover, the short-eared owl, the whitetail kite, the golden eagle, the waterhead shrike, the bats, the burrowing owl, the Swenson's hawk will all benefit from having foraging and hunting territory; potentially nesting territory.

Many of those species use open grasslands for hunting and nesting. And there are also wetlands, drainages, and alkaline meadows there. And that will benefit even crustaceans such as the fairy shrimp, if there are any there. That could be inventoried and looked at. Also western pond turtle of California, red-legged frog may not only disperse through there, but may be encouraged by some restoration to come and inhabit that area.

Q Specifically, what restoration are you -- do you mean?

A Well, as this mitigation parcel is developed for management by a third party

1 management entity, there will be input and
2 discussion about what the management and
3 restoration of that project -- of that site will
4 entail. And that will include protection, most
5 likely protection and enhancement of existing
6 wetlands and drainages. Maintenance of
7 connectivity to other habitat patches.
8 Q Will that be part of the resource
9 mitigation implementation and monitoring plan?
10 A Yes. And unlike -- contrary to what was
11 stated in Dr. Smallwood's testimony, both the
12 outline and the draft BRMIMP have been available
13 for over a year. That final BRMIMP will be, is
14 pending, and will be developed, the final BRMIMP.
15 Q So, in your opinion, do you think the
16 public and us intervenors have been provided an
17 opportunity for a meaningful and informed
18 participation on the project's biological resource
19 mitigation implementation and monitoring plan?
20 A Yes. I hope so, yes.
21 Q But you don't have specific knowledge of
22 what the process would be for us to have input? I
23 mean, I've never had input on one before, and I've
24 been involved in a lot of projects, so.
25 A Well, it was provided as a response to

one of staff's data requests. I think it was 59. And it has been in the docket for a year, since September of 2001.

Q Okay. And then the last question is, this kind of goes to the uncertainty of some of your responses that I heard to Bob. Are you aware of the uncertainty principle in risk assessment?

A Yes.

Q Okay, thank you.

MR. BOYD: That's all my questions.

HEARING OFFICER WILLIAMS: Is there any redirect?

MS. DeCARLO: Redirect? Yes. A couple of questions, please.

REDIRECT EXAMINATION

BY MS. DeCARLO:

Q Are there any studies showing that wildlife tend to acclimate to increases in noise?

A Yes.

Q Based upon the noise testimony submitted by staff, are you confident that the noise levels emitted by the project are sufficiently low to not cause a significant adverse impact to wildlife species?

A Yes.

1 Q Did the National Marine Fisheries
2 Service determine that there would be no
3 biological, significant biological impacts due to
4 the project's use of water?
5 A Yes.
6 Q Are you confident that the air quality
7 mitigation proposed in the air quality testimony
8 is sufficient to mitigate for any potential impact
9 to wildlife due to NOx deposition from project
10 emissions?
11 A Yes.
12 MS. DeCARLO: That's all for staff.
13 HEARING OFFICER WILLIAMS: Thank you.
14 MR. SARVEY: Am I allowed one redirect
15 question? Pardon me.
16 MR. HARRIS: Actually, based on the
17 limited scope of that, I have no further
18 questions.
19 HEARING OFFICER WILLIAMS: Go ahead.
20 RECROSS-EXAMINATION
21 BY MR. SARVEY
22 Q Lisa mentioned that, or asked had you
23 satisfied with the air quality proposal and the
24 mitigation provided. Without the mitigation
25 provided, and the air quality recommended by

1 staff, do you still think there is no significant
2 adverse impact to the biological resources?
3 A I'm sorry, can you repeat that?
4 Q Without the air quality mitigation that
5 is recommended by staff, do you still feel that
6 there is no adverse significant impact to
7 biological resources without, I'm saying, if it's
8 not provided, this mitigation is not provided, is
9 there still a possibility, or I mean, do you feel
10 that there will be a significant adverse impact to
11 biological species?
12 A Yes, I think there would be a
13 potentially significant impact to biological
14 resources without those mitigations.
15 MR. SARVEY: Thank you.
16 PRESIDING MEMBER KEESE: Mr. Boyd, do
17 you have anything else on this?
18 MR. BOYD: No, I'm finished.
19 PRESIDING MEMBER KEESE: Okay.
20 HEARING OFFICER WILLIAMS: You have a
21 witness though, right?
22 MR. BOYD: Yes.
23 HEARING OFFICER WILLIAMS: Yes, are you
24 ready?
25 MR. BOYD: I'm ready whenever you are.

1 HEARING OFFICER WILLIAMS: Okay. Do you
2 want to swear the witness.
3 MR. BOYD: Can he be sworn?
4 HEARING OFFICER WILLIAMS: Yes.
5 Whereupon,
6 SHAWN SMALLWOOD
7 was called as a witness herein, and after first
8 having been duly sworn, was examined and testified
9 as follows:
10 DIRECT EXAMINATION
11 BY MR. BOYD:
12 Q First, Dr. Smallwood, for the record,
13 I'd like you to state your qualifications.
14 A Sure. I have a --
15 Q Briefly.
16 A -- PhD from UC Davis in 1990. I served
17 as a post-graduate researcher for four years
18 afterwards in the department of agronomy and
19 marine sciences.
20 And I've been a consultant and
21 researcher ever since, fairly independent. I've
22 worked for various people, several consulting
23 firms. I've been very academically involved,
24 published a bunch of papers and reports.
25 Q Okay, Dr. Smallwood, I direct your

1 testimony to exhibit 5 on biological resources of
2 CARE's prehearing conference statement.
3 MR. BOYD: And I have provided a copy, I
4 got an extra copy if you want me to give it you
5 guys. Since you know I do everything online,
6 pretty much. Kind of paperless.
7 BY MR. BOYD:
8 Q Dr. Smallwood, did you prepare this?
9 MR. HARRIS: Excuse me, Mr. Boyd. I
10 just want to make sure I know which document you
11 have in your hands, Mike. Is it --
12 MR. BOYD: Sure.
13 MR. HARRIS: This is not Dr. Smallwood's
14 prefiled --
15 MR. BOYD: This is Dr. Smallwood's --
16 MR. HARRIS: -- prefiled testimony?
17 MR. BOYD: -- prefiled testimony, yes,
18 sir.
19 MR. HARRIS: Oh, okay, I thought you
20 were talking about something else.
21 MR. BOYD: No, nothing new.
22 MR. HARRIS: Oh, okay, that's fine.
23 MR. BOYD: I wouldn't do that to you,
24 Jeff.
25 MR. HARRIS: Thank you, Mike.

1 HEARING OFFICER WILLIAMS: By the way,
2 Mr. Boyd, you're number 7 on the exhibit chart, so
3 that document you are holding will be, let's make
4 it 7A.
5 BY MR. BOYD:
6 Q Okay. And is that testimony true and
7 correct to the best of your knowledge?
8 A Yes.
9 Q Do you have any changes to your
10 testimony here today?
11 A Yes. I just today discovered in the
12 Tesla Power project staff assessment that the East
13 Altamont Energy Center is considering mitigating
14 its impacts for biology by possibly buying 90
15 acres worth of credits at the Haera Conservation
16 Bank.
17 And if that is the case, then I think
18 it's inappropriate because the Tesla power project
19 is planned to be right next to that, and think the
20 integrity of that conservation bank would be
21 compromised by that power plant's location.
22 Q Now your testimony identifies certain
23 biological impacts as a result of the construction
24 and operation of this project. Could you briefly
25 summarize the nature of those impacts?

A Well, there will be impacts from the use of so much water that's got to come from some place, very likely the Delta. There is going to be habitat impacts. There is going to be impacts from the atmospheric pollutants over thousands of acres. There is going to be impacts from the noise and the light of the facility and from the laydown area.

Q On the question of the environmental documents that you reviewed, is the piecemeal release of environmental documents preventing you from making a comprehensive and maximally effective review of the project's biological resource impacts?

A Very much so. I am very busy; I have a lot of projects I'm working on; I keep getting these documents coming across my plate in a piecemeal fashion. It is very difficult for me to stop what I'm doing and go reassess something new.

Just in the last couple of days, I've gotten two new documents. Amendments to the FSA in the biology, and I've got some maps of PM10, cumulative impacts, which I've never saw before. I've had no time to assess those documents. This is a very common problem.

1 Q In your professional opinion, has the
2 public and the intervenors been provided an
3 opportunity for meaningful and informed
4 participation on the project's biological resource
5 mitigation implementation and monitoring plan?
6 A Not in my opinion, I've never seen it.
7 I've been -- as in past power plant application
8 cases, I've been very anxious to see it. I saw
9 one before the decision was made, and that was it.
10 The others I have not seen. I've been told, by
11 staff, now, that it's been available, but I've
12 been looking for it, and I've not seen it.
13 Maybe it's hidden in a data response.
14 But it really should be part of the -- there
15 should be an entire package, there should be one
16 package that we could look at, like in the CEQA
17 process. There should be an EIR, or something
18 like it. When you have documents all over the
19 place, it's hard for me to keep track of what's
20 going on, and what means what. Things change too
21 fast here.
22 Q In your professional opinion, should the
23 CEC Staff be directly involved in the preparation
24 of the environmental review documents for the East
25 Altamont Energy Center, or should the CEC Staff be

1 limited to critiqueing the documents prepared by
2 the applicant.
3 A In other CEQA cases, the lead agency is
4 reviewing the project -- or the documents provided
5 by an applicant. In this case, the documents I'm
6 commenting on principally are the documents
7 prepared by staff, the CEC staff. So when I
8 provide constructive criticism on those documents,
9 it can very easily be perceived as adversarial.
10 Because they put their own ideas and
11 creativity into these documents, it's only natural
12 to defend them. That's not the way reviews are
13 provided in the academic environment. That's not
14 an independent review, by any means. It's hard to
15 review your own documents objectively.
16 That's why we, in the academic review
17 process, we have an administrator of the reviews
18 who sends their papers out to somebody else, who
19 then reviews them. That's not happening here, not
20 even close.
21 Q In your professional opinion, did the
22 CEC staff and applicant identify all special
23 status species associated with the project?
24 A Well, they have now, just a few minutes
25 ago, they did address bats. It was addressed

1 briefly in the FSA. Western spadefoot is still
2 not assessed properly.
3 Q In your professional opinion, is the
4 proposed mitigation for the conversion of 44.5
5 acres of land and to the facility being
6 compensated utilizing adequate mitigation for
7 biological impacts from the project?
8 A Are you asking me if I think that the
9 Gomes ranch conservation easement is adequate?
10 Q Basically, yes.
11 A No, I don't think it's adequate at all.
12 The impacts involve thousands of acres, 151 acres
13 of conservation easement in an area that's
14 receiving anti-coagulant baits, which is toxic to
15 the kit fox, which has no obvious benefits to
16 other species.
17 You have to keep in mind too, that it's
18 already there. That property is there. We're not
19 creating wildlife habitat, it's there. So, I
20 think the mitigation is very disproportionate to
21 the impacts of the project.
22 Q In your professional opinion, did the
23 CEC Staff and applicant properly consider the
24 effects of water resource impacts from the East
25 Altamont Energy Center on wildlife habitat and

1 productive farmland?
2 A No. I understand from testimony today
3 from the staff that it was considered but it's not
4 in the documents. There is no mitigation for the
5 impacts, none whatsoever. Not that I could see in
6 the documents.
7 Q In your professional opinion, did the
8 CEC Staff and applicant properly consider the
9 effects of atmospheric pollutants generated by the
10 project onto habitat of the California red-legged
11 frog and California tiger salamander?
12 A No. There is a growing body of
13 literature from recent studies that some of these
14 criteria pollutants to be generated from this
15 plant are dangerous to these two species.
16 And I know there is a lot of uncertainty
17 about the exact impacts, it's hard to predict
18 exactly how many animals are going to die and
19 what-not, but I don't think that's really our job
20 to do that. We don't have to prove what the
21 impacts are going to be; we have to just say that
22 they are very likely.
23 And so the mitigation should be
24 appropriate to that uncertainty. It's up to them
25 to prove that their -- it's not dangerous, not up

to us.

Q In your professional opinion, --

MR. BOYD: Actually, I have here some figures that Dr. Smallwood provided in his written testimony that I would -- I brought for like visual aides. And I can turn on my projector here. But I don't know if you can turn off -- can you turn off any of the lights over here?

HEARING OFFICER WILLIAMS: Do you have hard copies of --

MR. BOYD: It's all in the document that I have.

(Pause.)

BY MR. BOYD:

Q In your professional opinion, did the staff and the applicant properly identify that the generation of atmospheric pollutants from the East Altamont Energy Center will be unusually great compared to other proposed gas-fired power plants?

