

STATE OF CALIFORNIA
ENERGY RESOURCES CONSERVATION
AND DEVELOPMENT COMMISSION

In the Matter of:) Docket No. 04-SPPE-01
)
Application for A Small Power Plant)
Exemption for the Riverside Energy)
Resource Center (RERC))
_____)

Energy Commission Staff's Reply Brief

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LISA M. DECARLO
Staff Counsel
California Energy Commission
1516 Ninth Street, MS-14
Sacramento, California 95814
Telephone: (916) 654-5195
Facsimile: (916) 654-3843
E-mail: Ldecarlo@energy.state.ca.us

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Energy Commission Staff’s Reply Brief

I. Introduction

Staff, the applicant, and CURE filed opening briefs in this proceeding on September 22, 2004. Out of 17 technical areas analyzed by staff, only one remains in dispute – air quality. Staff’s analysis of the Riverside Energy Resource Center’s (RERC) potential to result in significant air quality impacts consists of 93 pages – well beyond what one would normally find in an initial study. This is in addition to the analysis conducted by the applicant. Based upon this analysis, and staff’s thorough investigation of each issue raised by CURE, staff concludes that the project, as mitigated by all measures proposed or agreed to by the applicant, clearly does not have the potential to result in any significant impacts. As discussed in staff’s opening brief, and below, CURE has failed to show that there is any substantial evidence to support a fair argument otherwise.

II. CEQA Does Not Prevent the Commission From Issuing a Mitigated Negative Declaration to Support an Exemption Solely Because an Expert Witness Has Expressed an Opinion That the Project Might Cause a Significant Impact.

CURE has argued that the California Environmental Quality Act (CEQA) prohibits the issuance of a mitigated negative declaration because their experts have testified that it is their opinion that RERC might have significant environmental impacts. For the varied reasons identified below, this assertion is incorrect and contradicts established caselaw and the CEQA regulations; the Commission may issue a mitigated negative declaration for RERC because CURE has failed to provide substantial evidence to support a fair argument that the project may have significant adverse impacts.

A. A Mitigated Negative Declaration May Be Issued Where, As Is The Case Here, Potential Significant Impacts Have Been Identified But Changes Agreed To By An Applicant Have Been Incorporated Prior To Public Release Of A Draft Mitigated Negative Declaration And Would Avoid Or Mitigate Significant Impacts.

Where an initial study reveals evidence that a significant environmental effect may occur, but the project proponent can, and will, modify the project to eliminate the significant effects, or reduce them to less than significant, an agency may issue, and circulate for public review, a mitigated negative declaration. (Pub. Resources Code, §21064.5; Cal. Code Regs., tit. 14, §15064(f)(2).) As a result of the environmental review of RERC, and the conclusion that there was a potential for significant impacts in some technical areas, staff has proposed, and the applicant has agreed to implement, several mitigation measures, identified as Conditions of Exemption. These conditions include reporting and/or monitoring programs to ensure compliance during project implementation, as required by CEQA. (Pub. Resources Code, §21081.6(a)(1); Cal. Code Regs., tit. 14, §§15074(d), 15097.) Additionally, staff proposed the incorporation of additional language to address concerns raised by CURE. (Staff's Opening Brief, pp. 12, 16-17.) With the incorporation of all of these mitigation measures, staff concluded that RERC would not result in any significant adverse impacts to the environment. Therefore, issuance of a mitigated negative declaration is warranted.

B. The Commission May Weigh Evidence And Consider The Credibility Of Witnesses In Determining Whether Such Evidence Is "Substantial"

CURE argues that the fair argument standard is so low that any evidence presented that a project may have significant impacts is sufficient to require an EIR (or equivalent). While the "fair argument" standard applicable to negative declarations is lower than the "substantial evidence" standard applicable to environmental impact reports, it is not so low as to allow the mere assertion of an impact to prevent issuance of a negative declaration. The fair argument must be supported by substantial evidence. (Cal. Code Regs., tit. 14, §15064(f)(5).) In determining whether evidence is substantial, an agency looks at the whole record. (Cal. Code Regs., tit. 14, §15064(a)(1).)

All of the cases cited by CURE to support their assertion that conflicting evidence cannot justify issuance of a negative declaration deal with evidence that was deemed to be substantial. Staff acknowledges that, if the evidence supplied by CURE were substantial, then any contrary substantial evidence presented by staff would be insufficient to support issuance of a negative declaration. As discussed in staff's opening brief, and below, CURE has not, however, provided substantial evidence to support their arguments.

CURE claims that the Committee cannot make even the initial determination of whether their evidence is substantial. This assertion is contradicted by both caselaw and CEQA itself. CEQA sets forth a definition of what constitutes substantial evidence and what does not constitute substantial evidence. (Cal. Code Regs., tit. 14, §15064(f)(5).) An agency is given leave to apply these definitions to evidence presented and to determine if that evidence meets the definition of substantial evidence; otherwise, CEQA would have simply allowed any evidence of a potential significant impact, regardless of accuracy, credibility, or factual foundation, to require an EIR. “The determination of whether or not evidence is ‘substantial’ **is in itself a weighing process**...[e]vidence that rebuts, contradicts or diminishes the reliability or credibility of [another party’s] evidence is properly considered.” (Citizen’s Committee to Save Our Village v. City of Claremont (2nd Dist. 1995) 37 Cal. App. 4th 1157, 1168 [emphasis added].)

