EVIDENTIARY HEARING

BEFORE THE

CALIFORNIA ENERGY RESOURCES CONSERVATION

AND DEVELOPMENT COMMISSION

In the Matter of:	)	
	)	
Application for Certification	)	Docket No.
for the GWF Tracy Peaker Project	)	01-AFC-16
Project in San Joaquin County	)	
(GWF Energy LLC)	)	
_____	)	

HOLIDAY INN EXPRESS HOTEL & SUITES

LODI ROOM

3751 TRACY BOULEVARD

TRACY, CALIFORNIA 95304

WEDNESDAY, MARCH 13, 2002

10:00 A.M.

Reported by:
Duncan Fankboner
Contract No. 170-01-001

COMMITTEE MEMBERS PRESENT

Robert Pernell, Commissioner, Presiding Member

Robert A. Laurie, Commissioner, Associate Member

HEARING OFFICER AND ADVISORS PRESENT

Cheryl Tompkin, Hearing Officer

Ellen Townsend-Smith, Advisor to Commissioner Pernell

STAFF AND CONSULTANTS PRESENT

Kerry A. Willis, Staff Counsel

Cheri Davis, Project Manager

Joe Donaldson, Visual Resources Consultant

Steve Baker, P.E., Senior Mechanical Engineer

Eileen Allen, Senior Planner, Land Use/Traffic & Transportation Unit

Negar Vahidi, Senior Associate, Aspen Environmental Group

Jacob Hawkins, Environmental Planner, Aspen Environmental Group

Sally M. Salavea, Senior Planner, PCR

Bill Reeds, Director, Development & Engineering Services, City of Tracy

PUBLIC ADVISER

Roberta Mendonca, Public Adviser

APPLICANT

John P. Grattan, Esq., Counsel for Applicant
Grattan and Galati

Irwin D. Karp, Esq., Counsel for Applicant
Grattan and Galati

Douglas W. Wheeler, Vice President, GWF Power
Systems Company, Inc.

David A. Stein, P.E., Senior Project Manager, URS
Corporation

James A. Adams, REA, Senior Project Manager, URS
Corporation

Rob Greene, INCE Bd. Cert., Manager, Noise &
Vibration Environmental Planning, URS Corporation

Jennifer L. Hernandez, Esq.; Beveridge & Diamond,
P.C., Environmental & Land Use Law

INTERVENORS PRESENT

Irene Sundberg, Tracy resident

Robert Sarvey, on behalf of the Sarvey family

John D. Bakker, Esq.; Meyers, Nave, Riback, Silver
& Wilson, representing City of Tracy

Howard L. Seligman, Esq.; Seligman & Willett,
Inc., representing Charles Tuso

Michael H. Weed, Esq., representing Larry Chang

David Blackwell, Esq., co-counsel representing
Larry Chang

Dennis C. Noble, Esq., representing John Corcorus
and Roger Traina

Charles Tuso, on behalf of the Tuso family

ALSO PRESENT

Brad Williamson, Business Representative, Int'l
Brotherhood of Electrical Workers, Local 595

James Hamrick, Regional Environmental Manager
Owens Illinois

Paula Buenavista

Les Serpa

Dawn Serpa

Susan Sarvey

Lance Chun

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

2 10:00 a.m.

3 PRESIDING COMMISSIONER PERNELL:

4 Welcome. This is a continuation of the

5 evidentiary hearing on the GWF Energy LLC

6 application for certification for the GWF Tracy

7 Peaker Project.

8 This morning we will be covering, or

9 this afternoon, however long it takes, Visual

10 Resources, Noise, and Land Use. At this time I'll

11 turn the hearing over to our hearing officer,

12 Cheryl Tompkins. Ms. Tompkins (sic), please.

13 HEARING OFFICER TOMPKIN: Thank you,

14 Commissioner Pernell. Let me start this

15 proceeding by asking the parties to identify

16 themselves for the record, and we'll begin with

17 the applicant.

18 APPLICANT COUNSEL GRATTAN: John

19 Grattan. I'm counsel of the applicant. On my

20 left is Irwin Karp, my colleague, and on my right

21 is David Stein from URS, and David has been here,

22 David and URS have prepared the application for

23 certification and he supervised the preparation of

24 the expert testimony.

25 HEARING OFFICER TOMPKIN: Thank you,

1 Mr. Grattan. And for staff?
2 STAFF COUNSEL WILLIS: Thank you. I'm
3 Kerry Willis, staff counsel. And to my left is
4 Joe Donaldson, who is our visual witness. And to
5 his left is Cheri Davis, project manager.
6 HEARING OFFICER TOMPKIN: Thank you,
7 Ms. Willis.
8 At this time I'm going to ask the
9 intervenors to identify themselves.
10 INTERVENOR SUNDBERG: Irene Sundberg,
11 resident of the City of Tracy.
12 INTERVENOR SARVEY: Howard Seligman,
13 representing Charles Tuso.
14 INTERVENOR WEED: Michael Weed,
15 representing Larry Chang.
16 INTERVENOR BAKKER: I'm John Bakker,
17 representing the City of Tracy. Behind me is Bill
18 Reeds, who is going to be testifying on the land
19 use issues on behalf of the City. Also here is
20 Bill Dean from the City planning staff.
21 INTERVENOR SARVEY: Bob Sarvey,
22 representing my family.
23 INTERVENOR NOBLE: Dennis Noble,
24 representing John Corcorus and Roger Traina.
25 INTERVENOR TUSO: Chuck Tuso,

representing my family.

HEARING OFFICER TOMPKIN: Did we get all of the intervenors?

All right.

PRESIDING COMMISSIONER PERNELL: Just one quick announcement. My associate member on this committee, Commissioner Laurie, he is in Tracy and he will be joining us shortly.

HEARING OFFICER TOMPKIN: As everyone present should be aware, these proceedings started on March 6th, 2002. They are scheduled to continue through March 14th, if necessary. As everyone should also be aware, these are more formal structured proceedings than the committee conferences and informal staff workshops that previously occurred.

Because some of the intervenors that are present here today were not present for the prior hearing dates, what I am going to do is briefly review some procedural pointers that we went over the first day.

A party sponsoring a witness shall briefly establish the witness's qualifications and have the witness orally summarize his or her testimony before requesting that testimony be

1 moved into evidence. Relevant exhibits may be
2 offered in evidence at that time as well.
3 Multiple witnesses may testify as a panel as
4 necessary.
5 At the conclusion of a witness's direct
6 testimony, the committee will provide all other
7 parties with an opportunity of a cross
8 examination. The committee may also question
9 witnesses. That will then be followed by redirect
10 and recross examination, if appropriate.
11 Upon conclusion of all topic areas,
12 members of the public will be permitted to offer
13 unsworn public comment. Public comment is not
14 testimony, but may be used to explain evidence in
15 the record.
16 Also, as we indicated on the first day
17 of hearing, unless you prefile testimony for your
18 witness as directed in the hearing order, you will
19 not be allowed to have the witness offer direct
20 testimony, even if that individual was tentatively
21 listed as a potential witness on the revised topic
22 and hearing schedule.
23 When cross examining a witness, do not
24 be repetitive in asking questions. If the
25 question has been asked before, that is sufficient

1 for purposes of the record. It need not be re-
2 asked several times. Parties interested in the
3 same matter are encouraged to consolidate their
4 presentations from their questions, if it is all
5 possible. And this is important to minimize
6 duplication and conserve our limited hearing time.
7 The questioning must be limited to
8 relevant matters within the scope of the witness's
9 testimony. If a person is testifying on geology,
10 you may not ask that witness about, for example,
11 cultural resources. I would also like to advise
12 parties not to argue with a witness. Often, a
13 witness will not give the answers that a party
14 desires; however, the response is the witness's
15 answer, and it is not permissible to engage in a
16 debate with the witness to try to force him or her
17 to change that answer.
18 I would also like to remind the parties
19 not to testify while cross examining a witness.
20 Cross examination is designed to elicit a response
21 from a witness regarding a specific issue. It is
22 not a party's opportunity to comment on the
23 witness's response or offer an opinion regarding a
24 particular issue.
25 When asking a question, it is helpful if

1 you refer to a specific page of the witness's
2 testimony and/or an exhibit he or she is
3 sponsoring. This will guide the witness and the
4 committee so we can better understand the
5 question.
6 Direct testimony must be on matters
7 within the witness's personal knowledge; however,
8 there are somewhat different rules for witnesses
9 who quality as experts. Experts, by virtue of
10 their education and experience, are allowed to
11 render expert opinion based on studies, reports,
12 and similar information which they may not have
13 personally authored but which they have reviewed.
14 Those were the tactical pointers I
15 wanted to cover. So at this point we will proceed
16 with the evidentiary presentation. We will follow
17 the schedule that is shown for today is the
18 revised topic and witness schedule.
19 The first subject area on the schedule
20 for today is Visual Resources, so at this time I'm
21 going to ask Mr. Grattan?
22 APPLICANT COUNSEL GRATTAN: Yes. Madam
23 Hearing Officer, I believe that we had agreed in
24 our last session here that the record for air
25 quality would be briefly opened, just to allow the

1 applicant to submit its proposed voluntary
2 conditions with respect to local offsets and
3 operating hours. And it would be opened for that
4 purpose only.
5 I might add that these proposed
6 voluntary conditions have been docketed yesterday,
7 and on Monday we made sure that all intervenors
8 received a copy of this. We had them faxed or
9 hand-delivered.
10 HEARING OFFICER TOMPKIN: All right.
11 Would you like that marked as an exhibit?
12 APPLICANT COUNSEL GRATTAN: Yes. I
13 would propose that the document entitled GWF
14 Suggested Conditions, Local Air Quality
15 Enhancement Package, which is condition number
16 one, and Reduction in Hours of Operation, which is
17 condition number two, be admitted -- be marked and
18 admitted into evidence.
19 My colleague, Irwin Karp, tells me that
20 this should be Exhibit 48.
21 HEARING OFFICER TOMPKIN: That would be
22 fine. Do you have a copy of that?
23 APPLICANT COUNSEL GRATTAN: Yes, I do.
24 And you say that copies have been previously
25 provided to the other parties?

1 APPLICANT COUNSEL GRATTAN: Correct.
2 HEARING OFFICER TOMPKIN: All right.
3 The document described by counsel will be marked
4 as Exhibit 48 for identification.
5 (Thereupon, the above-referenced
6 document was marked as Staff's
7 Exhibit 48 for identification.)
8 HEARING OFFICER TOMPKIN: Is there any
9 objection to this exhibit?
10 INTERVENOR SARVEY: Bob Sarvey. I'd
11 like to object to this exhibit, not because of its
12 content, but on the basis of the fact this is
13 another piece of late information that's being
14 entered into the evidentiary hearing with no
15 elements of prefiled statements or anything. It's
16 been a continuing pattern and I just want to
17 object to it on that fact.
18 APPLICANT COUNSEL GRATTAN: May I
19 respond to that?
20 Oh, go ahead, staff.
21 MS. WILLIS: Staff requests that we hold
22 off -- Our air quality staff was out sick and we
23 have not had an opportunity to get specific
24 comments on this. We would just like to wait
25 until later on in this hearing today, and

1 hopefully we can have them respond back to us
2 before it's entered in as part of the exhibits.
3 In response to Mr. Sarvey, staff has
4 requested the applicant go further in providing
5 air quality enhancement program. This is not
6 something that the applicant is trying to come in
7 at the last minute with something, it's something
8 that we have requested that they go further in
9 providing this package.
10 And so we fully support these efforts,
11 and we would just hope that we would have a little
12 bit more time to have our staff give us a call
13 back during the break.
14 APPLICANT COUNSEL GRATTAN: That's
15 certainly acceptable to the applicant, and if I
16 might briefly respond. This is not testimony,
17 this is a condition the applicant is offering.
18 There is no requirement that this be prefiled.
19 There certainly is a requirement that no one be
20 unduly surprised. We presumed we got it out to
21 people in time, but we're certainly willing for
22 staff's air quality person to review and comment
23 on it.
24 HEARING OFFICER TOMPKIN: All right.
25 MS. WILLIS: Thank you.

1 HEARING OFFICER TOMPKIN: I will note
2 Mr. Sarvey's objection to the record and overrule
3 it. We will hold this matter open and I'll ask
4 Mr. Grattan to bring it to my attention again if I
5 neglect to --
6 APPLICANT COUNSEL GRATTAN: Right.
7 HEARING OFFICER TOMPKIN: All right.
8 Then at this time we will proceed with Visual --
9 Oh, yes, let me note for the record that
10 our Associate Commissioner, Mr. Laurie, has
11 arrived and he is seated to my right.
12 At this time, then, Mr. Grattan?
13 APPLICANT COUNSEL GRATTAN: The
14 applicant calls to the stand Mr. David Stein of
15 URS Corporation.
16 HEARING OFFICER TOMPKIN: If we could
17 have Mr. Stein sworn in, please.
18 Whereupon,
19 DAVID STEIN
20 Was called as a witness herein and, after first
21 being duly sworn, was examined and testified as
22 follows:
23 DIRECT EXAMINATION
24 BY APPLICANT COUNSEL GRATTAN:
25 Q Now, Mr. Stein, could you give your name

1 and address and current employment.
2 A My name is David Stein. I'm employed by
3 URS Corporation as a program director in the
4 Environmental Services department in Oakland,
5 California.
6 Q And have you prepared and previously
7 submitted written testimony in this proceeding
8 with regard to Visual Resources and Visual Impact?
9 A Yes.
10 Q And could you briefly -- I know your
11 qualifications have been attached to your
12 testimony. Could you give us a one-or-two-
13 sentence waltz through your qualifications,
14 please.
15 A Certainly. With regard -- Well, I hold
16 two bachelor's degrees, one in biological
17 sciences, one in environmental engineering. I
18 also hold a master's degree in environmental
19 engineering. I'm a registered chemical engineer
20 in the State of California. For the last 25 years
21 I have been engaged in environmental consulting,
22 either for government or for industry on a variety
23 of issues, including Visual Resources.
24 Specifically with respect to Visual
25 Resources, I have managed or prepared Visual

1 Resources assessments for power plants on several
2 Energy Commission siting cases, including the
3 Tracy peaker project.
4 Q Thank you very much, Mr. Stein. Are you
5 sponsoring any exhibits at this time?
6 A Yes. I'm sponsoring Section 8.11 of the
7 original AFC dated August 2001; Section 3.11 of
8 the supplemental AFC dated October 2001; Data
9 Responses 39 through 66 dated November 9, 2001;
10 Data Response 58 of the supplement to the first
11 set of data responses dated November 28th, 2001;
12 and a Landscape Plan dated January 10th, 2002.
13 Q Okay. And, Mr. Stein, are you also
14 sponsoring a letter from the Fish and Wildlife
15 Service to the CEC regarding landscaping?
16 A Yes.
17 Q And also, I direct you to a March 1st
18 submission docketed before the Commission called
19 the Attached Revising Landscape Plan, along with
20 Visuals of Critical Key Observation Points One,
21 Nine and Ten.
22 A Yes, I am also sponsoring the material
23 that was docketed on March 1st, 2002.
24 Q Thank you, Mr. Stein. Do you have --
25 Can you affirm your testimony under oath today?

A Yes.

Q And do you have any corrections or modifications to that testimony?

A No.

Q Could you summarize that testimony, please.

A I'd be happy to. The Visual Resources analysis for the Tracy peaker project involved an examination of the existing environmental setting, a review of the applicable general plans and ordinances that may pertain to visual resources, completion of field surveys to identify the visual boundary, and identification of potentially sensitive viewers and key observation points, and a review of computerized photo simulations that were prepared by the architect engineer, Black and Veatch, for the project to determine the impact of the project at the key observation points that were identified.

With respect to the existing environment, the Tracy peaker project is located in a relatively sparsely populated portion of the county that's near the City of Tracy. It's adjacent to or in close proximity to existing industrial uses, including the Owens-Brockway

1 glass container manufacturing facility, Nutting-
2 Rice warehouse facility, and the Tracy Biomass
3 power plant.
4 There is an existing railroad corridor
5 on the northern boundary of the property. The
6 Delta Mendota canal is directly to the west of the
7 property, and on other sides of the property are
8 rural or agricultural uses.
9 Interstate 580 is located about one mile
10 to the southwest of the site. There are several
11 residences scattered in proximity to the site with
12 the closest being approximately a half a mile to
13 the west-southwest, and another approximately .7
14 miles to the east of the project.
15 There are residences along Lammers Road,
16 scattered residences along Lammers Road, and the
17 project would be visible to northbound travelers
18 on Interstate 580 from approximately Coral Hollow
19 Road to the point where their travel would bring
20 them perpendicular to the site. That's about a
21 one-and-a-half-mile segment.
22 With regard to applicable standards, the
23 San Joaquin County government has established an
24 open space element as part of their general plan.
25 It identifies Interstate 580 as a scenic corridor.

1 The element does indicate that a landscaping plan
2 should be provided for development along scenic
3 corridors.
4 With respect to the key observation
5 points, we conducted field surveys. We also
6 conducted with the CEC Visual Resource staff, and,
7 in fact, expanded the number of key observation
8 points at the request of CEC staff, and looked at
9 visual quality and potential visual resources
10 impacts for ten key observation points. We
11 believe that that adequately represents some
12 potentially impacted viewers within the view shed
13 of the project.
14 There were a number of photo
15 simulations, as I mentioned, of the proposed Tracy
16 peaker project, that were prepared by Black and
17 Veatch based on details of the plant general
18 arrangement. And we reviewed those as did staff,
19 and we also prepared a landscaping plan to provide
20 screening of the Tracy peaker project in response
21 to the request of the CEC staff.
22 In regards to landscape plan, in order
23 to accommodate some concerns that were expressed
24 by the US Fish and Wildlife Service with regard to
25 the potential migration of San Joaquin kit fox in

1 the corridor that is reflected by the Delta
2 Mendota canal on the -- the property immediately
3 adjacent to the Delta Mendota canal, the
4 landscaping plan was revised and resubmitted and
5 is believed to represent an adequate screening,
6 giving deference to the concerns that were raised
7 by US Fish and Wildlife with regard to the San
8 Joaquin kit fox.
9 The plant will be designed to include
10 non-reflective surfaces and lighting and the plant
11 will be shielded and downcast and inwardly
12 directed to minimize outside light and glare and
13 impacts. We concluded that the project would not
14 have a significant impact on visual resources,
15 either individually or cumulatively, with the
16 mitigation that has been proposed.
17 We've also reviewed the staff's
18 assessment and agree with its conclusions and
19 findings. The project would comply with all
20 applicable laws, ordinances, regulations, and
21 standards with respect to visual resources.
22 Q One followup question, Mr. Stein. You
23 have prepared a cumulative impact analysis, which
24 I believe was submitted on February 13th as part
25 of the applicant's testimony. And my recollection

1 is in that cumulative impact analysis, you looked
2 at the impact of the project together with a
3 variety of proposed residential projects as well
4 as energy development projects.
5 Did you reach any conclusions with
6 respect to the cumulative impacts of the Tracy
7 peaker plant together with these other planned
8 future projects?
9 A I did. My basic conclusion there is
10 that, as the South Schulte and Tracy Hills
11 specific plans proceed through build-out, these
12 developments will, in fact, significantly alter
13 existing view sheds and reduce views of the Tracy
14 peaker project to positions that are very close to
15 the site itself. And that the introduction of
16 these large developments would have a potentially
17 significant cumulative impact on existing view
18 sheds, but the TPP contribution to this would be
19 minimal and insignificant.
20 Q Thank you.
21 APPLICANT COUNSEL GRATTAN: That's all I
22 have. The witness is available for cross
23 examination.
24 HEARING OFFICER TOMPKIN: Does staff
25 wish to question this witness?

1 MS. WILLIS: No, we don't.
2 HEARING OFFICER TOMPKIN: Does any
3 intervenor wish to question this witness?
4 INTERVENOR SELIGMAN: Yes.
5 HEARING OFFICER TOMPKIN: All right, Mr.
6 Seligman.
7 INTERVENOR SELIGMAN: Mr. Stein, my name
8 is Howard Seligman and I represent Charles Tuso,
9 one of the intervenors who lives on Lammers Road.
10 I just have a couple of questions.
11 CROSS EXAMINATION
12 BY INTERVENOR SELIGMAN:
13 Q To what extent did you consider any
14 visual impacts on the existing residence on
15 Lammers Road in connection with this project?
16 A We considered impacts to existing
17 residences by identifying a number of key
18 observation points that were considered
19 representative of the general views that would be
20 experienced by surrounding residents. Those views
21 were selected in consultation with the Energy
22 Commission Visual Resources staff.
23 Q Do you know if the location of this
24 site, of this plant at the proposed site would
25 have any direct impact on the property, on the

1 home owned by Mr. Tuso at 27249 South Lammers Road
2 as it relates to his view of Mt. Diablo?
3 A I don't know specifically where that
4 residence is, Mr. Seligman.
5 Q This would be a followup inquiry, then.
6 How did you make a conclusion as to visual impacts
7 on single-family residences on Lammers Road if you
8 did not -- do not know those locations?
9 A Well, again, the key observation points
10 that we selected did include locations along
11 Lammers Road or near Lammers Road, and so we
12 believe that the key observation points capture a
13 representative sample of views from those
14 locations.
15 Q Is it my understanding, then, from your
16 testimony that you did not make any specific
17 conclusions as to visual impacts on specific homes
18 on Lammers Road?
19 A We made an assessment of impacts from
20 key observation points, including points along or
21 near Lammers Road, which we believed to be
22 representative of the views from Lammers Road
23 residences.
24 INTERVENOR SELIGMAN: Madam Hearing
25 Officer, could I have an answer to my question?

1 It has still not been answered.
2 HEARING OFFICER TOMPKIN: Well, I
3 believe he's answered it, but I'll give him one
4 more opportunity to clarify.
5 BY INTERVENOR SELIGMAN:
6 Q Specifically, Mr. Stein, my question was
7 did you make any inspection of the existing
8 single-family homes on Lammers Road, including
9 27249 South Lammers Road, to determine if there
10 would be any visual impacts to that project at the
11 proposed site?
12 A As part of our field survey we did drive
13 around the entire area to identify the view shed
14 boundary. That included drive-bys along all of
15 the residences along Lammers Road. As a result of
16 that field survey we selected key observation
17 points as a basis for conducting the assessment.
18 The selection of those points was
19 conducted in consultation with CEC staff. We did
20 expand the number of view points at the request of
21 staff. We believe that the analysis reflects the
22 general view that would be experienced by
23 homeowners along Lammers Road.
24 INTERVENOR SELIGMAN: Madam Hearing
25 Officer, I'm not going to pursue this, but for the

1 record I want it to be known that Mr. Stein did
2 not give a specific answer to my question.
3 HEARING OFFICER TOMPKIN: Thank you,
4 Mr. Seligman.
5 Mr. Tuso, you are represented by an
6 attorney, so you need to speak to your counsel at
7 this point.
8 Is there another intervenor who wishes
9 to question this witness?
10 INTERVENOR SARVEY: Yes.
11 CROSS EXAMINATION
12 BY INTERVENOR SARVEY:
13 Q Mr. Stein, you mentioned that you drove
14 along Lammers Road and inspected the view shed
15 along that --
16 HEARING OFFICER TOMPKIN: Can I
17 interrupt you briefly and have you identify
18 yourself for the record.
19 INTERVENOR SARVEY: Robert Sarvey.
20 HEARING OFFICER TOMPKIN: Thank you.
21 INTERVENOR SARVEY: Thank you.
22 BY INTERVENOR SARVEY:
23 Q You said that you drove along Lammers
24 Road and inspected visual points from Lammers
25 Road. Did you do any visual assessment of homes

1 that were closer to Lammers or closer to the plant
2 than Lammers Road? There are several homes that
3 go along small dirt roads inside and they would
4 not be considered in your visual analysis if the
5 only analysis you did was along Lammers Road.
6 So can you explain to me if you did that
7 also?
8 A Mr. Sarvey, I'm not sure which homes or
9 roads you're referring to. We did -- There are a
10 number of homes, residences directly to the west
11 of the site, on the opposite side of the Delta
12 Mendota canal that have prominent views of the
13 project site. And we did make an attempt to
14 evaluate the visual resource impacts from those
15 locations.
16 Q I was speaking of the roads, or of the
17 homes that are along Lammers Road that are on the
18 plant side of the canal that have dirt roads into,
19 say, as close as 3,000 feet.
20 A I don't believe that there were any
21 visual, any key observation points at locations --
22 Well, let me take that back. We did -- There is a
23 dirt access road off of Lammers Road that would I
24 believe be the south, the temporary south entrance
25 to the site during the initial construction

1 period. And there was a key observation point
2 located there.
3 I'm not aware of any other key
4 observation points that were located on dirt roads
5 off of Lammers Road.
6 Q So from the questions that I just asked
7 you and your answers, you can say that there's
8 actually three dirt roads that go in from Lammers
9 Road towards the project site, and your answer to
10 the question of whether you had explored all those
11 roads would be no; is that correct?
12 A We did not explore all those roads.
13 Q Thank you. You mentioned that the
14 proposed landscaping plan had no screening between
15 the canal and the plant due to the Fish and Game
16 requirements. Can you explain to me how you came
17 upon that, or what requirements Fish and Game had
18 that kept you from putting adequate landscaping
19 between the plant and the canal?
20 APPLICANT COUNSEL GRATTAN: Objection.
21 Mr. Sarvey, nobody that you are -- you used the
22 term kept you from preventing adequate landscaping
23 in there. There is nothing in the record that
24 indicates that the landscaping put in is not
25 adequate.

1 HEARING OFFICER TOMPKIN: I'll sustain
2 the objection. You can reword your question.
3 INTERVENOR SARVEY: Okay.
4 BY INTERVENOR SARVEY:
5 Q The Department of Fish and Game placed
6 several requirements on you, as far as putting a
7 screening between the plant and the Delta Mendota
8 canal. Can you describe those requirements,
9 please?
10 A The US Fish and Wildlife Service, the
11 original landscaping plan had proposed the
12 planting of eucalyptus trees. It's a fast-growing
13 species that's quite abundant and grows
14 successfully with minimal attendance here in
15 California. And we had proposed the use of
16 eucalyptus fairly generously on both the eastern
17 and western border of the site, as well as often
18 on the south part of the site.
19 US Fish and Wildlife expressed concern
20 with that species because it is a good roosting
21 place for predators of the San Joaquin kit fox, a
22 California threatened species and a federally
23 protected species as well. And Fish and Wildlife
24 expressed concern about increased mortality of kit
25 fox associated with information from raptors

1 roosting in the eucalyptus trees, and they were
2 also concerned about the proximity of the trees to
3 the migration corridor on the west.
4 So it was their expressed request to
5 both the applicant and the Energy Commission staff
6 that the trees on the western boundary of the site
7 be removed, and all of the trees be replaced with
8 a different species that, for lack of a better
9 description, had droopy leaves that would not
10 sponsor raptors that could prey on juvenile kit
11 fox traveling that corridor.
12 Q So what was the height of the tallest
13 tree that the Department of Fish and Game would
14 allow you to put on that side of the plant between
15 the Mendota canal and the plant itself?
16 A I don't believe that US Fish and
17 Wildlife specified a maximum height, Mr. Sarvey.
18 Q Well, we were planting the blue
19 elderberry; is that correct?
20 A That is one of the species proposed to
21 be planted, yes.
22 Q And also, the golden currant, correct?
23 A Yes.
24 Q And what's the maximum height of the
25 blue elderberry?

