STATE OF CALIFORNIA

Energy Resources Conservation
And Development Commission

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| In the Matter of:<br><br>Application for Certification<br>for the Oakley Generating Station | Docket No. 09-AFC-4 |

**ENERGY COMMISSION STAFF'S OPENING BRIEF**

## I. INTRODUCTION

On March 15, 2011, the Committee for the Oakley Generating Station conducted an evidentiary hearing in Oakley, California. The contested subjects that were identified and discussed included Air Quality, Soil and Water Resources, and Biological Resources. Kathleen Truesdall and Brenda Cabral provided sworn testimony on behalf of the Bay Area Air Quality Management District. Chris Nagano provided comments on behalf of the United States Fish and Wildlife Service, indicating that he had been advised to refrain from providing sworn testimony. At the end of the session, the subjects of Land Use and Alternatives, as well as Pipeline Safety, were continued for further proceedings to March 25, 2011.

A second day of evidentiary hearings was conducted on March 25, at which time Staff and Applicant introduced a stipulation resolving the previously contested issues in Soil and Water Resources and Biological Resources. Additionally, evidence was admitted regarding pipeline safety, land use, and alternatives. In its briefing schedule (previously set for March 21), the Committee for the Oakley Generating Station issued a briefing schedule directing all parties to file Opening Briefs no later than March 30.

## II. ANALYSIS

### 1. PROJECT APPROVAL

#### A. Staff Provided Substantial Evidence in the Record to Support Its Recommendation of Project Approval.

Staff provided substantial evidence in its written testimony to support its recommendation that the Oakley Generating Station, with Staff's recommended Conditions of Certification, should be approved. Those documents include: the Staff Assessment (Ex. 300); the Bay Area Air Quality Management District's Final Determination of Compliance (Ex. 301); Supplemental Staff Assessment (Ex. 302); Staff's Rebuttal Testimony (Ex. 303); and Staff's Supplemental Testimony on Hazardous Materials Management (Pipeline Safety) (Ex. 304). In addition, the Applicant also provided substantial evidence orally and in writing that supported all of Staff's testimony and independently met the Applicant's burden of proof pursuant to Title 20, California Code of Regulations, section 1748(d).

#### B. Staff's Testimony Determined That With the Proposed Conditions of Certification, the Oakley Generating Station Will Not Cause Any Significant Adverse Impacts to the Environment.

Pursuant to Title 20, California Code of Regulations, section 1742, the Applicant is required to include in its Application for Certification information on the environmental effects of the proposed project. Energy Commission Staff and all concerned environmental agencies are then tasked with reviewing the application to assess whether the application's "list of environmental impacts is complete and accurate, whether the mitigation plan is complete and effective, and whether additional or more effective mitigation measures are reasonably necessary, feasible, and available." (Cal. Code Reg., tit. 20, §1742(b).)

Title 20, California Code of Regulations, section 1742.5 outlines Staff's responsibilities in conducting its environmental assessment. Staff's duties include reviewing information from the Applicant and other sources, assessing the potential environmental effects of the proposed project, assessing the completeness of the proposed mitigation, and the need for and feasibility of

further or alternative mitigation. Staff is required to present its assessment in a report to be offered at an evidentiary hearing.

Portions of the Staff Assessment (Ex. 300) and the entire Supplemental Staff Assessment (Ex. 302) comprised Staff's written testimony in accordance with sections 1742 and 1742.5. In each section of these documents, Staff analyzed the project's potential to cause direct, indirect or cumulative impacts, and concluded that the project, with appropriate mitigation, would not cause a significant impact to the environment. Additionally, the testimony of the Applicant's witnesses fully supported Staff's conclusions.

### C. Staff's Testimony Determined That the Oakley Generating Station Will Be Reliable and Not Create a Significant Impact to Public Health and Safety.

California Code of Regulations, section 1743 requires Staff and interested agencies to assess the completeness and adequacy of the measures proposed by the Applicant in terms of applicable health and safety standards and other reasonable requirements. (Cal. Code Reg., tit. 20, §1743(b).)

Staff reviewed public health and safety in all of the applicable technical areas, and in each section concluded that the Oakley Generating Station would not adversely impact public health and safety. Once again, the Applicant's testimony fully supported Staff's conclusions. No other substantial evidence was offered into the record to refute Staff's analyses or conclusions.

### D. Staff, Along With the Bay Area Quality Management District, Determined That the Oakley Generating Station Will Create No Significant Adverse Impacts to Air Quality.