One of the foremost books on CEQA holds likewise:

Thus, under section 21080, subdivision (c)(1), as amended, where the record as a whole shows that the purported evidence supporting a fair argument is not really “substantial,” the agency need not prepare an EIR, and should approve a negative declaration. Such a view is consistent with the Second District’s decision in Citizen’s Committee to Save Our Village v. City of Claremont (2d Dist. 1995) 37 Cal. App. 4th 1157....) (See also Dunn-Edwards Corporation v. South Coast Air Quality Management District (2d Dist. 1993) 19 Cal. App. 4th 519, 532-535 [24 Cal.Rptr.2d 90](upholding air district’s determination that no EIR equivalent was required to support the adoption of a rule limiting the volatile organic compound content of paints and other coatings, despite opponents’ contention that substantial evidence supported a fair argument that the rule might have significant effects; **court appeared to conclude that the opponents’ purported evidence was not “substantial,” in light of rebuttal evidence presented by the air district**.)

(Remy, Thomas, Guide to the California Environmental Quality Act, (1999) p.212 [emphasis added]; see also Oro Fino Gold Mining Corporation v. County of El Dorado (3rd Dist. 1990) 225 Cal. App. 3d 872)[holding that the lead agency and not the court determines the weight of evidence and whether to consider it “substantial”].)

Additionally, in determining the credibility of a witness, an agency may consider any matter that has any tendency in reason to prove or disprove the truthfulness of the witness’ testimony at hearing, included the existence or nonexistence of a bias, interest or other motive. (Evidence Code, §780) Thus, the Committee may take into consideration any biases CURE’s witnesses may have in determining

how credible their testimony ultimately is and what weight, if any, to give such testimony.

C. Expert Opinion Is Not Substantial Evidence Unless It Is Supported By Facts.

Expert witness testimony, in and of itself, is not substantial evidence. Expert opinion must be supported by facts in order to qualify as substantial evidence. (Cal. Code Regs., tit. 14, §15064(f)(5).) Regardless of how qualified CURE's experts are, if their opinions regarding the significance of RERC's impacts are not supported by facts, they cannot be considered substantial evidence.

Nor does submitting countless documents constitute substantial evidence if the documents do not contain facts that have been properly sponsored into the record and that clearly support CURE's opinion testimony. If the documents are irrelevant to the project at hand, do not contain sufficient detail, or, upon a reasonable reading, do not reach the conclusions asserted by CURE, they cannot be relied upon to elevate expert testimony to substantial evidence.

Dr. Fox failed to lay a proper foundation indicating that experts reasonably rely on the documents she proffered. (see Smith v. ACandS, Inc. (1994) 31 Cal. App. 4th 77 [court held that an expert could not rely on photographs to predict asbestos levels where the expert failed to lay a foundation indicating that industrial hygienists reasonably rely on such photographs.]) An expert's opinion must be based on matter that is of a type that reasonably may be relied on by experts in the particular field in forming opinions on the subject to which the opinion relates. (Evidence Code, §801(b).) Dr. Fox failed to lay such a foundation for any of the documents upon which she relies.

In civil and criminal court, judges use factors set forth in Daubert v. Merrell Dow Pharmaceuticals to determine the admissibility of scientific testimony. (Daubert v. Merrell Dow Pharmaceuticals, Inc., (1993) 509 US 579.) These factors are equally relevant to the submission of expert testimony in administrative hearings. In Daubert, the Court held that in determining the admissibility of scientific evidence and testimony a judge must make "a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue." (Id. at 592-593.) This assessment requires that experts proffering testimony provide explicit technical details to support their opinions and facilitate cross-examination and "show that at least some segment of the scientific community recognizes the viability of his chosen methodology." (Bruce Abramson, Blue Smoke or Science? The Challenge of Assessing Expertise Offered as Advocacy, 22 Whittier L. Rev. 723, 728 (2001); see also General Electric Co. v. Joiner (11th Cir. 1996) 78 F.3d 524, 537 ["an expert may not bombard the court with innumerable studies and then, with blue smoke and sleight of hand, leap to the conclusion."] (Smith, J., dissenting) rev'd, 522 U.S. 136 (1997).)

CURE claims that the fact that they have submitted hundreds of pages of documents proves that there is substantial evidence that RERC may result in significant impacts. (CURE's Opening Brief, p. 13.) What CURE has, in fact, really done is simply bombard the record with excerpts of reports and then jumped to the conclusion that these reports apply to the analysis of RERC's impacts and require the conclusion that RERC will cause significant adverse impacts. One cannot tell from looking at the reports how CURE's experts have made these logical leaps. The excerpts do not provide explicit technical details to support CURE's opinions or facilitate cross-examination; nor has CURE shown that their methods for calculating emissions, for either construction or operation, are recognized by some segment of the scientific community. Thus, CURE's testimony fails the Daubert test. (see *also*, Evidence Code, §403 [stating that the proponent of proffered evidence has the burden of producing evidence of the existence of a preliminary fact where the relevance of the proffered evidence depends on the existence of such preliminary fact.]) The relevance of the documents submitted by CURE is dependant upon a showing that these documents are relied on by at least some experts in the field of air quality analysis to reach the conclusions reached by Drs. Fox and Pless. CURE has made no such showing.