1 A That tree at maturity is about 25 feet
2 tall. The golden currant that you mentioned is at
3 maximum height about ten feet tall, but I'd note
4 as well that there are a number of river she-oak
5 (phonetic) also proposed for landscaping, and the
6 maximum height of that species is about 100 feet.
7 Q The river she-oak I understand were not
8 allowed between the canal and the plant site; is
9 that correct?
10 A That was the request of the US Fish and
11 Wildlife, that's correct.
12 Q And can you describe how tall the stacks
13 of your plant are?
14 A I believe they are 100 feet tall.
15 Q And how many trees of California, or
16 excuse me, blue elderberry and golden currant were
17 you allowed to plant on the canal side there?
18 A Well, I haven't counted them up,
19 Mr. Sarvey. There is a document that I think you
20 received a copy of dated March 1st that includes a
21 planned view of the trees and shows I think quite
22 clearly where the trees are located. I would
23 refer you to that document.
24 Q So would four blue elderberry and five
25 golden currant be an accurate count on the number

1 of trees that you could plant on that side?
2 A Well, I think that the, you know, the
3 plan shows a much larger number of trees or of
4 that particular species in the landscape plan, you
5 are correct, that at the request of US Fish and
6 Wildlife there was an approximately 300-foot
7 buffer created on the western portion of the
8 parcel to allow for unfettered movement of that
9 threatened species. And there is limited planting
10 on that side as a result.
11 Q In your visual analysis of that side of
12 the plant -- That's specifically the one I want to
13 address -- are you aware that the Tracy Hills
14 project would be located directly across the canal
15 and there would be no visual, or very little
16 visual, actually eight trees between the plant and
17 the homes along the canal there of the Tracy Hills
18 project?
19 A No, I wasn't aware of that.
20 Q You were not aware that the Tracy Hills
21 project would be directly across the canal in your
22 landscaping plan; is that correct, sir?
23 A That's correct. I'm not aware that the
24 Tracy Hills project is located directly across the
25 Delta Mendota canal.

1 Q So you provided no mitigation for the
2 residents of Tracy Hills who will be directly
3 across the canal; is that correct?
4 A Well, I don't believe that the Tracy
5 Hills development is directly across the canal. I
6 think it's considerably south of the project.
7 Q So you are aware of the Tracy Hills
8 project, then; are you saying that now?
9 A I'm aware of the Tracy Hills project.
10 I'm not aware that it's directly across the canal.
11 Q Back in October staff submitted some
12 data requests to you, Mr. Stein, and one of the
13 questions was the AFC states on page 8.11-7 that
14 "The traffic on I-580 would have fleeting views of
15 the TPP. Although it appears that views of the
16 project site for eastbound traffic would be brief
17 and intermittent, it appears that some views for
18 westbound traffic on I-580 would be more open and
19 of longer duration."
20 Since this is technically a scenic
21 highway and you mentioned you had some plans for
22 mitigating, but could you describe those plans to
23 us so we know exactly how you plan on mitigating
24 that view from the highway?
25 A Well, as I mentioned in my opening

1 comments, Mr. Sarvey, the view from Interstate 580
2 is a view that, it's approximately a one-and-a-
3 half-mile stretch, so depending on the speed with
4 which travelers are on the highway, they have a
5 partial or complete view of the site for something
6 on the order of five or six minutes. It's not an
7 extended view, but it is a view.
8 I'd note that the view also includes
9 other industrial uses that are existing in the
10 area, so although the highway is considered a
11 quote, unquote scenic corridor, in my professional
12 opinion, the scenic portion of that view is on the
13 west side of the property -- or the west side of
14 the highway, not the east side where there are
15 existing industrial uses.
16 We did propose, as part of the original
17 landscape plan, as I'd mentioned, the planting of
18 eucalyptus trees along the western portion of the
19 site as an offer of partial buffering of that
20 view. My sense is that it was probably the
21 County's intent for that kind of buffering to
22 really be provided for development that is right
23 up against the highway, not something that's
24 recessed back over a mile.
25 Nevertheless, we did propose that

1 landscaping, and again, as I mentioned, at the
2 request of the Fish and Wildlife Service, and in
3 deference to their concerns with the San Joaquin
4 kit fox that the planting of those eucalyptus
5 trees was modified and the planting was removed
6 from the west side of the property.
7 Q So, in answer to the CEC's data request
8 originally you stated that you would be planting
9 eucalyptus trees, but at a later time the
10 Department of Fish and Game would not allow that.
11 So can we take that to mean that there is no
12 mitigation between the scenic highway and the TPP?
13 A Well, there is some planting, as is
14 noted in the landscape plan. I think that plan
15 represents a compromise between the concerns of
16 the Fish and Wildlife Service and the desire to
17 buffer views of the site.
18 Q And the maximum height of those trees is
19 23 feet and the maximum height of your stacks is
20 100 feet; is that correct, Mr. Stein?
21 A Yes.
22 Q Thank you. Another data request was
23 issued in I believe October. It says, on page
24 8.11-13, "The AFC states that KOP-7 is a canal
25 access road that is not used by the general

1 public. However, it appears that the road along
2 the canal is open to general public access for
3 fishing and possibly other recreational uses."
4 Since you were not allowed to put some
5 landscaping there, how do you intend to mitigate
6 the views of the fisherman and the recreationists
7 that come along the canal? Do you have a plan for
8 that?
9 A Well, I don't believe that a plan is
10 specifically necessary for those infrequent
11 visitors. Although that canal is open to the
12 public, you know, I personally have been out there
13 many, many times. And I think on one occasion I
14 encountered an individual out there who appeared
15 to be a member of the public. It's just not a
16 location that is a magnet for intensive public use
17 that would require visual screening.
18 Q Well, I fish there quite often,
19 Mr. Stein, and it seems that in the data request
20 they requested some sort of analysis or something.
21 So we can conclude from your statements that you
22 felt that that was not an important issue to
23 provide landscape screening between the plant for
24 the recreationists and the fisherman?
25 APPLICANT COUNSEL GRATTAN: I believe

1 the question has been answered, and I guess
2 everyone is free to draw their own conclusions.
3 INTERVENOR SARVEY: Thank you,
4 Mr. Grattan.
5 BY INTERVENOR SARVEY:
6 Q In addition -- This is further in the
7 data request. "In addition, the California
8 aqueduct access road is a public recreation trail.
9 Recreationists using this access road would have
10 foreground and near middle ground views of the
11 project. Also, it appears that there may be other
12 designated bicycle routes or recreation trails in
13 the project area."
14 Once again, since you were limited by
15 Fish and Game as to what you could do to that, do
16 you have some sort of plan to provide some
17 mitigation for the recreationists and the
18 bicyclists along the California aqueduct?
19 A No, and I believe that based on the
20 intensity of the use, none is required.
21 Q Could you say that again for me,
22 Mr. Stein? I missed that.
23 A No, and I believe that based on the
24 intensity of the use or lack of intensity of the
25 use, no mitigation is required. There is no

1 significant impact to recreational users at that
2 location, no significant impact.
3 INTERVENOR SARVEY: Visual resources
4 KOP-1, could I present that to Mr. Stein so he can
5 follow this question, please?
6 HEARING OFFICER TOMPKIN: What is it
7 you're presenting?
8 INTERVENOR SARVEY: I would like to ask
9 him a question about this particular visual
10 resource, and I was wondering --
11 HEARING OFFICER TOMPKIN: Is that part
12 of the documentation that's been docketed?
13 INTERVENOR SARVEY: Yes, it is.
14 HEARING OFFICER TOMPKIN: If you can
15 refer to the page.
16 INTERVENOR SARVEY: Yes, it is. KOP-1,
17 I was just going to try to make it easy for him.
18 Let's see, Appendix 2.9-5, Figure One.
19 HEARING OFFICER TOMPKIN: Do you have
20 that available, Mr. Stein? All right.
21 BY INTERVENOR SARVEY:
22 Q Have you made any alterations to that
23 plan there, as far as Visual Resources, to KOP-1?
24 A Yes, we have.
25 Q Could you describe them for me.

A Mr. Sarvey, they're described in the March 1st material that was docketed, and there's a new photosimulation for KOP-1 in that document.

Q Would it be the same photosimulation after five years of growth?

A This photosimulation I believe is at maturity, the one that I'm looking at.

Q Okay. So we can assume that after five years of growth this would be the view from KOP-1; is that correct?

A Yeah, I actually believe, Mr. Sarvey, this is a different species that's represented in this simulation that you've provided me, and was modified by replacement of those species with another type of tree that was considered to be quote, unquote raptor friendly.

Q And what is the height of that tree that you substituted there?

A It grows to approximately 100 feet at maturity.

Q And the height of it at planting?

A I don't have that information.

Q And do you have an assessment for the rate of growth of this tree?

A I'm not certain of that either.

1 Q Well, can we assume, then, that this
2 will probably be a very good simulation of what
3 this scene will look like in five years, after
4 you've planted your landscaping?
5 A I don't believe that a five-year
6 simulation was done for this particular species,
7 and I'd be hard-pressed to say whether this is
8 representative or not.
9 INTERVENOR SARVEY: Thank you,
10 Mr. Stein.
11 INTERVENOR NOBLE: Good morning, Hearing
12 Officer. My name is Dennis Noble. I represent
13 John Corcorus and Roger Traina.
14 Mr. Stein, good morning.
15 THE WITNESS: Good morning.
16 CROSS EXAMINATION
17 BY INTERVENOR NOBLE:
18 Q One question for you. You've mentioned
19 in your direct testimony that you have evaluated
20 your analysis relative to all LORS. Does that
21 include the LORS of the City of Tracy?
22 A We did not evaluate the LORS for the
23 City of Tracy. Because the project is located in
24 the County, we don't believe that the City of
25 Tracy ordinances apply.

1 INTERVENOR NOBLE: Thank you very much.
2 INTERVENOR WEED: Michael Weed for Larry
3 Chang. May I ask a question, please?
4 CROSS EXAMINATION
5 BY INTERVENOR WEED:
6 Q Are you aware that the proposed project
7 site is within the sphere of influence of the City
8 of Tracy?
9 A Yes.
10 Q Okay, and still you concluded that the
11 Tracy LORS were not relevant.
12 A Correct.
13 INTERVENOR WEED: Thank you.
14 COMMISSIONER LAURIE: Commissioner
15 Pernell, if I may?
16 PRESIDING COMMISSIONER PERNELL:
17 Commissioner Laurie.
18 EXAMINATION BY COMMITTEE
19 BY COMMISSIONER LAURIE:
20 Q Mr. Stein, if 580 is a designated state
21 scenic highway, what is your understanding of the
22 legal implications of that designation, as applied
23 to Visual Resources? Strike that. Are you aware
24 of what the legal implications are?
25 A Commissioner, I'm not aware of any legal

1 implications other than its designation as such in
2 the County's general plan indicates that there are
3 policies with respect to that corridor that should
4 be considered in development in the County.
5 Q Do you have any understanding that state
6 identification of a state highway as a state
7 scenic corridor imposes certain state standards?
8 A It's not my understanding that it's
9 designated as a state scenic highway, it's my
10 understanding that it's designated as a scenic
11 corridor by the County.
12 Q Okay. The final staff report states
13 that "580, from Interstate 5 to Alameda County, is
14 designated as a state scenic highway." And then
15 it goes on to state, "Therefore, state standards
16 pertaining to scenic resources are applicable to
17 the project."
18 Do you agree with that statement?
19 A I don't know that I can answer that,
20 Commissioner Laurie. My understanding is that the
21 County identified that segment as a scenic
22 corridor.
23 Q I believe the normal course of events is
24 the counties request that it be included in the
25 state highway plans or such, and then the state

1 adopts it. But once it is adopted, my
2 understanding is that there are occasions, and I
3 will be asking staff's witness, what those
4 implications and what those state standards are.
5 Secondly, have you made any attempt to
6 have discussions regarding off-site landscaping as
7 mitigation?
8 APPLICANT COUNSEL GRATTAN: May I confer
9 with Mr. Stein on that? I may have some
10 information.
11 Commissioner Laurie, the witness tells
12 me he has no direct knowledge of this. We do have
13 a witness who could be brought up here who can
14 testify at least of meetings that have been had to
15 discuss this.
16 COMMISSIONER LAURIE: Let me advise of
17 my interest in the question. If you plant a 10-
18 or-20-foot tree next to, adjacent to a 100-foot-
19 tall facility, it has certain visual results. If
20 you plant the same size tree closer to the viewer,
21 it has a different result. Recognizing that the
22 highway traffic poses a different issue when you
23 have such a long period of view, it does you no
24 good to plant trees immediately adjacent to the
25 highway, because you have too long of a view

1 period. But there is some point between the
2 highway and the facility that maximizes view
3 protection; thus, my interest in having an
4 understanding as to whether any thought was given
5 to such off-site mitigation.
6 And I will be interested, I would be
7 interested, either at this moment or some future
8 moment, in having that discussion.
9 APPLICANT COUNSEL GRATTAN: Maybe when
10 we're through with Mr. Stein, I could bring Mr.
11 Wheeler up to the stand.
12 COMMISSIONER LAURIE: I leave that to
13 the chairman. Commissioner Pernell, would you be
14 interested at this point in having that discussion
15 or would you like to do it later?
16 PRESIDING COMMISSIONER PERNELL: Well,
17 because we're on the topic, why don't we conclude
18 your questions, so please bring up a witness that
19 can answer the question.
20 APPLICANT COUNSEL GRATTAN: Certainly.
21 We call Mr. Doug Wheeler, who is the
22 vice president for Project Development with GWF.
23 PRESIDING COMMISSIONER PERNELL: All
24 right. And now Mr. Wheeler will have to be sworn
25 in.

1 Whereupon,

2 DOUGLAS WHEELER

3 Was called as a witness herein and, after first

4 being duly sworn, was examined and testified as

5 follows:

6 APPLICANT COUNSEL GRATTAN: I am aware

7 of Mr. Wheeler's experience, and maybe I could

8 lead him, with your kind permission, lead him up

9 to the point where you can ask further questions,

10 Commissioner Laurie?

11 COMMISSIONER LAURIE: Give it a shot.

12 APPLICANT COUNSEL GRATTAN: Yes.

13 DIRECT EXAMINATION

14 BY APPLICANT COUNSEL GRATTAN:

15 Q Mr. Wheeler, you've been sworn in?

16 A Yes, I have.

17 Q Mr. Wheeler, have you had any

18 discussions regarding off-site landscaping with

19 (a), any of the intervenors here, or (b), with the

20 City of Tracy or any other local government, and

21 can you tell me the results of those discussions?

22 A Yes. We've had one discussion with one

23 of the land owners that would be located near the

24 proposed site. We have also had discussions with

25 the task force that had been created, set up by

1 the City of Tracy. And I have had discussions
2 with the land owner that would be immediately
3 adjacent to the proposed project site.
4 Q And what was the result, first, of the
5 landowner discussion?
6 A The landowner discussion, we talked
7 about additional landscaping that we proposed that
8 would be located south of the existing proposed
9 site property boundary that would be very similar
10 to the landscaping that is indicated on the
11 docketed information that Mr. Stein referred to,
12 that being the river she-oak that the estimated
13 height would be approximately 100 feet.
14 Q And are the discussions, are they
15 ongoing?
16 A Yes, they are.
17 Q One further question. The issue was
18 raised with Tracy Hills. Did you have discussions
19 with the Tracy Hills developer, AKT?
20 A Yes, I did.
21 Q And based on those discussions, did
22 Tracy -- And you had discussions specifically
23 relating to visual impacts?
24 A Yes, I did.
25 Q And based on those discussions, did the

1 developer AKT withdraw its intervention in this
2 project?
3 A Yes, they did.
4 APPLICANT COUNSEL GRATTAN: That's --
5 COMMISSIONER LAURIE: All right, thank
6 you.
7 EXAMINATION BY COMMITTEE
8 BY COMMISSIONER LAURIE:
9 Q Mr. Wheeler, was -- Well, that's -- I
10 won't object to the hearsay nature of the reason
11 why AKT withdrew their petition, so let me ask was
12 there any agreement regarding protection of view
13 shed in regards to the AKT development?
14 A The agreement was that GWF would make
15 best efforts to provide additional landscape
16 screening to the south of the proposed facility.
17 Q And you can't provide me any more
18 specific information than that?
19 A The additional information that I can
20 provide is, as I responded to earlier, there are
21 ongoing discussions with the City of Tracy task
22 force. It will be our proposal that we provide
23 additional landscape mitigation on the south side
24 of the proposed property site.
25 To do that, the landowner that would be

1 immediately adjacent to the GWF parcel has agreed
2 in principal to provide either a conservation
3 easement or conservation easement that would
4 provide both additional buffers and setbacks, and
5 an easement for landscaping.
6 The reason that we could not go south
7 was our property line proximity to the PG&E
8 transmission lines, as I think everyone is aware
9 of, run across the southern boundary. We could do
10 some limited planning, but we had 30 feet to work
11 with, and the height of the trees depicted in the
12 docketed information reflected the maximum height
13 that PG&E was willing to deal with.
14 By extending that easement further to
15 the south, what that means is we can use a taller
16 tree that will fully mitigate the project stacks,
17 if you will, the 100-foot stacks from views south
18 of the proposed project site. It will also have
19 some beneficial effect on view corridors from 580.
20 Q It is not only important that the
21 current residents not suffer any detriment because
22 of additional view shed impact, but future
23 residents as well so that the growth and
24 development of the area is not inhibited. My
25 concern is that adequate mitigation be imposed to

1 protect the future development as well, and it
2 sounds like that's the nature of your discussions.
3 Now, at some point I think we have to
4 know the results of those discussions. I'm always
5 hesitant to consider any condition that says you
6 shall reach agreement with somebody in the future
7 because of the difficulty of enforcement that
8 arises from those conditions.
9 So can you discuss at this moment what
10 you believe the status of those discussions
11 negotiations are and the timing of the various
12 specific concrete proposals regarding the views of
13 the task force and yourself on the view shed
14 question?
15 APPLICANT COUNSEL GRATTAN: Might I
16 interject here, Commissioner Laurie?
17 COMMISSIONER LAURIE: Yes.
18 APPLICANT COUNSEL GRATTAN: We do have
19 the City of Tracy here, and I think probably the
20 City of Tracy might be, when the time comes, the
21 best witness with regard to when this issue will
22 be wrapped up.
23 COMMISSIONER LAURIE: That's fine,
24 Mr. Grattan.
25 Thank you, Mr. Wheeler. Thank you,

1 Mr. Stein.

2 INTERVENOR SELIGMAN: Madam Hearing

3 Officer, are any questions allowed of Mr. Wheeler?

4 APPLICANT COUNSEL GRATTAN: It's all

5 right with me.

6 HEARING OFFICER TOMPKIN: Yes. Since he

7 was sworn on the topic, I will permit questions of

8 this witness. Mr. Seligman?

9 CROSS EXAMINATION

10 BY INTERVENOR SELIGMAN:

11 Q Mr. Wheeler, in view of the fact that

12 GWF has concluded that the local ordinances and

13 rules and standards of the City of Tracy do not

14 apply, then why are you now actively engaged with

15 the City of Tracy on this particular issue?

16 A We're active with the City of Tracy

17 through this task force, because there were a

18 number of issues that had been raised regarding

19 community benefits. And what additional

20 mitigation GWF may provide that would make the

21 proposed project more acceptable to the community.

22 That's the purpose of the task force,

23 and certainly visual impacts is one of the impacts

24 that has been raised, and one of the areas that

25 GWF has moved aggressively to try to address. And

it's my belief and opinion that that issue will be fully addressed as part of the task force.

Q Do you believe that the visual issue potentially affects the Tracy Hills project that is located within the city limits of Tracy?

A It's my belief that the residentially zoned component of the Tracy Hills development project would have a view of the proposed project, yes.

Q And do you also believe that there is a potential visual impact on the properties that would lie within the sphere and influence of the City of Tracy?

A There would certainly be views from properties within the South Schulte plan.

INTERVENOR SELIGMAN: Thank you.

CROSS EXAMINATION

BY INTERVENOR SARVEY:

Q Mr. Wheeler, can you describe any discussions on visual impacts you've had with the Tracy task force?

APPLICANT COUNSEL GRATTAN: I believe he just did, so I'm going to object to that.

BY INTERVENOR SARVEY:

Q But could you give me any specifics in

1 terms of what type of visual impacts the City of
2 Tracy has professed an interest in mitigating?
3 HEARING OFFICER TOMPKIN: Well, the
4 witness indicated that these are ongoing
5 discussions. If you have a specific issue -- He
6 has responded generally to that question. If
7 there is something specific --
8 BY INTERVENOR SARVEY:
9 Q Has the Tracy Hills representative, Mike
10 Sousa, proposed any mitigation for visual impacts
11 during these discussions?
12 A Not that I'm aware of, no.
13 Q Has any other member of the task force
14 introduced any specific visual impacts that they
15 would like to address?
16 A Yes, they have.
17 Q And can you describe those for me.
18 A One of the members of the task force who
19 has property close to the proposed project site
20 has requested or indicated that the visual impacts
21 from his property should be mitigated by GWF.
22 Q Would that be Mr. Tuso?
23 A Yes, it would.
24 INTERVENOR SARVEY: Thank you,
25 Mr. Wheeler.

1 APPLICANT COUNSEL GRATTAN: May I have
2 just brief redirect of the panel here?
3 PRESIDING COMMISSIONER PERNELL: I have
4 a question.
5 APPLICANT COUNSEL GRATTAN: Sure.
6 PRESIDING COMMISSIONER PERNELL: A
7 question for Mr. Stein.
8 EXAMINATION BY COMMITTEE
9 BY PRESIDING COMMISSIONER PERNELL:
10 Q You indicated in your testimony that the
11 nearest residents were .5 miles to the project?
12 A Yes.
13 Q And my question is the key observation
14 points, were any one of those points .5 miles to
15 the project?
16 A Yes.
17 Q Was it at the residences?
18 A Yes.
19 PRESIDING COMMISSIONER PERNELL: Thank
20 you.
21 HEARING OFFICER TOMPKIN: Mr. Grattan?
22 APPLICANT COUNSEL GRATTAN: Thank you.
23 REDIRECT EXAMINATION
24 BY APPLICANT COUNSEL GRATTAN:
25 Q First, with respect, Mr. Wheeler, with

1 respect to the views -- You mentioned that the
2 South Schulte proposed development would have
3 views of the project, you mentioned that Tracy
4 Hills would have views of the project -- would
5 they have also views of the existing industrial
6 area by the project?
7 A Yes, they would.
8 Q And I note that you're a lay witness
9 here, but you said they had views; my
10 recollection, you did not say that they were
11 significant views. Were the views in your
12 opinion, you know, are the views significant
13 adverse visual impacts?
14 A Well, the existing industrial facilities
15 would be facilities that would be viewed by
16 existing residences along Lammers and any future
17 residences in either the Tracy Hills area or South
18 Schulte area.
19 Q Okay. Mr. Stein, in your professional
20 opinion, is the methodology that was used in
21 taking the key observation point simulations, was
22 that methodology and was the resultant product,
23 the KOP simulations, were they adequate to
24 represent potentially impacted views?
25 A Yes.

1 Q Very good. With respect to the views
2 that are exposed with the -- let's say the
3 scaleback of the landscaping plan which was done
4 at the request or maybe the insistence of the US
5 Fish and Wildlife service, would the impact to
6 viewers, either along the highway or recreational
7 viewers, would the impact on those viewers be
8 significantly adverse, in your professional
9 opinion?
10 A No. In my professional opinion, those
11 views are already degraded views by the nature of
12 the existing industrial development.
13 Q That's all -- One further question,
14 Mr. Stein. The proposed off-site view shed
15 mitigation, in your professional opinion does
16 that, either to existing residents or future
17 residents, is that made necessary to mitigate a
18 significant adverse impact?
19 A No.
20 APPLICANT COUNSEL GRATTAN: Thank you.
21 INTERVENOR SELIGMAN: May I have a
22 followup question?
23 HEARING OFFICER TOMPKIN: That will be
24 permitted.
25 INTERVENOR SELIGMAN: Thank you.

1 CROSS EXAMINATION

2 BY INTERVENOR SELIGMAN:

3 Q Mr. Stein, are any of the existing

4 industrial uses, do any of those uses have 100-

5 foot-high stacks?

6 A Yes, they do.

7 Q And how far away are they from the

8 existing residences?

9 A I don't know the specific distances, but

10 there in close proximity to the Tracy peaker

11 project site. In some instances those industrial

12 uses are actually closer to some of the residences

13 near the intersection of Schulte and Lammers Road.

14 But I don't know the specific distances.

15 Q Do you know how high the buildings are

16 in the existing industrial uses?

17 A I know that the stack of the Tracy

18 Biomass plant is approximately 150 feet, and the

19 stack for the Owens-Brockway facility is

20 approximately 140 feet. There is also a water

21 tower on the south side of that, the Owens-

22 Brockway facility that's probably the closest

23 structure to the proposed site. And that water

24 tower, I believe, is 122 feet tall.

25 Q Do you know how far away the Biomass

1 facility is from the Tuso property?
2 A No.
3 Q Do you know how close the project site
4 would be to the Tuso property?
5 A No, I don't.
6 Q Do you have any knowledge as to who owns
7 the Biomass facility site?
8 A I have some knowledge, yes.
9 Q And what is your knowledge?
10 A My understanding is that the site is
11 partially owned by owners of GWF.
12 INTERVENOR SELIGMAN: Thank you.
13 CROSS EXAMINATION
14 BY INTERVENOR WEED:
15 Q Commissioner Laurie raised the issue of
16 the planned residence in the south, South Schulte
17 specific plan.
18 HEARING OFFICER TOMPKIN: Would you
19 identify yourself for the record.
20 INTERVENOR WEED: Oh, yes, Michael Weed
21 representing Larry Chang.
22 BY INTERVENOR WEED:
23 Q Do any of the mitigation plans proposed
24 to date address the impacts on those proposed
25 residents in that South Schulte specific plan?

1 A I'm sorry, Mr. Weed, I missed the first
2 part of your question.
3 Q The South Schulte specific plan, which I
4 believe you stated before, you did not consider.
5 Are the proposed residences in that specific plan,
6 are any mitigation measures proposed or adopted in
7 the conditions that would mitigate the impacts on
8 those residences?
9 APPLICANT COUNSEL GRATTAN: I'm going to
10 object to the question because I believe Mr. Stein
11 has stated already that his opinion was that there
12 were no significant impacts to those residents, so
13 therefore the obligation of mitigation doesn't
14 arise.
15 INTERVENOR WEED: It seems to me if
16 actual question, regardless of his opinion as to
17 the impacts, it's just a straightforward factual
18 issue, has there been mitigation proposed to
19 mitigate the effects on those planned residences
20 in the specific plan?
21 HEARING OFFICER TOMPKIN: I'll overrule
22 the objection. You may answer.
23 THE WITNESS: Well, the landscaping plan
24 that has been proposed by GWF is, the most current
25 version of that is in material that was docketed

1 March 1st. And, as Mr. Wheeler stated in his
2 comments here today, it's possible that through
3 further discussions with the City that they will
4 develop additional landscaping to the south of the
5 site.
6 The landscaping that's proposed would
7 provide some level of mitigation to those
8 residences. It was not placed specifically for
9 that purpose.
10 BY INTERVENOR WEED:
11 Q And in addition to whether other
12 mitigations are included, were the impacts of, the
13 visual impacts on the proposed residences studied?
14 A Well, they were studied to the extent
15 that, you know, we looked at the existing view
16 shed and we looked at a number of key observation
17 points in the area. We identified that the view
18 shed is significantly impacted by existing
19 industrial uses. So, you know, it's been
20 evaluated in that context.
21 Q But not in the context of the proposed
22 specific plan?
23 A Well, you know, we did do a cumulative
24 impact assessment where we evaluated the general
25 impact of the project together with other planned

1 development in the area.