California Code of Regulations, section 1744.5 requires the local air pollution control officer, in this case the Bay Area Air Quality Management District (BAAQMD), to conduct "a determination of compliance review of the application in order to determine whether the proposed facility meets the requirements of the applicable new source review rule and all other applicable district regulations. If the proposed facility complies, the determination shall specify the conditions, including BACT and other mitigation measures, that are necessary for compliance..." (Cal. Code Reg., tit. 20, §1744.5(a).) BAAQMD completed their Final Determination of Compliance on January 21, 2011, and determined that the proposed Oakley

Generating Station complies with all applicable District, state and federal air quality rules and regulations subject to the permit conditions, BACT and offset requirements discussed in the FDOC. (Ex. 301, *Bay Area Quality Management District Final Determination of Compliance*, p. 100.) Furthermore, Staff testified that the project would not result in significant air-related impacts. (Ex. 300).

Section 1744.5(c) requires BAAQMD to provide a witness at the evidentiary hearings to explain the determination of compliance. At the evidentiary hearings on March 15, 2011, Staff presented Brenda Cabral and Kathleen Truesdell from BAAQMD. The panel was cross-examined by Intervenor Sarvey, who offered no evidence that the proposed project would not be in compliance with all LORS or would result in significant air-related impacts.

### E. Staff Concluded That the Oakley Generating Station Will Be in Compliance With All Laws, Ordinances, Regulations and Standards.

California Code of Regulations, section 1744 requires that information on the measures planned by the applicant comply with all applicable federal, state, regional, and local laws, regulations, standards (LORS), and that each agency responsible for enforcing the applicable LORS assess the adequacy of the Applicant's proposed compliance measures to determine whether the facility will comply with the applicable LORS. The Staff is required to assist and coordinate the assessment of the conditions of certification to ensure that all aspects of the facility's compliance with applicable laws are considered. Section 1744 (e) also states that "comments and recommendations by an interested agency on matters within that agency's jurisdiction shall be given due deference by Commission staff." (Cal. Code Reg., tit. 20, §1744 (e).)

In this matter, Staff testified that it reviewed all applicable LORS for the proposed project and consulted with the appropriate federal, state, regional, and local jurisdiction. Staff concluded that the Oakley Generating Station, with the recommended Conditions of Certification, in some cases including mitigation measures, would be in compliance with all applicable LORS. (Exs. 300, 302, 304.) Furthermore, the Applicant's testimony supported the conclusion that the project would be in compliance with all LORS.

## 2. PIPELINE SAFETY

### A. PG&E's Natural Gas Pipeline Past the First Point of Interconnect Is Not Under the Energy Commission's Jurisdiction.

During the Commission business meeting of March 9, 2011, the Energy Commission determined that Application for Certification (AFC) power plant licensing proceedings, including the existing Oakley Generating Station (OGS) licensing case, must include an enhanced assessment of the natural gas pipeline supply/availability and safety. To this end, the Presiding Member of the OGS Committee directed that parties address a set of seven questions covering issues of pipeline safety by way of documentary evidence and declarations from qualified individuals.

Staff's original analysis in the Final Staff Assessment (Ex. 300) was limited to the new interconnection pipelines up to the point where they tap into the PG&E gas system. The new pipeline(s) that would interconnect OGS to PG&E's gas transmission lines and terminate at the new on-site metering station would be designed, constructed, operated, maintained, and managed by PG&E in accordance with 49 Code of Federal Regulation (CFR) 192 and California Public Utilities Commission (CPUC) General Order No. 112. These regulations constitute an existing extensive regulatory program that Staff believes is sufficient to ensure either pipeline, Line 303 or 400, would be built and operated in compliance with all laws, ordinances, regulations, and standards (LORS), and without significant risk to public safety.

Staff notes that the current existing regulatory programs applicable to natural gas transmission lines protect the public from significant hazards. In the absence of evidence that such a program is insufficient to protect the public, CEQA allows a lead agency to rely on such programs. The Energy Commission does not, nor cannot assume jurisdiction over the gas pipeline, as Lines 303 and 400 were permitted by the agency that has such jurisdiction, the California Public Utilities Commission.