A No, and I think that the Commissioners deserve to have this kind of information where you can compare the levels of output from the plant to other plants, other plants that have been sited. And also feasible levels that can be achieved through other technologies, like SCONOx.

1 Q Can you go over some of these, maybe
2 explain some of these graphs so that they can
3 understand.
4 A Well East Altamont Energy Center is
5 represented by the darkened square at the upper
6 right. That's the level of NOx you're going to be
7 seeing. The other open squares are other power
8 plants.
9 Q And where did you get the information on
10 those other power plants from?
11 A From the, oh, it's from the CEC's
12 website, from their various FSAs and PSAs.
13 Q And in this case, we're talking about
14 NOx?
15 A Yes.
16 Q Would you describe what the different
17 lines mean?
18 A The dashed line in the middle there is
19 the least permitted level, so far, for power
20 plants in California. So the CEC has so far been
21 considering, or actually, some of them have not
22 been -- they haven't been certified yet. So they
23 are still in the process. But their environmental
24 documents indicate that those levels could be
25 achieved, those levels of NOx production.

1 Then the diamond in the lower right,
2 that's what could be achieved through SCONOx.
3 Q Okay, now that's for which pollutant are
4 we talking about here?
5 A NOx. Nitrogen oxides.
6 Q And then this one is for ammonia?
7 A Yes, ammonia slip.
8 Q What is the blue, the little blue
9 diamond down in the --
10 A Well, as I understand it, SCONOx does
11 not produce any ammonia slip. So the blue diamond
12 indicates a slip of zero. And that's achievable.
13 Q Okay, now here we have PM10.
14 A Yes.
15 Q Is that the same case here?
16 A Yes.
17 Q And then volatile organic compounds.
18 A VOCs, yes.
19 Q And then here we have sulfur oxides.
20 A Um-hum.
21 Q And carbon monoxide.
22 A Carbon monoxide. In each case there are
23 achievable levels, or feasible levels that can be
24 achieved that are much lower than what we're
25 talking about in the FSA.

1 Q And then finally, this graph seems to
2 summarize it all. Can you explain what this
3 represents, please?
4 A Yeah, if I can remember.
5 MR. HARRIS: Excuse me, can you tell me
6 where this is in the prefiled testimony?
7 MR. BOYD: Certainly, you've got the --
8 MR. HARRIS: Maybe the problem is that
9 I've got a black and white.
10 MR. BOYD: -- page, what page is it on?
11 DR. SMALLWOOD: Here it is, page 14 on
12 mine.
13 MR. BOYD: Page 14.
14 MR. HARRIS: Page 14, thank you.
15 MR. BOYD: Now, one thing I should
16 clarify, that intervenor Sarvey submitted an early
17 version of this with his prefiled testimony, and
18 then I submitted a later one, and maybe you've got
19 the wrong one there, Jeff.
20 MR. HARRIS: Well, I thought --
21 MR. BOYD: I'd be happy to share the one
22 we've got if you need it.
23 MR. HARRIS: We're back to my first
24 question about which document are you talking
25 about. Apparently there are more than one

1 documents?

2 MR. BOYD: Well, I had my prefiled

3 hearing testimony and intervenor Sarvey had his

4 prefiled hearing testimony. But basically --

5 MR. HARRIS: Who's sponsoring your

6 prefiled testimony?

7 MR. BOYD: I'm sponsoring it. CARE.

8 And I'm sponsoring the witness.

9 MR. HARRIS: So, who's the --

10 MR. BOYD: And intervenor Sarvey also

11 sponsored the same witness, but he's not doing --

12 MR. HARRIS: We have a basic process

13 problem here, because --

14 MR. BOYD: Okay.

15 MR. HARRIS: -- you have a witness, Dr.

16 Smallwood, before us. I've got his testimony,

17 this is not part of his testimony.

18 MR. BOYD: Depends on which version of

19 his testimony you have.

20 MR. HARRIS: Well, that's --

21 MR. BOYD: And obviously you're not

22 looking at the one I submitted, or else you would

23 have this.

24 HEARING OFFICER WILLIAMS: Let's go off

25 the record.

1 (Off the record.)

2 HEARING OFFICER WILLIAMS: Excuse me,

3 one second, Mr. Boyd. We've reviewed the

4 documents, and there does appear to be some

5 discrepancy in the filed testimony. But we are

6 going to reserve admitting CARE's Exhibit 7A until

7 Monday the 21st, to give applicant assurances

8 that --

9 MR. BOYD: It's the final.

10 HEARING OFFICER WILLIAMS: -- that it is

11 the final document and to give them a chance to

12 review it. You may proceed, Mr. Boyd.

13 MR. BOYD: Okay.

14 BY MR. BOYD:

15 Q So, Dr. Smallwood, if you would explain

16 what this figure means.

17 A It's just a comparison of what you get

18 with different technologies. Also there's an

19 estimate. There also is an estimated generation

20 of these pollutants by the CEC; and then there is

21 a permitted level by the CEC, which has caused me

22 some confusion.

23 There is a table that has both values,

24 and I'm not sure which value applies. But, there

25 they are, I put them in the table anyway, or the

1 figure, for your digestion.
2 And you also have the precedent set by
3 the CEC for use with SCR at other power plants.
4 And you have what's feasible using SCONOx.
5 Q Is that it for this stuff?
6 A I think so. Does everybody understand
7 the graph?
8 MR. HARRIS: Just one point of
9 clarification. In the correct testimony, the
10 table is above the figure. Did you just flip them
11 here, Mike, for convenience, or is that a
12 different table?
13 MR. BOYD: What, this one?
14 MR. HARRIS: No, go back, --
15 DR. SMALLWOOD: No, he's saying that
16 table there was above the figure in the other --
17 MR. HARRIS: In the text of the
18 correct --
19 MR. BOYD: Oh yeah, that's correct. I
20 just, for presentation purposes, put the bar graph
21 above the table of values.
22 MR. HARRIS: Okay, same table though,
23 just flip --
24 MR. BOYD: It's the same table, I just
25 moved it.

1 MR. HARRIS: Thank you.
2 MR. BOYD: Certainly. Okay, you can go
3 ahead and turn on the light again, I think we're
4 done with the figures now. Getting a little hot
5 over here.
6 BY MR. BOYD:
7 Q Okay, recognizing that you're not an
8 attorney, what is your personal experience in the
9 CEQA and/or NEPA environmental review process?
10 And briefly describe CEQA and NEPA projects you
11 have participated in and your role in such.
12 A Oh, I have participated as an expert, in
13 a number of the CEQA and NEPA cases, CEQA and/or
14 NEPA. Including, oh gosh, Headwaters Forest HCP
15 and EIR. I've reviewed the EIRs as an expert.
16 I've reviewed negative declarations.
17 I've reviewed, as a consultant, I've reviewed
18 documents on behalf of clients. I've reviewed
19 about seven power plant site licensing cases. And
20 I've actually participated as a petitioner in one
21 CEQA suit this year.
22 Q Based on your personal experience, in
23 your professional opinion, based on staff's, the
24 Bay Area Air Quality Management District's, and
25 the applicant's analysis, and technical literature

1 and reports you have reviewed, in your
2 professional capacity as an ecologist, which of
3 the two emission control technologies, SCR,
4 selective catalytic reduction, or SCONOx meets
5 CEQA's foremost principle of maximizing
6 environmental protection through feasible
7 mitigation?
8 A Well definitely after looking at the
9 last chart, especially this is, you know -- it's
10 SCONOx, yeah.
11 Q And you're --
12 A It's an easy call, easy call.
13 Q In your professional opinion, is the CEC
14 Staff and applicant's cumulative impacts analysis
15 encompassing a six-mile radius around East
16 Altamont Energy Center, the appropriate region for
17 analysis of the project's cumulative impacts, or
18 what area do you propose be used?
19 A Well, it's an inappropriate area. It's
20 fairly arbitrary area. I don't know where they
21 came up with the six-mile radius. There is no --
22 I've never seen any explanation for why it's a
23 six-mile radius, and why it only includes power
24 plants, typically. It should include, in this
25 case, the entire air basin for air impacts. For

1 water, it should be the watershed.
2 Q In your professional opinion, did the
3 CEC staff and applicant properly identify ongoing
4 impacts caused by existing generators of
5 pollution, and other ongoing adverse impacts on
6 wildlife caused by energy generation in that
7 region?
8 A No --
9 Q Give us some examples.
10 A -- yeah, well one example is, as I
11 understand, the Mountain House development wasn't
12 included in the cumulative impacts analysis for
13 air --
14 Q Until recently.
15 A Was it?
16 Q Well, that's --
17 A It's another, okay, yeah, I can't keep
18 up, sorry. Last time I checked, it wasn't. And
19 then another example is the impact of the wind
20 turbines at Altamont Pass killing the raptors.
21 That did not factor into the cumulative impacts
22 analysis and should have, because there is an
23 ongoing existing energy generating impact up
24 there. And this can only exacerbate that problem.
25 Q Based on staff's recently submitted

1 impacts analysis of PM10, that's this stuff right
2 here, including considering the development of
3 Mountain House, do you now believe staff's
4 analysis and proposed mitigation plan to be
5 adequate to mitigate significant environmental
6 impacts on biological resources?
7 A Based on PM10?
8 Q Yeah.
9 A I haven't had a chance to review the
10 PM10 document.
11 Q Okay. In your --
12 HEARING OFFICER WILLIAMS: Excuse me,
13 Dr. Smallwood, you're going to be coming back for
14 air quality, right?
15 DR. SMALLWOOD: I hope not. Would I
16 have to go through whole day like this? Let me
17 say that I'm not an atmospheric scientist. I only
18 look at air impacts from my limited point of view
19 as an ecologist, what the impacts might be on
20 wildlife and plants. So I may not be that helpful
21 with air impacts, because in the focus of air
22 impacts, on humans, anyway, that's not my area.
23 HEARING OFFICER WILLIAMS: Oh, okay,
24 yeah, I was just checking. I didn't recall if I
25 had listed you.

1 MR. BOYD: No, you listed another
2 gentleman that I had offered up, but was unable to
3 provide.
4 HEARING OFFICER WILLIAMS: Right. Thank
5 you.
6 BY MR. BOYD:
7 Q In your professional opinion, should the
8 applicant have been required to prepare a
9 cumulative impact analysis on the expected water
10 use of 25,161 acrefeet per year by the East
11 Altamont Energy Center, Tracy Peaker Project,
12 Tesla Power Project, and the Mountain House and
13 Tracy Hills developments?
14 A Of course, based on everything I know
15 about cumulative impact analysis, that should have
16 been done.
17 Q In your professional opinion, did the
18 CEC staff and applicant properly identify that the
19 biological mitigation offered up by the applicant
20 exposes San Joaquin kit foxes to some of the same
21 impacts as will be generated by the East Altamont
22 Energy Center, i.e., noise and light pollution, as
23 well as deposition of atmospheric pollution from
24 the plant. And that it exposes the kit fox to an
25 additional impact proximity to an extensive area

on which anti-coagulant rodent baits are broadcasted on the ground?

A That's a lot to respond to.

Q It's a trick question.

A Yeah, well, as I understood the deposition maps of these criteria pollutants, at least some of them, there is going to be criteria pollutants deposited upon this property. That's my memory of reviewing those maps in the FSA.

And there is a pumping station there, so there would be noise generated from that pumping station and light.

There are some of the same impacts, or similar impacts, that are being experienced at the power plant. I don't think that the mitigation site is that helpful, because, like I said before, it already exists, it's going to be an area of deposition, it's receiving anti-coagulant baits from the County of Alameda for ground squirrel control. But anti-coagulant baits are toxic to canine species, that's dog-like animals, including kit fox.

It's amazing to me that -- I'd like to know, and I haven't seen the BRMIMP, like I say, so there may be conditions in there that, for

1 example, include easement conditions that disallow
2 anti-coagulant baits on that property. The
3 problem still remains though that it's being used
4 everywhere else. Maybe not on the Fish and Game
5 property, but certainly on the ranchland all
6 around there. So there is a huge area of impact.
7 I'd frankly be surprised if there are
8 any kit fox left there at all at this point.
9 They're subject to so much abuse, in my opinion.
10 And so this mitigation site is pretty puny in a
11 sea of impact, to be really meaningful, from my
12 point of view.
13 Q In your professional opinion, is the
14 biological mitigation offered up adequate, based
15 on the extent of the impacts, and compared to the
16 precedence set by developers of housing tracts,
17 and compared to the approximate 10.5 billion gross
18 income that will be made by the applicant by
19 operating the East Altamont Energy Center over 30
20 years, based on their contract terms?
21 A That's another mouthful for me to
22 answer. If I don't address something, please
23 remind me. The area of impact, like I've said
24 before, is thousands of acres, and from my point
25 of view. And that being said, I have to point out

that there are some uncertain -- I think I may have already pointed this out, there is some uncertainty about what the actual impacts are going to be.