2 INTERVENOR WEED: Thank you.

3 HEARING OFFICER TOMPKIN: If there are

4 no further questions for this witness?

5 Mr. Grattan?

6 APPLICANT COUNSEL GRATTAN: The witness

7 is apparently finished, and we would like to move

8 the witness's testimony and exhibits into the

9 record. And if we can identify exactly what those

10 exhibits are.

11 APPLICANT COUNSEL KARP: Irwin Karp,

12 Madam Chairman. I'll identify the exhibits

13 accompanying the Visual Resources testimony.

14 Section 8.11 of the original

15 application, August 2001. The original

16 application is already Exhibit One in this

17 proceeding. Section 3.11 of the supplemental

18 application, October 2001, and that is already

19 accepted as Exhibit Two in this hearing.

20 Just a question in terms of marking,

21 Number 48, Air Quality Conditions. That's going

22 to stay identified as 48; is that correct?

23 HEARING OFFICER TOMPKIN: That's

24 correct.

25 APPLICANT COUNSEL KARP: Okay. Now, the

1 new Exhibit 49, Data Responses 39 through 66,
2 dated November 9th, 2001.
3 HEARING OFFICER TOMPKIN: Okay. The
4 data responses will be marked as Exhibit 49 for
5 identification.
6 (Thereupon, the above-referenced
7 document was marked as Staff's
8 Exhibit 49 for identification.)
9 APPLICANT COUNSEL KARP: Okay, and then
10 new Exhibit 50 would be Data Response 58 of the
11 supplement to the first set of data responses,
12 dated November 28th, 2001.
13 HEARING OFFICER TOMPKIN: And that will
14 be marked as Exhibit 50 for identification.
15 (Thereupon, the above-referenced
16 document was marked as Staff's
17 Exhibit 50 for identification.)
18 APPLICANT COUNSEL KARP: Okay, and then
19 Exhibit 51, which is also designated as Number 26
20 on the applicant's exhibit list, that is Landscape
21 Plan and Additional Visual Simulations,
22 January 10th, 2002.
23 HEARING OFFICER TOMPKIN: All right.
24 That will be marked as Exhibit 51 for
25 identification.

1 (Thereupon, the above-referenced
2 document was marked as Staff's
3 Exhibit 51 for identification.)
4 APPLICANT COUNSEL KARP: And then Number
5 52, which is marked as Number 27 on the
6 applicant's exhibit list, it's a letter from the
7 US Fish and Wildlife Service to the CEC regarding
8 landscaping, and it's dated January 8th, 2002.
9 HEARING OFFICER TOMPKIN: That will be
10 marked as Exhibit 52 for identification.
11 (Thereupon, the above-referenced
12 document was marked as Staff's
13 Exhibit 52 for identification.)
14 APPLICANT COUNSEL KARP: And finally, on
15 Visual Resources, Number 53, a document that was
16 docketed on March 1st, 2002, and it is entitled
17 the Attached Revised Landscaping Plan, Along with
18 Visuals of Key Observation Points One, Nine and
19 Ten, Respectively, for the Tracy Peaker Project.
20 HEARING OFFICER TOMPKIN: The revised
21 landscape plan will be marked Exhibit 53 for
22 identification, including the attachments.
23 (Thereupon, the above-referenced
24 document was marked as Staff's
25 Exhibit 53 for identification.)

1 APPLICANT COUNSEL KARP: Thank you.
2 HEARING OFFICER TOMPKIN: Is there any
3 objection to the exhibits proposed?
4 INTERVENOR SARVEY: I object to
5 Exhibit 53 as a late filing, past the date. It's
6 prejudicial to staff and the intervenors, and I
7 object to that. Thank you.
8 HEARING OFFICER TOMPKIN: Ms. Willis?
9 MS. WILLIS: Staff does not object to
10 the late filing, although I believe it was
11 actually prepared in response to the workshop we
12 held in January, and if I'm not mistaken, I
13 believe a draft markup was docketed some time ago.
14 This is just actually a more formal drawing that
15 has been submitted.
16 APPLICANT COUNSEL GRATTAN: Number one,
17 that is correct, and number two, this was docketed
18 the 1st of March. It is an exhibit supporting
19 testimony that was filed on the 13th of February.
20 It's here for the purpose of clarification and
21 filling out.
22 Today is the 13th of March, just for the
23 record. This has been in the docket since the 1st
24 of March.
25 HEARING OFFICER TOMPKIN: Thank you. I

1 will note Mr. Sarvey's objection, but it will be
2 overruled.
3 Exhibits 48 (sic), 49, 50, 51, 52, and
4 53 will be admitted in evidence.
5 (Thereupon, the above-referenced documents,
6 marked as Staff's Exhibits 49-52 for
7 identification, were received into evidence.)
8 HEARING OFFICER TOMPKIN: Ms. Willis,
9 you may call your first witness.
10 APPLICANT COUNSEL KARP: Oh, excuse me,
11 Madam Chairperson, when you read those, you
12 also -- I appreciate it, but you also included
13 Number 48, I believe --
14 HEARING OFFICER TOMPKIN: Oh, sorry.
15 APPLICANT COUNSEL KARP: -- and staff
16 has asked for an opportunity to review that.
17 HEARING OFFICER TOMPKIN: Thank you for
18 that correction.
19 APPLICANT COUNSEL KARP: You're welcome.
20 HEARING OFFICER TOMPKIN: Forty-eight is
21 not in evidence. That will be taken up at a later
22 time and date.
23 Ms. Willis?
24 PRESIDING COMMISSIONER PERNELL: Off the
25 record, please.

1 (Thereupon, a recess was held
2 off the record.)
3 MS. WILLIS: Thank you. Staff calls the
4 witness Joe Donaldson, and Mr. Donaldson will need
5 to be sworn in.
6 Whereupon,
7 JOE DONALDSON
8 Was called as a witness herein and, after first
9 being duly sworn, was examined and testified as
10 follows:
11 DIRECT EXAMINATION
12 BY MS. WILLIS:
13 Q And, Mr. Donaldson, could you please
14 state your name for the record.
15 A My name is Joe Donaldson.
16 Q Was a statement of your qualifications
17 attached to your testimony?
18 A Yes.
19 Q Could you briefly state your education
20 and experience as it pertains to visual resource
21 analysis.
22 A Yes. I have an undergraduate degree in
23 architecture from UC, Berkeley. I have a master's
24 of landscape architecture degree from Utah State
25 University. I have taught landscape architecture

at California Polytechnic State University for several years. I teach a class at UC, Davis Extension for the past ten years in environmental planning and site analysis, which involves visual resources assessment.

I've conducted visual assessments on a rather large variety of projects for the past 20 years. I've worked on a variety of visual analysis systems developed by the federal government including the US Fish and Wildlife Service, the Federal Highway Administration, the Bureau of Land Management, the US Army Corp of Engineers, the Natural Resource Conservation Service as well, so I'm familiar with a broad variety of different visual systems.

I've conducted numerous visual analyses for projects using CEQA or under CEQA guidelines, including mining projects, power line projects, housing projects and so on. I've also worked on several projects for the California Energy Commission as an expert witness, including the Delta Energy Center in Pittsburg, the Metcalf Energy Center down in San Jose, and I'm currently working on another project in Elverta as well, in addition to this one.

1 Q Thank you. Did you prepare the
2 testimony in the staff assessment entitled Visual
3 Resources?
4 A Yes, I did.
5 Q And also, did you prepare the testimony
6 in the staff supplement on Visual Resources?
7 A Yes, I did.
8 Q Do you have any changes to your
9 testimony today?
10 A I do have one change. It's a minor
11 change on page 5.11-28, under the discussion of
12 LORS. There appears to be something that didn't
13 get changed along the way. It's identified that
14 the proposed project would be inconsistent with
15 three of the seven applicable policies in the San
16 Joaquin County general plan; that should be
17 changed to four.
18 Table five is correct and in the
19 conclusions it's also correct in that statement.
20 So again, this is just a minor adjustment,
21 correction.
22 Q Thank you. Do the opinions contained in
23 your testimony represent your best professional
24 judgment?
25 A Yes, they do.

1 Q Okay. Mr. Donaldson, could you briefly
2 explain how you conducted your visual analysis.
3 For example, did you visit the site and the
4 surrounding areas?
5 A Yes. I first of all reviewed maps and
6 became familiar with the area in that fashion, and
7 then drove around the area for the better part of
8 a day and looked at views from different
9 locations. Looked at the existing conditions that
10 were out there from a visual standpoint.
11 I looked at the KOPs that the applicant
12 had suggested and agreed with those.
13 Q And, just for clarification, KOP?
14 A Oh, I'm sorry, key observation position
15 or key observation point is the term. We'll say
16 key observation point, because I think that's
17 consistent with the Energy Commission's language.
18 Also looked at visual change based on
19 the project description. I looked at visual
20 contrast, the potential contrast with its
21 surroundings; the project's dominance in terms of
22 scale and spatial dominance, and I looked at the
23 potential for view blockage to identify overall
24 visual change that would be created by the project
25 on the existing conditions.

1 Q In the staff assessment, you analyzed
2 ten key observation points. In your analysis of
3 visual resources, did you conclude there would be
4 any direct significant adverse impacts to the
5 environment?
6 A I did conclude there would be a
7 significant adverse impact prior to mitigation for
8 KOP-1, and if I could just make a point of
9 clarification, the analysis, even though the KOPs
10 are identified 1 through 10, number 6 was
11 eliminated much earlier in the process, and there
12 were actually nine KOPs that were technically
13 evaluated. Number 6 was eliminated because of a
14 change in the project. A power transmission line
15 was originally supposed to go across the highway,
16 across I-580, and that was eliminated from the
17 project description, so that KOP was also
18 eliminated.
19 Q Maybe you could describe briefly where
20 KOP-1 is located.
21 A I'm sorry, KOP-1 is represents a view
22 from residences and people that might be traveling
23 along Lammers Road, which would be pretty much
24 directly west of the project area. So it's a
25 representation of a number of views, or a

1 combination of views from the general area along
2 Lammers Road -- I'm sorry, east of the project,
3 excuse me.
4 Q With the proposed mitigation, did you
5 determine there would be any direct or indirect
6 visual impacts from this project?
7 A With the implementation of mitigation,
8 as described in the conditions of certification,
9 my conclusion was that the impacts, the visual
10 impacts would be reduced to less than significant.
11 Q As we have heard, the applicant has
12 proposed a revision to the landscaping plan that
13 was docketed on March 4th. Could you please
14 explain the purpose of a landscaping plan and the
15 reasons for those revisions?
16 A Yes. The landscaping plan, first and
17 foremost, is intended to help blend the project
18 and partially screen the project. And I'm
19 emphasizing blend and partially screen the project
20 in my testimony. I think it's important to
21 recognize that the landscape plan is a way of
22 helping to blend the project with its overall
23 setting and to reduce those visual impacts.
24 The landscape plan has gone under, as
25 Kerry pointed out, has undergone some revision

1 based on input from biologists with the Fish and
2 Wildlife Service and with CEC staff as well.
3 Those revisions were along the lines of trying to
4 reduce the impacts or potential impacts on the San
5 Joaquin Valley kit fox and the migration corridor
6 along the Delta Mendota canal, along that area.
7 The landscape plan's intent was, again,
8 to help provide some plantings that would provide
9 some screening and, again, to help blend the
10 project overall.
11 Q Did you also analyze potential impacts
12 from light or glare?
13 A Yes. I looked at the potential impacts
14 of the plant on light and glare and included
15 that -- Would you like me to continue? Okay,
16 yeah, and included that the impacts would be less
17 than significant, based on the existing conditions
18 that are out there for light and glare.
19 Q Did you view the proposed site in the
20 evening or at night?
21 A Yes, I did. I viewed it during
22 darkness, yes, at night.
23 Q Did you analyze cumulative visual
24 impacts?
25 A Yes, I did.

1 Q And did you conclude that there would be
2 any cumulative visual impacts from the proposed
3 project?
4 A I concluded that there would not be
5 cumulative visual impacts based on the known
6 projects in the area.
7 Q Did you analyze the project in reference
8 to local laws, ordinances, regulations, and
9 standards?
10 A Yes, I did.
11 Q And which laws, ordinances, regulations,
12 and standards did you determine locally would be
13 applicable?
14 A I looked at the laws, ordinances,
15 regulations, and standards identified in the San
16 Joaquin County general plan.
17 Q Did you analyze the visual impacts of
18 the proposed project based on the South Schulte
19 plan?
20 A I considered those. I did review the
21 South Schulte specific plan, but determined that
22 it wasn't applicable in this situation, given CEQA
23 guidelines.
24 Q And could you explain, first of all,
25 define CEQA and explain what the guidelines would

1 have indicated to you.
2 A Yes, and the California Environmental
3 Quality Act is CEQA. That states that --
4 Actually, I could read it from the Act.
5 Q Why don't you just summarize.
6 A Okay, I'll summarize. It states that
7 the existing conditions would be the baseline for
8 evaluating visual impacts, and that those existing
9 conditions would be those that occur at the time
10 of the notice of preparation, or in the absence of
11 a notice of preparation at the time the analysis
12 begins for the project.
13 So, in this case, because there are no
14 houses, trails, roads, parks or other elements
15 there existing that are part of that particular
16 plan, I determined that it wasn't appropriate to
17 do further evaluation of that under the guidelines
18 for the California Environmental Quality Act.
19 Q Can you further explain why it would be
20 difficult for you to evaluate the project from the
21 visual perspective based on the South Schulte
22 plan?
23 A It would be difficult because from my
24 perspective it would be speculative and not clear
25 at what point in time we would be looking at

1 particular visual impacts. There weren't
2 identified specific house locations or things like
3 that that I would really be able to make a good
4 determination based on. So given the
5 unspecificity, I guess, of the information in the
6 specific plan, I was not able to draw strong
7 conclusions that I could really base my analysis
8 on.
9 Q Did you determine this project would be
10 in compliance with all LORS?
11 A No. I initially without mitigation
12 identified that it would be inconsistent with four
13 of the seven laws, ordinances, regulations, and
14 standards.
15 Q And with mitigation?
16 A With mitigation I determined that it
17 would be consistent with those seven LORS that
18 were identified.
19 Q Earlier Commissioner Laurie asked the
20 applicant a question regarding Interstate 580 as
21 the designation as a state scenic highway. Is
22 that your understanding, that I-580 is designated
23 as a state scenic highway?
24 A Yes, it is designated as a state scenic
25 highway and it's also designated by the County as

1 a scenic highway as well.
2 Q And could you explain what the
3 implications of that designation are?
4 A I've been on the web for Caltrans and
5 looked at their standards, their guidance for both
6 designating scenic highways and for any standards
7 that would apply to that. The California
8 Department of Transportation, Caltrans
9 essentially -- I don't know how to describe it, I
10 guess, but sort of pushed it back on the County or
11 the local communities to determine what standards
12 and regulations would apply to those.
13 The state itself does not have any
14 strict guidance, nor does it actually identify a
15 specific distance from the highway that would
16 qualify as a scenic corridor in particular. So
17 the state is not real clear as far as providing
18 specific guidance on these things. They really do
19 put it back on the local government agency to
20 identify what standards they apply to that.
21 And, in fact, the County of San Joaquin
22 does -- in their laws, in their LORS, do identify
23 some local standards that do apply to this,
24 including the provision that there be a
25 landscaping plan developed. Again, it's not clear

as to what distance from a scenic highway, scenic designated road or highway, where that might apply.

Q Does that conclude your testimony?

A Yes.

Q Okay, thank you.

MS. WILLIS: This witness is now available for cross examination.

PRESIDING COMMISSIONER PERNELL: Commissioner Laurie.

COMMISSIONER LAURIE: Thank you, Commissioner Pernell.

EXAMINATION BY COMMITTEE

BY COMMISSIONER LAURIE:

Q Mr. Donaldson, I believe you testified and I need clarification on just a couple of things. With regard to KOP-1, is it your conclusion that the impact at this point remains unmitigated, an unmitigated significant impact?

A No. No, that's not -- Maybe I wasn't clear about that, I apologize. I determined there would be a significant adverse impact from KOP-1; however, with mitigation of the landscaping, the implementation of the landscape plan, that that would be reduced to less than significant.

1 Q And when you refer to the landscape
2 plan, that's the revised landscape plan as
3 submitted?
4 A That is correct.
5 Q Thank you. As to my second point, the
6 general plan policy, I believe it's also your
7 statement that with mitigation, you would find
8 that the project is consistent with, again, the
9 general plan?
10 A With the seven LORS that I identified in
11 the County general plan, that's correct.
12 Q And when you refer to mitigation, are
13 you referring to mitigation already identified?
14 A As part of the -- Already identified --
15 Q Let me go a little bit further. In the
16 staff report it talks about central to achieving
17 consistency in the general plan, it would require
18 further development and improvement of the
19 project's landscape plan to ensure that the
20 project landscape is more effective in helping to
21 blend the project with its surroundings.
22 So is it your testimony that currently,
23 with the docketed evidence, in your view the
24 mitigation is enough to find consistency with the
25 plan, or are you testifying that additional

1 mitigation is required before you'd be able to
2 recommend the finding of consistency?
3 A The landscape plan that was submitted
4 and docketed on I believe it was March 4th
5 actually, that landscape plan serves as the
6 mitigation that I referred to. Therefore, with
7 that landscape plan implemented, my finding is
8 that it's a less than significant impact.
9 Q In regards to findings of significant
10 impact and findings of mitigation of such, is it
11 your view that such findings in either case are
12 subjective and non-quantifiable? That is, it's in
13 the eye-of-the-beholder kind of deal?
14 A My strong feeling, having done visual
15 analysis for quite a period of time and heard that
16 many times is that based on the methodologies and
17 a lot of research that supports this, in terms of
18 identifying user preferences, viewer preferences,
19 etc., that that information and research leads us
20 to understand that it's not entirely subjective,
21 that we can base conclusions for visual preference
22 on a broad understanding of how people view the
23 landscape and that's been tested and reinforced in
24 a number of situations.
25 Q Is it your opinion that the project,

as -- Strike that. Do you have an opinion as to whether this project, as mitigated, will have a significant impact on the future development of the region?

A My personal opinion, personal expert professional opinion regarding that is that for future development, the project as mitigated would probably have some adverse impacts on future development within the area -- recreational use of trails, housing and so forth.

Q And do you have an opinion as to whether that impact would be significant?

A I would have a hard time concluding that it would be significant at this point without understanding more clearly what the nature and patterns of development might be within that particular area.

Q During the course of your analysis, did you examine regional projects -- Well, you testified that, you said cumulative impact, as part of that analysis have you studied projects recently approved by the City and the County or anticipated to be reviewed by the City and the County in the near future?

A I've reviewed the South Schulte specific

1 plan, if that's one that you might be referring
2 to. I've looked at housing projects that, just
3 from driving around, I would anticipate would be
4 occurring to the northeast of the project area.
5 So I've looked at it from that perspective.
6 In fact, part of the reason for some of
7 the dense line of trees along the north and
8 northeastern portion of the property boundary,
9 that double row of trees along there in the
10 landscape plan was, in fact, anticipating that
11 there would be some future housing that might have
12 views from that direction.
13 Q Now, have you reviewed the landscape
14 plan submitted by the applicant?
15 A Yes.
16 Q What is your understanding of the period
17 of time it will take for the trees to reach
18 maturity?
19 A I should point out I'm also a licensed
20 landscape architect and have some understanding of
21 growth rates and soils and so forth within that
22 area. My understanding, my professional opinion
23 really is that it's going to take probably on the
24 order of 25 or 30 years for it to approach
25 maturity.

1 Q And what size will the trees be when
2 planted, do you know?
3 A I don't believe that that was specified
4 as part of the landscape plan.
5 Q From your experience, can you estimate
6 as to the size of the subject trees in the normal
7 course of the business when those trees are
8 replanted?
9 A I could suggest that they should be
10 probably planted out at a fairly large size, maybe
11 a 24-inch-box size, which might be on the order of
12 20 feet, between 15 and 20, possibly even 25 feet
13 in height at that size of planting.
14 COMMISSIONER LAURIE: Thank you.
15 Thank you, Commissioner Pernell.
16 PRESIDING COMMISSIONER PERNELL: Thank
17 you, Commissioner Laurie.
18 EXAMINATION BY COMMITTEE
19 BY PRESIDING COMMISSIONER PERNELL:
20 Q Mr. Baker (sic), it has been stated that
21 the nearest residence is .5 miles from the
22 proposed facility. My question deals with the
23 KOP, the key observation points. And was the
24 residence that is .5 miles from the facility one
25 of your key observation points? And I think I

1 called you by a different name.
2 (Laughter.)
3 PRESIDING COMMISSIONER PERNELL: That's
4 why we have advisors, you know. So I apologize
5 for that.
6 THE WITNESS: That's fine.
7 BY PRESIDING COMMISSIONER PERNELL:
8 Q But my question stands.
9 A My understanding of the question is, was
10 the residence that was about a half a mile from
11 the power plant identified as a key observation
12 point, and the answer to that question is no.
13 Q So that wasn't one of your key
14 observation points?
15 A If you're talking about the residence
16 identified as R-2 on Figure 8.11-1, that is not a
17 key observation point. I can explain why. My
18 understanding is that that residence is not, does
19 not have clear views of the project because it
20 sits down at a lower elevation and there are
21 orchard trees that are between that and the
22 project site. R-2 is the one that's located about
23 a half-mile southwest of the proposed project.
24 In addition to that, I did look at key
25 observation points that are immediately behind

1 that, I guess, with R-2 located directly between
2 the power plant and those other three residences
3 that are identified as KOPs 3, 4 and 5, and I felt
4 that those also represented the perspective or the
5 views from that direction.
6 Q Okay. And am I correct in your
7 testimony that the state refers back to the County
8 in terms of scenic corridors?
9 A That's my understanding from the
10 Caltrans web site. The information is posted
11 there, that the state does not have specific
12 standards or guidelines, and, in fact, refers back
13 to the County or the City, the local community,
14 the local authority to identify exactly how they
15 would I guess manage the visual resources within
16 that area, near a scenic corridor.
17 Q And you mentioned Caltrans. To your
18 knowledge, is that the agency that has
19 jurisdiction?
20 A Yes. As far as the state designation of
21 scenic highway corridors, yes.
22 PRESIDING COMMISSIONER PERNELL: Thank
23 you.
24 HEARING OFFICER TOMPKIN: Would the
25 applicant like to question this witness?

1 APPLICANT COUNSEL GRATTAN: Applicant
2 would like at this time to pass and to allow the
3 witness to be cross examined by the intervenors.
4 HEARING OFFICER TOMPKIN: All right.
5 We'll proceed with the intervenors.
6 Mr. Seligman?
7 INTERVENOR SELIGMAN: Is it correct that
8 your last name is Donaldson?
9 (Laughter.)
10 THE WITNESS: Yes.
11 CROSS EXAMINATION
12 BY INTERVENOR SELIGMAN:
13 INTERVENOR SARVEY: Mr. Donaldson, you
14 made reference in your response to a question
15 asked by the Commission that you concluded that
16 there were some violations of San Joaquin County
17 general policies which were, in your opinion,
18 mitigated by the proposal submitted by GWF; is
19 that correct?
20 A Actually, that's not correct.
21 Q Would you then state what your position
22 is on that?
23 A Yes. I would say that it's inconsistent
24 with four of those policies, four of the seven
25 policies.

1 Q Did you have any discussions with any
2 representatives of the San Joaquin County
3 Community Development Department on those
4 policies?
5 A No, I did not.
6 Q Is there any reason why you did not?
7 A I did not because I've reviewed lots of
8 general plans and looked at the policies and feel
9 that I'm a professional and understand those.
10 Q Would it have been relevant to know what
11 the general intent, spirit and intent of
12 interpreting and implementing general plan
13 policies of San Joaquin County would be?
14 A I believe that I understood that from
15 what was stated in the general plan.
16 Q But not based on any discussions with
17 any officials; is that correct?
18 A That's correct.
19 Q Did you review any local ordinances,
20 rules, regulations, or standards of the City of
21 Tracy?
22 A No, I did not.
23 Q And was that based on the testimony that
24 you concluded that you did not believe that CEQA
25 made that a requirement?

1 A No, that was based on the fact that the
2 project is located in the County and not within
3 the city limits, the City of Tracy.
4 Q Are you aware of the fact that the
5 project is within the sphere of influence of the
6 City of Tracy?
7 A Yes, I am aware of that.
8 Q And what is your understanding, from a
9 CEQA standpoint, if the land is within the sphere
10 of influence of a local agency?
11 A I don't -- I'm not sure -- I don't
12 believe that CEQA is clear about that. If it is,
13 I'm not aware.
14 Q Do you have any knowledge as to whether
15 or not San Joaquin County would make an automatic
16 referral for comment to a local governmental
17 agency, if it was within the sphere of influence?
18 MS. WILLIS: I'm going to object; that's
19 outside this witness's expertise and outside of
20 the scope of his testimony.
21 INTERVENOR SELIGMAN: In response to
22 that, I believe that the witness indicated that in
23 his interpretation of the CEQA guidelines, he was
24 basing it on, I use his quote, "the existing
25 conditions that applied at this particular time."

1 And I would like to ask a question on that. That
2 was his response to a question that was asked by
3 counsel.
4 HEARING OFFICER TOMPKIN: Well, I'll
5 sustain the objection and ask you to rephrase your
6 question as to that.
7 INTERVENOR SELIGMAN: All right.
8 BY INTERVENOR SELIGMAN:
9 Q Mr. Donaldson, do you recall, in
10 response to a question that your attorney asked
11 you, that you made reference to CEQA guidelines?
12 A Yes.
13 Q Would you restate that guideline before
14 I ask the question.
15 A I could summarize or I could just simply
16 read it.
17 Q Fine, either.
18 A It's CEQA Guidelines, Section 15125,
19 Environmental Setting, and the first paragraph (a)
20 under that, it states, "An EIR must include the
21 description of the physical environmental
22 conditions in the vicinity of the project as they
23 exist at the time that the notice of preparation
24 is published, or, if no notice of preparation is
25 published at the time environmental analysis is

1 commenced, from both a local and regional
2 perspective."
3 That's what I was referring to and
4 attempting to summarize earlier.
5 Q Do you know whether or not, at the time
6 that you made your review and analysis, the
7 specific plan, the South Schulte specific plan was
8 in existence, a condition that existed at that
9 particular time?
10 A I was aware that the South Schulte plan
11 was -- I understood that it had been approved
12 several years prior.
13 Q And who would have approved that?
14 A I believe the City of Tracy would have
15 approved that.
16 Q So was that an existing condition in
17 effect at that time?
18 A It would be an existing approved plan.
19 Q Did you have knowledge at that
20 particular time that this particular site was
21 within the sphere of influence of the City of
22 Tracy?
23 A When I began my analysis and began to
24 look into the general plan, I identified that it
25 was within the sphere of influence. I understood

1 that, yes.
2 Q Do you believe that to be within the
3 sphere of influence is an existing condition?
4 A Perhaps we're off in our interpretation
5 of existing conditions. I was looking at existing
6 conditions as the condition of the landscape, the
7 location of houses, streets, roads, parks, and
8 those other elements by which one might position
9 themselves in the landscape so they could view the
10 potential project.
11 Q But I gather from your testimony that
12 you did take into account this perspective of
13 residential development in the South Schulte
14 development plan?
15 A I generally try to get a sense of what
16 the development patterns are within an area, but
17 again, I have to rely on the guidelines that I
18 understand from CEQA which identify existing
19 conditions as the baseline conditions.
20 Q Did you consider the potential visual
21 impact of Tracy Hills?
22 A I considered it.
23 Q And is that within the city limits of
24 the City of Tracy?
25 A I understand it is.