While the Commission need not adhere to strict rules of evidence, where serious accusations regarding a proposed project's environmental impacts are made, staff believes that such assertions must meet some minimum test to be considered scientific evidence. Daubert and the California Evidence Code provide good references to what that test should be, and CURE's testimony has failed to meet either one.

D. Thresholds Of Significance Cannot Be Used By Themselves To Conclude That A Particular Impact Will Be Significant.

As discussed above, CURE's entire argument consists of claiming that RERC may cause a significant adverse impact solely because it may exceed thresholds of significance. CURE offers no testimony or analysis as to how the exceedance of these thresholds adversely affects the environment or people in the vicinity of the project. Thresholds of significance cannot be used without other evidence to conclude that a particular impact will, or will not, be significant. (Protect the Historic Amador Waterways v. Amador Water Agency, (3rd Dist. 2004) 116 Cal. App. 4th 1099, 1108-1109.) Such thresholds "can be used only as a measure of whether a certain environmental effect 'will *normally* be determined to be significant' or '*normally* will be determined to be less than significant' by the agency." (Id.[quoting CEQA Guidelines, §15064.7].) Thus, a threshold of significance may be an indication of what is normally considered significant, but it does not follow that mere measurements above or below the threshold constitute substantial evidence of whether there will or will not be a significant impact.

Indeed, CURE agrees that thresholds, themselves, do not substantiate whether there is a significant impact. They cite to Amador to support their assertion that agencies cannot rely on thresholds to support a determination of no significant impact where there is substantial evidence otherwise. (CURE's Opening Brief, p. 11.) Staff agrees completely that the mere fact that a project exceeds or complies with a threshold of significance is insufficient, by itself, to deem the impact significant or insignificant, especially a threshold that was not adopted by the lead agency. For this reason, as thoroughly discussed in staff's opening brief, staff did not rely on any particular threshold and instead considered the specific characteristics of the proposed site, including the proximity of sensitive receptors, the duration of the anticipated emissions, meteorologic data specific to the site, the mitigation measures proposed by staff and agreed to by applicant, et cetera, to conclude that the project would not result in any significant adverse impacts to air quality. (Exh. 12 & 15.) The main fault the court found in Amador was that the water agency had used CEQA Checklist items that had no relevance to the project's impacts, while ignoring potential impacts that were not enumerated in the checklist, and had, thus, failed to analyze the particularities of the proposed project. (Id. at 1103.) As the record before the Committee clearly demonstrates, this is not the case with staff's analysis. Failure to analyze project-specific impacts does, however, invalidate almost all of CURE's assertions and, therefore, warrants their dismissal for failing to constitute substantial evidence.

E. This Is Not A Marginal Case That Would Otherwise Require An EIR Based Upon Conflicting Expert Opinion.

This is not a marginal case. There is almost unanimous agreement that this project will not have any significant effects in 16 out of 17 technical areas. There is no credible evidence that even one person or the environment will be significantly affected by the project, even in the contested issue of air quality. The Energy Commission has already found that several projects nearly identical to RERC will not have any impacts on the environment and, therefore, qualify for an exemption; no one has disputed these findings. As discussed below, CURE's so-called "evidence" that the project may result in significant impacts is based almost entirely on the assertion that the project will exceed thresholds of significance. Not only is this assertion false in most instances, it is also merely an assertion and, as held in Amador, one of the most recent CEQA cases to be decided at the appellate level, mere assertion that a threshold of significance will be exceeded is insufficient on its own to constitute substantial evidence. (Amador 116 Cal. App. 4th 1099, 1108 ["thresholds cannot be used to determine automatically whether a given effect will or will not be significant."]) A case cannot be "marginal" where the assertions of an impact (even if there are eleven of them) are not supported by credible, accurate, and, thus, substantial evidence. The courts have held in several cases that a negative declaration was appropriate despite expert testimony that the proposed project would have significant impacts. (see Citizen Action to Serve All Students v. Thornley (1990)

222 Cal. App. 3d 748, Dunn-Edwards Corporation v. South Coast Air Quality Management District (1993) 19 Cal. App. 4th 519.)

III. In Light Of The Whole Record There Is No Substantial Evidence To Support A Fair Argument That RERC, With Mitigation Incorporated, May Have A Significant Adverse Impact To Air Quality.

CURE's repeated claim is that RERC will cause a significant adverse impact to air quality. The sole support, repeated in various ways, that they offer for this assertion is that RERC may cause exceedances of other agencies' thresholds of significance. They point to no authority that states that exceedance of an air quality standard automatically demonstrates a significant impact or the potential for one. Moreover, the record is clear that any exceedances due to construction would occur, if at all, during a short period of only a few weeks at most and all emissions from operation would be fully offset and, thus, mitigated. As discussed below, CURE's assertions are not supported by substantial evidence and are thoroughly rebutted by staff's and applicant's testimony.