And when you have that, uncertainty about what the actual impacts are going to be, it's not good enough to throw up your hands and say well, I don't know what they're going to be, so I'll just work with the laydown area because I know that one. I mean, that's 45 acres or plus, you know, including the pipelines, and whatnot.

When there is uncertainty about what the impacts could be, there is things that we can do, you know, to find out, to mitigate. We could, for example, be conservative in our approach, that's consistent with the precautionary principle in risk assessment, be conservative.

We could mitigate across a much larger area, a meaningful area. Another thing that we could do is require, as mitigation, a large area, long-term, monitoring project by professional scientists to establish -- well, to learn about what the impacts really are.

Because, you know, what we -- in a lot of cases, we really don't know. And we have an

1 opportunity here, with a project like this,
2 involving so much money, that's going to be
3 grossed, to find out. Help us out, we can learn
4 from this.
5 And you know, there's one CEQA suit that
6 I was a petitioner on this last year. We
7 negotiated with the developers over a housing
8 development that was about 940 acres in size. We
9 negotiated with them over about eight months, my
10 co-petitioners and myself, Sierra Club actually
11 and myself, and we came up with a deal.
12 You know, we got another four million
13 out of the developers; they are mitigating across
14 a much greater area; they're contributing to an
15 education fund for wildlife-friendly practices;
16 they're paying for a long-term, large area
17 monitoring program so we can learn what the
18 cumulative impacts really are, and what the
19 magnitudes are.
20 They contributed a much larger
21 proportion of their gross towards the mitigation,
22 than what's being shown here. What's being shown
23 here is a drop in the bucket compared to what
24 housing developers are offering up as mitigation.
25 This is a giveaway, in my opinion, based on

1 precedent.
2 So it's certainly feasible, from my
3 experience with other projects, it's feasible for
4 them to mitigate in a much bigger way than this.
5 And it's needed, because the impacts are much
6 greater than what's being admitted by staff and by
7 the applicant.
8 Q Okay, that sort of leads to this other
9 question, which is, in your professional opinion,
10 based on your personal experience, do you know of
11 other appropriate mitigation measures in addition
12 to the ones you just mentioned that could have
13 been included that were not included?
14 A Well, I think I just mentioned the
15 monitoring program, that should be included. Dry
16 cooling, thank you. I would -- you could refer to
17 my report, I'm sure there's probably some other
18 measures I suggest there, but I don't remember.
19 Q And then finally, do you have any other
20 oral testimony you wish to present?
21 A Only that I think, and I've seen the
22 trend here today, I've seen conclusions being made
23 by scientists who I have respect for, without any
24 foundation for conclusions. And I think it's
25 important that experts, not just provide their

1 credentials, why they're an expert, but also when
2 they make their arguments, they need to provide a
3 foundation for their conclusions, supportable
4 evidence. Or some reference to something, some
5 other document. Something to back up what they're
6 saying. That's it.
7 MR. BOYD: I'm complete with my direct.
8 Is --
9 HEARING OFFICER WILLIAMS: Open for
10 cross?
11 MR. BOYD: The witness is available for
12 cross.
13 HEARING OFFICER WILLIAMS: Okay,
14 applicant?
15 MR. HARRIS: A couple questions. I
16 guess first off --
17 HEARING OFFICER WILLIAMS: Just a
18 couple?
19 MR. HARRIS: -- depending on the
20 answers.
21 CROSS-EXAMINATION
22 BY MR. HARRIS:
23 Q First, in terms of your expertise,
24 you're here as a biological witness, is that
25 correct?

A I'm commenting on biological resources. I'm an ecologist, yes.

Q And you've admitted that you're not an economist, for example, is that correct?

A I'm not an economist.

Q And you're not an attorney, is that correct?

A Not an attorney.

Q And you admitted a minute ago that you're not an air quality expert, is that correct?

A That's right.

Q And it is also true that you're an expert in issues related to noise, is that correct?

A I think that's safe to say, unless you're talking about the possible impacts on wildlife, I'm familiar with the literature.

Q Let's talk a little bit about this project, as opposed to the literature. Have you been to the site?

A The East Altamont Energy Center Project site?

Q Yes.

A Yes.

Q When were you there, can I ask?

1 A Sometime early this year, probably March
2 or so.
3 Q Was that a single visit to the site?
4 A Yes.
5 Q When was that, was it in the daytime
6 or --
7 A Yes, daytime.
8 Q About what time?
9 A Probably around noon, I'd guess.
10 Q And this is at the project site?
11 A Yeah.
12 Q Did you walk around the project site?
13 A Perimeter? Yes. Not on the project
14 site, itself.
15 Q Sorry, I'm not trying to get you for
16 trespass here. I'm mean, but I'm not that mean.
17 (Laughter.)
18 BY MR. HARRIS:
19 Q What about the Gomes property, the Gomes
20 farm. Did you visit that site as well?
21 A I think I've been on it, yes.
22 Q You think you've been on it?
23 A It's hard to tell, you know, when you're
24 there. I've been -- if I wasn't on it, I was
25 right next to it. Put it that way.

1 Q And was this during your one-day trip --
2 A -- no.
3 Q -- in March?
4 A No, it's on a different project.
5 Q Different project?
6 A Yes.
7 Q But you're not sure whether you were on
8 the site?
9 A Not entirely, I didn't have the parcel
10 map in front of me. I know I was very very close,
11 if not on it.
12 Q Where is the Gomes ranch located
13 relative to the project site?
14 A West of the project site.
15 Q Did you do any surveys?
16 A No.
17 Q So no level of surveys during your day
18 visit to the site?
19 A No, sir.
20 Q And no surveys on the -- what you might
21 think might have been the site for the other
22 project you looked at?
23 A No surveys of any kind, no.
24 Q Yet, on page six of the version of the
25 testimony that I have, you criticize the applicant

1 for not conducting protocol surveys, is that
2 correct?
3 A I'm not sure.
4 Q Let me read you the language of your
5 testimony.
6 A Oh, yes.
7 Q All right. And in reference to --
8 A I said that one day of protocol level
9 surveys for red-legged frogs is not enough.
10 Q So that's a criticism of the applicant's
11 biological assessment, that no surveys were
12 conducted, is that correct?
13 A It's a criticism when somebody makes
14 that kind of -- takes a level of assessment and
15 concludes that the impacts are de minimis or only
16 slight.
17 Q Yet you've admitted that you conducted
18 no surveys whatsoever, is that correct?
19 A That's right.
20 Q You've complained about what I think
21 what you described as being piecemeal approach.
22 And again, you're a biologist, not a lawyer, is
23 that correct?
24 A That's right.
25 Q Are you confused then about what the

1 project is?
2 A I am confused sometimes, basically -- I
3 mean, it's hard to keep up with the changes.
4 Q Okay, so you've done no surveys, you've
5 spent one day in the field, you've complained
6 about the information flow, and now I guess my
7 question is are you confused about what this
8 project is?
9 A It's an 1100 megawatt power plant.
10 Q So --
11 A Maybe I don't understand the nature of
12 the question.
13 Q I guess I see an inconsistency here. On
14 the one hand, you're saying it was difficult to
15 follow because of this piecemealing, is that
16 correct?
17 A Yes, it has been difficult.
18 Q But on the other hand, you're providing
19 a definitive assessment suggesting mitigation, I
20 think on the order of 229,000 acres --
21 A Oh, no, I'm not.
22 Q -- and so I see and inconsistency there,
23 and I'm just --
24 A No, I'm not. I provide -- I show you
25 where there's inadequate assessment. It's not my

1 job to provide the assessment really, it's your
2 job, the applicant's job. It's your job to prove
3 there is no impact on these species.
4 Q Can we go to your testimony, though.
5 You've provided specific acreages you've suggested
6 that would be adequate mitigation, isn't that
7 correct?
8 A I've steered, I hope, the staff into
9 directions that they ought to explore more
10 rigorously. My estimates of what's suitable are
11 not set in stone by any means. They are first-cut
12 estimates only, and I think I explained that.
13 Q So they're not set in stone.
14 A No.
15 Q So let's look at some of the, I guess,
16 un-stoned estimates.
17 (Laughter.)
18 BY MR. HARRIS:
19 Q You've suggested in terms of -- I'm
20 sorry, in terms of mitigation on page 22 of my
21 version of the document, that to provide the
22 appropriate amount of mitigation you'd need
23 229,000 acres of conservation easements. Is that
24 your testimony?
25 A I think that's taken out of context. I

1 think I was saying to be consistent with the
2 developers I dealt with in Yolo County and the
3 acreages of impact from atmospheric pollutants in
4 water that if you factored in those factors, that,
5 yeah, we're looking at mitigation at that level.
6 And the point is, not that that's the
7 exact amount of acres that should be mitigated. I
8 don't know, I mean, it really deserves more
9 attention.
10 Q More than a single day's visit and no --
11 A By all means --
12 Q -- surveys, is that correct?
13 A -- yes, yes.
14 Q Okay, thank you. Are you aware that the
15 U.S. Fish and Wildlife Service found no impacts to
16 special status species?
17 A They oftentimes do that. I don't always
18 agree with them. And you know what, I didn't have
19 a chance to weigh in on their BO in this case,
20 again --
21 Q My question was, are you aware that they
22 made that finding?
23 A I am.
24 Q And are you aware that NMFS also found
25 that there would be no impacts on special status

species?

A Yes.

Q I want to go to page 12 of my version, which is probably page -- I guess it's page 8 of your current testimony.

Under atmospheric pollution, you're talking about the effects of pesticides. Let me read what your testimony says. It says, "Atmospheric pollutions are known to kill major wildlife. For example, upwind applications of pesticides, pesticides, correlate spatially with expatriations", is that right?

A Extirpations.

Q -- "extirpations of threatened California red-legged frogs." Then you go on to say, "The East Altamont Energy Center, EAEC, would contribute air pollutants."

Isn't it correct that pesticides and air pollutants are two different things?

A Not necessarily. If you're breathing in pesticides, I would consider it to be a pollutant.

Q So you've equated pesticides with criteria pollutants, is that your testimony?

A Not necessarily, I'm not sure -- let me read this and see if you're getting the context

1 correct.
2 I don't think I'm equating pesticides
3 with -- I'm just using pesticides as an example of
4 a pollutant, an atmospheric-borne pollutant.
5 Q Your citation there in the footnote
6 relates to pesticides. And so the question is,
7 are pesticides the same thing as atmospheric --
8 A No, that --
9 Q -- pollutants?
10 A No, the footnote refers to the U.S. Fish
11 and Wildlife Service's recovery plan. That
12 includes their assessment of impacts from some of
13 the criteria pollutants, as well.
14 Q The footnote actually is Davidson.
15 A Okay, yes, right. Oh yes, yes, I'm
16 sorry.
17 Q The Davidson reference is in relation to
18 the impact of pesticides?
19 A Yes.
20 Q But your statement goes on to talk about
21 atmospheric pollutants.
22 A Yes.
23 Q So, my simple question is, do you equate
24 pesticides with atmospheric pollutants?
25 A Pesticides are one form of atmospheric

1 pollutants, yes.
2 Q Are pesticides criteria pollutants?
3 A No.
4 Q Took us awhile. Thank you. In terms of
5 the discussion of light and noise, is a species,
6 is a species, is a species, in terms of the effect
7 of light and noise?
8 A No, there are species-specific
9 differences.
10 MR. HARRIS: Give me just a minute,
11 please.
12 (Pause.)
13 BY MR. HARRIS:
14 Q In your discussion about housing
15 development, you talk a little about mitigation
16 there. Is it a biological criteria to determine
17 the amount of mitigation based upon what other
18 developers have paid in other places, in other
19 situations, for other uses?
20 A No, but it goes to feasibility. And
21 fairness, I suppose.
22 Q Fairness. And so, as a biologist, you
23 think that one of the things you're going to look
24 at is to try to look at what other projects have
25 been required to pay in terms of mitigation. Do

1 you --
2 A We inevitably do. I mean we have
3 precedents set by other projects, other mitigation
4 standards. Yes, that's what we do.
5 Q Do you compare the impacts of those
6 particular projects? Do you equate the impacts of
7 a housing development with the impacts of a power
8 plant?
9 A That's a variability. In this case I
10 tried to do that, as well.
11 Q Okay, but your basic argument is a
12 fairness one, that you're saying somebody else
13 paid more so these guys should pay more?
14 A Gosh, I mean, you know, there's no
15 calculus of mitigation really. We're not
16 offsetting impacts really. I mean, come on. We
17 don't know what the impacts are, and we don't know
18 how to mitigate them. We're just trying to
19 compensate. And we're trying to come up with a
20 fair compensation.
21 Q Is money mitigation?
22 A Money for what?
23 Q Just money, the payment of money.
24 A No.
25 Q That's not mitigation, is it?