1 Q Do you know how far away it is from the
2 site?
3 A I believe it's approximately, the
4 boundaries are somewhere around a mile to a mile
5 and a half. I'm not positive of that.
6 Q Did you also take into account possible
7 visual impacts of existing single-family
8 ranchettes that are in the vicinity of this
9 project site?
10 A The existing ones, yes.
11 Q And approximately how far away are they?
12 A Looking at the map, they're
13 approximately three-quarter of a mile to a mile
14 away from the project site. There are a couple
15 that are -- well, it was the one I'd mentioned
16 earlier that appears to be about a half-mile from
17 the project site to the southwest.
18 Q Do you know if they're located within
19 the County or the City?
20 A I believe -- I would have to look at
21 another map to be clear about that. I've reviewed
22 the maps in the past, but I can't tell you
23 exactly. I believe they're in the County.
24 Q Did you also consider the residential
25 developments within the development known as Red

1 Bridge residential development?
2 A I looked at the fact that there would be
3 housing there to the northeast, and the Red Bridge
4 development, if you're talking about the existing
5 housing up by Lammers Road and Schulte Road, I did
6 look at views from that area and from those
7 houses.
8 Q And how far away is that from the
9 project site?
10 A They're slightly more than a mile away.
11 Q Is it possible that it's less than a
12 mile away?
13 A Not according to the maps that I have in
14 front of me.
15 Q Did you review the staff assessment on
16 this particular issue, which noted that it was
17 approximately .8 mile to the northeast to this
18 site?
19 A I guess I'm looking at the existing
20 housing that's located slightly over a mile away.
21 If that's -- If there's some reference to a .8 of
22 a mile, I'm not sure what residences specifically
23 they're talking about.
24 Q Do you know if this is a custom two-
25 story residential development within the City of

1 Tracy?
2 A This is an existing development?
3 Q Do you know if it is?
4 A I might be getting confused here. Are
5 you talking about -- Could I just get
6 clarification? Are you talking about the existing
7 housing that's part of the Red Bridge development
8 that's located northeast of the intersection of
9 Lammers Road and Schulte Road?
10 A I'm asking a question whether or not you
11 know there is an existing single-family
12 residential development known as Red Bridge
13 consisting of custom two-story housing that is
14 located within the City of Tracy?
15 A Yes. My understanding is that the Red
16 Bridge housing located at the position I just
17 stated a while ago is within the City of Tracy,
18 yes.
19 Q And do you know whether or not that is
20 less than one mile from the project site?
21 A According to the map and the scale on
22 the map that I have, it is located slightly over a
23 mile away from the project.
24 Q Did you limit your investigation of that
25 issue just to the maps?

1 A My investigation, including driving out
2 there, walking around the area, standing in front
3 of the wall that separates those two-story
4 residences from the intersection and the project
5 area. I took photographs and I reviewed maps,
6 USGS maps, so I believe I trust the scale of those
7 maps.
8 Q So would it be fair to say that you did
9 consider projects that either are ongoing by the
10 City of Tracy or are in the pipelines of the City
11 of Tracy but not yet being implemented?
12 A I certainly considered those projects,
13 but as far as my analysis, I limited my analysis
14 to the existing conditions and the existing
15 residences and roadways around the area.
16 Q In considering those -- Using your
17 words, in considering those projects, do you think
18 it would have been appropriate for you to know
19 what if any general plan policies, rules or
20 regulations existed within the City that would
21 apply to these projects?
22 A I tried to make myself aware of those
23 types of things, and, in fact, reviewed the
24 general plan and the specific plans for those
25 projects proposed within the area. But again,

1 limited my analysis to those existing conditions.
2 Q It's my understanding, though, from an
3 answer to a prior question that I asked, that you
4 did not make any direct contact with City of Tracy
5 officials on those particular issues; is that
6 correct?
7 A That's correct.
8 INTERVENOR SELIGMAN: Nothing further.
9 PRESIDING COMMISSIONER PERNELL: Thank
10 you. Next intervenor, please.
11 INTERVENOR WEED: Michael Weed,
12 representing Larry Chang.
13 CROSS EXAMINATION
14 BY INTERVENOR WEED:
15 Q As part of your determination of
16 compliance with local ordinances and rules, you
17 indicated that you did not consider the South
18 Schulte plan because of its speculative
19 development, and your analysis was based on the
20 CEQA provisions you just read to us; is that
21 correct?
22 A Not exactly correct. I did consider the
23 plan, but did not analyze it for visual purposes
24 for my analysis.
25 Q Right, and that analysis is what

1 separates a personal opinion from the scientific
2 process that you described, removing it from the
3 eye-of-the-beholder realm into a more objective
4 and scientific analysis; is that correct?
5 A I probably wouldn't state it that way.
6 Q Okay, but you did not conduct your
7 normal analysis of proposed projects. You limited
8 it to existing conditions; is that correct?
9 MS. WILLIS: I'm going to object; the
10 normal analysis of proposed projects I think --
11 INTERVENOR WEED: Well, I'm sorry --
12 MS. WILLIS: Could you please restate
13 that.
14 INTERVENOR WEED: Sure.
15 BY INTERVENOR WEED:
16 Q The analysis that you based your
17 conclusions on, that analysis was not conducted
18 with respect to proposed but not existing
19 projects; is that correct?
20 A That's correct.
21 Q Okay, and the basis for not conducting
22 that analysis was your determination that the CEQA
23 provisions you just read to us directed you to
24 limit your analysis to existing conditions.
25 A That was my interpretation, but also

1 that was the advice that I received from legal
2 counsel at the Energy Commission on both this case
3 and a prior case that I worked on, the Metcalf
4 Energy Center.
5 Q Okay. And at least partially based on
6 those CEQA provisions that you quoted, I assume
7 that's why you read them to us?
8 A Yes.
9 Q Yes. And it seemed to me when you read
10 those that those provisions related to the
11 required elements of an environmental impact
12 report and didn't really address the task at hand,
13 which was compliance with local ordinances and
14 regulations. Would you disagree with that?
15 A No, I wouldn't disagree with that.
16 Q Okay. You stated that the South Schulte
17 specific plan was not considered in your analysis
18 because there was no existing residences and it
19 would be too speculative. But doesn't the plan
20 identify large areas where a representative
21 location could have been chosen for a thorough
22 analysis?
23 A It does identify areas of different
24 residential densities, and it does identify
25 potential pathways and parks and other elements,

1 yes.
2 Q So regardless of the fact that there was
3 no existing structures, you could have chosen a
4 representative location from which to conduct your
5 analysis.
6 A It's possible.
7 Q Right, you sure could. And I believe
8 you stated that you did not consult with the
9 County, although you -- Let me back up, excuse me.
10 It was your statement that the administration
11 requirements imposed on the scenic corridor would
12 be handled by the County and not by the State of
13 California, despite the scenic highway
14 designation; is that correct?
15 A By the local jurisdiction, whether it be
16 county or city.
17 Q And did you state that the -- you did
18 not consult with the County regarding those
19 requirements, because you weren't sure exactly how
20 far from the highway they would actually be
21 imposed?
22 A No, I didn't consult with the County on
23 those, because they were identified within the
24 general plan for the County.
25 Q Okay. So all the regulations that you

1 felt were applicable, under the scenic corridor
2 designation, you did consider those in your
3 analysis.
4 A Yes, all those that are identified
5 within the San Joaquin County general plan.
6 Q And is it your opinion that all the
7 analysis that the County would undertake to ensure
8 compliance with scenic corridor regulations would
9 be set forth in that general plan and there
10 wouldn't be another level of analysis at a staff
11 review level?
12 A It's my understanding that the general
13 plan represents those laws, ordinances,
14 regulations, and standards that would apply.
15 Q But you did not confirm with county
16 staff that there were additional analysis that
17 might be undertaken. You made your conclusion
18 based on your own review of the general plan.
19 A Yes, I based my conclusion on my review
20 of the general plan, that's correct, and
21 consulting with other staff at the Energy
22 Commission as well.
23 INTERVENOR WEED: Thank you.
24 INTERVENOR BAKKER: John Bakker,
25 representing the City of Tracy. The City would

1 like to have Bill Reeds ask a few questions of the
2 witness, if that would be okay.
3 APPLICANT COUNSEL GRATTAN: That's
4 acceptable.
5 HEARING OFFICER TOMPKIN: Any objection
6 from staff?
7 MS. WILLIS: No.
8 HEARING OFFICER TOMPKIN: There is no
9 objection.
10 INTERVENOR REEDS: Thank you. Bill
11 Reeds, Director of Development and Engineering
12 Services for the City of Tracy.
13 CROSS EXAMINATION
14 BY INTERVENOR REEDS:
15 Q Mr. Donaldson, I think it's been
16 testified that there would be two stacks 100 feet
17 high. I think that your analysis also includes
18 that there would be two reactors that would be 60
19 feet high. From what distance would you expect to
20 be able to see this project if it's built? Is
21 several miles a fair answer?
22 A Yes, several miles would be a fair
23 answer if there are no obstructions in the way,
24 yes.
25 Q Would it be visible from two existing

1 residences within the City of Tracy?
2 A It would be visible, my analysis showed
3 that it would be visible from several residences
4 within the City of Tracy.
5 Q But your analysis did not include an
6 assessment of impacts on those residences, did it?
7 A My analysis did indicate, yes. I did
8 evaluate views from residences.
9 Q Within the City of Tracy.
10 A Those would be the Red Bridge
11 development residences to the northeast of the
12 project site. Yes, my analysis did consider
13 those.
14 Q Did your analysis and your staff
15 assessment include any conclusion as to what those
16 impacts might be?
17 A Yes, it did.
18 Q Okay. Is there a reason when you did
19 your analysis that you chose a mile, not a half a
20 mile, not two miles, five miles?
21 A For what purposes?
22 Q Well, as I read it in the staff
23 assessment, within a mile radius you concluded
24 that there were 27 residences, and those were the
25 ones that you analyzed in your assessment?

A Actually, my analysis considered views from areas beyond that limit. What I did, I guess just to clarify the nature of the analysis, I looked at it in terms of distance zones -- foreground, middle ground and background distance zones, and generally am most concerned about elements or locations that are within the foreground distance, but also considered those that are within the middle ground and background distance zones as well.

The foreground distance zone is generally considered, and this is based on the literature, based on other systems that have been developed, generally looked at to be up to a half-mile from the project site. And the middle ground distance then is generally looked at to be about a half-mile to as much as four miles away.

But based on your background as a landscape architect, is it your opinion that there's any way to realistically screen a project of this size? You used the term "blend" I think earlier, which --

A Yes. I use the terms "blend" or "partially screen." The intent for mitigation often in these projects is not necessarily to

1 fully screen a project, fully block views of it,
2 but to partially screen and to help blend a
3 project such as this into, or better blend it with
4 its surroundings.
5 Q When you considered the environmental
6 justice of the proposed project, you went a radius
7 of six miles; did you not?
8 MS. WILLIS: I'll need to object. The
9 environmental justice issue was handled under our
10 Socioeconomic testimony.
11 INTERVENOR REEDS: I thought there was a
12 section on this as well.
13 HEARING OFFICER TOMPKIN: Well, we're
14 dealing with Visual Resources at this time.
15 THE WITNESS: To the extent I can
16 answer, there is a section in my analysis that
17 considered environmental justice, and I used the
18 information that was provided to me by the Energy
19 Commission about the locations of minority and
20 low-income populations. And that information does
21 indicate that there was, to look at a six-mile
22 radius.
23 CROSS EXAMINATION
24 BY INTERVENOR SARVEY:
25 Q Now, earlier I handed out a Visual

1 Resource --

2 PRESIDING COMMISSIONER PERNELL:

3 Mr. Sarvey, name for the record.

4 INTERVENOR SARVEY: Oh, Robert Sarvey.

5 Sorry about that.

6 PRESIDING COMMISSIONER PERNELL: Quite

7 all right.

8 BY INTERVENOR SARVEY:

9 Q Earlier I handed out a Visual Resource

10 KOP-1, the view from West Lammers Road and

11 residences. The hills behind this plant in KOP-1

12 in the handout, are they obscured from this

13 viewpoint?

14 A There are some hills, low hills visible

15 on the far left side. It's not very clear from

16 the copy that you handed out, but in the

17 photographs, the color photographs it's a little

18 more clear. You can see some low hills in the

19 distance.

20 Q Yeah, I live very close to this site,

21 and I really enjoy the view, and I was wondering

22 if you had any proposed mitigation for the fact

23 that I will no longer be able to view these hills

24 because the plant will be in the --

25 MS. WILLIS: I'm going to have to object

1 as that is evidence that has not been entered as
2 part of this record.
3 INTERVENOR SARVEY: Pardon me?
4 MS. WILLIS: You're assuming evidence
5 that we have not heard, that your views would be
6 blocked.
7 INTERVENOR SARVEY: Okay. Assuming that
8 they're --
9 HEARING OFFICER TOMPKIN: I'll sustain
10 that. Rephrase the question.
11 INTERVENOR SARVEY: Okay.
12 BY INTERVENOR SARVEY:
13 Q The view from West Lammers Road and
14 residences assume that these people enjoy the view
15 of these hills behind there. Is there any
16 mitigation proposed to alleviate this condition
17 that these people will no longer be able to see
18 these hills behind the plant?
19 MS. WILLIS: I would still have to
20 continue my objection to the phrasing of the
21 question. We don't have any evidence that these
22 views will be blocked.
23 BY INTERVENOR SARVEY:
24 Q Does the plant obscure any hills behind,
25 from the view from this, from KOP-1?

1 A From KOP-1, the plant, there would be
2 extremely minor blockage of a small portion of the
3 northern extent of the low hills that extend up
4 that way from KOP-1.
5 Q Thank you. In what time frame do you
6 expect this landscaping that you have proposed as
7 mitigation to provide the proposed mitigation at
8 this site?
9 A I believe that I answered that earlier,
10 but I believe I stated somewhere on the order of
11 25 to 30 years before the landscaping or the trees
12 reach maturity, or what I would consider sort of a
13 mature height.
14 Q Is it unusual for a proposed mitigation
15 to take 20 to 25 years to achieve its goals?
16 A Is it unusual? I'm sorry, could you
17 just repeat the question? I just got sidetracked.
18 COMMISSIONER LAURIE: Mr. Sarvey, if
19 I -- may I try an additional question, please?
20 INTERVENOR SARVEY: Please.
21 COMMISSIONER LAURIE: At what point, Mr.
22 Donaldson, in your opinion, is the project
23 mitigated to the point where there is no longer
24 significant impact? At the time of maturity of
25 the plants or at some lesser earlier point in

time?

THE WITNESS: I would say at some lesser earlier time prior to the 30 years that I stated for the maturity of the plants, but probably on the order of it could be ten, 15 years or so, possibly more before the planting really takes effect. It certainly has a partial effect prior to that time.

BY INTERVENOR SARVEY:

Q We spoke earlier about the scenic value of the highway. Is your experience on a highway's scenic value limited to your recent experience on the web site?

A I'm sorry, could you repeat the question?

Q We were talking earlier about the visuals from the highway, 580, and I just wanted to ask was your experience on a highway's scenic value limited to your recent experiences on the web site in exploring this issue?

A The information I presented earlier was, yes.

Q Okay. Were you in the teleconference call with myself and Tasha Nelson at GWF?

A No, I was not.

1 Q Okay. Earlier you stated that the
2 lighting from TPP would not have an adverse impact
3 on kit fox and wildlife. Are you a biologist?
4 Are you qualified to make that statement?
5 A I don't believe I made that statement,
6 actually, and no, I'm not a biologist.
7 Q Okay. I believe the statement was that
8 you anticipated no impacts to the kit fox from
9 TPP's lighting plan?
10 A No, actually I didn't state that, that's
11 incorrect. I stated that there would be no light
12 and glare impacts, that the light and glare
13 impacts from a visual standpoint would be less
14 than significant. But I didn't state anything
15 having to do with the impacts on kit foxes. I am
16 not qualified to make that kind of a statement.
17 Q I'm sorry, I must have heard the wrong
18 thing there.
19 Have you read Dr. Shawn Smallwood's
20 testimony, that the nighttime lighting will affect
21 54 acres of grassland of the kit fox?
22 A No.
23 APPLICANT COUNSEL GRATTAN: If I could
24 make a point of clarification here, and I
25 understand this is not applicant's witness, my

1 understanding is that is not testimony and there
2 is no obligation -- it is not surprising that it
3 hasn't been read.
4 BY INTERVENOR SARVEY:
5 Q What amount of time did you take, did
6 your initial analysis take?
7 A I'm sorry?
8 Q What time frame did your initial
9 analysis take? Was it one day, two days, a week?
10 MS. WILLIS: Maybe you can clarify. Are
11 you referring to the time he spent at the project
12 site or the time it took him to complete the staff
13 assessment analysis?
14 BY INTERVENOR SARVEY:
15 Q The time that it took you to present the
16 preliminary staff assessment, issued on December
17 2001.
18 A If I remember right, it was about a
19 couple of months, two, two and a half months, it
20 seems like.
21 Q Can you give me the figures, just
22 approximate, of how many hours you spent on this
23 visual analysis?
24 A Boy, I'd have to look at my invoices to
25 be sure.

1 Q Sorry I asked that.
2 (Laughter.)
3 THE WITNESS: I can't remember exactly,
4 I'd have to look at my files.
5 BY INTERVENOR SARVEY:
6 Q Do you consider that an ordinary amount
7 of time for such analysis? Is that the ordinary
8 amount of time you take on each project?
9 A Yes, I felt -- Well, if I can clarify
10 that --
11 MS. WILLIS: Yeah, maybe I -- I don't
12 necessarily want to object to the question, but I
13 just want to clarify that Mr. Donaldson previously
14 worked on a project that went on for two and a
15 half years, so his experience of what "ordinary"
16 might be in this project is going to be somewhat
17 different than your --
18 (Laughter.)
19 INTERVENOR SARVEY: Understood.
20 MS. WILLIS: -- than the normal use of
21 the language.
22 BY INTERVENOR SARVEY:
23 Q Have you worked on other projects of
24 this nature that took more time than this one?
25 A I've worked on a couple of other

1 projects for the Energy Commission that have taken
2 more time. They were not a four-month project,
3 however.
4 Q Was your initial assessment before
5 December 28th affected by the governor's executive
6 order for expedited review?
7 A I'm sorry, could you repeat the
8 question?
9 Q Was your initial assessment in the staff
10 assessment of December 28th affected by the
11 governor's executive order for expedited review?
12 A Not me personally, I wasn't aware of
13 that, no.
14 Q Were you aware that Tracy Hills will
15 build the homes directly across the canal?
16 A I remember looking at the plans for
17 Tracy Hills, and I remember that it was to the
18 south of the project. I'm not clear on exactly
19 how far south of the project.
20 Q So you're not exactly sure what the
21 location is of that particular development,
22 correct?
23 A Well, I'm generally clear about it, I'm
24 just not -- I don't have precise distances, no.
25 Q Knowing the issues that have surrounded

1 this that have come up today, would you like to
2 have more time to analyze this project?
3 A I don't feel that I need more time to
4 analyze the project.
5 Q Did your analysis depend on the land use
6 analysis to inform you of any current and
7 reasonably foreseeable development projects?
8 A Would you repeat that?
9 Q Did your analysis depend on the land use
10 analysis to inform you of any current and
11 reasonably foreseeable projects?
12 A My analysis -- I considered future
13 projects, but again I'm limited by my
14 understanding of the baseline for the existing
15 setting, in terms of actually drawing conclusions
16 and doing a detailed analysis.
17 Q Were the findings in the January 31st
18 supplemental staff analysis included in your
19 visual analysis of reasonably foreseeable
20 projects?
21 MS. WILLIS: I don't believe that your
22 question is clear enough for this witness to
23 understand what you're asking.
24 INTERVENOR SARVEY: Okay.
25 BY INTERVENOR SARVEY:

1 Q In the January 31st supplement, some
2 would refer to it as the final staff analysis,
3 they identified a group of projects, reasonably
4 foreseeable development projects. Was your
5 analysis used with those newly found projects in
6 mind?
7 A My analysis didn't include those
8 projects.
9 Q Have you recognized any current projects
10 that are under development?
11 A I'm sorry, could you repeat that?
12 Q Have you recognized any current projects
13 that are under development besides the reasonably
14 foreseeable projects that are listed in that staff
15 assessment dated January 31st?
16 A Am I aware of any existing projects?
17 Q Yes.
18 COMMISSIONER LAURIE: Excuse me,
19 Mr. Sarvey, your question is ambiguous. If you
20 identify by specific project, you can ask him
21 whether or not those individual projects have been
22 considered, although I think generally those
23 questions have been asked numerous times this
24 afternoon.
25 But I don't understand your question

1 sufficient to --

2 INTERVENOR SARVEY: I'm sorry,

3 Mr. Laurie, I'll withdraw that question. Thank

4 you.

5 BY INTERVENOR SARVEY:

6 Q Did you prepare the data requests for

7 the -- the initial data requests from the

8 applicant October 23rd, 2001?

9 A Yes, I prepared the data requests.

10 Q In the data request it states, on page

11 8.11-13, "The AFC states that KOP-7 is a canal

12 access road that is not used by the general

13 public; however, it appears that the road along

14 the canal is open to the general public. Access

15 for fishing and possibly other recreational uses."

16 Did you provide -- Did you suggest the

17 applicant provide any sort of screening or

18 mitigation for that fact, since you asked that

19 question?

20 A No, I didn't suggest that the applicant

21 provide screening or mitigation. My data request

22 was just along the lines of identifying that there

23 were -- that the road was open to public use, the

24 levy road.

25 Q So you feel that there is nothing

1 required in that area, then.
2 A Because of the what I would consider
3 extremely light use of that for recreational uses,
4 the very low numbers of people that appear to be
5 using that, my conclusion was that it sort of fell
6 below the thresholds of considering it needing
7 mitigation.
8 Q And what was your basis to determine
9 that that particular canal had limited use and was
10 not currently used by the public? Were you there
11 on the weekends? Were you there on holidays and
12 recreational times?
13 A I was there I believe it was during mid-
14 week. It was not on the weekend when I visited
15 that area. And the nature of my data request was
16 to ask for information from the applicant to
17 identify anything they could from the state or
18 from the operators of the Delta Mendota canal to
19 try to see if there was -- what the use levels
20 were. And they did provide some information along
21 those lines.
22 Q So you relied on the applicant's
23 information to assess this impact.
24 A Yes, that was the purpose of the data
25 request was to have the applicant collect that

information.

Q Further, you asked a question in your data request that "The California aqueduct access road is a public recreation trail. Recreationists using this access road would have foreground and near middle ground views of the project. Also, it appears that there may be other designated bicycle routes or recreation trails in the project."

Can you identify any significant impacts to those views for those recreationists?

A Again, I believe that there would certainly be some adverse impacts; however, those fall below the threshold for qualifying as significant, based on my analysis.

INTERVENOR SARVEY: Thank you.

PRESIDING COMMISSIONER PERNELL: Thank you.

EXAMINATION BY COMMITTEE

BY COMMISSIONER LAURIE:

Q Mr. Donaldson, one more time on the question of consistency with the general plan.

A Yes.

Q In cross examination with the intervenors, you stated the project is inconsistent with certain policies of the general

1 plan. Earlier you testified that it would be
2 consistent if mitigated pursuant to the proposed
3 mitigation measures.
4 Can you clarify for the record what your
5 opinion is? That is to say, is the project -- In
6 your opinion, is the project, as mitigated,
7 consistent with San Joaquin County general plan
8 policies?
9 A Yes.
10 COMMISSIONER LAURIE: Okay.
11 HEARING OFFICER TOMPKIN: Any redirect?
12 MS. WILLIS: Just one second, please.
13 HEARING OFFICER TOMPKIN: Oh, just a
14 moment. Mr. Grattan wishes to cross.
15 APPLICANT COUNSEL GRATTAN: Briefly.
16 HEARING OFFICER TOMPKIN: Go ahead.
17 APPLICANT COUNSEL GRATTAN: Just a brief
18 cross.
19 CROSS EXAMINATION
20 BY MR. GRATTAN:
21 Q You've indicated that you had no direct
22 contact with the City of Tracy or with the County
23 of San Joaquin. Is it your understanding that the
24 various iterations of the staff assessment were
25 provided to the City of Tracy and to the County of

1 San Joaquin? Is that standard Energy Commission
2 practice?
3 A To my knowledge it is, but I don't have
4 direct knowledge of that.
5 APPLICANT COUNSEL GRATTAN: Can I get
6 the project manager to answer that question,
7 please?
8 HEARING OFFICER TOMPKIN: Is there an
9 objection to having the project manager sworn, if
10 you feel that that's essential?
11 APPLICANT COUNSEL GRATTAN: Yes, I do.
12 MS. WILLIS: I mean, we can also testify
13 under Land Use or another topic, but -- We can
14 also provide that information under Land Use.
15 This witness is a consultant to the Energy
16 Commission and doesn't really have the knowledge
17 of --
18 APPLICANT COUNSEL GRATTAN: I just want
19 a yes or no, whether this was provided to this --
20 whether the staff assessment, including Visual,
21 was provided to the County and the City.
22 THE WITNESS: I actually don't know. I
23 don't have direct knowledge of that.
24 APPLICANT COUNSEL GRATTAN: That's why I
25 wanted the project manager.