A. CURE Has Not Provided Substantial Evidence To Support A Fair Argument That Construction Emissions May Cause A Significant Impact By Violating The 24-Hour PM₁₀ CAAQS.

There is no reliable support for CURE's assertion that causing a violation of a California Ambient Air Quality Standard (CAAQS) automatically constitutes substantial evidence in support of a fair argument of a significant impact. CAAQS are set to be health protective of the most sensitive people and are, therefore, overly protective for most of the population. If the CAAQS are exceeded in an area where no one will be exposed, there is no one with even the potential to be impacted, and thus, no impact to human beings. While Dr. Fox and Ms. Sears claim to have never seen a project found to be less than significant where it caused a violation of an AAQS, the Commission has previously made at least 21 such findings in previous proceedings. (Staff's Opening Brief, p. 6.)

Dr. Fox claims that, if the air were pristine, the construction emissions would cause a violation of the 24-hour PM₁₀ CAAQS. There is no factual basis to support this argument. The air is not pristine – the 24-hour PM₁₀ CAAQS has been violated in the vicinity of the proposed site. (RT 8/31/04 pp. 23-24.) The appropriate question, pursuant to the CEQA Guidelines, is whether RERC will substantially contribute to the existing violation. (see Kings County Farm Bureau v. City of Hanford, (5th Dist., 1990) 221 Cal. App. 3d 692, 717 [where the court explains the correct interpretation of the question "whether the project would cause a violation of an air standard," as contained in the CEQA Guidelines, is whether the *addition* of project emissions to the existing ambient air concentrations would result in a violation (and not whether the emissions themselves would exceed the identified standard, as CURE claims.)] As discussed below, it will not.

B. CURE Has Not Provided Substantial Evidence To Support A Fair Argument That RERC's Construction Emissions May Substantially Contribute To The Existing 24-Hour PM₁₀ CAAQS Violation.

CURE points to CEQA's mandatory requirement that any project that will cause substantial adverse effects on human beings must be deemed to have significant impacts. (CURE's Opening Brief, p. 15.) None of CURE's witnesses provided any evidence that any person will be exposed to the project's emissions in the locations where exceedances most likely may occur or that any adverse effects to humans will occur. As discussed in Amador, the sole fact that a threshold will be violated is not substantial evidence that a significant impact will occur. (Amador, 116 Cal. App. 4th at 1108.)

The CEQA Checklist does not ask merely whether the project will make any contribution to an existing violation – it asks whether the project will make a substantial contribution. (Cal. Code Regs., tit. 14, §15000 et seq., Appendix G.) CURE incorrectly refers to the projected worst-case 24-hour fence-line concentration of 97.6 µg/m³ PM₁₀ (it is actually 65µg/m³) and claims this is significant without any substantiation.

Staff, on the other hand, analyzed, among other things, the duration of the anticipated exceedance (no more than 3 weeks) and the location (at the project fence line, far from any potential receptors) in reaching its conclusion that the emission impacts will be less than significant. (Exh. 12, pp. 4-35 to 41.) CURE claims that whether any sensitive receptors will be exposed to the emissions is irrelevant because the CAAQS apply everywhere outside the fenced boundary of a project. (CURE's Opening Brief, p.17.) This completely contradicts their assertion that CEQA's mandatory findings of significance require that a significant impact be found here because the project will cause substantial adverse effects on human beings. (CURE p. 15.) If one were to follow CURE's reasoning, then any contribution to a violation of an ambient air quality standard, even just one molecule, would, per se, be substantial evidence of a significant impact. If CEQA supported this reasoning the checklist would ask whether the project contributes at all to the violation of an air quality standard, not whether it substantially contributes.

CURE also claims that CEQA requires that short-term impacts, such as dust generation, be found significant. (CURE's Opening Brief, p. 17.) While the Guidelines do identify construction-related dust as an example of a direct physical change in the environment, it does not dictate whether such a change must be deemed significant or less than significant. (Cal. Code Regs., tit. 14, §15064(d)(1).) Staff does not argue that short-term effects, under certain circumstances, can be determined to create a significant impact. Neither of CURE's references to No Oil v. City of Los Angeles or Friends of "B" Street v. City of Hayward, however, require such a finding here.

In No Oil v. City of Los Angeles, (1974) 13 Cal. 3d 68, the court's sole reason for disallowing the City of Los Angeles' approval of ordinances establishing three oil districts, which would have allowed two test wells to be drilled, was because the city failed to issue a written negative declaration regarding the action. (Id. at 80-81.) The court opined that an EIR would most likely be necessary due to the project's potential for impacts such as causing landslides and blowouts, which might lead to oil polluting nearby beaches; however, the court does not claim that these impacts are short term. Regardless, such discussion is clearly dicta, as it is not essential to the decision. (Id. at 85.) In striking down the trial court's interpretation of CEQA (that an EIR is required only if environmental impacts are "of a permanent or long enduring nature"), the court acknowledged that the "duration of an environmental effect is one of many facts which affect its significance," but simply held that short-term impacts are not per-se insignificant. (Id. at 85.) The court does not hold, as CURE implies, that short-term impacts must be deemed significant.