1 A Depends how you spend it.
2 MR. HARRIS: I think that's it for us.
3 DR. SMALLWOOD: Thank you.
4 HEARING OFFICER WILLIAMS: Staff.
5 MS. DeCARLO: A couple of questions.
6 CROSS-EXAMINATION
7 BY MS. DeCARLO:
8 Q Did you ever request from Energy
9 Commission Staff a copy of the BRMIMP?
10 A In this case I'm not sure. But in other
11 cases I have, definitely, yes.
12 Q But you're not sure about this case?
13 A No, I'm not.
14 Q Did you ever participate in any of the
15 numerous workshops held by staff on biological
16 resources in this case?
17 A I wasn't aware of any of them.
18 Q Did you ever submit comments to the
19 preliminary staff assessment?
20 A No.
21 MS. DeCARLO: That's all.
22 MR. BOYD: You do include the
23 preliminary staff assessment, though?
24 DR. SMALLWOOD: Oh, yeah, I'm sorry.
25 Thank you. My review is on the PSA and the FSA,

1 together with the AFC.
2 BY MS. DeCARLO:
3 Q But it was just submitted on October
4 1st, correct?
5 A Yes. I -- yes.
6 HEARING OFFICER WILLIAMS: Mr. Boyd, do
7 you have something further? Do you have redirect?
8 MR. BOYD: Certainly. Well, Bob didn't
9 have a chance yet, though, I don't know if he had
10 any questions.
11 HEARING OFFICER WILLIAMS: He said he
12 did not.
13 MR. BOYD: Okay.
14 REDIRECT EXAMINATION
15 BY MR. BOYD:
16 Q You did, did you not, prepare a comment
17 letter to the preliminary determination of
18 compliance for the Bay Area Air Quality Management
19 District --
20 A Oh, yes, yes.
21 Q -- on the deposition?
22 A Yes, I did.
23 Q And --
24 A It's hard to keep track of what I
25 prepared comments on. Yes, I did.

1 Q And to your knowledge, didn't I submit
2 that to the Energy Commission?
3 A I can't --
4 Q Along with my status report on the PDOC?
5 A I hate to hurt your feelings, Mike, but
6 I don't remember.
7 Q Okay.
8 PRESIDING MEMBER KEESE: Is that it?
9 HEARING OFFICER WILLIAMS: That's it?
10 MR. BOYD: That's all I have.
11 HEARING OFFICER WILLIAMS: Okay, then
12 it's my understanding that applicant will review
13 these several documents and get back with us on
14 Monday. Are you going to be here on Monday, the
15 21st, Mr. Boyd? That's air quality.
16 MR. BOYD: Well, I was originally
17 planning on being here, but since I don't have a
18 witness, no, I don't plan on being here.
19 HEARING OFFICER WILLIAMS: Okay.
20 MR. BOYD: I don't have any witnesses to
21 offer up. The one I did offer up staff declined
22 to retain, so.
23 HEARING OFFICER WILLIAMS: Okay, so you
24 will not be participating on --
25 MR. BOYD: And I thank you for allowing

1 me to participate to the level that I have. And I
2 apologize for any misunderstanding that may have
3 been had about the level of participation. I
4 tried to make it clear at the prehearing
5 conference.
6 HEARING OFFICER WILLIAMS: Well,
7 certainly you should then communicate with Mr.
8 Sarvey, or have him act on your behalf.
9 MR. BOYD: If I -- what I would like to
10 request, though, if it's possible to get a phone
11 call in. I could participate if there was -- if
12 it was like when you have your meetings in
13 Sacramento, I can call in on the phone. And then
14 I can participate. It's easy for me to work
15 because I'm not going to really be saying
16 anything. And I can just listen in. So I would
17 request that first, as my first priority.
18 If that's not possible then, of course,
19 I'll try and consult with Intervenor Sarvey to
20 provide --
21 HEARING OFFICER WILLIAMS: Yeah, you --
22 MR. BOYD: -- him a list of questions
23 that I may have.
24 HEARING OFFICER WILLIAMS: Yeah, and,
25 Mr. Sarvey, you should be prepared to respond then

1 to applicant's objections, if any, to 7A for
2 identification.
3 MR. BOYD: Now, before we move on,
4 though, I wanted to just clarify that all that I'm
5 offering up in evidence at this point is that one
6 version dated the 30th --
7 HEARING OFFICER WILLIAMS: Right.
8 MR. BOYD: -- of Dr. Smallwood's
9 testimony.
10 HEARING OFFICER WILLIAMS: Right.
11 MR. BOYD: And my understanding is that
12 Intervenor Sarvey won't be offering up the 23rd
13 version.
14 HEARING OFFICER WILLIAMS: That's
15 correct.
16 MR. BOYD: So, and then --
17 MR. SARVEY: Not unless it's disallowed
18 by the Committee.
19 MR. BOYD: The decision will be made on
20 Monday, I take it, to whether or not that's going
21 to be allowed into evidence.
22 HEARING OFFICER WILLIAMS: Okay, with
23 that, I think we can close biology.
24 MR. HARRIS: I'd like to move my
25 documents.

1 HEARING OFFICER WILLIAMS: Good idea.
2 Any objection?
3 MS. DeCARLO: No objections from staff.
4 HEARING OFFICER WILLIAMS: Okay. And so
5 applicant's biology documents are in.
6 And, staff, we've already moved yours,
7 right?
8 MS. DeCARLO: Yes.
9 HEARING OFFICER WILLIAMS: Okay. And
10 you didn't have any, correct, Mr. Sarvey?
11 MR. SARVEY: No, no documents.
12 HEARING OFFICER WILLIAMS: Okay. Next.
13 MR. WHEATLAND: May we go off the record
14 for a moment?
15 HEARING OFFICER WILLIAMS: Yes, off the
16 record.
17 (Off the record.)
18 HEARING OFFICER WILLIAMS: We're going
19 to start in on alternatives.
20 MR. WHEATLAND: All right, may I have my
21 witnesses sworn in, please.
22 Whereupon,
23 JERRY SALAMY and ALICIA TORRE
24 were called as witnesses herein, and after first
25 having been duly sworn, were examined and

1 testified as follows:

2 MR. WHEATLAND: And the testimony on

3 alternatives has been pre-identified as exhibit

4 4B.

5 DIRECT EXAMINATION

6 BY MR. WHEATLAND:

7 Q Could you each please just state your

8 name for the record.

9 MR. SALAMY: My name is Jerry Salamy

10 with CH2M HILL.

11 MS. TORRE: My name is Alicia Torre; I'm

12 an independent consultant.

13 MR. WHEATLAND: And I understand that

14 the other parties are agreeing that we can

15 dispense with the preliminary questions laying the

16 foundation for this testimony, is that correct?

17 MS. DeCARLO: Yes.

18 MR. SARVEY: Yes.

19 PRESIDING MEMBER KEESE: That is

20 correct.

21 MR. WHEATLAND: And so I have just one

22 additional question for Ms. Torre.

23 Ms. Torre, if the staff, in its

24 testimony, the testimony of Paul Richins,

25 references the DWR contract, do you have a

1 clarification regarding the DWR contract?
2 MS. TORRE: Yes, and could I also
3 comment that the testimony of Susan Lee also
4 references this contract.
5 There is a reference made to DWR
6 contract number 2 between the State of California
7 and Calpine, which is the parent company of the
8 applicant.
9 This contract provides for a systems
10 sale by Calpine to be delivered to points on north
11 path 15, which means in northern California, from
12 generating assets in the western system
13 coordinating council, which I believe has been
14 renamed, and I'm not familiar with the new name.
15 It does not provide for any unit-
16 specific sales. And certainly none from East
17 Altamont Energy Center.
18 In northern California alone, Calpine
19 has three gas fired facilities in operation, and a
20 number of geothermal facilities, which together
21 provide more than enough generation to fulfill
22 this contract.
23 So the contract is not with East
24 Altamont Energy Center. It is not a unit-specific
25 sale. It is a systems sale.

1 And although the contract provides for
2 certain consequences if Calpine does not meet
3 specific milestones in the development of the East
4 Altamont Energy Center, Calpine's obligations to
5 develop -- to deliver electricity and the state's
6 obligations to pay for those deliveries would not
7 be affected, since the contract provides for a
8 systems sale.
9 MR. WHEATLAND: Okay, with that
10 clarification, the witnesses are available for
11 cross-examination.
12 PRESIDING MEMBER KEESE: Thank you.
13 HEARING OFFICER WILLIAMS: Staff.
14 MS. DeCARLO: No questions from staff.
15 HEARING OFFICER WILLIAMS: Mr. Boyd.
16 MR. BOYD: Okay.
17 CROSS-EXAMINATION
18 BY MR. BOYD:
19 Q First question, is it your understanding
20 that CEQA requires agencies such as the CEC to
21 implement feasible alternatives as identified in
22 some sort of environmental impact report or
23 equivalent for projects that will otherwise cause
24 significant adverse impacts?
25 MR. SALAMY: It's my understanding that

1 the Warren Alquist Act and the AFC certification
2 process requires the analysis of alternatives,
3 both site selection, as well as generating
4 technology. And that is what we prepared for this
5 proceeding.
6 MR. BOYD: Okay. Is it your
7 understanding that the CEC's siting process, as
8 specified in the Warren Alquist, is CEQA
9 equivalent?
10 MR. SALAMY: That is my understanding.
11 MR. BOYD: In light of that, do you
12 still -- what's your opinion on feasible
13 alternatives identified for the projects that will
14 otherwise cause significant impacts?
15 MR. SALAMY: Well, --
16 MR. BOYD: Does it require the agencies
17 to implement -- to mitigate, to implement
18 alternatives or not?
19 MR. SALAMY: I guess I'm a little
20 unclear on the question. Can you --
21 MR. BOYD: Well, let me restate --
22 MR. SALAMY: -- restate it very --
23 MR. BOYD: -- it again.
24 MR. SALAMY: -- very briefly?
25 MR. BOYD: Does or does not CEQA or CEQA

1 equivalency require agencies to implement feasible
2 alternatives to identify, in some environmental
3 review for the project, that will otherwise cause
4 significant adverse impacts? Is mitigation
5 required if it would otherwise cause significant
6 impacts?
7 MR. SALAMY: Under CEQA I'm not sure if
8 mitigation is required.
9 MR. BOYD: Okay. Do you have anything
10 to add? You don't have anything to add to that?
11 MR. WHEATLAND: Me? No.
12 MR. BOYD: Okay, --
13 MR. WHEATLAND: I could, but I --
14 (Laughter.)
15 MR. BOYD: No, no, no, no, no, I'm
16 asking the witness. You're the lawyer.
17 MR. SALAMY: He can't testify is my
18 understanding.
19 HEARING OFFICER WILLIAMS: I think he
20 was referring to Ms. Torre.
21 MR. BOYD: Ms. Torre?
22 MS. TORRE: I thought the answer was
23 fine.
24 MR. BOYD: Okay. You were speaking
25 about the DWR contract. What's your understanding

1 that if -- I assume you've reviewed that contract,
2 is that correct, Ms. Torre?
3 MS. TORRE: Not completely, no. My job
4 is as the project development manager, not as a
5 power sales negotiator. I was not involved in the
6 negotiation of that contract whatsoever.
7 So I have reviewed it only for very
8 specific concerns related to East Altamont.
9 MR. BOYD: So you have reviewed it,
10 though.
11 MS. TORRE: I did not say I had reviewed
12 the entire document.
13 MR. BOYD: Obviously, okay, thank you.
14 You stated that there was no specific commitment
15 for any capacity basically coming from any
16 generation --
17 MS. TORRE: That's not what I said. What
18 I said is --
19 MR. BOYD: You -- it's part of a --
20 basically when you look at the contract there's a
21 number of different projects covered under that
22 section of the contract where East Altamont is.
23 MS. TORRE: That is not what I said.
24 MR. BOYD: Okay.
25 MS. TORRE: If I could explain --

1 MR. BOYD: Re-state what you --
2 MS. TORRE: A systems sale means that a
3 company is making a commitment to provide a
4 certain amount of energy at the delivery point
5 from whatever resource is available to it.
6 And it is not unit-specific, even to the
7 assets it owns in that region. It happens that
8 this contract names -- it doesn't name generating
9 assets -- excuse me a moment -- make sure I get
10 this right.
11 (Pause.)
12 MR. SARVEY: Mr. Williams, would you
13 like a copy of the contract for Chairman Keese, so
14 he could follow along.
15 MR. BOYD: I have a copy here, too, if
16 you can refer to a page or something.
17 HEARING OFFICER WILLIAMS: Yeah, that
18 would be --
19 MS. TORRE: I think I can now proceed.
20 The seller has an obligation to deliver the energy
21 it's committed to deliver from its western
22 generation assets.
23 Now, western generation assets means
24 generating assets, or portions or output thereof,
25 located in the western system coordinating

1 council. And owned or controlled by seller or its
2 affiliates.
3 Those assets are not listed in this
4 contract because they may change over the period
5 of delivery. Well, actually I don't know why --
6 put it that way -- I don't know why they weren't
7 listed as to what they are today, but clearly over
8 an eight-year period companies may sell or buy
9 different assets that would be located within that
10 region.
11 And there are no commitments made to
12 deliver electricity from any specific generating
13 unit within the western system coordination
14 council region owned or controlled by Calpine.
15 Not just no electricity sales
16 specifically from the East Altamont Energy Center,
17 but there's not a contract for unit-specific sale.
18 It's a systems sale.
19 MR. BOYD: Okay. Now, I think I have
20 the same contract. Just to clarify, if you look
21 at page 2 in the contract, at the top of the page,
22 under contract quantity.
23 MS. TORRE: Yes.
24 MR. BOYD: Under product one.
25 MS. TORRE: Yes.