1 HEARING OFFICER TOMPKIN: Well, maybe if
2 she's represented that it's available under Land
3 Use, if you could simply ask that question then.
4 APPLICANT COUNSEL GRATTAN: Then I'd
5 like to --
6 MS. WILLIS: We don't have an objection
7 to swearing her in --
8 HEARING OFFICER TOMPKIN: Why don't we
9 go ahead and ask her, then.
10 INTERVENOR SELIGMAN: Madam Hearing
11 Officer, I have an objection, for the very reason
12 that -- My name is Howard Seligman, representing
13 Charles Tuso. My objection is for the very reason
14 that was alluded to, that this goes to the issue
15 of Land Use. It opens up all other sorts of
16 questions which you have instructed us earlier to
17 focus on one subject matter only. And by having
18 an answer to that question now, it's going to
19 raise a variety of land use issues, which goes
20 beyond your direction.
21 So on that basis, I would object.
22 APPLICANT COUNSEL GRATTAN: If I can
23 respond to that, Mr. Seligman, you and perhaps
24 some other intervenors asked the witness as to
25 whether they consulted with the City of Tracy and

1 the County of San Joaquin, and whether the visual
2 policies, specifically the City of Tracy, were
3 looked at.
4 My offer of proof is to show that, in
5 fact, the document did go, and to find out whether
6 there were comments received with respect to the
7 policies specifically of the City of Tracy, and of
8 the County of San Joaquin, visual policies.
9 INTERVENOR SELIGMAN: In response to
10 that, Madam Hearing Officer, the question was
11 asked as to whether or not this witness did that.
12 I did not ask the question as to whether or not he
13 knew, whether or not anybody in the staff of the
14 CEC did that. That was not my question. It was
15 limited solely to what this particular witness did
16 or did not do.
17 APPLICANT COUNSEL GRATTAN: And in
18 response to that --
19 PRESIDING COMMISSIONER PERNELL: One
20 second, one second. Let's go off the record for a
21 minute.
22 (Thereupon, a recess was held
23 off the record.)
24 HEARING OFFICER TOMPKIN: The committee
25 is prepared to rule on the request of the project

1 manager at this time regarding her transmittal to
2 the City of Tracy regarding Visual Resources, and
3 to the County as well. And the committee will
4 permit that question and we're opening this only
5 as to the Visual Resources.
6 (Thereupon, the witness was
7 excused from the stand.)
8 Whereupon,
9 CHERI DAVIS
10 Was called as a previously duly sworn witness
11 herein and was examined and testified as follows:
12 HEARING OFFICER TOMPKIN: The project
13 manager has previously been sworn. I would remind
14 her that she is still under oath, and she may
15 answer that question.
16 APPLICANT COUNSEL GRATTAN: Sorry for
17 all the hubbub.
18 CROSS EXAMINATION
19 BY APPLICANT COUNSEL GRATTAN:
20 Q A simple question: Did the Commission
21 staff circulate all iterations of the staff
22 assessment to the City of Tracy and the County of
23 San Joaquin, including the Visual sections?
24 INTERVENOR SELIGMAN: Objection; that's
25 not based on your ruling. That question is

1 broader than you ruled. You said it was to be
2 limited to the Visual Resources only. The
3 question that was asked went beyond that.
4 HEARING OFFICER TOMPKIN: You're limited
5 to Visual Resources, Mr. Grattan.
6 And I'm going to ask you to state your
7 name for the record.
8 BY MR. GRATTAN:
9 Q Was the Visual section circulated to,
10 and all iterations of it circulated to the City of
11 Tracy and the County of San Joaquin?
12 A My name is Cheri Davis, and yes, both
13 San Joaquin County and City of Tracy had members
14 on our mailing list.
15 Q And did the City of Tracy respond?
16 A Yes, the City of Tracy did respond in a
17 letter, in between the staff assessment and
18 supplement to the staff assessment.
19 Q And did the City once mention any visual
20 policies of the City that needed to be addressed?
21 To the best of your recollection.
22 A To the best of my knowledge, no.
23 Q I believe we talked over one another.
24 To the best of your recollection?
25 A As to the best of my knowledge, no.

1 APPLICANT COUNSEL GRATTAN: Thank you.
2 HEARING OFFICER TOMPKIN: I'll permit
3 recross limited to that only.
4 INTERVENOR SELIGMAN: Thank you.
5 CROSS EXAMINATION
6 BY INTERVENOR SELIGMAN:
7 Q Ms. Davis, when were those -- when was
8 the circulation of the Visual Resources material
9 transmitted to the City of Tracy and to San
10 Joaquin County?
11 A I don't have the exact date for the
12 mail-out of the original staff assessment, but I
13 believe that it was the very end of December. I
14 have here the agency letter that was sent out for
15 the supplement to the staff assessment, and that
16 was sent out and docketed on February 1st.
17 Q Of this year?
18 A Yes.
19 Q And the other one was sent out December
20 of 2001?
21 A Yes.
22 Q Did the staff send out any other written
23 communications to either the City of Tracy or the
24 County of San Joaquin prior to December of 2001?
25 PRESIDING COMMISSIONER PERNELL: We're

on --

MS. WILLIS: Yeah, we're --

BY INTERVENOR SELIGMAN:

Q As it relates to Visual?

MS. WILLIS: I need to object. I don't have a mic. I object. This goes beyond the scope of what we were discussing on Visual Resources, and I apologize that it's been opened up, but I don't believe this witness is prepared to go into a detailed date and time and to whom things were sent to at this point. If we could hold off a little bit, we could probably have her prepared to answer that.

We are prepared to offer our Visual witness, which is Mr. Donaldson.

INTERVENOR SELIGMAN: This goes to some of the very issues that are going to be before you this afternoon, potentially into this evening, as to whether or not there has been compliance with appropriate notification to the City of Tracy on any of this stuff, including the Visual, and to the County as to what the staff did or did not do.

And so the date sequence becomes very critical. This witness has indicated December of 2001, and again, February 1st of 2002, which is

1 approximately a month and a half prior to this
2 hearing. But it goes to some of the very heart of
3 the arguments that the intervenors have in
4 connection with what we believe has been a fatal
5 defect in this whole process, and that's why we
6 have opened this door now.
7 And I think we're entitled to have those
8 questions asked, since the question was asked.
9 MS. WILLIS: I'd like to respond. And I
10 understand Mr. Seligman's questions, and I think
11 that we would be fully amenable to answer the
12 questions to the best of our ability; however, the
13 project manager actually did not even have to be
14 present today. The witness present is
15 Mr. Donaldson, and he is here to testify in Visual
16 Resources and his analysis as provided in the
17 staff assessment and the supplement.
18 If we could have some time, we would be
19 happy to have Ms. Davis come prepared with dates
20 and times later on this afternoon; however, at
21 this point in time I don't think it's fair to just
22 start bombarding her with questions on the whole
23 process as a whole. This process began in
24 October.
25 There is not going to be a large amount

1 of time for anything that's going to be -- that
2 may please everybody as far as how much time
3 people had to review things. I think she was
4 clear that when the staff assessment came out was
5 in late December, and the supplement came out I
6 believe in January.
7 INTERVENOR SELIGMAN: Then Madam Hearing
8 Officer, I would --
9 HEARING OFFICER TOMPKIN: Just a moment.
10 APPLICANT COUNSEL GRATTAN: May I
11 respond?
12 I would agree with counsel for the staff
13 that it is appropriate to go into the whole issue
14 of process and notice at some other point. I
15 agreed to Mr. Seligman's -- well, more
16 importantly, the committee agreed to Mr. Seligman
17 opening this up for Visual only. I believe we've
18 handled Visual, and I would suggest we go into
19 notice and process later in the afternoon.
20 HEARING OFFICER TOMPKIN: Okay. What I
21 will permit, Mr. Seligman, is you can ask this
22 witness, to her knowledge, if there was any
23 communication with the City or County regarding
24 visual prior to the initial staff assessment. And
25 that will be limited to that question.

1 INTERVENOR SELIGMAN: All right.
2 BY INTERVENOR SELIGMAN:
3 Q Ms. Davis, did you hear the question of
4 the hearing officer so I don't have to repeat it?
5 A Could you repeat the question, please?
6 Q Well, actually, it wasn't my question,
7 it was the hearing officer's. Were there any
8 other written communications to either the City or
9 the County in connection with the visual issue
10 that's before you prior to December of 2001, to
11 the best of your knowledge?
12 A We mailed out the application for
13 certification as well as the supplement to the
14 application for certification, both of which
15 contain sections on Visual Resources from the
16 applicant.
17 Q And do you have any dates when that
18 occurred?
19 A I don't have those in front of me.
20 Q Okay. Do you know to whom you mailed
21 those, or to whom the staff mailed those
22 communications to, either the City or the County?
23 A I don't recall the names on the County,
24 for the County, but Bill Dean was on the list for
25 the City.

1 Q I'm sorry, I did not hear your answer on
2 the --
3 A Bill Dean was on the list for the City,
4 but I can't recall the names for the County.
5 Q When you say building was on the City,
6 what --
7 A Bill Dean.
8 Q Oh, Bill Dean, all right. Do you know
9 whether or not -- Do you have any other name other
10 than Bill Dean?
11 A I could get that for you later on today.
12 Q Okay. Was the name Bill Dean as a
13 result, used as a result of the letter that he had
14 submitted to this Commission on the project, or
15 was it from other information?
16 A Other information.
17 Q What information that you relied on in
18 using his name?
19 A At the very beginning of the project, I
20 looked to technical staff to give me names and
21 addresses for relevant agencies to which the AFC
22 and future communications should be sent.
23 Q Okay.
24 INTERVENOR SELIGMAN: I'll defer further
25 questions until we get to the Land Use issue,

1 then, on the process.

2 HEARING OFFICER TOMPKIN: All right.

3 INTERVENOR BAKKER: John Bakker,

4 representing the City of Tracy.

5 CROSS EXAMINATION

6 BY INTERVENOR BAKKER:

7 Q Just a brief question for the project

8 manager. You referred to Bill Dean's January 15th

9 letter, and I think it was in response to a

10 question from Mr. Grattan concerning whether the

11 City had raised any visual impact issues during

12 the proceeding. Did the City's letter purport to

13 contain all of the City's objections, potential

14 objections to the project, to your knowledge?

15 A I don't recall if they said that those

16 were all of their objections.

17 INTERVENOR BAKKER: Thank you.

18 HEARING OFFICER TOMPKIN: All right.

19 (Thereupon, the witness was

20 excused from the stand.)

21 APPLICANT COUNSEL GRATTAN: I'll finish

22 my cross very quickly, back with Mr. Donaldson.

23 HEARING OFFICER TOMPKIN: Please

24 proceed.

25 APPLICANT COUNSEL GRATTAN: Thank you.

1 Whereupon,

2 JOE DONALDSON

3 Was called as a previously duly sworn witness

4 herein and was examined and testified as follows:

5 CROSS EXAMINATION (RESUMED)

6 BY MR. GRATTAN:

7 Q Mr. Donaldson, you had mentioned in the

8 course of your testimony that some aspects of the

9 project from certain KOPs will remain visible or

10 actually will be visible to the -- if and when the

11 planned communities of South Schulte and perhaps

12 Tracy Hills are built out.

13 Does your analysis and methodology that

14 you use to calculate significant visual impacts,

15 is the fact that a project or a part of a project,

16 a feature of a project is visible? Does that make

17 it alone a significant impact?

18 A No.

19 Q And could you perhaps just briefly

20 explain the analysis that you've performed to base

21 your conclusions on whether there is a significant

22 visual impact or not?

23 A Yes, I could -- I guess one thing I

24 could do that might simplify this a little bit

25 would be to point you to a table which is in

1 Appendix VR-1, and this is a summary from my
2 analysis. And in this summary -- It's an 11-by-
3 17-size pull-out page, and it's VR-1 -- what this
4 does is summarize for the various KOPs that I
5 looked at of the different categories of
6 information that I considered in the analysis.
7 I looked at visual quality of the
8 existing conditions out there. I looked at the --
9 who the viewers were and what their concerns might
10 potentially be. I looked at the existing viewer
11 exposure, in terms of visibility of the project,
12 what distance zone, how far the project would be
13 away from viewers. I looked at the number of
14 viewers, in terms of different levels -- low,
15 moderate, high. I looked at how long they would
16 be looking at things for, the duration of views.
17 I evaluated the overall viewer exposure, based on
18 those elements I just described.
19 And then considered what the overall
20 visual sensitivity of the project would be, based
21 on visual quality, viewer concern and viewer
22 exposure. And then evaluated what the existing
23 project impacts would be, and compared those
24 changes in views from the various KOPs and the
25 areas around the KOPs, what those would be and

1 whether or not they would actually be considered
2 significant or not, a significant change from the
3 existing condition.
4 So I hope that summarizes the
5 methodology.
6 APPLICANT COUNSEL GRATTAN: Thank you.
7 INTERVENOR SARVEY: May I ask a
8 question? Bob Sarvey --
9 MS. WILLIS: Wait, I'm going to object.
10 Mr. Sarvey has already cross examined our witness.
11 INTERVENOR SARVEY: For a followup
12 question?
13 MS. WILLIS: I haven't even had a chance
14 to redirect.
15 HEARING OFFICER TOMPKIN: I'll permit
16 one question, Mr. Sarvey.
17 INTERVENOR SARVEY: Okay.
18 CROSS EXAMINATION (RESUMED)
19 BY INTERVENOR SARVEY:
20 Q Earlier I asked the question about the
21 January 31st staff assessment, the reasonably
22 foreseeable projects, and my question now is if
23 the Land Use issues are not clearly defined, does
24 that hamper your ability to assess the visual
25 impacts of this project?

1 A No, it doesn't hamper my ability to do
2 the visual analysis. What it -- I guess what it
3 does is sort of clarifies at what point or what
4 viewer locations or what point in time I might
5 need to consider the evaluation of visual impacts.
6 Q So you need to rely heavily that you get
7 the correct information in the Land Use section,
8 correct?
9 A I'm sorry --
10 Q You need to rely heavily that you were
11 given the correct information in the Land Use
12 section so you can do a proper analysis of key
13 points from potential reasonably foreseeable
14 developments or something like that? It would be
15 very hard --
16 PRESIDING COMMISSIONER PERNELL:
17 Mr. Sarvey, we are allowing you some latitude, and
18 I understand, you know, being an intervenor and a
19 community resident, so I'm allowing you some
20 latitude. We talked about one question.
21 INTERVENOR SARVEY: Okay. Well, I just
22 never got a yes-or-no answer to that question and
23 that's what I was looking for.
24 PRESIDING COMMISSIONER PERNELL: Okay.
25 Well, restate your question and please answer

1 directly.
2 BY INTERVENOR SARVEY:
3 Q Your analysis depends that you were
4 given the right information in terms of reasonably
5 foreseeable developments, existing developments,
6 to properly analyze viewpoints and other matters
7 in relation to visual assessment; is that correct,
8 yes or no?
9 A No.
10 INTERVENOR SARVEY: Thank you.
11 HEARING OFFICER TOMPKIN: If we're done
12 with this witness, Ms. Willis?
13 MS. WILLIS: I have a few questions on
14 redirect.
15 REDIRECT EXAMINATION
16 BY MS. WILLIS:
17 Q Mr. Donaldson, I'm going to address some
18 of these questions regarding the County general
19 plan. You testified that for this proposed
20 project, you analyzed the County general plan; is
21 that correct?
22 A Yes.
23 Q And you reviewed county LORS because you
24 determined the project was located in the County;
25 is that correct?

1 A Yes.
2 Q Do you customarily consult with county
3 or local jurisdictional staff, in reviewing their
4 local general plan?
5 A I would say customarily no, unless there
6 is a specific element that I feel is unclear or
7 needs further clarification.
8 Q So your testimony is that your analysis
9 in this project doesn't differ in a great way from
10 your analysis that you would have performed or
11 have performed in the past of other power plant
12 siting projects?
13 A That's correct.
14 Q And to your knowledge, did the County of
15 San Joaquin ever express any concerns to you
16 regarding potential visual impacts from this
17 proposed project?
18 A No.
19 Q Under the visual review under CEQA, are
20 you required to analyze views of the proposed site
21 from each individual residence or each individual
22 building located in the vicinity?
23 A Under CEQA I don't believe so.
24 Q And so can you explain, just once again,
25 how you determine the key observation points and

1 why you did not look at each individual location?
2 A Yes. What I generally do is drive
3 around the area -- look at the maps, aerial
4 photographs if they're available -- drive around
5 the area, get out, stop, photograph, do as
6 thorough a review of the area as I possibly can.
7 And get a sense of where the most important views
8 might be, and those then really literally boil
9 down to being the key observation points.
10 And again, the key observation points
11 are representative of broader areas, and I do my
12 analysis then based on those representative
13 points, where I believe provide the most concern
14 for viewers.
15 Q Now, you stated earlier in your analysis
16 that you looked at ten key observation points and
17 narrowed them down and combined some of the points
18 for your analysis. Was that something unusual for
19 this project, or is this, the number of key
20 observation points similar to other projects that
21 you've analyzed?
22 A The number is similar. Having ten key
23 observation points is perhaps a little excessive,
24 and that's why I was able to boil down several of
25 those and combine my analysis. I looked at all of

1 the key observation points. I considered the
2 views from all of those, plus a variety of other
3 locations around the area.
4 And, from my analysis, I determined that
5 in a couple of situations there were key
6 observation points that had been identified by the
7 applicant in their analysis that were actually
8 fairly close to one another, and that it was fair
9 to do one analysis. If I was to analyze from all
10 three of those points, my analysis would have been
11 essentially the same from all three of those, so I
12 just combined my analysis for those.
13 Q Okay. Finally, you discussed the
14 guidelines, CEQA guidelines regarding existing
15 conditions. Why did you not, or did you consider
16 South Schulte plan, the plan an existing
17 condition?
18 A I did not consider the plan an existing
19 condition.
20 Q And can you explain why, or why not?
21 A In explaining why not, why I didn't
22 consider it, again, I returned to CEQA and to the
23 language that's in the guidelines which identified
24 that the existing condition which in this case
25 would be existing roads, residences and so forth

1 that are out there, it would provide the baseline
2 for comparison and for the impacts analysis.
3 Q So to clarify in your mind, then, an
4 existing condition would have to be physically
5 present?
6 A Yes, an existing condition would have to
7 be physically present.
8 Q Okay, thank you.
9 MS. WILLIS: That's all we have.
10 HEARING OFFICER TOMPKIN: Mr. Seligman,
11 briefly.
12 INTERVENOR SELIGMAN: I hope I have been
13 brief, but I would like to ask just a few followup
14 questions in response to the questions that were
15 asked.
16 RECROSS EXAMINATION
17 BY INTERVENOR SELIGMAN:
18 Q Mr. Donaldson, did you ever -- you
19 indicated in response to an earlier question that
20 you never had contact with San Joaquin County in
21 connection with the general plan; is that correct?
22 A I did not have direct contact with an
23 individual from the County, correct.
24 Q Well, would the County have any
25 knowledge that you were, in fact, performing an

analysis of the Visual Resources?

A I would assume that they would, but I don't have direct knowledge of that.

Q But you made no contact. Did anyone from the County make contact with you?

A No one from the County made contact with me, no.

Q Do you know whether or not San Joaquin County has any jurisdiction over this project?

A My understanding is that because it's located within the County that the County is the authority with jurisdiction.

Q No, but my question is do you have any knowledge as to whether or not San Joaquin County has any jurisdiction over the approval or disapproval of this project?

MS. WILLIS: You're asking a question not regarding the location of the site but whether San Joaquin County has jurisdiction of siting of a power plant of this size?

INTERVENOR SELIGMAN: It's my understanding, Counsel, that exclusive jurisdiction rests with this Commission, and that San Joaquin County does not have any responsibility on CEQA requirements. So my

1 question is to Mr. Donaldson as to whether or not
2 he has knowledge as to whether or not San Joaquin
3 County has any responsibility in connection with
4 satisfying CEQA requirements in this project?
5 MS. WILLIS: I'm going to object. I do
6 believe that this calls for a legal determination
7 by the --
8 INTERVENOR SELIGMAN: I'm only asking if
9 he has knowledge.
10 MS. WILLIS: I'm sorry, I'm --
11 INTERVENOR SELIGMAN: I'm only asking if
12 he has knowledge, not whether or not it does.
13 HEARING OFFICER TOMPKIN: He can answer
14 as to whether he has knowledge, has personal
15 knowledge.
16 THE WITNESS: I have personal knowledge
17 that the -- my understanding is that the
18 California Energy Commission has the jurisdiction
19 to approve or disapprove the project, and takes
20 into consideration those other information.
21 BY INTERVENOR SELIGMAN:
22 Q The last question that I have,
23 Mr. Donaldson, is whether or not there is
24 anything -- within your knowledge, whether or not
25 there is anything within the CEQA guidelines that

1 would require you to consider projects such as
2 Schulte specific plan because of potential
3 cumulative impacts, as opposed to existing
4 conditions?
5 A I think if there is a proposed project,
6 and I think maybe that's the point of concern here
7 is at what point is something a proposed project
8 as opposed to a plan, because a proposed project,
9 and if it's reasonably foreseeable, that should be
10 considered.
11 INTERVENOR SELIGMAN: Nothing further.
12 HEARING OFFICER TOMPKIN: Ms. Willis?
13 MS. WILLIS: At this time we'd like to
14 move into evidence the staff assessment section
15 entitled Visual Resources and the staff supplement
16 with the same title, and that has been previously
17 marked.
18 HEARING OFFICER TOMPKIN: Is there any
19 objection?
20 APPLICANT COUNSEL GRATTAN: No
21 objection.
22 HEARING OFFICER TOMPKIN: Hearing no
23 objection, the Visual Resources sections of both
24 the staff assessment and the staff supplement will
25 be admitted in evidence.

1 And at this time we will close the
2 record on Visual Resources, absent any objection.
3 All right. That section is now closed.
4 PRESIDING COMMISSIONER PERNELL: We're
5 going to take an hour lunch. It appears that it's
6 going to be a long afternoon and evening.
7 (Laughter.)
8 PRESIDING COMMISSIONER PERNELL: Please
9 be back at 2:00 o'clock. Thank you.
10 We're off the record.
11 (Thereupon, the luncheon recess was held
12 off the record.)
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1 A F T E R N O O N S E S S I O N

2 HEARING OFFICER TOMPKIN: We'll begin

3 with the topic area of Noise.

4 Mr. Grattan.

5 APPLICANT COUNSEL GRATTAN: Good

6 afternoon.

7 PRESIDING COMMISSIONER PERNELL: Good

8 afternoon.

9 APPLICANT COUNSEL GRATTAN: The

10 applicant calls to the table Dr. David Greene.

11 DR. GREENE: Rob Greene.

12 APPLICANT COUNSEL GRATTAN: Rob Greene,

13 excuse me.

14 DR. GREENE: David is my brother.

15 APPLICANT COUNSEL GRATTAN: Okay. Rob

16 Greene, and if we could get Mr. Greene sworn in.

17 Whereupon,

18 ROB GREENE

19 Was called as a witness herein and, after first

20 being duly sworn, was examined and testified as

21 follows:

22 DIRECT EXAMINATION

23 BY MR. GRATTAN:

24 Q Having botched your name, maybe you

25 could give us all your name, address, current

1 employment and your role in the project.
2 A Certainly. My name is Rob Greene, and
3 my address, my work address is 2020 East First
4 Street in Santa Ana, California, where I am
5 employed as a principal scientist. And I am the
6 manager of the Noise and Vibration Practice for
7 URS Corporation.
8 My role on this project was to be the
9 task leader for the Noise and Vibration assessment
10 of the project.
11 Q And, excuse me, I wonder if -- And you
12 did prepare testimony as part of the applicant's
13 testimony package?
14 A Yes, I have.
15 Q And you've prepared testimony, if I can
16 lead you a little bit here, on January 24th,
17 submitted on January 24th, and supplemental
18 testimony submitted February 13th?
19 A February 13th, 2002, yes. Those were on
20 the noise issues related to the Tracy peaker
21 project.
22 Q And are you sponsoring any exhibits in
23 addition to this testimony?
24 A Yes, I am. That would comprise Section
25 8.5 and Appendix E of the original AFC, and that

1 was dated August I believe 2001, and also a
2 supplement dated October of 2001.
3 Q And you have, as I recollect, some
4 exhibits which have not been included in your
5 prefiled testimony?
6 A There are -- There is a supplemental
7 study that we would like to also submit.
8 Q And has this been docketed?
9 A Yes, it has.
10 Q And, well, tell us what the study is.
11 A The study is based on some comments and
12 issues raised by the staff supplemental
13 assessment, and that additional study undertook
14 some wintertime measurements to supplement the
15 measurements we had made during the summertime.
16 So we conducted a supplemental study following the
17 CEC guidelines of having 25-hour long-term
18 measurements in addition to short-term accompanied
19 measurements, just to take a look at what goes on
20 in the wintertime to resolve some of the issues
21 raised by the staff assessment.
22 Q And this was docketed on -- The date of
23 my letter was March 5th. I believe it was
24 docketed on March 6th; is that correct?
25 A That's correct, to the best of my

1 knowledge.

2 Q And do you have another exhibit which I

3 believe relates to the 39-dba contour and the 42-

4 dba contour?

5 A Yes, we do. During the project, the CEC

6 staff asked us to generate a noise contour from

7 the project and overlay that on a pictorial map,

8 satellite imagery map, depicting the 39-decibel

9 contour, which we did supply to the CEC staff.

10 Subsequent to that I had prepared an

11 exhibit of which we had copies and we've also

12 docketed, which shows, in addition to that 39-dba

13 contour, the 42-decibel contour predicted from the

14 plant, which is being recommended for use in this

15 project.

16 Q And that was docketed in I believe the

17 first week in March as well?

18 A That's my understanding. And, as I

19 said, we do have some extra copies here if someone

20 needs to see them.

21 Q Thank you. Could you, before we go into

22 your testimony, could you give us your

23 qualifications and experience, and I would urge in

24 this case, since we're dealing with a very

25 technical issue here, not to be modest.

1 A Okay. That shouldn't be too difficult.
2 (Laughter.)
3 THE WITNESS: Basically, I hold a
4 bachelor's degree in environmental science, but
5 more importantly, additional specialized studies,
6 advanced studies in noise and vibration. During a
7 career in community noise and noise control
8 engineering that spans 25 years, I've been working
9 in this field.
10 I have served as the acoustical engineer
11 for a major county in Southern California, dealing
12 with noise and land use issues. I've published
13 numerous papers in noise/land use compatibility,
14 some of those papers dealing specifically with
15 noise from power plants. I've been invited to
16 give the distinguished lecture in plenary sessions
17 for environmental noise in Calgary, Alberta,
18 Canada, by their Environmental Noise Board,
19 specifically in the energy field.
20 I am a board-certified noise control
21 engineer by the Institute of Noise Control
22 Engineering in the United States. I'm licensed by
23 the County of Orange as an acoustical consultant,
24 and certified as a noise and air quality
25 specialist by the -- environmental professional by

1 the County of San Diego. Also, certifications
2 from the National Transit Institute in noise and
3 vibration assessment of transit, including rail of
4 all sorts and buses, and certified by Caltrans in
5 traffic noise assessment.
6 Finally, I sit on the National Academy
7 of Science's Transportation Research Board,
8 Committee A1F04, which is a noise and vibration
9 committee of the TRB. And have won a couple of
10 awards in community noise planning from the
11 National Association of Counties, the so-called
12 NACO awards as well. I think that pretty well
13 wraps it up for qualifications.
14 Q Thank you very much, and do you have any
15 corrections or additions to the two pieces of
16 testimony previously submitted?
17 A No corrections to those pieces of
18 testimony.
19 Q And can you affirm them under oath
20 today?
21 A Yes, I can.
22 Q Can you briefly summarize your
23 testimony -- first, your January 24th testimony,
24 and next, your supplemental testimony of
25 February 13th.

A Yes. Basically, the noise assessment for the power plant, and I've done several of these, both in California and throughout the United States and in foreign countries, follow a very specific format. Here in California, of course, we follow the CEC guidelines for conducting noise studies, so we examine the existing noise environment. And we do that by a series of measurements, both long-term, and by that we mean 24-hour measurements with automated equipment, and short-term measurements with sound level meters. We also review the local standards.

We do what we call critical listening, to be in an environment and not just rely on looking at the meter, but we listen for what's going on around us -- highways, other plants, any other kinds of noise sources. We take that information, and by analyzing the information, we characterize the existing environment.