Staff does not claim that RERC's construction impacts are insignificant solely because they are short-term. As is discussed in No Oil, the very short-term nature of the emissions was only one factor among many that led staff to conclude that the impacts clearly will be less than significant. CURE offered no credible evidence, other than bald assertions, to support a fair argument that the impacts would be otherwise.

The court in Friends of "B" Street v. City of Hayward, (1980) 106 Cal. App. 3d 988, found that a negative declaration was not appropriate because there was a laundry list of short and long-term impacts including the removal of 153 mature trees, the removal of two neighborhood stores, the permanent displacement of 12 families, the acceleration of the conversion of single-family residences to commercial or multi-family use, et cetera. (Id. at 1003.) There is no indication whatsoever that the court would have dismissed the negative declaration if the impacts were limited to increased dust from construction. Thus, neither of the cases cited by CURE support the argument that RERC's short-term impacts must be deemed significant and CURE fails to provide substantial evidence to support a fair argument that the impacts will be significant.

C. CURE Has Not Provided Substantial Evidence To Support A Fair Argument That RERC's Construction Emissions May Substantially Contribute To A Violation Of The Annual PM₁₀ CAAQS.

Dr. Fox claims that RERC's contribution to annual PM₁₀ concentrations at the fence line is a substantial contribution to an existing violation. The only support she provides for this contention is SCAQMD's Rule 1303, table A-2, which identifies 1 µg/m³ as the threshold beyond which contributions are considered significant. (CURE's Opening Brief, p.22.) SCAQMD testified that this number was not to be used to analyze construction emissions. (RT 8/31/04 pp. 206-207.)

Even if it were relevant to the analysis of RERC's construction impacts, exceedance of this standard does not constitute substantial evidence to support a fair argument that RERC would have significant impacts. (Amador, 116 Cal. App. 4th at 1108.) CURE has not provided any other evidence to support their contention that RERC's temporary contribution to the annual PM₁₀ violation in very limited areas will create a significant adverse impact.

D. CURE Has Not Provided Substantial Evidence To Support A Fair Argument That RERC's Construction Emissions Will Cause A Violation Of SCAQMD's Local Significance Threshold Of 24-Hour PM₁₀ (10.4µG/M³.)

Although staff does not believe that a 12-hour construction schedule would create a significant impact, the applicant has agreed to limit construction during initial site preparation activities to no more than 8 hours per day. Staff has recommended language holding the project to this timeframe (the language allows for nine hours (7am to 4pm) because one of those hours would be the lunch hour during which no activity would occur) and CURE agrees that, with this limitation, no significant effects will occur. (CURE's Opening Brief, p.24.)

E. CURE Has Not Provided Substantial Evidence To Support A Fair Argument That RERC's Construction NOx Emissions May Cause A Significant Adverse Impact.

CURE claims that the RERC's construction NOx emissions are significant. The sole support it offers for this contention is that the project will emit NOx in amounts greater than SCAQMD's 100 lbs/day significance threshold. (CURE's Opening Brief, p.25.) Again, mere exceedance of a significance threshold does not constitute substantial evidence to support a fair argument. (Amador, 116 Cal. App. 4th at 1108.) CURE offers no other analysis to support Dr. Fox's assertions. As discussed in staff's opening brief, a site-specific analysis conducted by staff shows that RERC's construction NOx emission impacts would clearly be less than significant. (Staff's Opening Brief, pp. 12-13.)

F. CURE Has Not Provided Substantial Evidence To Support A Fair Argument That RERC's Construction Emissions Will Be Higher Than Estimated.

CURE argues that staff and applicant underestimated the potential for construction emissions and that they will be higher than the numbers relied upon. (CURE's Opening Brief, p. 26.) This argument is based upon three assertions presented by Dr. Fox: 1) emissions from scraper drop operations will be more than was estimated; 2) silt content is higher than was estimated; and 3) watering will not be as effective at controlling dust as was estimated.

For her assertion that scraper drop emissions were underestimated, Dr. Fox relies solely on selected pages from one study. (Exh. 31.) The three pages provided constitute one page of text and two pages of tables. As discussed in applicant's opening brief, when one reads the entire report it becomes clear that Dr. Fox's assertion do not withstand scrutiny. (Applicant's Opening Brief, pp. 15-16.) The one page of text that was provided explains that the report recommends four different estimation methods depending upon the level of information known about the site. (Exh. 31, p. ES-3.) Without the additional pages of the report, it is impossible to determine whether Dr. Fox used the appropriate estimation method and whether the tables provided even apply to the proposed site. Because the excerpts of the report are insufficient to validate Dr. Fox's use of the report and are not amenable to cross-examination, the report provides insufficient factual support for Dr. Fox's assertions. Dr. Fox failed to lay the proper foundation for reliance on this report; therefore, her claim that the scraper drop emissions were underestimated is unsupported by fact and does not constitute substantial evidence.