1 MR. BOYD: Is it your understanding that
2 East Altamont is one of the proposed projects
3 covered under product one? Or is it one of the
4 other products?
5 MS. TORRE: I think you're not
6 understanding --
7 MR. BOYD: The system, the whole -- I'm
8 talking about all of them together. You have to
9 deliver --
10 MS. TORRE: East Altamont Energy Center
11 is not built. It is not a generating asset today.
12 MR. BOYD: I understand.
13 MS. TORRE: At this moment none of us
14 know whether it will ever be --
15 MR. BOYD: I'm not asking --
16 MS. TORRE: -- a generating --
17 MR. BOYD: I'm not asking whether it
18 will be built. I'm just asking is this part of
19 that pool, that's called a pool, a pool of supply,
20 okay.
21 MS. TORRE: Let me answer this
22 hypothetically. If the project is licensed --
23 PRESIDING MEMBER KEESE: Let me try. I
24 believe he said that any generating asset west of
25 the Rockies can be used to fulfill this contract.

1 MR. BOYD: And that's your --
2 PRESIDING MEMBER KEESE: Owned by
3 Calpine or power purchased by Calpine.
4 MR. BOYD: Is that what you're trying to
5 say? Any of these -- any of -- there's product
6 one through four here --
7 PRESIDING MEMBER KEESE: Any generating
8 unit west of the Rockies, that's in what is now
9 called WECC.
10 MR. BOYD: Okay.
11 PRESIDING MEMBER KEESE: Could be
12 acquired by Calpine and dedicated to this. That's
13 what I heard her say.
14 MR. BOYD: Right. Is that what you
15 said?
16 MS. TORRE: Yes, although I wouldn't use
17 the word dedicated. Energy from that facility
18 could be used to provide energy required under
19 this contract, but there's, in fact, no dedication
20 of --
21 PRESIDING MEMBER KEESE: Right.
22 MS. TORRE: -- any particular facility.
23 MR. BOYD: So, --
24 MS. TORRE: Whether or not --
25 MR. BOYD: -- then possibly product two

1 could include it, or product four could include
2 it? You get what I'm saying? I'm trying to
3 narrow it down because when I read the contract,
4 it seemed to me I was looking at all product one
5 was under stuff that pretty much hadn't been built
6 yet, didn't have any capacity payments tied to it
7 or anything.
8 MS. TORRE: I'm not sure what I'm being
9 asked. I'd like to be precise in my answer.
10 MR. BOYD: I'm precisely trying to ask
11 you, he characterized that you're saying that
12 basically -- I'm trying to reinterpret what he
13 said -- that all products, product one, two, three
14 and four, any of those products could possibly
15 come from if this project is approved,
16 potentially. Product one, two, three or four, any
17 of those could come from this project.
18 MS. TORRE: Okay, now I can answer your
19 question.
20 MR. BOYD: And not just product one.
21 MS. TORRE: Product two, which is for
22 electricity to be provided May 1, 2002 to June 30,
23 2002, could not be served by this project.
24 MR. BOYD: It's too late.
25 MS. TORRE: And that is also true of

1 product three, since it goes from June 1, 2002 to
2 December 31, 2002. And then the summer months of
3 2003, and obviously we couldn't do that.
4 And the same thing is -- well, the time
5 period, obviously, would not apply either for
6 product four.
7 MR. BOYD: So that leaves --
8 MS. TORRE: So I think, if I may answer
9 your question, if this project is licensed,
10 financed, constructed and put into operation it is
11 possible that, although by no means certain, that
12 some of the electricity generated by the project
13 could be used by Calpine to meet its obligations
14 under this contract.
15 But that is by no means for sure. And
16 since there is already a tremendous amount of
17 generation available to Calpine right now today
18 far in excess of its obligations under this
19 contract, in order to serve this contract, whether
20 East Altamont is constructed or not is really
21 irrelevant.
22 MR. BOYD: I'm just trying to narrow
23 what the contract covers, that's why, because it
24 seems to me that it could only be product one,
25 based on what I see for the timelines.

1 MS. TORRE: I think we agree.
2 MR. BOYD: Okay. Now, on page 8 of the
3 contract, they specifically speak to the East
4 Altamont Center.
5 HEARING OFFICER WILLIAMS: Mr. Boyd, the
6 copy I have is only 7 pages, so --
7 MR. BOYD: Sorry.
8 HEARING OFFICER WILLIAMS: And a lot of
9 the, three of the initial pages seem to be
10 duplicative.
11 MR. BOYD: Oh, okay.
12 HEARING OFFICER WILLIAMS: So, --
13 MR. BOYD: You got a clean copy for them
14 there, Bob?
15 MR. SARVEY: Can you hold a second?
16 (Pause.)
17 HEARING OFFICER WILLIAMS: Mr. Sarvey,
18 do you plan to introduce this document as part of
19 the alternatives?
20 PRESIDING MEMBER KEESE: We don't --
21 we'll get our copy from --
22 HEARING OFFICER WILLIAMS: Yeah, you may
23 continue, Mr. Boyd.
24 MR. BOYD: Okay, trying to make sure --
25 MS. TORRE: You were on page 8.

1 MR. BOYD: I'm on -- I'm trying to find
2 special condition 3 here.
3 What is your understanding will happen
4 if, according to the contract, if the seller
5 uses -- I mean if the seller, Calpine in this
6 case, or EAEC, uses every effort to complete the
7 East Altamont project and is unable to do so
8 within the timeline spelled out by the contract,
9 what is your understanding of the state, what role
10 the state will have in regards to insuring that
11 this project is constructed?
12 MR. WHEATLAND: I'm going to object to
13 the question because it goes way beyond the scope
14 of this witness' testimony. She's testifying
15 regarding alternatives and made a clarification
16 regarding the unit sales. But she's not here to
17 testify as to that portion of the contract between
18 Calpine and DWR.
19 HEARING OFFICER WILLIAMS: Yeah, I'm
20 going to have to agree, Mr. --
21 PRESIDING MEMBER KEESE: Where are we
22 going?
23 MR. BOYD: Well, basically I'm trying to
24 demonstrate for the record that under the terms of
25 the Department of Water Resources contract if the

1 applicant is unable to develop this project then
2 the state will take that over.
3 And I have specific language --
4 PRESIDING MEMBER KEESE: And that's
5 relative to?
6 MR. BOYD: And that's relative to
7 alternatives, because how can you do unbiased
8 alternatives analysis if you've already -- the
9 state's already precommitted to the project. They
10 said they'll build it if they don't.
11 PRESIDING MEMBER KEESE: No, they --
12 MR. BOYD: I mean that's what the
13 language in the contract appears to say, is that
14 the state will take over --
15 PRESIDING MEMBER KEESE: That the state
16 could.
17 MR. BOYD: The state could. It says the
18 state could take over the project. And they've
19 signed the contract already, so what's to prevent
20 the state from taking the project if they don't?
21 And what's the point of being here if the state's
22 already made a contract to build this plant, no
23 matter what?
24 They're going to build it whether --
25 PRESIDING MEMBER KEESE: No, --

1 MR. BOYD: -- you approve it --
2 PRESIDING MEMBER KEESE: -- that is not
3 the --
4 MR. BOYD: Doesn't say anything about
5 whether or not you approve it here. It does put
6 specific timelines when you have to give the
7 certification by for this to kick in, but it
8 doesn't specifically -- it doesn't specifically
9 preclude the state from taking over the project,
10 if the applicant's unable to perform to the
11 contract.
12 PRESIDING MEMBER KEESE: I am --
13 MR. BOYD: Which includes provisions to
14 construct the plant.
15 PRESIDING MEMBER KEESE: I am aware --
16 MR. BOYD: No matter what.
17 PRESIDING MEMBER KEESE: -- that there
18 is a Power Authority in California that if it
19 issues bonds and gets authorized by its board to
20 build power plants, could, under this, build power
21 plants. Or there could be some other entity at
22 sometime that might.
23 The question is how does that relate to
24 our alternatives analysis?
25 MR. BOYD: The point I'm trying to make

is that how can you do an alternatives analysis if you've -- there is no alternative, basically if -- one of the criteria for determining whether an alternative is viable or not is whether it can meet the requirements of the DWR contract, then there is no alternative, because it's the only -- the contract's specific about this project.

PRESIDING MEMBER KEESE: I do not --

MR. BOYD: Follow?

PRESIDING MEMBER KEESE: No, I don't understand the relevance of this whatsoever. I'm not --

MR. BOYD: Well, I'm trying to raise the issue -- what I did is --

PRESIDING MEMBER KEESE: We're not --

MR. BOYD: I submitted a --

PRESIDING MEMBER KEESE: I don't see how this Committee is going to take into consideration anything in this document.

MR. BOYD: So you're saying that there's nothing in the FSA or in any of the staff's findings that are going to be based on the existence of a contract requiring the construction of this plant to meet their contractual obligations to the Department of Water Resources

1 through this contract to build the plant?
2 PRESIDING MEMBER KEESE: I can't speak
3 for staff. I will say the Committee's not going
4 to -- this is not going to be a basis for any
5 judgment of this Committee.
6 HEARING OFFICER WILLIAMS: Yeah, quite
7 frankly, I don't really understand why there are
8 references --
9 MR. BOYD: Well, I'm trying to relay the
10 basis for --
11 HEARING OFFICER WILLIAMS: No, I
12 understand what you're --
13 MR. BOYD: -- the fact that there is no
14 real meaningful alternatives analysis, because of
15 the existence of this contract, which pre-commits
16 the state to the construction of the project.
17 HEARING OFFICER WILLIAMS: And what did
18 you --
19 MR. BOYD: Prior to an environmental
20 review being completed.
21 PRESIDING MEMBER KEESE: It gives the
22 state -- Mr. Boyd, it gives the state an option.
23 It does not pre-commit the state, the state is not
24 committed to do anything. It gives the state --
25 this contract evidently gives somebody in the

1 state an option.

2 MR. WHEATLAND: I'd like to just add for

3 the record, this is a contract between Calpine and

4 the Department of Water Resources, not even the

5 State of California as a whole, but the Department

6 of Water Resources.

7 And as Mr. Boyd knows very well from

8 being before this Commission for a long time, the

9 statutes which create this Commission created it

10 as an independent Commission. It is not a

11 department of the State of California. It's not

12 an executive office within the State of

13 California. It's an independent Commission.

14 MR. BOYD: It's also a subdivision of

15 the State of California.

16 MR. WHEATLAND: It's an independent --

17 HEARING OFFICER WILLIAMS: Well, we

18 don't need to quibble about that point, but I

19 would say that based upon everything that has been

20 said today, I quite frankly have been straining to

21 determine why there are various references to this

22 master power purchase contract.

23 I mean it's really attenuated from the

24 licensing process.