The second portion of our responsibility is to obtain the engineering data about the plant -- how many motors or turbines, what kind of machinery will be there -- and, based on the information we receive from manufacturers, we're able to predict, fairly accurately we can predict

1 what we believe the noise level will be at various
2 distances from the plant, at various locations.
3 Armed with that type of information, we
4 then compare what we measured of our existing
5 environment compared to what we predict the plant
6 will do. And we also additionally compare those
7 two numbers with guidelines, laws, ordinances,
8 regulations, and standards such as those from
9 local jurisdictions to determine whether or not
10 the construction and operation of the plant would
11 cause a significant adverse environmental effect.
12 If we find that it might cause that, we
13 generally work with the engineers to reduce the
14 noise level of the plant such that there will not
15 be significant adverse noise effects, and that the
16 project would not cause an effect on the
17 environment, and that is the process we did follow
18 here with the Tracy peaker project.
19 Q And perhaps you could be a little bit
20 more specific in terms of the standards you were
21 looking at and in terms of the plant's
22 performance, predicted performance vis-…-vis those
23 standards.
24 A Yes. The standards, we have San Joaquin
25 County, which generally has a standard of 50

1 decibels during the daytime and 45 decibels at
2 nighttime, and those would be applied or are
3 appropriate at what we call a noise-sensitive
4 receptor. And in general in this area, that would
5 be a dwelling, a residence where somebody would
6 live and sleep, talk, eat, watch television, play
7 with their kids, a residence would be considered a
8 noise-sensitive location. In some areas we have
9 hospitals or we might have a church or we might
10 have something else. Generally here we have
11 residential use.
12 There are city standards as well from
13 the City of Tracy: 50 decibels daytime and 50
14 decibels at nighttime, similar application.
15 Q And what would be the performance of the
16 plant? Does it comply with either or both of
17 those standards?
18 A The plant's performance, as currently
19 envisioned and configured, would easily satisfy
20 and does, in fact, satisfy those standards. It
21 complies with all of the relevant LORS to have a
22 very low noise level, and what we talked about
23 earlier and what's depicted on this other exhibit
24 is the plant would generate not more than a 42-
25 decibel level at the nearest residential receptor.

1 Q And can you tell us specifically the
2 standard that the plant will meet at the closest
3 residential receptor?
4 A Yes. As currently envisioned, and this
5 includes noise mitigation, includes such things as
6 a very low noise transformer and such, the plant
7 will not create a noise level above 42 decibels at
8 the closest receptor, which means the noise level
9 from the plant would be even lower as we got
10 farther away from the plant. So the next nearest
11 receptor would actually have a little bit lower
12 noise, and as we got farther away, that noise
13 would continue to decrease to the point of
14 inaudibility.
15 Q Given the 42-dba achievement level at
16 the closest receptor, and is that outdoors at the
17 closest receptor?
18 A That's an outdoor level, yes.
19 Q Okay. Did you conclude whether that
20 would, understanding that it's your testimony that
21 it meets the applicable local jurisdiction noise
22 ordinances, does it also -- would you also
23 conclude that it would not have a significant
24 impact?
25 A Yes, and I'd like to emphasize my

1 testimony in that area, if I might. Forty-two
2 decibels is a very, very quiet noise level,
3 especially outdoors. And I'm pausing for a
4 reason, because, in fact, if we were to just
5 listen to the noise level in this room when
6 everybody is quiet, it's louder here than what the
7 plant would probably be. Right about a db, just
8 about 41. Very quiet.
9 PRESIDING COMMISSIONER PERNELL: And
10 what is the instrument you have in your hand?
11 THE WITNESS: This is the sound level
12 meter, one of the sound level meters we used in
13 our survey, our noise survey to measure noise
14 levels in various locations. And it's nice to be
15 able sometimes to put an actual physical sensation
16 to a noise level.
17 BY MR. GRATTAN:
18 Q Now could we focus on and could you
19 summarize your supplementary testimony dated
20 February 13th, and maybe if you'll go through the
21 purposes behind filing that testimony and the
22 points you wish to make.
23 A Right. The supplementary testimony, as
24 I said, was based on some comments in the staff
25 supplement which indicated that the staff had

1 utilized our original measurements and determined
2 that the quietest hours of the measured period
3 should be the standard against which the plant was
4 judged.
5 And, in doing so, they selected some
6 quiet hours which turned out to be daytime hours,
7 they weren't nighttime hours, in the vicinity of
8 the plant. And one rationale was given that they
9 thought it might be quieter during the wintertime
10 because frogs, dogs and something else wasn't
11 making noise, and, therefore, they believed that
12 that was an appropriate application.
13 We thought it would be prudent to
14 actually do measurements during the wintertime and
15 we did that, and, as I indicated, we found that
16 the noise levels were slightly higher but not
17 appreciably so. So it was probably not
18 appropriate to use daytime noise levels. The
19 nighttime levels were a little higher in the
20 existing condition.
21 So the other point was that we had not
22 been able, in the previous set of measurements, to
23 conduct long-term measurement at the nearest
24 residential receptor, which, by the way, really is
25 what we call LT5R and not LT2, as the staff report

1 indicates. It's the residence that is located
2 south-southwest of the plant. The actual dwelling
3 is slightly closer to the proposed plant than the
4 other residence which is to the west.
5 So we were able, by asking permission
6 from the landowner could we go onto his property
7 and set a long-term meter there, to which he
8 agreed and actually was kind enough to locate a
9 post on which we could place our meter, and he was
10 happy with that, it was within 20 or 30 feet of
11 his actual dwelling. And we were able to take
12 another measurement at that dwelling location.
13 Similarly, on the residence to the west
14 we were able to take another measurement closer to
15 the actual outdoor use where they have a patio and
16 lawn furniture and use the property. So where
17 there would be frequent human use we were able to
18 take a measurement there as well. And this I
19 believe helps to further characterize the ambient
20 conditions in the area surrounding the Tracy power
21 peaker plant.
22 Q And was there another purpose for your
23 supplementary testimony?
24 A Well, we wanted to see also the
25 difference between the L90s and the LAQ values.

1 That was one other area.
2 Q Why don't we just join the issue here,
3 and you have some disagreement with the staff
4 report, and that's why you submitted supplementary
5 testimony, and maybe you could go into the
6 differences -- maybe we could just frame the
7 issues here -- the differences that you have with
8 the staff report and sort of march through them
9 and we might have a more productive discussion.
10 A I think so. We have, in addition to, as
11 I indicated, some small differences in which
12 location is closer or farther away. I think
13 substantive issues I have three disagreements,
14 technical disagreements with the staff report.
15 The first has to do with the noise
16 descriptor or metric or the method we use to
17 characterize the noise in the area. The second
18 disagreement I have is the specific application of
19 the plus-five-decibel significance criteria to a
20 very quiet noise environment. And finally, I
21 disagree with the application of a 39-decibel
22 standard as opposed to a 42-decibel standard for
23 various reasons.
24 INTERVENOR SARVEY: Point of order,
25 Mr. Commissioner?

1 PRESIDING COMMISSIONER PERNELL: Not
2 right now. We'll call you on cross examination.
3 INTERVENOR SARVEY: Well, I'd like to
4 object to the admission of this evidence without
5 it being accepted by staff or the intervenors, and
6 it's late-filed evidence and I would like to
7 object to its submission into the record.
8 APPLICANT COUNSEL GRATTAN: This was
9 filed testimony, February 13th, in accordance with
10 the Commission order.
11 INTERVENOR SARVEY: We're not talking
12 about the additional testimony that was filed
13 afterwards in March?
14 APPLICANT COUNSEL GRATTAN: There's no
15 additional testimony. February 13th was the
16 supplemental testimony.
17 HEARING OFFICER TOMPKIN: I think, by
18 the way of clarification, he is simply explaining,
19 if I understand correctly, his testimony. Staff
20 has --
21 INTERVENOR SARVEY: Okay, I apologize.
22 HEARING OFFICER TOMPKIN: -- submitted a
23 response to the supplement and he's explaining why
24 he came to the conclusions he did, and why he
25 disagrees with that.

1 INTERVENOR SARVEY: Thank you.
2 HEARING OFFICER TOMPKIN: And it was
3 submitted on March 5th, but it was for the
4 clarification of earlier prefiled testimony. So
5 I'll note your objection but overrule it.
6 INTERVENOR SARVEY: Would the staff have
7 an opportunity to rule on that also?
8 HEARING OFFICER TOMPKIN: Ms. Willis?
9 MS. WILLIS: Yes. Well, staff would
10 like to hear further from the applicant. We did
11 only receive this last week while we were in
12 hearing, so it's all new measurements and so we
13 will have questions for the applicant, because we
14 did not know it was coming nor did we receive it
15 until just recently.
16 As I said, we were in hearings from
17 Wednesday through Friday, and it appeared in my
18 office on Wednesday.
19 HEARING OFFICER TOMPKIN: Well, I didn't
20 understand that, but you have no objection? And
21 you will have an opportunity to cross examine.
22 MS. WILLIS: We may have objections to
23 it being entered in at the end, but we'd like to
24 be able to ask questions first.
25 HEARING OFFICER TOMPKIN: Okay.

1 APPLICANT COUNSEL GRATTAN: That's
2 understandable and that's acceptable, and again,
3 we're talking right now he's going through his
4 testimony, not an exhibit to the testimony filed
5 on February 13th.
6 THE WITNESS: If I might continue, I
7 disagreed with the selection and modification of a
8 noise descriptor by the staff, and that descriptor
9 is referred to as the L90, although it's been
10 somewhat modified in that the descriptor itself
11 does not fully characterize an environment. It
12 does not describe the ambient environment which is
13 referred to by the California Environmental
14 Quality Act and does not -- it is not directly
15 comparable to any of the noise and land use
16 planning standards which I have used and which are
17 incorporated in the -- California's, for instance,
18 their guide to the content and preparation of
19 noise elements of the general plan, which calls
20 for the use of a CNEL or an LDN, average level
21 day/night.
22 It is not the descriptor that the
23 American National Standards calls for, for
24 determining compatible land use and noise levels.
25 That standard also calls for an average day/night

1 sound level. But the real issue is that the L90,
2 especially the L90 that's been modified to only
3 look at the quietest time periods, ignores, from
4 the beginning it ignores 90 percent of the sound.
5 It's the level exceeded 90 percent of the time.
6 So it's only looking at the ten percent of the
7 quietest time that occurs during the measurement
8 period.
9 And additionally, the staff says that
10 the measurement period in some cases is 25
11 hours -- That's what the CEC guideline calls us to
12 look at -- yet they only apply an eight-hour
13 period. And, as it turned out, that eight hours
14 was during the daytime and not during the
15 nighttime when it should be more appropriate to
16 have a quieter sound level.
17 So for all those various reasons I do
18 not believe the L90 is an appropriate metric.
19 Additionally, it's difficult for a human to
20 respond to a statistical level like that. We
21 generally don't respond in that manner. It's been
22 shown for the 1974 levels document forward -- That
23 was done by the EPA to determine which descriptor
24 should be used for noise and land use
25 compatibility, and that was '74, a lot of years

1 ago, and set up in '76 by the State of California,
2 and reaffirmed in 1990 by the State of California,
3 that the level day/night is the most appropriate
4 descriptor.
5 And what that also lets us do is compare
6 other pieces of equipment, other kinds of noise
7 environments, determine what is a noisy
8 environment, what is a quiet environment. It lets
9 people make an assessment of the noise whereas you
10 cannot do that with an L90 descriptor. So that is
11 I believe a major shortcoming of the L90.
12 It also artificially reduces or lowers
13 the numerical value against which is applied the
14 five-decibel increase. And I should probably like
15 to move on to the five-decibel increase. So we
16 have an artificially low floor, and then we add
17 five db arbitrarily do determine whether this is a
18 significant effect.
19 While five db may be appropriate in some
20 or a lot of applications, it is not appropriate
21 all the time. One size does not fit all. And
22 it's specifically most inappropriate in very low
23 noise environments, a good example of which is the
24 Tracy location during some hours of the day. It
25 does get very quiet during a very short period of

1 time. And if we only go up by five db and
2 determine that that's significant, I don't believe
3 that's an accurate measure of significance.
4 Five db is a -- Decibels are relative.
5 It's not an absolute number. So, for example, if
6 I had one buzzing fly around here and I could hear
7 it, it was just within my earshot, and two more
8 buzzing flies came into my hearing, and now I have
9 three, that's a five-decibel increase. I had one,
10 now I have two more; the sound level went up by
11 five from a fairly quiet sound of a buzzing fly.
12 Now, if I have a heavy truck or a
13 tractor revving its engine and making noise, and
14 now I add two more heavy trucks or two more
15 tractors, I also have a five-decibel increase, and
16 I would submit that we'd all probably be heavily
17 annoyed there and think that might be significant.
18 I've got three heavy trucks now making a racket,
19 but yet the difference is still five decibels.
20 So I do believe we need to consider what
21 these absolute quantities of sound are, and when
22 we're talking at sound levels of 40 decibels and
23 42 and 39, those are very low noise levels. And
24 so the five db is an overly stringent requirement
25 in that very low-noise environment, and I don't

1 believe it's appropriate in the environment as we
2 have here at Tracy.
3 Other jurisdictions have provision for
4 using a sliding scale and they, in fact, allow
5 more noise to be generated at very low noise
6 levels, being mindful that you don't allow very
7 much at high noise levels. So it's my opinion
8 that the five-db increase is not always
9 appropriate and in this case is not appropriate
10 because it is a low-noise environment.
11 That leads to my final objection to the
12 staff report's conclusion that 39 db is an
13 appropriate standard. I believe 39 db is
14 artificially low, that it is very -- it's almost
15 an imperceptible difference from 42. I would be
16 very hard-pressed -- Even the staff's own report
17 indicates three decibels is difficult to perceive.
18 But the real issue here is one that it does not
19 really benefit the surrounding, the people that
20 live near it or the surrounding areas by being
21 that low. The 39 does not accrue any additional
22 benefit from the 42.
23 What it does do is drive costs up
24 considerably to achieve that technologically
25 feasible mitigation, which we did look at, to try

1 and see how we could get to 39. That extra three
2 db would probably cost on the order of $600,000
3 for additional stack silencers or additional
4 lagging of the piping and such to achieve that for
5 two sensitive receptors that are located within
6 that contour.
7 Q And one further clarifying question.
8 The difference between the 39 dba, which is what
9 is proposed to be in staff condition five, I
10 believe, and 42, which is what you're
11 recommending. Number one, it costs $650,000
12 difference, or at least according to your
13 testimony, it does to achieve that.
14 Would there be a perceptible difference
15 to a resident at that spot, (a); (b), if there is
16 a perceptible difference, would it interfere with
17 any activities? Would the difference, in other
18 words, between being there at 39 dba and being
19 there at 42 dba, is it perceptible? And if it is
20 perceptible, would it interfere with any
21 activities?
22 A The difference is just perceptible, and
23 I believe there's an exhibit in the staff's report
24 that goes through perceptibility, less, you know,
25 one db is nearly impossible to even determine

1 outside of a laboratory, and I believe three db
2 just says just barely perceptible. So it might
3 just be perceptible.
4 But, more importantly, the second
5 question is would it have -- would either of those
6 two sound levels have any effect on activity, on
7 speech interference or communications capability
8 or sleeping or anything like that, no. Thirty-
9 nine to 42 would not have an effect, and, in fact,
10 for example, it is an exterior standard.
11 So if we had a 42 at the nearest
12 residences, just outside the residence, and had
13 the windows open, the typical residential
14 structure will give you approximately ten decibels
15 of noise reduction, and that's right out of the
16 California state standards from the Department of
17 Health. So that 42 would be reduced inside to a
18 32, which is well below any sleep interference
19 standards.
20 So either a 39 or a 42 would not cause a
21 problem, and importantly, 42 would not cause a
22 problem, either inside or outside.
23 Q Is that another way of saying that 42
24 dba, in your opinion, is not a significant
25 environmental impact?

1 A That's correct. Forty-two is definitely
2 not a significant environmental impact, and, in
3 fact, it is really quiet.
4 Q Is that also -- Once again, is that with
5 the County standards?
6 A Yes. That would comply with the County
7 standards for nighttime, the more stringent
8 standard of the two.
9 Q And with the City standards?
10 A Yes, it would also comply with the City
11 of Tracy standards for nighttime, again the more
12 stringent standard that they have.
13 Q Thank you.
14 APPLICANT COUNSEL GRATTAN: The witness
15 is available for cross examination.
16 PRESIDING COMMISSIONER PERNELL:
17 Mr. Baker --
18 APPLICANT COUNSEL GRATTAN: Greene.
19 PRESIDING COMMISSIONER PERNELL: Greene?
20 THE WITNESS: I'm Greene.
21 APPLICANT COUNSEL GRATTAN: Commissioner
22 Pernell, between me lousing up his first name and
23 you his last --
24 (Laughter.)
25 PRESIDING COMMISSIONER PERNELL: All

1 right, we'll get this right.

2 PRESIDING COMMISSIONER PERNELL:

3 EXAMINATION BY COMMITTEE

4 BY PRESIDING COMMISSIONER PERNELL:

5 Q Mr. Greene, what standard are you using?

6 Is it state, county, city? What standard are you

7 using for your dba?

8 A That's a good question. We always are

9 faced with the difficulty of using multiple

10 standards on most projects. In some cases there

11 may be two jurisdictions or there might be a state

12 standard as well as a local standard. In some

13 cases there are jurisdictions close enough that

14 the noise from a plant might affect both of them

15 differentially.

16 So in the city, say city X, we might

17 apply the city standard for those structures or

18 sensitive uses in the city. We might use a county

19 standard for those sensitive uses in the county.

20 And then if there is an overriding standard, we

21 would take a look at that as well.

22 Q All right. So which standard are you

23 using?

24 A In this case, we are using both the city

25 standard and the county standard, the more

1 stringent which would be 45 decibels, and
2 initially we actually had suggested that might
3 work but took a little bit more -- looked at the
4 engineering and reductions and could reduce the
5 plant down to 42, which we also believe limits the
6 increase, if we were to look at what I think is a
7 reasonable descriptor. If we looked at LEQ or the
8 LDN or even L50, we would be below a five-decibel
9 increase, even looking at that standard.
10 It's only if we look at this
11 artificially manipulated partial L90 that we
12 exceed that five db on partial L90.
13 Q Okay, and the 42-dba level, is that for
14 the plant when it's running?
15 A Yes, that's for the plant when it's
16 running.
17 Q And did you do an analysis on the noise
18 level on the construction of the plant?
19 A We do an analysis on the noise level for
20 construction. Although construction is generally
21 considered not to be a significant effect because
22 it is limited in its time frame, its duration,
23 it's also generally limited in time of day -- It
24 doesn't usually occur at night, so it occurs
25 during a less sensitive period.

1 And our conclusion was that the
2 construction noise would not constitute a
3 significant adverse environmental effect.
4 Q And the resident that allowed you to put
5 a receptor on his or her property, is that the
6 resident that is .5 miles from the site?
7 A Yes, that would be the Timmons resident,
8 I believe, and that is approximately 20 -- I have
9 it specifically, but about 2500 feet, roughly a
10 half a mile from the site.
11 Q Is that the closest residence to the
12 site?
13 A Yes, sir, it is.
14 PRESIDING COMMISSIONER PERNELL: Thank
15 you.
16 HEARING OFFICER TOMPKIN: Does staff
17 wish to question the witness?
18 MS. WILLIS: Yes.
19 HEARING OFFICER TOMPKIN: You may
20 proceed.
21 MS. WILLIS: Thank you.
22 CROSS EXAMINATION
23 BY MS. WILLIS:
24 Q Mr. Greene, could you point to where, or
25 indicate to us where in your written testimony you

1 referenced several cost figures -- I believe you
2 said upwards of $600,000, your counsel indicated
3 $650,000 -- to achieve staff's proposed
4 performance level.
5 Could you indicate to us where in your
6 written testimony these figures appear?
7 A That's not in the written testimony,
8 that's in response to the comments made in the
9 staff supplemental report that indicate to the
10 effect -- I mean, I could quote, read it directly,
11 but something to the effect that the applicant has
12 not given any indication why this wouldn't be
13 feasible. We think they can get another three db
14 without a problem. So we did take a look at it.
15 Q Okay, and isn't it true you filed two
16 supplemental filings, your testimony and the
17 recent filing on March 5th, since the staff has
18 filed their supplemental testimony? Isn't that
19 correct?
20 A I would believe that that's correct,
21 yes. That's true.
22 Q Okay. So in none of those you came up
23 with these figures. I guess for our purposes this
24 was the first time we've heard them, so I'm going
25 to ask you a couple of questions, then.

1 A Sure.

2 Q Could you please be more specific as to

3 exactly where these figures came from? Perhaps

4 you might itemize what equipment would be used and

5 the cost that would be used, the cost that would

6 be involved with each piece of equipment or

7 technology or whatever it is that you're referring

8 to?

9 A Well, we're pretty limited in what

10 technologically can be applied to the plant. And

11 so in talking with the engineers, what we were

12 discussing was if it's possible to add additional

13 stack silencers, and there would be two of them,

14 and those only work, as you might know with

15 acoustics, you can't just fix one thing and have

16 everything improve, you have to fix everything to

17 get an appreciable benefit.

18 So in addition to the stack silencer,

19 you have to apply lagging and wrapping around the

20 ducts that carry the exhaust so that the whole

21 area does not radiate sound. And so there would

22 be a cost associated with the silencer to be

23 placed in the stack, as well as the cost

24 associated with lagging and wrapping the duct work

25 leading to the exhaust.

1 Right now the plant is as quiet as it
2 can be from the manufacturer. So we'd have to be
3 looking at probably an after-market silencer, if
4 one were available to do that. Now, in my
5 experience in working on power plants, typically
6 after -- you know, a silencer can easily run
7 $200,000 for a stack silencer, and you'd have two
8 of those, and lagging and wrapping of duct work,
9 $100,000 each of those, and there you go to six.
10 Q And those are estimates you've received
11 recently?
12 A Those are estimates based on my
13 experience in working with power plants throughout
14 the world at various times, various applications
15 and so forth.
16 Q So those estimates are not estimates you
17 received in the course of doing, working on this
18 project.
19 A That's correct. Those are not written
20 quotes, if that's the nature of your question.
21 Q Yes, thank you. So my understanding,
22 then, is in accordance with your written
23 testimony, your testimony today, you're not
24 testifying that achieving staff's proposed
25 performance level is infeasible; is that correct?

1 A We're not saying it's infeasible, it
2 would just be excessively expensive.
3 Q Thank you.
4 APPLICANT COUNSEL GRATTAN: Counsel, if
5 I can quickly -- If you were to rephrase that
6 question technically infeasible --
7 THE WITNESS: Right.
8 APPLICANT COUNSEL GRATTAN: -- I think
9 that answers --
10 MS. WILLIS: No, he answered my
11 question. Thank you.
12 THE WITNESS: That's the understanding I
13 have.
14 BY MS. WILLIS:
15 Q I'd like to go into another area.
16 You've talked a lot about the difference between
17 39 db and 42 db.
18 A Correct.
19 Q But, in effect, wouldn't the people
20 around -- or actually the sound difference would
21 not be between 39 and 42, but between the ambient
22 level at 35 and 42; wouldn't that be a correct
23 characterization of what the power plant would
24 contribute?
25 A Would you please clarify the question?

1 It's not clear to me what you're asking.
2 Q Sure. You've been talking a lot about
3 the difference between staff's proposed
4 performance level of 39 db and the applicant's
5 preference of 42 db as a three-db difference and
6 that's not very much. But, in essence, we're
7 really looking at the ambient level of 35 db --
8 I'll let your counsel coach you at this point.
9 APPLICANT COUNSEL GRATTAN: Yeah, show
10 him where it is.
11 THE WITNESS: I understand the nature,
12 it would be between 35 db and 42, or 35 db and 39.
13 BY MS. WILLIS:
14 Q And so, in essence, if -- adding 42
15 would actually bring up the ambient to be 43 db
16 which would be a difference of eight decibels, not
17 the three you've been discussing.
18 A Well, I think we need to be careful
19 about characterizing the ambient at 35. The very
20 quietest hour during the daytime that was measured
21 might have been 35, but that's only one hour out
22 of 24 and that's only one day out of 365. It is
23 not my testimony that it is 35 dba out there all
24 the time.
25 Hypothetically, though, if you want to

take 35 up to 39, you would probably hear that difference. If you took 35 up to 42, you would definitely hear that difference. The judgment, though, as to how much worse or not hardly big a difference at all would be very difficult to describe because they're both pretty low numbers, and that's the point that I tried to get across earlier.

Q I'm going to refer you to the newly filed, I don't know if it's testimony or -- they're supplemental ambient noise measurements that were submitted on March 5th. And these are basic questions because, as I stated earlier, staff has not had adequate time to review these.

A Yes.

Q And I'm just going to talk about them and see if I'm characterizing this correctly.

A Sure, okay.

Q You talk about three long-term ambient sound level measurements were at LT5R, LT2R and LT1B.

A That's correct.

Q And these are the new measurements; is that correct?

A That's correct.

1 Q Okay, and they're basically at locations
2 where you've measured previously; is that correct?
3 A Not quite; close.
4 Q Close. I know one of them was a short-
5 term measurement, but other than that?
6 A Yeah, you're close. One of the
7 measurements, and this would be figure one that
8 came with that supplemental testimony, the
9 measurement to the east of the property and this
10 would be the representative houses along Lammers
11 Road, the closest of the houses along Lammers, and
12 that's called LT1B, and in our kind of strange
13 nomenclature, that B just means it was done at
14 exactly the same fencepost as it had been done
15 with LT1 initially in the summertime. So we took
16 another measurement right at the same fencepost,
17 probably used the same screws to hook it in and
18 made it a little quicker. So that's where that
19 location is.
20 LT5R, again drawing your attention to
21 that figure one in the supplemental, is located at
22 the dwelling that's on that parcel, as opposed to
23 where old ST5 was located. We were not able to
24 get onto that property during the original
25 measurement period during the summer, so we took a

1 short-term measurement. During the wintertime we
2 were able to get onto that property and did the
3 measurement actually on the post that Mr. Timmons
4 was kind enough to set in the ground for us.
5 Q Okay. So as a point of clarification,
6 your new measurement was actually closer to the
7 dwelling than the previous measurement.
8 A That's correct.
9 Q So I guess my question is wouldn't that
10 new measurement take into account the sound level
11 of the dwelling as opposed to just the sound level
12 that would be contributed from the power plant.
13 A There is no power plant there, so this
14 measurement we took there was ambient.
15 Q I understand, but your ambient would be
16 at the dwelling including all the activity that
17 would be going on in the dwelling, as opposed to
18 further away, which would more accurately
19 represent ambient for the proposed site.
20 A That's true, and that would be of
21 concern, but Mr. Timmons indicated that no one is
22 there during the day and he wasn't there when we
23 were there and put the unit on the post, and then
24 when they came home at night he said fine, I'll
25 keep the dog inside and it just won't make any

1 difference.
2 Q And that's anecdotal; is that correct?
3 That's not a scientific way of measuring noise.
4 A I don't understand your question, then.
5 The issue --
6 Q Well, the question is, is that the
7 measurement was closer to a dwelling where there
8 could be activity --
9 A Right.
10 Q -- as opposed to further away, so they
11 are not measured at the same spot.
12 A The factual answer is they are not
13 measured at the same spot.
14 Q Okay. That's fine.
15 A It's speculation as to whether there is
16 activity or not or whether it contributed in some
17 manner to the measurement.
18 Q That's fine. I just wanted to clarify
19 that they were at two different spots.
20 A The ST5 and LT5R are at two different
21 locations.
22 Q Now, LT2R, that was also done in the
23 same manner, closer to the dwelling as opposed to
24 further away?
25 A By a couple hundred feet -- not even

1 that, about 150 feet closer to the dwelling,
2 because they had located some containers and such.
3 That property has about seven dogs and other
4 activities going on, and there were some
5 containers where the original location had been.
6 So we moved it on -- I do have photos if you'd
7 like to see what the actual measurement sites
8 looked like, but that one was located near the
9 area of what we call frequent human use, near the
10 patio table and outdoor use area.
11 Q That was just a clarification.
12 A Okay.
13 Q That wasn't indicated in your, at least
14 from our initial reading of your new filing.
15 MS. WILLIS: That's all we have.
16 PRESIDING COMMISSIONER PERNELL: Let me
17 ask a question, just for my clarification.
18 THE WITNESS: Sure.
19 EXAMINATION BY COMMITTEE
20 BY PRESIDING COMMISSIONER PERNELL:
21 Q The second measurement was closer to the
22 house, and you indicated that no one -- the owner
23 said no one was around, but he put the dog inside.
24 Is that what you --
25 A That's what he indicated to me on the

1 telephone, when we were talking about could we do
2 a measurement on his property and he said yes, and
3 would he locate the post and he said he'd be glad
4 to do that. And he also indicated a -- he thought
5 he might want to do his own sound measurement and
6 we offered to help him out any way we could,
7 either with calibration or anything. He said no,
8 I won't -- there won't be anybody here, there's
9 nobody here --
10 Q All right. I guess my question is you
11 don't know whether he put the dog inside or not.
12 A The dog was not outside on the property
13 during the time period that the meter was in
14 place.
15 Q And you were there that whole time?
16 A I was not, but Rachel Perry of my staff
17 was the one who had accompanied me on the original
18 measurements. She went back out to put the meter
19 there, and indicated that it was just nobody
20 anywhere near the area.
21 Now, there were dogs at the other site,
22 LT2R, because they have seven dogs.
23 PRESIDING COMMISSIONER PERNELL: Okay,
24 thank you.
25 HEARING OFFICER TOMPKIN: Questioning by

1 intervenors? Mr. Seligman?