### B. The Applicant and Staff Testified to the Safety of the Gas Pipeline.

On March 15, 2011, Staff filed supplemental testimony in the technical area of Hazardous Materials Management. In analyzing the proposed connecting pipeline, Staff

reviewed the design of the proposed new interconnecting pipeline to evaluate any risk to public safety. The interconnections to the PG&E pipeline, and the existing pipelines in the immediate vicinity of the interconnection, would be located in an area that is unpopulated, with the nearest residences about 1,000 feet southwest from the new line interconnections, and approximately 1,200 feet from the onsite OGS metering station. Other existing and proposed commercial occupancies would also be more than 1,000 feet from the proposed interconnection point.

According to 49 CFR 192.903 guidelines, the Potential Impact Radius (PIR) of a pipeline means the radius of a circle within which the potential failure of a pipeline could have significant impact on people or property. The PIR for a connecting pipeline of the worst-case largest proposed 10-inch diameter connected to Line 400 operating at 975 pounds per square inch gas pressure would be 215 feet. For a 10-inch diameter connecting pipeline connected to Line 303 operating at 720 pounds per square inch gas pressure the PIR would be 185 feet. Significant impacts to public safety would not be expected to occur in this setting even in the event of a complete loss of containment of either of the new pipelines, or, the risk would be less than significant. Should a rupture of one of the 36-inch transmission pipelines occur at the point of interconnection with the OGS interconnection pipeline, the PIR would be 667 feet for Line 303 and 776 feet for Line 400. As both of these distances are less than the distance to the nearest residence, staff concluded that the risk would again be less than significant. (Ex. 304)

Intervenor Sarvey, on the other hand, submitted documents on the subject of pipeline safety, some of which had no relation to the project site. Additionally, Mr. Sarvey offered an "expert" opinion regarding pipeline safety, despite lacking any special knowledge, skill, education, training, or even experience in the area of natural gas pipeline safety. California Evidence Code Section 720 provides:

> 720. (a) A person is qualified to testify as an expert if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates. Against the objection of a party, such special knowledge, skill, experience, training, or education must be shown before the witness may testify as an expert.

Here, Intervenor Sarvey's sole proffered qualification was his having participated in a previous pipeline proceeding before another governmental agency, not as an expert in a related

technical area, but as an intervenor. As such, his "testimony" should be given little or no weight by the Committee in its decision.

The current existing regulatory programs applicable to natural gas transmission lines protect the public from significant risk from the new pipelines and from the existing pipelines. In the absence of evidence that such a program is insufficient to protect the public, CEQA allows a lead agency to rely on such programs.

## 3. BIOLOGICAL RESOURCES

### A. Nitrogen Deposition

The Antioch Dunes National Wildlife Refuge (NWR) is approximately 1.6 miles west of the proposed OGS site. In the area encompassing the Antioch Dunes NWR, the baseline nitrogen deposition rate is estimated to be approximately 6.39 kg/ha/yr (Tonneson et. al. 2007). (Ex.300, 4.2-44) Staff thoroughly analyzed the possible impact of nitrogen deposition on the Antioch Dunes NWR in the Biological Resources section in the Final Staff Assessment. (Ex.300. 4.2) Indirect impacts to the nearby Antioch Dunes National Wildlife Refuge would result from nitrogen deposition caused by OGS emissions. Because the Antioch Dunes NWR is already experiencing habitat degradation likely caused by nitrogen deposition and fertilization, additional nitrogen deposition from OGS at this already stressed ecosystem would be a significant impact if left unmitigated.

Recognizing that the proposed OGS would not be the only contributor of nitrogen at Antioch Dunes NWR, staff has recommended that the applicant remit annual payment toward the operating budget of Antioch Dunes NWR that is proportional to the project's share of total nitrogen deposition. Implementation of the management activities funded by this annual payment toward the operating budget of Antioch Dunes NWR would mitigate adverse impacts to Antioch Dunes NWR and the Antioch Dunes evening primrose, Contra Costa wallflower, and Lange's metalmark butterfly from noxious weed proliferation exacerbated by the proportion of OGS's contribution to nitrogen deposition. Indirect and cumulative impacts would be less than significant with mitigation. Discussing its proposed mitigation, staff testified:

> Staff's proposed mitigation approach requires the applicant to remit annual payment towards the operation and maintenance budget of the Antioch Dunes NWR. The annual operating budget is approximately $385,000 and includes

> money for non-native plant removal/fire prevention, sand acquisition, grazing management, butterfly propagation, and rare plant propagation (Picco 2009). Contributing payment would be used to directly implement management activities required to address impacts to the Antioch Dunes NWR from the effects of noxious weed proliferation resulting from nitrogen deposition attributable to OGS.