25 PRESIDING MEMBER KEESE: I could

1 understand, Mr. Boyd, if the power from this power
2 plant, if the state had contracted for the power
3 from this power plant, this might be relevant.
4 Just as if Calpine had contracted to sell this
5 power to anybody else might be found to be
6 relevant for some reason.
7 But, as we've heard represented here,
8 this is a systems sales contract, not a sale of
9 the power from this power plant necessarily,
10 and --
11 MR. BOYD: And I don't dispute that.
12 All I'm disputing is the fact of whether or not
13 the state, through this contract, has committed to
14 its construction. Not whether they're going to
15 buy electricity from it, but whether this contract
16 commits the state to having this thing built.
17 PRESIDING MEMBER KEESE: To my knowledge
18 the entity -- the one entity that might, the
19 California Power Authority, has not authorized
20 either the bonds or has not even made the decision
21 that they will build power plants.
22 They're considering, actually, investing
23 in renewable energy.
24 MR. BOYD: So there's no contractual
25 obligation on the part of the applicant or the

1 state to construct this plant if you guys don't
2 approve it?
3 PRESIDING MEMBER KEESE: I believe --
4 MR. WHEATLAND: May I, just for the
5 record, the conversation is moving from the fact
6 that we have not offered a witness to testify as
7 to the state's intent with respect to this
8 agreement, and our witness has no opinion for the
9 purposes of this proceeding, on that issue.
10 And I think that's --
11 PRESIDING MEMBER KEESE: Okay.
12 MR. BOYD: That's --
13 MR. WHEATLAND: -- where I want to be.
14 MR. BOYD: We can leave it, if you wish.
15 PRESIDING MEMBER KEESE: Okay.
16 MR. BOYD: I don't object. I think you
17 understand what the issue is that I was trying to
18 raise, and, you know, those are the reasons I was
19 asking that line of questioning.
20 Because she's the one who brought up the
21 DWR contract, not me.
22 PRESIDING MEMBER KEESE: Okay, thank
23 you.
24 MR. BOYD: I didn't even ask her for it.
25 (Laughter.)

1 MR. BOYD: I was going to be very touchy
2 about --
3 PRESIDING MEMBER KEESE: Okay, any other
4 questions?
5 MR. BOYD: -- going there.
6 (Laughter.)
7 PRESIDING MEMBER KEESE: Any other
8 questions?
9 HEARING OFFICER WILLIAMS: And I think I
10 also would add that I think the Committee would be
11 open to a motion to strike any references to this
12 DWR contract.
13 MR. BOYD: Anywhere?
14 HEARING OFFICER WILLIAMS: Yeah. I
15 throw that out there for the parties'
16 consideration.
17 MR. BOYD: That would be friendly to me.
18 I mean I don't want to see it referred to in the
19 PSA, FSA, or the decision.
20 MS. DeCARLO: Staff doesn't object to
21 such a motion.
22 MR. WHEATLAND: We don't object to that.
23 HEARING OFFICER WILLIAMS: Okay.
24 MR. SARVEY: I object.
25 HEARING OFFICER WILLIAMS: Okay. All

1 right, so --
2 MR. BOYD: Mr. Sarvey believes it's
3 relevant, so.
4 HEARING OFFICER WILLIAMS: Yeah, okay,
5 so we'll get there. Are you done?
6 MR. BOYD: Certainly, thank you.
7 HEARING OFFICER WILLIAMS: Okay, you're
8 welcome. Mr. Sarvey.
9 MR. SARVEY: Oh, first of all I docketed
10 as one of my exhibits, I don't think it's
11 irrelevant and I haven't had an opportunity to
12 explain my position on the contract. And look
13 forward to --
14 HEARING OFFICER WILLIAMS: Okay, we'll
15 mark it as your next --
16 MR. SARVEY: -- look forward to the
17 opportunity.
18 HEARING OFFICER WILLIAMS: -- in order
19 then; it would be 6G.
20 MR. BOYD: Yeah, can we have a briefing
21 opportunity or something?
22 HEARING OFFICER WILLIAMS: Yeah, Mr.
23 Sarvey still gets his crack at this.
24 MR. SARVEY: Yeah.
25 HEARING OFFICER WILLIAMS: It's going to

be 6G for identification. Go ahead, Mr. Sarvey.

MR. SARVEY: Okay. Assuming we have a reference on page 8 to the East Altamont project, assuming this project is built and you do get $59.60 a megawatt for your electricity, my contention is that renewable energy can be purchased at a cheaper price than that.

And basically that's my contention. As an alternative I have a document in my hand issued by the Department of Water Resources which confirms my statement. It came out on September 20th. And I'd be willing to offer it as proof of what I'm saying.

And that's my only comments on alternatives, and we can all go home.

HEARING OFFICER WILLIAMS: Are you going to offer it?

MR. SARVEY: Yeah, I'd like to offer it if the applicant doesn't object.

HEARING OFFICER WILLIAMS: Thank you, we'll mark this as 6H.

MR. BOYD: Can you say what --

MR. SARVEY: Essentially this document describes a renegotiation of a long-term contract with PG&E trading. And it describes the DWR is

1 basically saying that they saved the state $2.8
2 million by reducing the price of a 66 megawatt
3 wind farm from $58.50 to $57.
4 And my contention is that this plant's
5 backdropped by a windfarm. And that if we can
6 produce electricity for $57 a megawatt using
7 windpower, then I feel that the contract is
8 exorbitant, and the alternative is to use the wind
9 power that we can easily provide, considering the
10 location of this plant.
11 MR. WHEATLAND: I'm sorry, Bob, but I do
12 need to object. Because what you've handed out
13 references the capacity from two recently built
14 peaker facilities. And what we are proposing to
15 construct is not a peaker facility, so --
16 MR. SARVEY: Look a little bit further
17 down, Mr. Wheatland. PG&E trading, ten-year, 66
18 megawatt windfarm.
19 MR. WHEATLAND: We're not proposing to
20 build a windfarm.
21 MR. SARVEY: I understand, and I'm
22 proposing as an alternative that if I can provide
23 wind power cheaper than you can a natural gas
24 fired power plant, then that should be the
25 alternative because there's much less

environmental consequences.

MR. WHEATLAND: Well, what this doesn't establish is that it would have the same load characteristics as the project that we're proposing to construct.

PRESIDING MEMBER KEESE: I think the Committee understands the difference between the nature of a gas fired power plant and then a wind --

MR. BOYD: A windmill.

MR. SARVEY: Yeah, that's my only comment on alternatives.

PRESIDING MEMBER KEESE: Thank you.

HEARING OFFICER WILLIAMS: Thank you.

PRESIDING MEMBER KEESE: Okay, we'll accept that document.

MR. SARVEY: Thank you, Chairman.

(Laughter.)

MR. SARVEY: Sorry, Mr. Wheatland.

MR. WHEATLAND: No, that's quite all right.

PRESIDING MEMBER KEESE: Any cross-examination on this one?

MS. DeCARLO: No.

PRESIDING MEMBER KEESE: All right, are

1 we done with alternatives?
2 HEARING OFFICER WILLIAMS: Yes.
3 However, --
4 MS. DeCARLO: Staff is available to
5 enter direct, or to respond to any cross-
6 examination questions.
7 MR. WHEATLAND: Well, first, can I just
8 move our exhibit into evidence, exhibit 4B.
9 HEARING OFFICER WILLIAMS: Any
10 objection?
11 MS. DeCARLO: No objection.
12 MR. SARVEY: No objection.
13 HEARING OFFICER WILLIAMS: So moved.
14 It's in.
15 Staff, have you -- we kind of jumped, I
16 guess. You haven't provided your direct in
17 alternatives.
18 MS. DeCARLO: No. Would the Committee
19 like us to?
20 HEARING OFFICER WILLIAMS: Yes.
21 MR. WHEATLAND: Can I ask if the parties
22 don't -- if the parties have any questions of
23 staff? Or can we just, can we just stipulate to
24 the admission of the staff testimony?
25 HEARING OFFICER WILLIAMS: It's in.

MR. SARVEY: Will be allowed just to submit my two exhibits? Will I be allowed to submit my two exhibits?

MR. BOYD: The ones you just did?

MR. WHEATLAND: These two? You got them in.

PRESIDING MEMBER KEESE: Yeah, you're going to submit your two exhibits.

MR. SARVEY: Oh, thank you, Mr. Wheatland. That's mighty kind of you.

(Laughter.)

PRESIDING MEMBER KEESE: Okay, all right, we've got those two in.

Staff's is in. Okay.

MS. DeCARLO: Okay, we're all set.

PRESIDING MEMBER KEESE: Took care of that one.

MR. SARVEY: Great, thanks.

PRESIDING MEMBER KEESE: All right. Hazmat.

(Pause.)

MR. WHEATLAND: Could we go off the record again, please?

HEARING OFFICER WILLIAMS: Off the record.

(Off the record.)

MR. WHEATLAND: Off the record we discussed the fact that no other party has questions for the staff's (sic) witness on hazardous materials, so I would move that exhibit 4F, the applicant's testimony on hazardous materials, be entered into the record by stipulation.

HEARING OFFICER WILLIAMS: Is that okay?

MR. WHEATLAND: I'm sorry, the applicant's --

MR. SARVEY: Other than the mistake of the staff's name.

MR. WHEATLAND: Yeah, I'm sorry, I misstated --

MR. SARVEY: You wanted to say the applicant, yeah. I have no objection.

MR. WHEATLAND: It is late, the applicant's.

MR. SARVEY: It's getting late.

MS. DeCARLO: No objection from staff.

HEARING OFFICER WILLIAMS: Okay, it can come in by stipulation.

So, I guess the same is true for staff's?

1 MS. DeCARLO: So we can stipulate to the
2 qualifications of Mr. Greenberg and --
3 HEARING OFFICER WILLIAMS: Yes.
4 MS. DeCARLO: -- dispense with all the
5 preliminary questions?
6 HEARING OFFICER WILLIAMS: Yes.
7 MS. DeCARLO: Mr. Greenberg was sworn in
8 yesterday, is that still valid?
9 HEARING OFFICER WILLIAMS: Yes, that's
10 fine.
11 Whereupon,
12 ALVIN GREENBERG
13 was called as a witness herein, and having been
14 previously duly sworn, was examined and testified
15 further as follows:
16 DIRECT EXAMINATION
17 BY MS. DeCARLO:
18 Q Doctor, I'm sorry, Dr. Greenberg, for
19 the record.
20 Dr. Greenberg, what were your findings
21 with regard to the project's potential for impacts
22 regarding hazardous materials?
23 A They're insignificant. Not the
24 findings, but the --
25 (Laughter.)

1 DR. GREENBERG: The first question you
2 should ask me is whether I'm still alert enough to
3 give competent testimony.
4 MR. SARVEY: We're not talking about
5 your testimony here.
6 DR. GREENBERG: No, my findings were
7 that the use, the storage and the transportation
8 of hazardous materials would result in
9 insignificant risk to the offsite public.
10 Would you like me to briefly summarize
11 some of the more important points of the hazardous
12 materials testimony?
13 Given the lateness of the hour, with the
14 Committee's indulgence, if I'll just read some of
15 my notes it can go a lot quicker.
16 HEARING OFFICER WILLIAMS: No objection.
17 Go ahead.
18 DR. GREENBERG: Staff's goal was to
19 review and evaluate the applicant's proposed
20 methods of hazardous materials management and
21 then, through preparing and proposing conditions
22 of certification, insure that the risk to the
23 offsite public is insignificant.
24 Staff reviewed hazardous materials
25 management during construction and operation of

1 the proposed power plant.
2 Staff focused on engineering and
3 administrative controls that would prevent an
4 accidental release of hazardous materials and
5 those controls which would contain an accidental
6 release, should one occur.
7 Staff evaluated every hazardous material
8 proposed for use at this power plant. Now some of
9 these hazardous materials, by virtue of their
10 small quantity, solid form, or if it's a liquid,
11 the low vapor pressure, and/or the low toxicity
12 posed virtually no risk of offsite consequence.
13 Others could pose some risk, and these
14 were evaluated further. As a result of this
15 evaluation, staff focused on the applicant's
16 proposed use of anhydrous ammonia used for
17 selective catalytic reduction to control the
18 oxides of nitrogen.
19 Now, in the preliminary staff assessment
20 staff recommended that the applicant use aqueous
21 ammonia. However, staff also stated in the PSA
22 that the applicant may state its case and
23 demonstrate that the use, storage and
24 transportation of anhydrous ammonia would not
25 result in a significant risk to the public.