2 CROSS EXAMINATION

3 BY INTERVENOR SELIGMAN:

4 Q Did I understand that from some answers

5 you gave to several questions that in determining

6 compliance with LORS you looked at both the County

7 of San Joaquin as well as the City of Tracy?

8 A Yes.

9 Q Did you make any test of noise levels

10 for those homes that are downwind from the site?

11 A Can you give me a specific area?

12 Q Well, on Lammers Road; specifically,

13 27249 South Lammers Road, property owned by

14 Mr. Tuso, which is downwind from the proposed

15 site?

16 A Well, the original map -- Let me ask you

17 if you could perhaps point it out on an exhibit.

18 We did, in fact, take ambient measurements along

19 Lammers Road during the initial summertime

20 measurements where we were just discussing this

21 LT1 and the back fencepost. Measurements were

22 also taken along Lammers Road, and they were also

23 taken down -- we had a site called ST6, which is

24 along the levy for a house that has some baseball

25 diamonds and so forth.

1 So yes, we did measurements of ambient
2 noise levels for areas -- not just these two
3 nearby residences, but for sites along Lammers
4 Road, and also for some sites down along the
5 freeway.
6 Q Were they downwind from the proposed
7 site?
8 A I would have to go back, I'm not sure if
9 downwind is -- if that's where the characteristic
10 wind row shows the wind to be, then that's where
11 we took the measurements.
12 Q Do you have any results of the studies
13 as to what noise level exists in the downwind
14 area, as opposed to those that exist on the other
15 side of the project site?
16 A We have all field data. It's all in the
17 AFC, documented site by site by site as to sound
18 level and time of day and everything else, if that
19 answers your question.
20 Q No, it doesn't. I'm trying to find out
21 if there is --
22 A Well, could you please rephrase your
23 question, then.
24 Q Is there a difference in your analysis
25 as to the sound level for the homes that are

1 downwind from the site from those that are not?
2 To repeat the question, Mr. Greene, I'm
3 curious to find out if, in his analysis, if there
4 was any difference in the noise level between
5 those properties that are downwind from the site
6 and those that are not, as it presently exists.
7 A As would be expected, there are
8 differences in sound levels, very tiny differences
9 on any difference of a site. Because the
10 environment might be slightly different.
11 In the case of the area, the environs
12 surrounding the Tracy peaker project site, there
13 were differences in sound level. They were not a
14 function, though, of upwind or downwind, they were
15 more a function of their proximity to the freeway
16 or their proximity to another source in the area.
17 They didn't have any relation necessarily to the
18 wind up or down. We're very careful when we take
19 our measurements.
20 We do, in fact, in addition to measuring
21 sound with this meter or a similar meter, we have
22 a three-cup digital anemometer, we have digital
23 hydrometers and thermometers and barometers, and
24 we look at the ambient temperature and humidity
25 and air pressure, and we only do measurements when

1 the wind speeds are below about ten miles an hour.
2 So the differences in measurement values would not
3 have been due to upwind or downwind.
4 My recollection, and we can look, we
5 have the numbers here, are that the sound levels,
6 the ambient levels of houses along Lammers were
7 higher than those of the residence to the south of
8 the plant or, in partial, the one to the far west,
9 mostly as a result of more activity: more street
10 traffic, a little higher density of houses and
11 such.
12 Q To what extent were they higher?
13 A If you give me a minute, we'll take a
14 look at the numbers.
15 Q Okay. All I'm trying to find out is if
16 your studies indicated that there was a difference
17 in the sound level, existing differences in the
18 sound level in that particular area, from one part
19 of Lammers to the other. That's all. Not the
20 rest of it.
21 A No, I don't think I need the appendix.
22 I'm just looking at some site numbers.
23 It appears that the sound level of the
24 residence to the northerly portion of Lammers,
25 which would be just south of the railroad tracks,

1 was slightly higher than what we would measure in
2 the other location. The residence, and we did one
3 across from 27081 Lammers Road -- I don't know who
4 lives there, just that was the number -- that
5 measurement, which was done at just a little after
6 noon, was about -- well, it wasn't quieter than
7 any and all other measurements, but it was a
8 little bit quieter than some of the measurements
9 during the day.
10 Most of the measurements ranged between
11 39 and -- you know, between 40 and 50, plus or
12 minus a little bit. So they did -- at some
13 scattered different locations.
14 Q And what, in your opinion, will the
15 measurements be if this facility were located at
16 the proposed site began taking into condition
17 those that are downwind from those that are
18 upwind?
19 A I can only characterize my answer as
20 being based on distance from the site and not
21 necessarily up- or downwind locations --
22 Q Doesn't the location of downwind from
23 upwind have also some significance as to the
24 existing noise level?
25 A Wind will affect noise levels.

1 Q All right.
2 A If the source is upwind, then the noise
3 levels from that particular source may be
4 elevated. If it's downwind, then the noise levels
5 would be lower. And that goes for the freeway or
6 the railroad line or the Biomass plant or the
7 glass plant or anything else.
8 As far as the noise levels in general
9 along Lammers Road, I think we have a predicted
10 number at LT1R, which is again on Lammers up near
11 the northerly portion of Lammers. We believe that
12 the plant added to the existing ambient noise
13 level, in terms of its LEQ value, would increase
14 by 0.6 of a decibel. It's a very, very tiny
15 amount. Difficult to measure, but we can
16 calculate it on our computer or calculator.
17 And as you got farther away from the
18 plant, then the effect would generally be lower
19 yet. If the noise level or ambient level
20 decreased the same way and they both came down,
21 then that effect would be roughly constant. So
22 less than a decibel out at Lammers, and that
23 decibel would probably stay pretty consistent.
24 Because we did look at the property right
25 alongside the canal, alongside the levy, and did a

1 calculation there at ST6R, and 0.6 decibel
2 difference.
3 INTERVENOR SELIGMAN: Thank you.
4 HEARING OFFICER TOMPKIN: All right.
5 Mr. Weed?
6 INTERVENOR WEED: Thank you. Michael
7 Weed.
8 CROSS EXAMINATION
9 BY INTERVENOR WEED:
10 Q You testified that the nearest
11 residential receptor was approximately a half-mile
12 away; is that correct?
13 A Yes, it's 2,550 feet, as near as we can
14 measure it off the map.
15 Q And that's the point at which the
16 permissible sound level is being measured in terms
17 of your disagreement with staff, at 42 at that
18 level and they'd prefer that to -- at that
19 location, and they'd prefer that to be 39; is that
20 correct?
21 A That's correct.
22 Q And if -- Can you give us an approximate
23 idea of what the sound levels would be if a
24 residence was located, say, half that distance
25 from the plant, a quarter-mile, and perhaps even

1 half of that at an eighth of a mile?
2 A If it were located half the distance
3 from that location, so in other words, not at
4 2,550 feet but about --
5 Q 1250.
6 A -- 1,200, 1,300 feet, something like
7 that --
8 Q Right.
9 A -- I would expect an increase of six
10 decibels. So the 42 could be about a 48,
11 approximately.
12 Q And then half again, closer say an
13 eighth of a mile, would you -- another linear
14 increase of six, perhaps?
15 A That would be an approximation, yes.
16 Q So at 54.
17 A Right.
18 Q And in those cases, they would not be in
19 compliance with either the city or county noise
20 ordinances, as far as you're aware.
21 A In terms of numerical value, that's
22 correct.
23 Q That's right. And did you consider the
24 possible perimeters of the South Schulte specific
25 plan residential development in any of your

analyses in whether any of those residences could be located close enough to the plant to be in violation of the ordinance?

A No, I did not look at the South Schulte plan, no.

INTERVENOR WEED: Thank you.

HEARING OFFICER TOMPKIN: Mr. Sarvey?

INTERVENOR SARVEY: Bob Sarvey.

CROSS EXAMINATION

BY INTERVENOR SARVEY:

Q Have you analyzed a project with the same configuration as the Tracy peaker plant?

A Could you restate the question, please?

Q Have you ever analyzed a project for sound with the same configuration as the Tracy peaker plant?

A Have I looked at other dual-turbine simple-cycle power plants?

Q In the same configuration as the Tracy peaker plant.

A Yes.

Q Are you aware that this configuration has not been applied in practice?

A At Tracy or --

Q The Tracy peaker plant configuration

1 that they currently have has not been applied in
2 practice?
3 A Two simple-cycle plants.
4 Q With the current emissions technology
5 that they have?
6 A I'm not aware of the emissions
7 technology; in terms of the air quality are you
8 talking?
9 Q No, no, in terms of the noise.
10 A Maybe you need to clarify it again.
11 HEARING OFFICER TOMPKIN: Could you just
12 maybe start over and rephrase the question.
13 INTERVENOR SARVEY: Okay.
14 APPLICANT COUNSEL GRATTAN: Maybe we
15 could -- I don't want to ask your question for
16 you, but I --
17 BY INTERVENOR SARVEY:
18 Q No, what I'm saying is earlier the
19 applicant had testified, earlier in the
20 proceedings that this technology had never been
21 applied with the particular type of pollution-
22 control equipment and cooling system that he's
23 applied has never been used in practice, and I was
24 wondering how that -- were you aware of this
25 experimental technology?

1 A These are the fans, the dilution cooling
2 fans? Is that what you're concerned about?
3 Q The entire package of technology.
4 A Right. As I indicated earlier, we
5 obtained the noise power levels, sound power
6 levels in frequency bands from the manufacturer.
7 So the manufacturer provides us with a spectrum
8 and a level attributable to each of the major
9 sources. And in this case, the spectrum and the
10 level included all of the various noise sources
11 that would be associated with this plan. And
12 that's how we do our analysis.
13 So that number comes from the
14 manufacturer themselves.
15 Q So your analysis itself doesn't consider
16 different configurations of emission control and
17 fans and stuff like that, it just basically looks
18 at GE frame seven and we've got two of them and
19 this is what it's going to sound like; is that
20 correct?
21 APPLICANT COUNSEL GRATTAN: Objection;
22 you're characterizing his answer, and my
23 recollection is that's not what he said.
24 HEARING OFFICER TOMPKIN: Well, I'll
25 permit the witness to answer and clarify his own

1 response.
2 THE WITNESS: We look at the specific
3 equipment that's being proposed for the specific
4 project, in as much detail as can be provided by
5 the manufacturer.
6 HEARING OFFICER TOMPKIN: Next question.
7 BY INTERVENOR SARVEY:
8 Q Well, I don't want to be redundant, but
9 have you ever analyzed a project with the same
10 configuration as the Tracy peaker plant?
11 PRESIDING COMMISSIONER PERNELL: I think
12 that is being redundant. Let's go to another
13 question.
14 INTERVENOR SARVEY: Sorry, Commissioner
15 Pernell.
16 BY INTERVENOR SARVEY:
17 Q If additional cooling fans are required
18 to lower the effluent temperature for emission
19 controls, would this affect your conclusion or
20 your analysis?
21 A It might.
22 Q When the Biomass plant and Owens-
23 Brockway are running -- I want to say this a
24 different way. Did you perform any ambient
25 background measurements when the Biomass plant and

1 Owens-Brockway were not running?
2 A The only way I can answer that is to
3 look at the record. I know that there were some
4 questions on whether or not the plant was
5 operating, and, in fact, we usually take notes.
6 For example, at this site, ST12, measurements done
7 on June 14th and 15th, at the southeast site
8 corner, which is right on the plant property, it
9 indicates that the source, one of the sources of
10 noises was industrial, and there was distant
11 aircraft and distant traffic.
12 So in that case, the plant was
13 operational. We did not specifically wait for the
14 plant to shut down or not shut down, but there are
15 cases where, I know there are sometimes where the
16 plant might have been at reduced capacity. We
17 have no way of knowing.
18 Generally, my recollection when I was on
19 site is that these facilities were operating.
20 Q So wouldn't the ambient background
21 levels be much lower if these plants were not
22 running?
23 A I could -- It wouldn't necessarily be
24 speculation, but if you closed the door and didn't
25 let anybody come in and pulled the power breaker

1 and the plants were not operating, it would
2 probably be quieter.
3 Q You mentioned that you had done some
4 studies at Mr. Timmons' house, and what time frame
5 did those measurements occur over? Was it an
6 hour, a day, a week?
7 A They were done over a two-day period.
8 They were done, conducted between February 12th
9 and 13th, 2002, for a -- Let's see, LT5R. They
10 started at 12:00 noon on 2/12 of '02, and they
11 concluded at 1300 hours or 1:00 p.m. on 2/13 of
12 '02.
13 Q Earlier Mr. Pernell asked you had you
14 attended the noise monitoring station during the
15 whole time, and you had mentioned that your
16 assistant Rachel had been there. Did Rachel stay
17 there for the whole two days to ensure that the
18 dog did not come out and bark?
19 A No, we do not attend the unattended
20 automated noise monitor units. They are attended
21 twice. You're there when they're placed and
22 you're there slightly before they're taken apart.
23 And then occasionally we will also do a short-term
24 measurement at the same location. And I could
25 check and see if one of those was done or not.

1 But generally, unattended meters are set
2 out and they record noise for the prescribed
3 program period, and then they are collected.
4 Q As an expert in noise, does your
5 expertise carry over from -- does it just involve
6 human sensitivity or does it involve any other
7 type of sensitivity, in terms of animals or
8 anything like that, or is it just humans that you
9 analyze?
10 A I am aware of some other species, non-
11 human species sensitivities. I would not
12 characterize myself as an expert in that field,
13 but I have done some research and studies for the
14 effect of noise on passerines, which would be your
15 gnatcatchers and things like that.
16 Q Okay. So you testified that the 39 to
17 42 dba noise level that wouldn't negatively impact
18 humans in your opinion?
19 A That's correct.
20 Q Do you have any knowledge or are you
21 aware how this noise level would impact the kit
22 fox?
23 A I do not have specific knowledge of
24 that.
25 Q Can you tell me what were the noise

1 levels during construction in dba's?
2 A Generally during construction we use, as
3 the basis for our assessment, a document prepared
4 for the Environmental Protection Agency by Bull,
5 Baronic and Newman prepared sometime ago, but it's
6 still valid, based on any other subsequent
7 measurements -- That was prepared about 1971, I
8 believe -- which characterized construction in
9 phases, rather than individual piece of equipment.
10 You can do construction noise two ways.
11 You can look at the front-end loader and the
12 tractor or whatever, or you can look at phases of
13 construction. The two -- And those are typically
14 clearing and grubbing, excavation, foundations,
15 erection, finishing and so on.
16 The two noisiest phases are pretty well
17 documented at about somewhere between 86 and 89
18 decibels at 50 feet. So we use that number, the
19 midpoint because since 1971 things have gotten a
20 little better, and we propagate that out. So we
21 start off with about an 86 decibel at 50 feet and
22 then propagate that out to the various distances.
23 That's how construction noise is generally
24 modeled.
25 Q And would that level of noise be

1 considered a nuisance to a nearby land owner or
2 farm worker?
3 A If you were 50 feet from the 86
4 decibels, it would certainly be loud. It's below
5 the OSHA standard, so the workers themselves would
6 just come under the noise evaluation program. As
7 you know, OSHA will allow 90 dba for eight hours,
8 so 85 would be an action level. You've had to put
9 them in a program.
10 But if you go out another 50 feet, go to
11 the 100-foot distance, it would drop down by six
12 db so you'd be around 80 at 100 feet, and these
13 places we're talking about are into the several
14 hundred thousands of feet distance.
15 Q So on the applicant's wet weather
16 construction route, it passes very close to
17 several houses. Did you do any analysis in terms
18 of construction noise and equipment in relation to
19 those houses?
20 A I did not specifically analyze the sound
21 of a truck or something else. It would be similar
22 to the sound level from an agricultural piece of
23 equipment or machinery passing by the same
24 location.
25 Q Workers that are, say, within ten or 15

1 feet of the generation equipment while it's
2 operating, can you give me an idea of what the
3 noise levels would be at that point?
4 A They will vary quite a bit, depending on
5 the piece of equipment. Generally and
6 specifically, as part of the staff, the CEC
7 regulations and guidelines, there is applied a
8 condition of approval that we need to go out and
9 monitor and measure the plant, once it has reached
10 80 percent of its output. And we do, in fact,
11 conduct those kinds of surveys, and we indicate
12 then to the owner where high noise levels might be
13 expected, and where hearing protection should be
14 required and where they have to post signs, and in
15 some cases delineate the areas. So it will vary.
16 There are places where the noise level
17 can approach levels certainly at or above the 90
18 db OSHA criteria, and for those places they would
19 be posted and the workers would be provided with
20 and expected to wear personal hearing protection.
21 They would probably also be, if they were plant
22 workers, they'd be in a hearing conservation
23 program. If they're construction workers, they
24 would be in a similar program but through their
25 own contractor.

1 Q So close to the turbine we could expect
2 dba's of 88 to 95 decibels?
3 A Sure, inside of the turbine enclosure,
4 yes.
5 Q Would those levels be equivalent to the
6 construction level noises that you were speaking
7 of earlier of 88 to 90 decibels?
8 APPLICANT COUNSEL GRATTAN: I'm going to
9 object at this point. This subject of worker
10 health and safety and noise impacts on workers has
11 been addressed and I believe addressed thoroughly
12 in our worker health and safety declaration.
13 He's been quite articulate here, but
14 he's getting a little beyond the level of what
15 he's testifying to.
16 INTERVENOR SARVEY: I wasn't really
17 worried about the workers, Mr. Grattan. Nearby
18 land owners and farm workers is what I was
19 addressing.
20 APPLICANT COUNSEL GRATTAN: They weren't
21 going to be inside the turbine.
22 PRESIDING COMMISSIONER PERNELL:
23 Gentlemen, let the hearing officer rule on the
24 objection.
25 HEARING OFFICER TOMPKIN: Thank you,

1 Commissioner. And I will sustain the objection.
2 Your questions do seem to be directed towards the
3 workers, so let's move on.
4 BY INTERVENOR SARVEY:
5 Q The construction levels of 88 to 90
6 decibels, which are similar to the ones that would
7 require hearing protection near the turbines,
8 would those also be recommended or would that be a
9 recommended practice for the nearby farm workers
10 or land owners?
11 A I'm not sure I understand your question,
12 but the levels that you're talking about would
13 occur only on the property within 50 feet of the
14 actual construction equipment, not in the vicinity
15 of someone working in the field.
16 Q Well, what I was alluding to was the wet
17 weather contingency construction plan, these
18 pieces of equipment had to go in and out of this
19 road which runs by several residences, and I don't
20 have the exact distances between the road and the
21 residences, but I was wondering what effects that
22 you would expect to have happen to the farm
23 workers and their residences as this equipment
24 rumbled by.
25 A I don't believe there would be any

1 effect, and if you are talking about vehicles that
2 would be legal for operation on the highway, if
3 that's what you mean, they come in on Lammers and
4 turn onto the dirt road and go to the site, and
5 they meet all of the California Vehicle Code
6 requirements for mufflers and a legal license to
7 be operated on a public right-of-way vehicle, we
8 all deal with those on a day-to-day basis without
9 adverse health effects.
10 So I would say that there doesn't appear
11 to me to be a problem here.
12 INTERVENOR SARVEY: Thank you.
13 HEARING OFFICER TOMPKIN: Anything
14 further? Mr. Grattan?
15 APPLICANT COUNSEL GRATTAN: If I can ask
16 just a few clarifying questions in redirect here,
17 I'd appreciate the opportunity.
18 HEARING OFFICER TOMPKIN: Yes, you may.
19 REDIRECT EXAMINATION
20 BY MR. GRATTAN:
21 Q First, in response to Mr. Sarvey's
22 question, did you, when you were doing your noise
23 calculations for noise from the plant, among the
24 equipment that you looked at did you look at the
25 fan that would basically cool the exhaust from the

1 plant? That's what Mr. Sarvey has been referring
2 to as the air pollution control equipment.
3 A Yes. We looked at all noise-producing
4 equipment associated with the turbines, the
5 cooling of the turbines, the transformers and so
6 forth.
7 Q Thank you. And, in response to staff
8 counsel's question as to whether there was
9 feasible mitigation to reach a 39 dba at the
10 nearest residence, when you answered
11 affirmatively, yes, it was feasible, did that yes
12 answer, did that address its technological
13 feasibility or its economic feasibility?
14 A Generally, in noise control mitigation
15 we separate those two areas. And the two words
16 used, which are really strange, are feasible and
17 reasonable. Feasible deals -- They come from
18 Caltrans, so we know maybe a little about why
19 they're a little strange. The feasible addresses
20 engineering controls -- you know, can I construct
21 a sound wall to give me five dba or can I put in a
22 muffler and reduce the noise level? That's the
23 technological feasibility.
24 Reasonableness is the term used to
25 decide on whether or not a mitigation measure has

1 economic and/or other factors included for
2 feasibility. There are standards for that; in
3 fact, some very well-thought-out standards by
4 Caltrans to talk about whether or not a particular
5 noise abatement measure is reasonable. And they
6 have established a criteria with a dollar amount,
7 and that's based on how noisy is it now, was the
8 residential use in place before or after the
9 freeway or the source, how quiet can you make it
10 and things like that.
11 And they start off with around $15,000
12 and they add numbers, dollars to accommodate these
13 various concerns, until they get to around $35,000
14 for a benefitted residence. And they consider
15 noise abatement, if it costs less than that
16 allotment, to be reasonable. And so that will
17 determine whether or not, for example, a sound
18 wall is built along a freeway.
19 So I do separate those two issues of
20 technological feasibility and reasonableness.
21 Q So is your answer -- Was your answer
22 that yes, it's technologically feasible but no,
23 it's not economically reasonable?
24 A That would be my answer, yes.
25 Q All right. And finally, just -- Maybe

1 not finally. The study that was submitted
2 entitled Supplemental Ambient Noise Measurements
3 in the Vicinity of the Proposed Tracy Peaker
4 Plant, the one that is dated February 25th but
5 wasn't docketed until the 5th of March while we
6 were in hearing, and that's probably counsel's
7 fault, was this done in response to a staff
8 question or a comment in the staff assessment?
9 A Yes, it was, and if you'd like, I can
10 point that out, but my --
11 Q That might be helpful. I wanted to
12 correct the impression that we were trying to
13 paper the record at the end.
14 A Okay, sure.
15 Q And while you're looking for that, can I
16 ask you if this measurement really changes any of
17 your conclusions or any staff conclusions in a
18 significant way?
19 PRESIDING COMMISSIONER PERNELL:
20 Mr. Grattan, let me ask a question. What is the
21 witness looking for? Is there a direct question
22 needing an answer?
23 APPLICANT COUNSEL GRATTAN: Yes. He's
24 looking for the staff comment that led to the
25 submission of this document.

1 PRESIDING COMMISSIONER PERNELL: Does he
2 know what the --
3 THE WITNESS: Yeah, I'm trying to
4 paraphrase it. The initial staff assessment
5 looked at the data we had provided on a 25-hour
6 basis, and determined that for a I believe it was
7 a contiguous eight-hour chunk of time, the L90
8 value was a certain number of decibels.
9 And the staff's conclusion, based on
10 that analysis, was that they realized this was a
11 daytime occurrence, that these real low quiet
12 noise levels occurred during the day. But they
13 speculated that in the wintertime, they thought it
14 likely that these low noise levels would be, in
15 fact, present during the nighttime hours.
16 PRESIDING COMMISSIONER PERNELL: I
17 understand that, and I think you've covered that
18 already.
19 THE WITNESS: And that's what the
20 question is, and that's one of the reasons we went
21 back out again and measured during the wintertime.
22 PRESIDING COMMISSIONER PERNELL: Right,
23 and you covered that in your original testimony.
24 So we're trying not to be redundant here,
25 Mr. Grattan.

1 APPLICANT COUNSEL GRATTAN: I apologize.
2 BY MR. GRATTAN:
3 Q Finally, was it your -- in response to
4 staff's question, staff identified that, and we
5 get a little confused -- at least, I get a little
6 confused -- with these decibel levels as they are
7 mentioned, you mentioned that the difference
8 between a 39 dba and a 42 dba was, in your
9 opinion, imperceptible. Staff pointed out in its
10 question, and I think rightly so from the staff
11 assessment, that, in fact, the ambient out there,
12 according to their measurement, is 35.
13 Now, your testimony is that you view 35
14 as an unacceptably or an unrealistically low
15 measurement of ambient, in that it only takes --
16 that it takes into account only the quietest ten
17 percent of the day?
18 A It actually takes in less than the
19 quietest ten percent of the day, and that's why I
20 believe it's an unrepresentative sound level.
21 APPLICANT COUNSEL GRATTAN: That's all.
22 HEARING OFFICER TOMPKIN: Ms. Willis?
23 MS. WILLIS: Yes. We just have one
24 recross.
25 HEARING OFFICER TOMPKIN: Go ahead.

1 RECROSS EXAMINATION

2 BY MS. WILLIS:

3 Q Mr. Greene, just to clarify that, in

4 fact, isn't it true that the data used for staff's

5 analysis was supplied by the applicant for the

6 noise analysis, as part of the application for

7 certification?

8 A Yes, we provided 25 hours' worth of

9 data.

10 Q Okay, thank you. I just wanted to

11 clarify that.

12 A Yes.

13 Q Staff did not go out and do their own

14 analysis, own measurements. Those were numbers

15 that you supplied staff; is that correct?

16 A We provided hourly noise levels on a 25-

17 hour basis, in addition to the short-term values,

18 yes.

19 MS. WILLIS: Thank you.

20 HEARING OFFICER TOMPKIN: All right.

21 Mr. Grattan?

22 APPLICANT COUNSEL GRATTAN: Yes. We'd

23 like to move the noise testimony and the following

24 exhibits into evidence.