Dr. Fox herself is not a geologist and cannot provide expert testimony on the probable silt content of the project site. For her assertion that silt content at the project site was underestimated, Dr. Fox relies on the refuted testimony of Mr. Baldwin. As discussed in staff's opening brief, Mr. Baldwin relied on incorrect and refuted data to reach his conclusion that silt content would be higher than the 13% arrived at by staff and applicant after laboratory analysis. (Staff's Opening Brief, pp. 13-16.) Therefore, Mr. Baldwin's testimony is clearly not supported by, nor constitutes, fact and any reliance on it by Dr. Fox discredits her testimony. Because Mr. Baldwin's discredited testimony was the sole basis for Dr. Fox's assertion that PM₁₀ construction emissions were underestimated by 18 lbs/day, her assertion was not based on substantial evidence to support a fair argument.

For her assertion that the applicant erred in relying on an 85% watering control efficiency, Dr. Fox relies solely on excerpts in the SCAQMD CEQA handbook (handbook). (Exh. 28, tab H.) She claims that the handbook allows the use of 85% watering control efficiency only when dust palliatives are used. Nothing in the pages of the handbook provide support for this contention. The handbook states that, although the use of dust palliatives is one factor that would support the use of 85% watering control efficiency, so too would increased watering¹. (Exh. 28, tab H, p. 11-16.) Thus, Dr. Fox's assertion that dust palliatives are the only option for justifying the 85% watering control efficiency is not supported by fact. The applicant and staff have explained that the use of the 85% watering control efficiency is justified by the one-week period of watering that will occur prior to site preparation and the use of an on-site AQCMM who will ensure that

¹ Additionally, other emission factor documents (such as AP-42 Section 13.2.2) clearly show that an 85% water control efficiency for unpaved road dust emissions can be achieved with appropriate watering. Staff considered all relevant technical resources, including the SCAQMD CEQA handbook, and required mitigation measures in making its assessment of the proper control efficiency.

the site will be watered to ensure the maximum control efficiency. (Staff's Opening Brief, pp. 16-17.) This testimony satisfies the handbook's requirement for a justification for the use of the 85% watering control efficiency and rebuts Dr. Fox's assertion.

G. CURE Has Not Provided Substantial Evidence To Support A Fair Argument That RERC's Operational PM₁₀ Emissions May Cause A Significant Adverse Impact.

For her assertion that RERC's turbines will emit more than 3.0 lbs/hr PM₁₀, and that the project will, therefore, exceed SCAQMD's threshold of 150 lbs/day PM₁₀, Dr. Fox relies on an incorrect interpretation of the GE Guarantee and excerpts from a few outdated, and excerpted, source tests. GE confirmed that its guarantee that the project will not emit more than 3.0 lbs/hr PM₁₀ applies to ambient temperatures from 0° to 115° F, thus rebutting Dr. Fox's testimony. (Exh. 33.) As for the documents that Dr. Fox relies upon to support her contention that source tests prove that these turbines will emit more than 3.0 lbs/hr PM₁₀, they are incomplete. The documents do not contain sufficient information regarding how the tests were conducted and omit any summary report information that would confirm the tests were valid. (RT 8/31/04 pp. 285-286.) Without this information, it is impossible to determine whether or not the tests represent anomalous conditions. The applicant's witness, who had first-hand knowledge of the tests relied on by Dr. Fox, testified that these tests were flawed and provided anomalous results and subsequent tests performed on the same turbines showed that they did in fact comply with the 3.0 lb/hr PM₁₀ threshold. (RT 8/31/04 pp. 313-314, 321.) Similarly, Dr. Fox's reliance on emission factors in AP-42, over actual vendor guarantee information, is discredited by EPA's own determination that such use is not the correct approach. (Staff's Opening Brief, pp. 20-21.) Thus, the documents submitted by CURE, and the tests described therein, do not constitute reliable or credible facts in support of Dr. Fox's opinion.

Even if one were to agree with Dr. Fox's assertion that turbine emissions of PM₁₀ would be greater than 3.0 lb/hr, CURE has failed to explain why this would constitute a significant impact. The mere fact that a threshold of significance is exceeded does not, by itself, provide substantial evidence to support a fair argument that a project will have a significant impact. (Amador 116 Cal. App. 4th at 1108.) The applicant will be required to obtain offsets for all of its project emissions, thus fully mitigating any potential impacts to less than significant. CURE offers no substantial evidence to contradict this conclusion.

H. CURE Has Not Provided Substantial Evidence To Support A Fair Argument That The Proposed Mitigation For Operation Emissions Is Insufficient To Mitigate The Project's Impacts.

CURE argues that the applicant would not obtain enough offsets through the diesel retrofit program. They also claim that such offsets would not be "local" enough and that the applicant has not proposed enough mitigation to comply with air district rules.

As discussed in staff's opening brief, staff has recommended, and the applicant has agreed, that a performance standard be imposed on RERC. (Staff's Opening Brief, pp. 26-28.) Such standard requires the applicant to obtain offsets for all of its emissions. If SCAQMD, during its permitting of RERC, recalculates the project's potential to emit, AQ-1 will require the applicant to obtain offsets for the recalculated figure. Several options for obtaining the offsets were analyzed and included in the condition. If, for some reason, the applicant is not able to obtain its offsets from the diesel program, then there are several other sources from which it can obtain them. CURE has provided no credible evidence that the applicant is unable to obtain the necessary offsets.