1 The applicant was asked to prepare a
2 transportation risk assessment. The applicant did
3 so. The applicant was asked to address the future
4 development of the Mountain House community and
5 transportation of anhydrous ammonia through the
6 new community. The applicant did so.
7 Staff reviewed the transportation risks,
8 and of course, the risks of storage of anhydrous
9 ammonia onsite.
10 In regards to the --
11 HEARING OFFICER WILLIAMS: Excuse me, I
12 hate to interrupt. You're not going anywhere are
13 you, Mr. Boyd?
14 MR. BOYD: I didn't have a witness or
15 anything --
16 HEARING OFFICER WILLIAMS: Well, we had
17 provided that you were going to sponsor Mr.
18 Sarvey's testimony on worker safety.
19 MR. SARVEY: We'll just allow Mr. Boyd
20 to go, and I'll withdraw my exhibit, and we'll
21 close the record on it.
22 HEARING OFFICER WILLIAMS: Okay.
23 MR. SARVEY: I'm happy with the record
24 at this time, that's fine.
25 HEARING OFFICER WILLIAMS: Okay, the

1 record's closed on worker safety and fire
2 protection.
3 MR. SARVEY: Thank you.
4 MR. BOYD: Sorry, caught me by surprise
5 there.
6 HEARING OFFICER WILLIAMS: Thanks.
7 (Laughter.)
8 PRESIDING MEMBER KEESE: Timing is
9 everything.
10 (Laughter.)
11 MR. SARVEY: No, no, Jeff's opening the
12 door, let the record reflect.
13 (Parties speaking simultaneously.)
14 DR. GREENBERG: In regards to the onsite
15 storage and use of anhydrous ammonia, staff
16 thoroughly evaluated the applicant's offsite
17 consequence analysis. In fact, we conducted our
18 own air dispersion modeling to verify the
19 applicant's air dispersion modeling.
20 We conducted this modeling without
21 consideration of two important mitigation measures
22 proposed by the applicant. One was a roof over
23 the anhydrous ammonia storage tank, and number
24 two, a water spray that would be a knockdown
25 spray, should there be a release of anhydrous

1 ammonia from the storage tanks.
2 Staff found that the results of the
3 offsite consequence analysis indicated that there
4 would be insignificant risks to the offsite
5 public. If you add in the mitigation measures
6 proposed by the applicant, those risks would drop
7 even further. So we're at a level of
8 insignificance, and even lower level of
9 insignificance in reality, taking into account
10 that mitigation.
11 Looking at the transportation risks,
12 staff found that in data supplied by Lee's, which
13 is a 1996 second volume of the Definitive Work of
14 Loss Prevention in the Chemical Industry, that in
15 chapter 23, data showed that most of the injuries
16 and fatalities associated with hazardous materials
17 transportation accidents are the result of the
18 accident, itself, and not due to the release of
19 hazardous materials.
20 One estimate found in this compendium is
21 that only one in 40 fatalities was due to the
22 hazardous material cargo, itself, as opposed to
23 the physical nature of an accident.
24 Staff took this information and compared
25 it to data showing that the frequency of accidents

1 involving hazardous materials transportation is
2 directly related to the vehicle miles traveled and
3 the number of trips taken.
4 Now, since the number of vehicle trips
5 transporting aqueous ammonia would be
6 approximately three times the number needed for
7 transporting anhydrous ammonia, an argument could
8 be made that the use of aqueous ammonia could
9 possibly increase the risk of a hazardous
10 materials transportation accident.
11 Now, staff is not making that argument
12 because it's not a pure one-to-one relationship or
13 direct relationship between number of trips and
14 frequency of accidents. There are other factors
15 that must be considered.
16 But nevertheless, that information taken
17 along with the data showing that far and away the
18 majority of fatalities associated with hazardous
19 materials transportation accidents is due to the
20 physical accident, and not to the release of the
21 cargo.
22 Staff found that the use and transport
23 of either aqueous ammonia or anhydrous ammonia
24 would pose an insignificant risk to the offsite
25 public, certainly if staff's proposed conditions

of certification are adopted.

So what staff found, then, was that the use of both of these forms of ammonia, at this location, would result in insignificant risks.

Staff's reading of CEQA and its responsibility under the Warren Alquist Act was that we could not scientifically justify requiring the applicant to use one form of ammonia over the other when both risks were insignificant, even though we might could find one of them slightly lower risk than the other.

So here's the level of the significance, one might be here, and the other one might be slightly lower, but they're both below the level of significance.

Staff did find, however, that aqueous ammonia is a feasible alternative. Nevertheless, the applicant is proposing to use anhydrous ammonia. They have demonstrated that they can use it, store it and transport it in a safe manner.

It would be up to the Committee to make a decision different from what the applicant wants. Staff cannot make a recommendation against what the applicant is offering, because we cannot find a significant risk.

1 Staff is proposing 12 conditions of
2 certification. One of them in particular would be
3 unique for this site in regards to hazardous
4 materials transportation, and that is because this
5 site is prone to fog conditions during certain
6 periods of the year, the applicant would have to
7 insure that the vendor delivering anhydrous
8 ammonia to the facility would contact the Caltrans
9 weather line, and if there's fog conditions in the
10 area, would not be allowed to deliver anhydrous
11 ammonia until the fog lifted.
12 And the Caltrans information line would
13 list those conditions. And literally, the
14 vehicle, after leaving the interstate freeway,
15 would have to stop by the side of the road until
16 the fog conditions lifted. We want to avoid any
17 type of accident where there is a rear-ending from
18 some other vehicle not seeing the tanker truck in
19 heavy fog conditions.
20 The other conditions of certification
21 are those that you often see at other power plant
22 sites.
23 Staff also reviewed the issue of
24 hazardous materials security in regards to a
25 threat from terrorist activity. This security

1 issue is in addition to the general site security,
2 and originally staff proposed the condition of
3 certification within the hazardous materials
4 management section. And there is a discussion in
5 the staff's assessment on hazardous materials
6 management that addresses hazmat security.
7 However, CEC Staff decided to have that
8 condition of certification moved and combined with
9 the general condition of certification, and I
10 think it's called COM8. And I'd like to address
11 that very briefly.
12 The USEPA --
13 HEARING OFFICER WILLIAMS: Is that the
14 matter that we left open?
15 MS. DeCARLO: Yes, it is.
16 HEARING OFFICER WILLIAMS: Yeah, okay.
17 DR. GREENBERG: The USEPA has issued two
18 security alerts involving industries which use
19 acutely hazardous materials. These were both pre
20 9/11. One of them was actually in the year 2000,
21 addressing the theft of anhydrous ammonia, not
22 from terrorist activities, but actually from
23 illicit drug manufacturers who were stealing the
24 anhydrous ammonia, using them in chemical
25 reactions to make methamphetamine.

1 The second was a general security alert
2 to prevent sabotage and terrorism. And these are
3 mentioned in the staff assessment, these two
4 documents.
5 Since 9/11 the U.S. Department of
6 Justice, working with Scandia National
7 Laboratories, issued in late July of 2002, a
8 chemical facility vulnerability assessment
9 methodology.
10 Basically this is essentially a risk
11 assessment, but focusing on whether or not a
12 facility which stores or uses acutely hazardous
13 materials would be vulnerable to a terrorist
14 attack.
15 Staff has proposed a condition of
16 certification to address both general site
17 security and hazardous materials security. Now,
18 I'm preparing a written clarification of what the
19 applicant must do under this condition of
20 certification, but my clarification,
21 unfortunately, is not ready yet today. It must
22 undergo CEC management review. And it will be
23 available to the applicant, intervenors and the
24 public not later than Monday morning, October
25 21st. Hopefully sooner, maybe we can get this out

on Friday.

I am prepared this evening, however, to answer questions and give verbal descriptions of these requirements.

It's my understanding right now that the applicant is not contesting this particular condition of certification pending a description of some particulars in writing. Staff is comfortable with the applicant's position on that.

Briefly, pending completion of a vulnerability assessment for a specific power plant, the power plant owner and operator would be responsible for implementing certain security measures, dependent on the output that comes from the vulnerability assessment.

The use of different hazardous materials could result in a different level of security needed at differing power plants. But, certainly during construction and operations, a gate guard would be necessary, probably not 24 hours a day, seven days a week during operations, but certainly during normal working hours. During construction there would probably need to be a guard there for 24/7.

Perimeter monitors and motion detectors

1 and/or video monitors would likely be required
2 24/7. Certainly the usual fence topped with
3 barbed wire around the perimeter, restricted
4 access, background security checks on all
5 personnel of the plant, and background security
6 checks for hazardous materials vendors, those
7 delivering hazardous materials.
8 We're not talking about what's termed a
9 Q level background security check. That would be
10 for individuals working at nuclear power plants
11 with fissionable materials, you know, such as at
12 San Onofre or Diablo Canyon. We're not at all
13 talking about that. Most likely what we're
14 talking about is a check, really, to determine
15 that a person is who he or she says they are, and
16 past employment practices.
17 The project owner would have the same
18 responsibility toward a hazardous material vendor
19 as the project owner has now in several of our
20 conditions of certification where the project
21 owner has to insure, for example, that a
22 Department of Transportation-certified vehicle,
23 tanker truck, be used by the vendor delivering
24 anhydrous ammonia.
25 That the project owner is responsible

that the vendor may follow only the approved transportation route. In this case it would be through a contractual relationship that the vendor delivering the anhydrous ammonia has to conduct a certain level of background check.

Basically, while staff understands that it may be impossible to insure a 100 percent security, we want the project owners to make it more difficult for any terrorist to successfully target a power plant and its hazardous materials.

Staff takes security issues and efforts to protect power plant and the lineal facilities such as gas pipelines, to protect them from terrorist attacks very seriously. And we have been working very closely with Attorney General Bill Lockyear's Staff, the California National Guard and the FBI.

For the record I've been informed that the condition of certification is COM-9, not COM-8. I had it wrong on my sheet.

That's my summary.

MS. DeCARLO: Staff's witness is available for cross-examination.

HEARING OFFICER WILLIAMS: Do you have anything, Mr. Sarvey?

1 MR. SARVEY: Yes, I do.
2 PRESIDING MEMBER KEESE: Applicant have
3 anything?
4 MR. WHEATLAND: I have, I guess, one
5 question of clarification.
6 CROSS-EXAMINATION
7 BY MR. WHEATLAND:
8 Q When you were talking about all
9 hazardous materials vendors requiring background
10 checks, would that be applying only to those
11 vendors delivering hazardous materials that are
12 stored or used at the project above the regulatory
13 thresholds?
14 A Yes. The U.S. Department of Justice
15 guidelines are linked to acutely hazardous
16 materials that an RMP is required. In other
17 words, there's a certain threshold and
18 concentration.
19 We will be modifying this, of course, to
20 link it to the CalARP program, the accidental
21 release program, which has slightly different
22 thresholds. But, yes, when one goes through the
23 decision matrix of the vulnerability assessment,
24 what comes out -- or some things will fall out
25 because they don't meet those thresholds, and

they're considered then low risk of terrorist focus, low risk if the terrorists even get ahold of it and try and use it.

MR. WHEATLAND: Thank you. That's the only question that I have.

HEARING OFFICER WILLIAMS: Mr. Sarvey.

CROSS-EXAMINATION

BY MR. SARVEY:

Q Yeah, I'd like to ask you a question about your additional testimony you just gave us. Is it your testimony that you just gave us a brief summary?

(Laughter.)

DR. GREENBERG: I could have gone on --

PRESIDING MEMBER KEESE: Yeah, was it a dream or a nightmare?

(Laughter.)

MR. SARVEY: Okay.

BY MR. SARVEY:

Q For my first question, is there a difference in cost to the applicant as far as using anhydrous or aqueous ammonia?

A Yes, there is.

Q And is it a significant cost?

A I don't know whether it's significant or

not. I can tell you that my understanding is that it is cheaper to use anhydrous ammonia, but I can also reassure you that that did not enter into my analysis, nor Rick Tyler's analysis. We both conducted this analysis.

We, you know, not to insult the applicant or anything, but cost is not relevant to us.

Q Okay.

A It's safety.

Q I was just asking as an alternative technique. I don't want to impose anything on the applicant that's prohibitive.

Do you know where the ammonia will be purchased at this point? Have you identified a location where it will be purchased?

A No, but typically it would be coming from a facility in Stockton.

Q Okay. Have you identified a transportation route at this point?

A Yes, we have identified a transportation route, and it is in the staff's assessment. We identify the route and limit the route from when a vehicle leaves an interstate highway.

