

STATE OF CALIFORNIA

**Energy Resources Conservation
And Development Commission**

In the Matter of:) Docket No. 01-AFC-19
)
Application for Certification) **Staff's Reply Brief on the Second**
of SMUD's Cosumnes Power) **Evidentiary Hearing**
Plant Project)
_____) June 20, 2003

INTRODUCTION

On May 16, 2003, the Cosumnes Power Plant Project (CPP) Committee (Committee) issued a Briefing Order (Order) for the CPP. That Order established a filing date for staff and the applicant, Sacramento Municipal Utility District (SMUD), of June 20, 2003, for Reply Briefs on issues addressed during the second set of evidentiary hearings. This is staff's Reply Brief, addressing the issues raised by SMUD in its Opening Brief filed June 13, 2003. Because the Opening Briefs of Interveners Dr. Michael Roskey and Ms. Kathy Peasha are due at the same time as staff's and SMUD's reply briefs, staff will, if necessary, file a supplement to this brief next week to address issues raised in the Intervener briefs.

I. THE CONDITIONS OF CERTIFICATION IDENTIFIED BY STAFF AT THE EVIDENTIARY HEARINGS SHOULD BE ADOPTED WITHOUT THE CHANGES PROPOSED BY SMUD IN ITS BRIEF.

In its Opening Brief, SMUD, for the first time, proposes to change one the Conditions of Certification identified in the FSA and agreed to by SMUD in its testimony. (FSA – Part 3, filed 4/24/2003; SMUD Group 2 Testimony, filed 5/5/2003, p. 16) Specifically, SMUD proposes to change the setback from the seasonal stream and swale that crosses the laydown area from 100 feet to 25 feet. (SMUD Opening Brief, filed 6/13/2003, p. 2) The reason offered for the change is that it is consistent with what SMUD has requested in

an application SMUD has filed with the Army Corps of Engineers. Staff does not recommend that a smaller buffer be adopted. We believe that 25 feet is insufficient to protect against potential impacts to fragile habitat. Moreover, we note that by not raising this issue during hearings, SMUD has effectively prevented the Committee from hearing staff testimony about why a 100-foot buffer should be required. Therefore, staff recommends that the Committee adopt the Condition of Certification **BIO-12** as written and as supported by SMUD at the evidentiary hearings.

In addition, staff notes an error in SMUD's Opening Brief. On page 12 of the Brief, SMUD states that no compensatory habitat replacement is warranted for burrowing owl burrows. SMUD bases this conclusion on the fact that it conducted surveys in April 2003 and did not find any occupied burrows within 250 feet of permanent project facilities.¹ This conclusion, however, is not consistent with the requirements contained in staff's proposed Conditions of Certification. The California Department of Fish and Game protocols referred to in **BIO-18** require preconstruction surveys within 30 days of construction, and **BIO-18** itself requires additional surveys 48 hours prior to the commencement of construction. Thus, the surveys SMUD cites in their brief are *not* the "preconstruction" surveys used to determine compliance with **BIO-15**. Moreover, to the extent that SMUD will be halting construction on any part of the project for more than 30 days, the protocols require that new preconstruction surveys be conducted before construction is continued. If occupied burrows are identified during any of these preconstruction surveys, the habitat compensation requirements of **BIO-15** will be applicable. It is therefore incorrect to state at this time that no habitat compensation for occupied burrowing owl burrows will be required. Staff urges the Committee to adopt **BIO-15** and **BIO-18** as written in the FSA – Part 3.

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¹ SMUD asserts in its Opening Brief that staff witness, Melinda Dorin, stated that the survey was "protocol level." In fact, Ms. Dorin acknowledged that the surveys began and ended outside of the protocol times, but testified that the survey was sufficient to base her opinion about potential significant impacts. Moreover, she pointed out that additional surveys would be required in order to determine whether mitigation would need to be implemented. (5/12/2003 RT, p. 258:10-18, pp. 261:12-25 – 262:1-9)

CONCLUSION

In conclusion, staff believes that all issues associated with SMUD's proposed project can be adequately addressed by adopting the proposed conditions of certification identified by staff. These conditions will ensure that the project is constructed and operated in a manner that complies with applicable laws and protects environmental quality.

Respectfully submitted,

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