CURE cites to Kings County Farm Bureau v. City of Hanford, (1990) 221 Cal. App. 3d 692 in their claim that AQ-1 is not an appropriate mitigation measure under CEQA. The holding in Kings County, however, does not call into question the validity of the mitigation proposed here. The court in Kings County struck down a mitigation measure that only required the payment of fees because there were serious questions as to whether mitigation was available for purchase. Unlike AQ-1, there was no performance standard that would have required the mitigation actually be achieved. Nor has CURE provided evidence that offsets cannot be achieved under any four of the options enumerated in AQ-1. Under CEQA, the specific articulation of the nuances of a mitigation measure may be deferred where there is a performance standard in place to ensure that mitigation will be obtained. (Cal. Code Regs., tit. 14, §15126.4(a)(1)(B).) Thus, AQ-1 is a legitimate mitigation measure under CEQA and serves to ensure that RERC's operation emissions will be fully mitigated.

CURE's assertion that the diesel retrofit project is not local and, therefore, does not mitigate the project's impacts fails on two grounds. The proposal to retrofit diesel school buses will absolutely provide mitigation locally. Although the offsets might not occur exactly when the project would be emitting or at the same site, they would certainly be in the vicinity of the project. More importantly, though, there is no evidence in the record that mitigation must be obtained locally or at the same time in order to effectively mitigate impacts. The project's emissions will contribute to regional impacts. Therefore, any offsets obtained in the region will be sufficient to mitigate the impacts.

CURE's claim that RERC has failed to provide enough offsets to comply with SCAQMD's requirements is a purely legal argument, unsupported by any testimony in the record^{2,3}. In order to find that CURE's assertion has any merit, one would have to reach the conclusion that SCAQMD will not follow or enforce their own rules. It is undisputed that RERC requires a permit from SCAQMD. If, during the permitting proceedings, SCAQMD determines that the potential to emit was miscalculated, it will require RERC to provide offsets to cover what it believes to be the accurate potential to emit. SCAQMD will not grant a permit to RERC unless it complies with all of its requirements. Without a SCAQMD permit, RERC cannot be built. Additionally, AQ-1 requires the applicant to provide offsets for any amount required by SCAQMD. There is no potential whatsoever that RERC will be constructed and operated without first complying with all SCAQMD and Energy Commission requirements. CURE has provided no evidence to the contrary and has not provided any evidence to support an assertion that, if SCAQMD required additional offsets, RERC would not be able to obtain them. Therefore, there is no substantial evidence that RERC would be constructed and operated without first complying with SCAQMD and Clean Air Act requirements.

I. CURE Has Not Provided Substantial Evidence To Support A Fair Argument That RERC's Operation CO Emissions May Cause A Significant Adverse Impact.

CURE argues that RERC's emission of CO is a significant impact. The sole basis for this assertion is Dr. Fox's testimony that RERC's CO emissions will exceed SCAQMD's significance threshold of 550 lbs/day. (CURE's Opening

² CURE references two documents: A July 29, 1997 Memorandum from Jack Broadbent to LCCH Permit Processing Staff and an NSR Staff report from SCAQMD. (CURE's Opening Brief, pp. 35 & 39.) These documents were attached to an earlier motion filed by CURE before hearings commenced, but were never proffered as exhibits during hearing proceedings. No foundation was laid for relying on the documents and no opportunity was given to cross-examine any witnesses regarding their contents. For these reasons, they are not in the record and cannot be relied upon to support CURE's contentions.

³ Nor are the documents the proper subject for official notice. The Energy Commission may take official notice of "any generally accepted matter within the commission's [sic] field of competence, and of any fact which may be judicially noticed by the courts of this state." (Cal. Code Regs., tit. 20, §1213.) The sections of the Evidence Code dealing with judicial notice offer guidance for what matters are properly subject to judicial notice. (Evidence Code, §450 et seq.) The memo proffered by CURE meets none of the requirements identified in the Evidence Code. A memorandum is not an official act and SCAQMD is not a state or federal agency. Nor does this document consist of "facts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy." (Evidence Code, §452(h).) A 7-year old memorandum that references projects dissimilar to power plants does not indisputably represent the current position of SCAQMD with regard to RERC. Staff's request for administrative notice regarding findings made in previous Energy Commission proceedings was proper because it dealt with official acts of a state executive department – the Energy Commission. Additionally, agencies not subject to the formal hearing procedures of the APA may also take official notice of evidence presented before the agency in prior proceedings involving the same issues. (Brewer v. Railroad Comm'n (1922) 190 Cal. 60, 78.)

Brief, pp. 41-42.) Again, exceedance of a threshold is insufficient, by itself, to constitute substantial evidence to support a fair argument that the project will have a significant impact. (Amador, 116 Cal. App. 4th at 1108.) The project will not create a new violation or contribute to an existing violation of the state ambient air quality standard for CO. (RT 8/31/04 p. 287.) There is no evidence in the record that RERC emissions of CO will cause any significant adverse impact to air quality or to public health. Therefore, there is no substantial evidence to support CURE's assertion of a significant adverse impact from CO.