So it would be interstate, leaving 205

1 either at Grantline Road, or at Mountain House
2 Parkway, and then up to Byron Bethany Road, then
3 to Mountain Home Road, or Mountain House Road, and
4 then to the facility.
5 Q And will that go by a substantial number
6 of homes or any new schools in the Mountain House
7 community that are being developed presently?
8 A We did indeed look at the plans very
9 carefully for the Mountain House community to
10 insure that this route did not go by any schools.
11 No school will be closer than 1000 feet from the
12 road.
13 Residents may be a little bit closer,
14 but our understanding from the Mountain House
15 Community Services District maps, which they
16 provided, is that homes will not be along the road
17 except for some apartment buildings along the
18 Byron Bethany Road.
19 Otherwise, it will be commercial
20 establishments along the entire route, or
21 agricultural fields.
22 Q Can you identify how close this will go
23 by these apartments on Byron Bethany Road?
24 A Yes, the apartments will be right on
25 Byron Bethany Road, so I would estimate, you know,

1 50 feet from the road.
2 Q Okay. I'm assuming from hazardous
3 condition 8 that you've got some serious concerns
4 about the transportation of this ammonia,
5 particularly you are requiring that when fog
6 conditions are not predictable -- I mean when fog
7 conditions are present, you'll be requiring that
8 the ammonia not be transported, is that correct?
9 A That is correct.
10 Q Are you familiar with our tule fog here
11 in the Valley?
12 A Yes, I am.
13 Q Do you realize that it concentrates in
14 patches, and it may be apparent in one spot, and
15 another 1000 feet down the road that it may not be
16 there, another 1000 feet it will be there?
17 A That's entirely possible, and what, of
18 course, we're trying to do here is that when it is
19 known that there is fog, there will be a
20 prohibition on the transportation once the
21 delivery vehicle gets off the freeway.
22 Certainly I'm aware that sometimes it
23 can be clear, and then 10 or 15 minutes later it
24 can be foggy. Likewise, it can be foggy and 10 or
25 15 minutes later it can be clear.

1 I will admit to you that there is no
2 perfect system, other than instructions to the
3 driver to pull over at a safe location, or turn
4 around and go back in a safe manner if there's fog
5 there.
6 But, you bring up a point that
7 demonstrates that, you know, there's no perfect
8 solution to dealing with tule fog.
9 Q So I'm assuming that this will be a
10 pretty hard condition of certification to enforce,
11 in your opinion?
12 A Well, I wouldn't say that it's going to
13 be hard to enforce. We also have proposed this
14 for another location in the Central Valley that's
15 using aqueous ammonia.
16 And basically what we want to try and
17 avoid, you know, any increased risk due to
18 transportation in a tanker truck during fog
19 conditions. That if we can reduce that to the
20 lowest level possible, we feel much more
21 comfortable about it.
22 But, you know, Mr. Sarvey, you know in
23 all honesty there is no such thing as a zero risk,
24 but rather is the risk below what staff would
25 consider a level of significance. And I feel

1 comfortable in saying that it's below a level of
2 significance in this case.
3 Q On page 5.4-12 of your testimony you
4 state that the probability of a tank failure
5 occurring at the same time as farmworkers are
6 present with low winds is too low to be considered
7 plausible. Is that true?
8 A Yes, that's true.
9 Q And you're aware that the rest of this
10 170-acre parcel will be used for agriculture?
11 A That is our assumption when Mr. Tyler
12 and I wrote that section, yes. And if it's not
13 used for agriculture, then it's a buffer zone.
14 We made a worst case assumption.
15 Q You also state that someone driving on
16 Mountain House Road at the time of tank failure
17 could be exposed to high levels of ammonia. Is
18 this also too small a possibility to be plausible?
19 A Once again, as the staff assessment
20 document clearly states, modeling conducted by the
21 applicant, which was verified by myself and my
22 staff in rerunning the SLAB air dispersion model,
23 shows that a level above 75 ppm could indeed occur
24 on Mountain House Road there.
25 Now that is without considering the

1 physical mitigation of the roof and the water
2 knockdown spray. So that's if they just have the
3 tank open, there's this massive release of
4 anhydrous ammonia. And we don't have a water
5 knockdown spray or a roof to keep it from going up
6 forward -- not forward, but up vertically.
7 The chances then of there being an
8 accidental release is so small that it's almost
9 zero, because there has never been a release of
10 either anhydrous ammonia or aqueous ammonia from a
11 CEC-certified gas fired power plant in the State
12 of California.
13 So what we're talking about here is
14 hypothetical and theoretical; it's not happened.
15 Nevertheless, we always ask the question, what
16 will happen if the first one does occur.
17 And in this case, what we have to figure
18 in are what are the odds that someone is driving
19 along, an accident occurs that has never happened
20 before, and they're driving by at the precise time
21 with the precise meteorological conditions that
22 are totally worst case.
23 We think that when you multiply those
24 odds, it's virtually nonexistent that that could
25 occur. But nevertheless, we're very honest about

1 it. We put that in, and say we've looked at that,
2 and we don't think that it's possible -- I'm
3 sorry, probable.
4 Q You mentioned apartment building on
5 Byron Bethany Road, if there was to be an accident
6 with this anhydrous ammonia truck, would those
7 people 50 feet from the road be at risk?
8 A It would depend on the meteorologic
9 conditions. It would also depend on whether or
10 not there was a release. Far and away the vast
11 majority of accidents involving anhydrous ammonia
12 releases are as a result of something other than
13 loss of contents from the tanker truck as a result
14 of the physical accident.
15 In other words, these tanker trucks are
16 pressure vessels, high, you know, carbon/steel,
17 they're built to withhold pressures, they're built
18 to hold caustic substances such as anhydrous
19 ammonia.
20 And when you look at the accident data,
21 and you look at what actually happened at the
22 accident when they report a release of anhydrous
23 ammonia, you find things that they consider this a
24 transportation accident, when the operator makes a
25 mistake on the hose coupling, or the operator

1 turns the wrong valve. Even though it's right
2 there at the site they call it a transportation
3 accident.
4 Or a 55-gallon drum of aqueous ammonia
5 falls off the back of a truck. Or it's an
6 agricultural use of anhydrous ammonia, which is
7 used quite extensively in the State of California.
8 And so it's a farmer who's not trained and not
9 very much aware, making a mistake and driving off
10 the road, and knocking a valve off, something like
11 that.
12 When you're looking at trained drivers,
13 and they have to be trained, the vendor has to
14 have trained drivers, there's federal DOT
15 regulations on training. There's also California
16 Department of Motor Vehicles regulations on
17 training. And when you look at that, when you
18 look at the DOT, MC330 or 331 vehicle, you can't
19 find accidental releases.
20 So now we're looking at, say there's an
21 accident, the chances of there being a release are
22 very very small. And then the changes of there
23 being a release that could impact those people
24 being very very small.
25 So the answer to your question, again,

1 Mr. Sarvey, is one of probabilities as opposed to
2 possibilities. Yes, it's possible that people
3 might have to be evacuated in that case. The
4 probability is something that we haven't faced
5 yet. Again, there's never been an accident of
6 anhydrous or aqueous ammonia in one of these
7 tanker trucks delivering to a CEC-certified
8 facility.
9 Others, you know, farmers using it,
10 yeah, there's lots of --
11 Q So it has happened?
12 A Yes.
13 Q You mentioned that the aqueous ammonia
14 would be purchased in Stockton. Have you provided
15 any sort of condition to provide training for
16 hazardous materials leaks, spills, accidents to
17 the -- from what I understood yesterday the
18 nearest hazardous materials response is Castro
19 Valley, so will there be anything provided for the
20 local San Joaquin responders to be trained in this
21 area?
22 A No. And let me explain why. I
23 understand that that's an issue of concern to the
24 San Joaquin County, and certainly to the Tracy
25 Fire Department.

1 There are laws and regulations in the
2 State of California that require that the local
3 law enforcement agency and local fire departments
4 and local environmental health protection
5 agencies, or you know, local environmental health
6 departments have jurisdiction over facilities that
7 use acutely hazardous materials within their
8 jurisdiction.
9 Therefore, in this case, the Alameda
10 County is the CUPA, the C-U-P-A, certified unified
11 program authority. They're the ones that legally
12 have jurisdiction and responsibility for anything
13 located within Alameda County.
14 Now, fortunately or unfortunately, it's
15 just the law that it doesn't address what do you
16 do if you have a facility right there literally on
17 the line, and half a mile away is another county.
18 But if you look at it that San Joaquin
19 County has many hazardous materials flowing
20 through it that start in another county and end up
21 in another county. Alameda has a lot of hazardous
22 materials that start in their county and end up in
23 another county.
24 So each county really has authority over
25 those fixed facilities within their borders, and

1 would have to deal with any transportation of
2 hazardous materials that go through their county,
3 should there be upset.
4 The level of response needs to be
5 understood. What happens if there is a spill on
6 the highway, it is the vendor's responsibility to
7 call their own contractor that is a hazardous
8 materials cleanup company.
9 Now what the local law enforcement would
10 do is come out there and assist in cordoning off
11 the area. The fire department and hazardous
12 materials teams would come out there and assist in
13 testing, if necessary, or at least containing it.
14 And helping with any type of evacuation.
15 But they're not going to be there
16 cleaning it up. It's going to be some other
17 vendor, like Caltrans used to have a contract with
18 IT Corporation --I think they have a contract with
19 another company now -- that would literally come
20 and clean it up.
21 With anhydrous ammonia, because it is a
22 gas at room temperature, should there be a leak it
23 will go to the atmosphere, and unless there is a
24 water source nearby and the leak is a jet pointing
25 down, we're not going to really have anything to

1 clean up. It's just going to go off into the air.
2 And so the responsibility and the impact
3 on San Joaquin County, from this project, is
4 really going to be very very minimal. They have
5 so many hazardous materials transportation -- or
6 being transported through their county, just like
7 Alameda does.
8 But when it comes to dealing with it at
9 the site, let's say there's a spill at the site,
10 small spills are going to be dealt with by the
11 applicant's team, onsite. The employees are going
12 to be trained. They're going to have personal
13 protective equipment. And they will not only be
14 able to control the spill and contain it, but
15 clean it up, also.
16 If it's a large spill, they'll be able
17 to control, contain, and then they get to call
18 their vendor who has a hazardous materials cleanup
19 crew to come onsite and clean it up.
20 Q Could you briefly -- I imagine most
21 exposures from ammonia occur in the transfer from
22 the vehicle to the storage tank. Is the anhydrous
23 ammonia a more dangerous form of ammonia in that
24 circumstance?
25 A Yes, it would be.

1 Q Okay. Are you aware of any terrorist
2 threats to any CEC -- or not CEC, but any power
3 plant in the country that would make this
4 anhydrous ammonia -- obviously it explodes if
5 someone was to launch an incendiary device into it
6 or shoot into the tank or whatever, run a 747 into
7 it, whatever, are you aware of any terrorist
8 threats to any power plant in the nation?
9 A I'd have to ask counsel whether I'm
10 allowed to breach confidentiality in the briefings
11 I've had from the FBI.
12 MS. DeCARLO: I would say you could
13 answer that the matter is confidential.
14 DR. GREENBERG: The matter's
15 confidential.
16 BY MR. SARVEY:
17 Q Okay. Can I offer you evidence of a
18 terrorist threat?
19 A Certainly, you can.
20 Q Okay.
21 A I don't know whether I can really
22 respond on it.
23 (Pause.)
24 MR. SARVEY: I don't want to beat a dead
25 horse here, because I want everybody to go home.

1 But I just want to ask the Commissioners
2 to consider making a condition of certification of
3 aqueous ammonia, and ask the applicant if they
4 would consider that, as well.
5 And that's the end of my testimony, or
6 my cross-examination, excuse me.
7 DR. GREENBERG: If I could reiterate,
8 Mr. Sarvey, the staff takes security measures
9 regarding hazardous materials very seriously.
10 We're working very hard on that issue.
11 HEARING OFFICER WILLIAMS: Well, let me
12 just state that Mr. Sarvey has presented four
13 separate articles. They'll be his next in order.
14 There's going to be some renumbering of Mr.
15 Sarvey's exhibits because he withdrew the
16 testimony on fire protection.
17 So these will be next in order. Any
18 objection? Okay.
19 Applicant, did you offer your exhibits
20 in hazmat?
21 MR. WHEATLAND: I think we did, but if
22 we didn't, I'll do it again.
23 HEARING OFFICER WILLIAMS: Okay, they're
24 in.
25 MR. WHEATLAND: 4F, thank you.

HEARING OFFICER WILLIAMS: Okay, that's in. Staff.

MS. DeCARLO: Staff offers our testimony on hazardous materials into the record.

HEARING OFFICER WILLIAMS: It's in.

MS. DeCARLO: I'm sorry?

HEARING OFFICER WILLIAMS: It's in.

MS. DeCARLO: Okay, thank you.

(Laughter.)

PRESIDING MEMBER KEESE: All right. Until we have more fun next Monday at 10:00. Okay, thank you, everybody.

(Whereupon, at 11:00 p.m., the hearing was adjourned, to reconvene at 10:00 a.m., Monday, October 21, 2002, at this same location.)

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CERTIFICATE OF REPORTER

I, VALORIE PHILLIPS, an Electronic Reporter, do hereby certify that I am a disinterested person herein; that I recorded the foregoing California Energy Commission Hearing; that it was thereafter transcribed into typewriting.

I further certify that I am not of counsel or attorney for any of the parties to said hearing, nor in any way interested in outcome of said hearing.

IN WITNESS WHEREOF, I have hereunto set my hand this 20th day of October, 2002.