Evidence offered by Intervenor Sarvey, the testimony of Stuart Weiss, PhD., agrees with the analysis completed by staff. However, Dr. Weiss takes issue with the adequacy of the mitigation proposed, stating that the project's proportional mitigation "is inadequate for effective habitat management *on the scale needed.*" (Ex.402, emphasis added) In addition, the United States Fish and Wildlife Service provided comments in this matter that agreed with staff's analysis, but also disagreed with the adequacy of Staff's proportional mitigation.

Mitigation Measures must be consistent with all applicable constitutional requirements. CEQA Guidelines, Section 15126.4(a)(4). Thus, "[t]here must be an essential nexus (i.e., connection) between the mitigation measures and a legitimate governmental interest." *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987). Furthermore, "[t]he mitigation measures must be 'roughly proportional' to the impacts of the project." *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

It is understood that emissions from the proposed OGS project would not be the only source of nitrogen deposition at Antioch Dunes NWR. There are existing industrial stationary sources as well as mobile sources (i.e., transportation) in the San Francisco Bay area that collectively contribute to elevated local and regional nitrogen deposition. In fashioning mitigation measures, government agencies must be careful to ensure that the mitigation actually relates to impacts caused by the project in question. The Energy Commission must forego the temptation to try to force an applicant such as OGS to provide a generalized public benefit that would do more than fully mitigate the impacts actually attributable to the project. Accordingly, staff proposes that the applicant's payment toward the operating budget of Antioch Dunes NWR be proportional to the proposed project's contribution toward total nitrogen deposition at Antioch Dunes NWR.

Dr. Weiss further opined that the "mitigation should be a series of specific projects." (Ex.402) The United States Fish and Wildlife Service, in their letter, also suggest that a specific

dollar amount "may not accurately reflect the conservation that may be necessary." However, both Dr. Weiss and the United States Fish and Wildlife Service fail to suggest how any such projects would be funded. In the absence of mitigation funds provided by entities such as the Oakley Generating Station, there could be no specific project to mitigate any impacts as identified by staff. Indeed, Condition of Certification BIO-20 would partially fund specific projects at Antioch Dunes NWR targeted at mitigating the effects of nitrogen deposition that are attributable to the OGS Project. It would be improper to require the Oakley Generating Station to provide mitigation that is not proportional to the impacts associated with the project.

**B. "Take"**

In its letter dated February 14, 2011, the United States Fish and Wildlife Service argues that the "Commission and or the applicant" should obtain authorization for incidental take pursuant to Section 7 of the Federal Endangered Species Act of 1973. The Service is wrong.

Staff has demonstrated that the potential adverse impact from the small amount of nitrogen deposition that is possible from the operation of Oakley Generating Station does not constitute a "take." Additionally, there is no evidence that any incidence of "take" could be attributable to the project. Second, although the United States Fish and Wildlife Service is recommending a take permit under either section 7or section10, there is no federal nexus to the project; therefore, the Applicant could not obtain a section 7 permit. Staff notes that the Applicant may elect to obtain a section 10(a) permit post-certification of the project, and in the absence of one, it would be the responsibility of the Service to enforce non-compliance with the federal ESA given the position of the Service that a take permit is required.

The Service has requested that Commission staff obtain written concurrence on these issues. However, given the position taken by the Service that is contrary to the applicable LORS and the conclusions of Commission staff, combined with the Service's failure to acknowledge the lack of Federal nexus, it does not appear that an attempt to obtain written concurrence would be fruitful. Staff will continue to work with the service to come to a mutual understanding, but must respectfully disagree with the Service's comments on this issue.

## III. CONCLUSION

By law, the Commission is required to make its findings and conclusions on whether the proposed Oakley Generating Station will cause a significant adverse impact on the environment or public health and safety based on substantial evidence offered into the hearing record by the parties. Staff and the Applicant offered substantial evidence in their written testimonies and orally during the evidentiary hearings, clearly demonstrating that the proposed project, with the recommended mitigation, would not cause a significant adverse impact on the environment, public health, or safety, and the project would be in compliance with all LORS. Intervenor Sarvey, on the other hand, has not provided substantial evidence to support his claims that the Oakley Generating Station should not be permitted, offering on the primary issues of contention only argument, speculation, and unqualified and unsubstantiated opinion. Therefore, Staff recommends that the Commission approve the Oakley Generating Station's Application of Certification.

Dated: March 30, 2011

Respectfully submitted,

___/s/ Kevin Bell_____

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