J. CURE Has Not Provided Substantial Evidence To Support A Fair Argument That RERC's Contribution To Any Cumulative Air Quality Impacts May Be Significant.

CURE claims that cumulative air impacts for both construction and operation are significant. (CURE's Opening Brief, p. 42.) The entirety of Dr. Fox's testimony regarding cumulative impacts, however, is based on pure speculation. She admits that she knows nothing about the Capital Improvement Project (CIP) except for the limited information provided in the financing documents. (Exh. 25, p. 40.) She did not consult any environmental reports completed for the CIP, nor does she have any indication, based on something other than speculation, whether emissions from the waste water treatment plant will increase or decrease as a result of the CIP and to what extent. Nor is there any evidence that any further development of the project site beyond RERC is reasonably foreseeable. (Staff's Opening Brief, pp. 29-31.) And, most importantly, even if these other projects were included in a qualitative cumulative impact analysis, CURE provides no evidence that RERC's emissions will substantially contribute to a cumulative impact. They claim that "even a small contribution from construction of immediately adjacent projects could result in cumulatively significant impacts." (CURE Opening Brief, p. 47.) This, however, is not the appropriate test to determine whether a project will cause significant cumulative impacts; "[t]he mere existence of significant cumulative impacts caused by other projects alone shall not constitute substantial evidence that the proposed project's incremental effects are cumulatively considerable." (Cal. Code Regs., tit. 14, §15064(h)(4).)

Even if the placement of additional turbines on the RERC site were reasonably foreseeable, the Commission is free to find that RERC will not considerably contribute to cumulative air impacts solely on the basis that it complies with an air quality plan, regardless of how many additional turbines might be built right next to this project. (Cal. Code Regs., tit. 14, §15064(h)(3) ["A lead agency may determine that a project's incremental contribution to a cumulative effect is not cumulatively considerable if the project will comply with the requirements in a previously approved plan or mitigation program which provides specific requirements that will avoid or substantially lessen the cumulative problem (e.g. ..., **air quality plan** ...) within the geographic area in which the project is located." (Emphasis added.)])

CURE's citation to various cases to support their assertion that RERC must be found to cause cumulative impacts is ill-founded. In Citizens to Preserve the Ojai v. County of Ventura, the court held that the EIR's reliance on an Air Quality Management Plan did not constitute an adequate cumulative impacts analysis only because there was substantial evidence in the record that the plan had excluded an entire subset of existing emissions – those emanating from the outer continental shelf. The EIR did not explain the basis for omitting the emissions from the analysis and did not explain why reliance on the AQMP was justified in light of the omissions. (Citizens to Preserve the Ojai v. County of Ventura, (1985) 176 Cal. App. 3d 421, 429-430.) CURE has submitted no evidence claiming to show the inventory staff relied on to conduct the cumulative impacts analysis has omitted any emission sources. Thus, Ojai is not on point and does not serve to support any claim that reliance on the district's inventory was flawed.

In Friends of the Eel River v. Sonoma County Water Agency, (1st Dist. 2003) 108 Cal. App. 4th 859, the court held that a proposal that had already initiated an environmental impact statement and was pending before FERC for approval, was a reasonably foreseeable future project. (Id. at 870.) This case is not on point; there is no proposal to add turbines to the RERC site in front of any governmental agency, nor has any environmental review commenced for any such proposal. The City of Riverside has testified that there is no such proposal even under consideration. Thus, Eel River does not invalidate staff's analysis.

In Kings County Farm Bureau v. City of Hanford, (1990) 221 Cal. App. 3d 692, the court held that in considering whether a project's contribution to a cumulative impact is significant an agency cannot rely on the fact that a project's emissions are relatively small when compared to existing emissions to find that the project will not have any significant impacts. (Id. at 718.) Staff, however, has not based its conclusion that RERC will not have significant cumulative air quality impacts on a comparison of RERC's emissions with existing emissions. Staff concluded that because RERC would comply with the air quality plan and its direct emissions would be fully offset and mitigated, the project's incremental effect would not be cumulatively considerable. (Exh. 12, p. 4-50.) Thus, the holding in Kings County does not invalidate staff's analysis.

IV. Conclusion

At first glance it might appear that CURE has raised serious questions as to whether RERC will cause significant impacts. Upon closer examination of the evidentiary record, however, it becomes clear that CURE has failed to substantiate any of their assertions with credible, accurate, or reliable facts. Without such substantiation, CURE's expert witness testimony does not constitute substantial evidence and does not prevent the Commission from issuing a mitigated negative declaration in support of a small powerplant exemption. Nor is this a marginal which otherwise might require an EIR

equivalent. As staff's thorough analysis, on par with an EIR equivalent analysis, shows, the project clearly will not result in any significant impacts and there is no substantial evidence to support a fair argument otherwise. For all of these reasons, a mitigated negative declaration is warranted in this proceeding and the small powerplant exemption should be granted.

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Respectfully submitted,

LISA M. DECARLO
Staff Counsel