25 APPLICANT COUNSEL KARP: Irwin Karp.

1 Applicant's noise exhibits are as follows:
2 Section 8.5 in Appendix E of the original
3 application, August 2001, that's Exhibit One;
4 Sections 8.5 in Appendix E of the October 2001
5 supplement that's already been accepted into
6 evidence as Exhibit Two.
7 Then we have some new exhibits. I
8 believe we're up to 54?
9 HEARING OFFICER TOMPKIN: That's
10 correct.
11 APPLICANT COUNSEL KARP: Okay. So this
12 will be marked as a new 54, a memorandum on
13 Supplemental Ambient Noise Measurements in the
14 Vicinity of the Proposed Tracy Peaker Plant. That
15 was the item that was docketed on March 6th, 2002.
16 And then new Exhibit 55, the location of
17 the 39-dba contour and the 42-dba contour. We
18 don't have the exact date. I believe it was
19 docketed in the first week in March as well.
20 HEARING OFFICER TOMPKIN: The documents
21 described by counsel will be marked as Exhibits 54
22 and 55 for identification, respectively.
23 (Thereupon, the above-referenced
24 documents were marked as Staff's
25 Exhibits 54 & 55 for identification.)

1 INTERVENOR SARVEY: I'd like to remind
2 everyone that I would object to that being entered
3 into the record, and it's prejudicial to staff and
4 the intervenors because of its late filing. Thank
5 you.
6 HEARING OFFICER TOMPKIN: Thank you,
7 Mr. Sarvey.
8 Ms. Willis?
9 MS. WILLIS: Just with the understanding
10 that staff did not have adequate time to read the
11 most recent filing on March 6th, but we are not
12 objecting to them being entered into the record.
13 HEARING OFFICER TOMPKIN: Can we go off
14 the record briefly?
15 PRESIDING COMMISSIONER PERNELL: We're
16 off the record.
17 (Thereupon, a recess was held
18 off the record.)
19 PRESIDING COMMISSIONER PERNELL: We're
20 back on the record. Ms. Tompkin?
21 HEARING OFFICER TOMPKIN: The staff has
22 considered the objection to the --
23 PRESIDING COMMISSIONER PERNELL: The
24 committee.
25 HEARING OFFICER TOMPKIN: -- excuse me,

1 the committee, thank you, has considered the
2 objection to the filing on March 6th of the
3 supplemental ambient noise document, and has
4 determined that they will admit this document as
5 administrative hearsay, or non-sworn testimony
6 because of the late filing, but it will be used to
7 explain and supplement direct evidence.
8 The other exhibits that were offered
9 will be admitted, so 54 will be administrative
10 hearsay.
11 (Thereupon, the above-referenced documents,
12 marked as Staff's Exhibits 54 & 55 for
13 identification, were received into evidence.)
14 HEARING OFFICER TOMPKIN: All right.
15 (Thereupon, the witness was
16 excused from the stand.)
17 HEARING OFFICER TOMPKIN: At this time
18 we'll move to Ms. Willis, your witness?
19 MS. WILLIS: Thank you. At this time
20 staff calls Steve Baker.
21 HEARING OFFICER TOMPKIN: Would you
22 please swear him in.
23 MS. WILLIS: Thank you.
24 HEARING OFFICER TOMPKIN: Please
25 proceed.

1 Whereupon,

2 STEVE BAKER

3 Was called as a previously duly sworn witness

4 herein and was examined and testified as follows:

5 THE WITNESS: I've been sworn.

6 MS. WILLIS: He has been sworn

7 previously. Should he be resworn?

8 HEARING OFFICER TOMPKIN: Oh, no, I'm

9 sorry, please proceed.

10 MS. WILLIS: Thank you.

11 DIRECT EXAMINATION

12 BY MS. WILLIS:

13 Q Mr. Baker, could you please state your

14 name for the record.

15 A Steve Baker.

16 Q And was a statement of your

17 qualifications attached to your testimony?

18 A Yes, it was.

19 Q And could you briefly state your

20 education and experience, as it pertains to noise

21 analysis.

22 A I hold a bachelor of science degree in

23 mechanical engineering, and a master of business

24 administration degree. I'm a registered

25 professional mechanical engineer in California.

1 I've taken training, formal training classes in
2 noise and in the California Environmental Quality
3 Act. I have ten years' experience on the Energy
4 Commission staff, either performing or supervising
5 the performance of noise testimony on power plant
6 citing cases.
7 I've personally written the noise
8 testimony on nine cases and I've supervised the
9 noise testimony on 26 further cases. I've done an
10 extensive amount of reading in the noise world.
11 I've read the documents that Mr. Greene referred
12 to earlier and many, many more. I'm familiar with
13 many of the applicable noise codes and standards
14 and what they are and why they are.
15 Q Thank you. Did you prepare the
16 testimony entitled Noise and Vibration in the
17 staff assessment?
18 A I prepared the supplemental Noise and
19 Vibration testimony.
20 Q And was that section to replace in total
21 the section that appeared in the staff assessment?
22 A Yes, it was.
23 Q Do you have any changes to your written
24 testimony that you're proposing today?
25 A No, I do not.

1 Q Do the opinions contained in your
2 testimony represent your best professional
3 judgment?
4 A Yes, they do.
5 Q Could you briefly state which laws,
6 ordinances, regulations, and standards you
7 considered when you conducted your noise analysis
8 for this power plant project?
9 A I considered federal LORS, including the
10 OSHA standards for worker protection; the state
11 Cal OSHA standards for worker protection. I
12 considered the California Environmental Quality
13 Act or CEQA, and I considered local ordinances,
14 which -- the one that I considered was the San
15 Joaquin County Noise Element.
16 Q And what does CEQA require in regards to
17 noise impacts?
18 A CEQA requires that noise impacts be
19 evaluated, and if there are found to be
20 significant adverse impacts, these must be
21 mitigated either to a point where they're no
22 longer significant or at least to the extent
23 feasible. CEQA particularly goes into a
24 definition of feasibility, which includes monetary
25 cost.

1 Q Thank you. And could you please explain
2 what a sensitive receptor is, and if you could
3 further explain what the importance of relying on
4 sensitive receptors is in your analysis.
5 A Sensitive receptors is some person or
6 organization that will hear noise and be affected
7 by it, and the word sensitive means this is some
8 person that will be significantly, importantly,
9 perhaps profoundly affected by the noise.
10 Typically, the sensitive receptors we deal with in
11 power plant siting are residences, hospitals,
12 elder care facilities, schools, places of worship.
13 Q Okay, thank you.
14 At this time we're going to refer to
15 Noise Figure Two in the staff supplement to the
16 staff assessment dated January 2002. This is part
17 of the supplement to the staff assessment. In
18 this case could you point out or describe where
19 the sensitive receptors are located?
20 A The sensitive receptors that the
21 applicant considered in their application and the
22 ones that I considered in my testimony were three.
23 The closest one is marked LT5R on this diagram.
24 The R stands for residence; that's the actual
25 house. Just to the north of it is LT2R, which is

1 the second closest receptor, then way over to the
2 east is LT1R. It appears in beige lettering.
3 Q Thank you. Now, could you also explain
4 what ambient noise levels are.
5 A Ambient means the environment, that
6 which exists around us. So the ambient noise
7 levels are the noise levels that currently
8 surround us. In the case of siting a power plant,
9 the ambient noise is the noise in the area, the
10 region, the neighborhood now, before the plant is
11 built and turned on.
12 Q The applicant has challenged the
13 measurements staff used in their analysis for
14 ambient noise levels. As simply as you can, can
15 you please explain the measurement you used and
16 why? And I want to note for the record that we're
17 relying on the illustration of hourly noise
18 metrics that was submitted as part of our visual
19 aid package.
20 A The diagram you see is a sample, it's an
21 actual noise trace taken by a consultant of ours
22 nearby, up near Calpine-East Altamont power plant
23 site, to the north and west of Tracy. So this is
24 representative of the neighborhood, the eastern
25 end of the Altamont Pass. The noise you see in

this diagram is not atypical of this region.

The very jagged dark blue trace that you see running up and down, this represents the actual moment-by-moment noise level that was heard by the noise monitoring device and the actual moment-by-moment noise level that your ear would hear if you were standing near the monitor. You can see that the noise at any one moment jumps up and down rapidly. The very high points on those traces, above 50 and above 55 decibels, are several times louder than the lowest parts of the traces, down around 35 decibels and lower. The difference between 35 and 55 decibels is about four times as loud.

We have one line across there, the brown or beige line, horizontal line across the trace is called the LEQ or the equivalent sound level, equivalent noise level. What this is, is an actual mathematical averaging of the energy in all the noise that that meter received, that the microphone heard or that your ear would hear.

If you're just sitting or standing somewhere and you just pay attention at any one moment to the noise that you're hearing, you're hearing my boring, sonorous voice, and you're

1 hearing the air conditioner over there blowing
2 warm air through the room, you hear people
3 rustling papers. That sound level you hear,
4 that's probably the LEQ, the equivalent sound
5 level at any one time.
6 We have another line on there. There is
7 a purple line below that called the L50. This is
8 just a mathematical construct. This is the
9 particular sound level in decibels that was
10 exceeded 50 percent of the time. The L50 -- In
11 many typical urban noise environments, the L50 and
12 the LEQ are generally relatively close together.
13 They're separated here in part because you have so
14 many of those very, very high noisy spikes in the
15 dark blue line. The actual sound level varies
16 considerably over short periods of time, and this
17 helps spread things out.
18 The next line down there, the green
19 line, that's the L90. This is one that Mr. Greene
20 talked about at length a few moments ago. The L90
21 is, again, an artificial mathematical construct.
22 It's the numerical sound level that's exceeded 90
23 percent of the time. So if you take the actual
24 energy level of that jagged blue line and
25 calculate the level that was exceeded 90 percent

of the time, that would be the L90.

The significance of this is that in the noise industry, and I don't mean just here at the Energy Commission staff, in the noise industry L90 is commonly taken to be what's called the background noise level. A little while ago Mr. Greene was answering a question and then he paused, and everybody held their breath, waiting to hear his next words. And he paused for a few seconds, and then he looked at his handheld noise meter, and he told us that the noise level when no one was talking was what, 41 decibels, I believe.

DR. GREENE: Forty-one point something.

THE WITNESS: Yes.

DR. GREENE: Close.

THE WITNESS: Right, okay. At that time no one was talking, the air conditioner happened to be off at the time, nobody was rustling papers, it was, you know, pretty quiet in here. That was an example of background noise level.

Out in the environment, out in the neighborhood near the power plant site, if you were to stand out there and the wind just wasn't particularly gusting at the moment, it was just average wind, or maybe there was a lull in the

1 wind, if there were no dogs barking, if you
2 couldn't hear a car driving by, if you couldn't
3 hear an airplane flying overhead, if nobody was
4 banging on sheet metal over at the car repair
5 shop, that moment then, when things are relatively
6 quiet, that's what we recognize as a background
7 noise level. That's a noise level that's there
8 all the time. There's always some background.
9 There's probably no place on the surface on the
10 earth that's absolutely quiet for any significant
11 length of time.
12 So what we hear when nothing is going
13 on, that's the background, and the noise industry
14 has taken as the L90. So that's the significance
15 of the number. Now, the reason that I've chosen
16 to apply it here and the reason that I've chosen
17 to apply it for the past ten years, and the reason
18 that people before me at the Energy Commission
19 applied it to these siting cases for 12, 14 years
20 before that is this.
21 The majority of the noise in our
22 environment is periodic. It's like that dark blue
23 line on the diagram. It's always changing. It's
24 going up and down, but it hardly ever stays the
25 same. At any one moment you can listen and sound

is changing. My voice is not constant. There are pauses between my syllables. The fellow moving across the room right now, when he brushes against a chair you can hear a sound. Somebody rustling papers, that's periodic.

You go outside, the wind is constantly varying, as it does, the grass rustles. You'll hear noise from the freeway and a big truck will go by and it will get a little noisier for a moment. A bird will chirp, a dog will bark, a plane flies over, something like that. Noise is constantly varying in our environment.

If you're in an urban environment, you hear lots of traffic, you hear air conditioners or air handling devices running, you hear doors opening and closing, people talking, television sets on. The noise in our environment is almost always changing, and that's what we're used to.

The noise standards, the noise element, general plan noise element that Mr. Greene referred to earlier, these standards are generally constructed with the typical environment, the typical urban noise environment in mind. They deal with noises that constantly vary louder and quieter, louder and quieter.

1 One of the unique aspects of a power
2 plant and its noise is that the noise from a power
3 plant is generally not varying. When the power
4 plant is running, the noise coming from it is
5 nearly constant for long periods of time. What
6 that means and the significance of that here is
7 this:
8 When you add power plant noise to an
9 environment, that constant, steady noise from the
10 power plant becomes part of the background. And
11 if you're near enough to hear the power plant,
12 that background noise from the power plant will
13 probably define the background or the L90. For
14 that reason we have chosen for over two decades to
15 consider the L90 as the significant noise
16 measurement when looking at power plant noise
17 impacts.
18 Q And could you explain why not use the
19 day/night sound levels that the applicant has
20 proposed?
21 A The day/night level, DNL or LDN, is an
22 artificial construct. Your ear does not hear LDN.
23 To calculate an LDN, let's look back at the
24 diagram. You could take the energy under the dark
25 blue trace, the jagged line, and average it; you

1 could average it over each hour, over each minute,
2 over each second, and you add those numbers
3 together and average them.
4 You take the daytime hours, which have
5 arbitrarily in the industry been chosen as 7:00
6 a.m. to 10:00 p.m., you take those daytime hours
7 and you average them. Then you take the nighttime
8 hours from 10:00 p.m. to 7:00 a.m. You average
9 those and then you arbitrarily add ten decibels to
10 that average. Then you take that nighttime with
11 its ten-decibel inflated average and you add it to
12 the daytime average, and once again it.
13 You've come up with an artificial
14 number. The reason behind that is when people are
15 trying to sleep at night, noise is more of a
16 problem, it's more intrusive. We need the
17 environment around us to be quieter at night.
18 It's more important for us to have it quiet at
19 night than it is to have it quiet during the day.
20 And we typically try to arrange our lives to have
21 just that situation.
22 The LDN takes account of this. If you
23 speak of LDN figures for a certain environment,
24 say an urban area, when you hear that number, you
25 have some idea of what the noise is probably like,

1 an LDN of 60 decibels, so you can imagine that the
2 noise is probably up around 60 decibels during the
3 day, and then it probably drops down to around 50
4 at night. That would roughly give you an LDN of
5 60. And it's very valid for putting together
6 noise regulations, like general plan noise
7 elements or noise ordinances. And that's fine.
8 But we're trying to be an awful lot more
9 specific here. We know that the noise from a
10 power plant is not constantly varying. We know
11 that the noise from a power plant typically
12 doesn't go down at night. Whenever that plant is
13 operating, that's the noise level.
14 Now, yes, the Tracy peaker project is
15 billed as a peaker, and there are certain reasons
16 why that's so. A peaker can come on line quickly,
17 it can shut down quickly when it's not needed.
18 But we also know that the applicant, they're wise
19 businessfolks. They've asked for Air Emission's
20 permission to run this plant up to I believe as
21 many as 8,000 hours a year. So if they are lucky
22 enough to gain dispatch, they will run this plant
23 in the day and they will run it in the night,
24 whenever they can and make a profit.
25 We don't know how many hours in the year

they will actually run it, but we know that they would, if they could, run it anytime of the day or night. And that's why our noise analysis has to take into account the possibility that this plant will run day or night, that it will be contributing to the background noise environment in the area, day or night.

Q Did you analyze both construction and operational noise impacts?

A Yes.

Q Did you determine that the construction of a power plant would cause significant adverse noise impacts?

A No, I didn't.

Q And could you please explain why that is.

A The proposed construction would take place in compliance with applicable LORS, particularly the federal OSHA and the Cal OSHA restrictions. The equipment used would be properly equipped with mufflers as such. In my testimony I've proposed condition of certification Noise two, which would further limit construction to, noisy construction to daytime hours, and limit the noise from nighttime construction in

1 accordance with the San Joaquin County noise
2 element.
3 And I believe that with these safeguards
4 and typical practices in place that there should
5 be no significant impacts from construction noise.
6 Q Thank you. Could you please explain how
7 you conducted the noise analysis for plant
8 operations and, just for the record, we're looking
9 at table four on page 3.5-10 of the staff
10 supplement.
11 A Let me point out first, for the
12 Committee's benefit, that the analysis I've
13 performed here is entirely consistent with the
14 analysis that I've performed on previous cases and
15 that I've supervised on the other cases where I've
16 supervised the noise analysis. I've done nothing
17 new or different here. Mr. Greene has represented
18 other applicants before the Commission, before
19 this, and so he's heard this before. It's nothing
20 new to him.
21 The project, as the applicant has
22 testified, the project if built as proposed would
23 comply with the local noise ordinance, the San
24 Joaquin County Noise Element. I agree with that.
25 APPLICANT COUNSEL GRATTAN: Mr. Baker,

1 could you speak into the microphone a little bit
2 closer to the microphone?
3 THE WITNESS: I'm sorry.
4 After verifying compliance with local
5 LORS, then I looked to CEQA, the California
6 Environmental Quality Act. And, as I summarized
7 earlier, CEQA requires us to identify any
8 significant adverse noise impacts and, if we find
9 any, we should see that they are mitigated either
10 until they are no longer significant or at least
11 to the extent feasible.
12 In order to determine if there is a
13 significant adverse noise impact, the customary
14 procedure is to look at how much noise will be
15 increased due to the project. So first we have to
16 know what the noise is and then we have to know
17 what the noise will be after the project is up and
18 running.
19 The applicant helped us out there. Part
20 of the Commission's siting regulations require
21 them to perform ambient noise monitoring in the
22 area of the power plant site and report this in
23 their application, which they did.
24 Now, as I mentioned earlier, the
25 measurement that concerns us the most is the

1 background or the L90, so what I've done is I've
2 looked at the L90 figures reported by the
3 applicant in their application and I picked out
4 the ones that I thought were germane.
5 Now, in some cases, if the power plant
6 is to be cited in a noisy urban area, and we've
7 had several like that in the cities of Crockett
8 and Pittsburg, for instance, what we'll look at is
9 the single quietest hour. We'll look at the L90
10 level at the quietest hour, which is typically, in
11 an urban environment, that's typically at night.
12 And we'll say, okay, we're going to compare the
13 noise of the power plant to this ambient L90 at
14 the quietest hour, and we come up with some
15 increase and we evaluate whether that increase is
16 significant or not.
17 When you have relatively quiet rural
18 environments, it's sometimes -- well, it's
19 generally unfair to pick the single quietest hour.
20 You put your noise monitor out in a field, and you
21 have noise: the wind blows and the grass rustles,
22 frogs croak and crickets chirp. And then say a
23 cat comes by and hunts the area for a while; all
24 the frogs and crickets will be quiet, and you'll
25 get an artificially low noise reading for a while,

then the cat moves on and the noise comes back again.

Picking one quiet hour or one quiet minute out of the night like that would be unreasonable. So what we do is quiet environments like this, we typically take the average L90 over a period of hours, perhaps the whole nighttime period or perhaps some lesser period. What I did here was I looked at the applicant's reported L90 figures, and they only measured long-term, in 25-hour figures, at two receptors, LT1 and LT2.

I looked at those figures and I picked a period of several hours in length, when the L90 was at its lowest. I did this to be conservative. Once this power plant is built and running, it's going to add to, it's going to change the noise environment in this area. And so in the interest of conservatism, I picked the lowest period to compare the power plant's noise against.

Now, it just so happened that that was a daytime, rather than a nighttime. In an urban environment, generally the nighttime is quieter. Out here in these fields on the east end of Altamont Pass, it just happens that some part of the year the daytime is actually quieter. So I

took the six hours, the six quietest hours, L90, and I averaged them and I came up with a figure of 35 decibels. Thirty-five is quiet. It's hold-your-breath quiet.

Excuse me, I'm getting ahead of myself. That was an eight-hour average. Anyway, 35 decibels is the number I picked against which to measure the power plant noise. And, if you look up on the table on the wall, the middle column, Summer Daytime, the lowest L90 measured, the lowest single hour was 34, but when I averaged these eight hours I came up with a 35. One decibel is not a lot of difference, but it's a little different.

You notice that during the nighttime the noise level was quite a bit higher. The eight-hour average for the nighttime was 43 decibels. That's eight decibels louder. That's nearly twice as noisy as the daytime. That's interesting, and I would expect that a lot of that is biological noise and perhaps wind. The Delta breezes blow through the Pass in the afternoon and nighttime hours, and so that may have been where a lot of that nighttime noise came from.

Then the applicant's proposal, their

1 current proposal -- not the one in the application
2 but one which was detailed in a later memo from
3 Mr. Greene to Mr. Greavy, my co-worker, claims
4 that the plant will contribute only 42 decibels at
5 the nearest receptor. This is relatively quiet.
6 It's not a horrendously, hideously noisy power
7 plant. But out in this quiet environment, it's a
8 noticeable noise level.
9 So if we look at the third line there,
10 Plant Contribution, it is 42 decibels. Now, we're
11 going to do some weird arithmetic here. When you
12 add noise levels, you do it logarithmically, and
13 please don't try to make sense out of this.
14 Please trust me on this.
15 When you add the 35 decibels average
16 background L90 to the 42 decibels from the power
17 plant, you get 43 decibels. So once the plant is
18 turned on, your background now jumps from 35 up to
19 43 decibels. That's an increase during the summer
20 daytime of eight decibels. If we look at the
21 nighttime, we add the nighttime background of 43
22 to the power plant's 42 and we come up with 46
23 decibels. That's only three decibels louder than
24 the noisy background during the summer nighttime.
25 So we can see that with the proposed

1 plant and using the numbers that I've chosen as
2 the significant or meaningful ones, during summer
3 daytimes the plant would probably increase the
4 noise level in the neighborhood about eight
5 decibels, which is nearly a doubling in noise.
6 My proposal is that they mitigate the
7 plant further. In the application they described
8 a power plant with some unspecified sound wall,
9 and that would be 45 decibels, that would visit 45
10 decibels on the nearest receptor, and that would
11 be in compliance with the San Joaquin County Noise
12 Element.
13 Subsequently, Mr. Greene's memo to
14 Mr. Greavy specified no sound wall, but they would
15 replace the electrical transformer with a quieter
16 transformer. Quieter, by the way, means more
17 expensive. You know, noisy is cheap and quiet is
18 expensive. Doing this would allow the power plant
19 to visit only 42 decibels on the nearest receptor,
20 so that's the number you see here in the third
21 line of this table.
22 My proposal is that they be asked to
23 provide further mitigation to the power plant,
24 such that the power plant can only visit the
25 nearest receptor with 39 decibels of noise. If

1 you take that 39 and add it to the 35 decibels of
2 background during the summer daytime, you come up
3 with 40, and that 40 is only five decibels more
4 than the 35, and that's in my mind unquestionably
5 not a significant impact.
6 Q So just to clarify your testimony today,
7 it is that with the performance levels that you
8 have recommended, you concluded that the operation
9 of the power plant would not cause a significant
10 adverse impact?
11 A That's correct.
12 Q In your professional opinion, is an
13 increase of eight decibels likely to cause
14 complaints from receptors?
15 A That's a qualified yes. There are
16 circumstances where that might be a definite yes,
17 circumstances where it might be a probably no.
18 Given the extreme interest in future residential
19 development in the near neighborhood around the
20 power plant, the likelihood that there will be
21 lots and lots of people living in lots and lots of
22 houses very near the power plant, perhaps even
23 closer than the residences that were measured for
24 the AFC noise readings, I would prefer to say that
25 eight decibels would probably be a significant

1 impact.

2 Q Has staff proposed any mitigation?

3 A No. Mitigating noise in a power plant

4 is something that only the power plant owner and

5 designer can do. They're the ones that can look

6 through the catalogs, talk to the manufacturers,

7 find out what's available, find out what it will

8 do in regards to quieting the plant and find out

9 what it will do in regards to the bottom line and

10 how much it costs to build the plant.

11 Only they can decide what's physically

12 possible and only they can decide what is

13 economically feasible.

14 Q Has the applicant indicated in its

15 testimony today or in its written testimony prior

16 that it would not be technically feasible to

17 achieve the noise standard as outlined in staff's

18 proposed conditions of certification, Noise five?

19 A I have not heard them make that claim.

20 Q If anyone has a noise complaint, either

21 during construction or operation of a power plant,

22 could you please, just for the general

23 information, explain what the steps are they need

24 to take to voice that complaint?

25 A Our proposed Noise condition of

1 certification three would require the power plant
2 owner to set up a noise complaint process. This
3 process must be put in place before construction
4 begins, and it must be in effect at least one year
5 after the power plant begins full operation.
6 Under this process they must maintain
7 and advertise a telephone number that anyone can
8 call to register complaints. If anyone calls the
9 phone number and registers a complaint, there is a
10 process that the power plant owner must follow to
11 investigate the complaint. If it is a valid
12 complaint, they must take measures to solve the
13 problem, and then provide feedback to us and
14 Energy Commission staff that they've dealt with
15 the problem.
16 Q And finally, just to clarify, with
17 staff's proposed conditions of certification, in
18 your opinion would this plant create a significant
19 adverse noise impact?
20 A No, it would not.
21 Q And with staff's proposed conditions of
22 certification, would this project comply with all
23 laws, ordinances, regulations, and standards?
24 A Yes, I believe it would.
25 Q The applicant filed the supplement noise

1 measurement wintertime, measurements for the
2 wintertime on March 5th or 6th, 2002. Did you
3 have a chance to review that new information?
4 A I had very little opportunity to review
5 it. I've given it a cursory review.
6 Q Do you have any further comments on
7 that?
8 A The one comment I'd like to make is that
9 the noise monitoring during the winter, two of the
10 monitors were placed in different locations from
11 where they were placed during the summer
12 monitoring that appeared in the application. The
13 monitors at LT2 and ST5 were both located closer
14 to the actual residences.
15 Now, when the measurements were first
16 taken last summer, Mr. Greene and his associate
17 did a great job of locating them. When you go to
18 monitor noise, you typically try to stay away from
19 homes, because you know that homes are noisy.
20 Even if people are gone during the day at work,
21 the air conditioner may be cycling on and off.
22 And when they come home in the evening, you know,
23 they drive up and there's doors slamming, people
24 start to live their lives, preparing meals,
25 watching television, talking, singing, whatever.

1 And it gets noisy around a residence.
2 This is the kind of noise you try to
3 avoid when you're attempting to measure the
4 ambient, and so Mr. Greene and his associate did a
5 very good job of locating the meters away from
6 these residences last summer. When they went back
7 to take the measurements again this winter, they
8 located the measurement devices much closer to the
9 residences. We heard here today -- I heard for
10 the first time just how close they were.
11 If I were asked to analyze this filing
12 at greater length I could do so, but I have not
13 had the chance to do so yet.
14 Q Thank you. Does that conclude your
15 testimony?
16 A Yes.
17 MS. WILLIS: This witness is now
18 available for cross examination.
19 HEARING OFFICER TOMPKIN: Does applicant
20 wish to examine this witness?
21 APPLICANT COUNSEL GRATTAN: Can we
22 reserve our cross examination until the
23 intervenors go?
24 HEARING OFFICER TOMPKIN: Are there any
25 questions from the intervenors?

INTERVENOR BLACKWELL: David Blackwell. I'm co-counsel with Mr. Weed on behalf of intervenor, Mr. Chang. I have a few questions.

HEARING OFFICER TOMPKIN: I don't remember you being listed as co-counsel. Is this a recent development?

INTERVENOR BLACKWELL: Yes, it is. My understanding of the regulations is that the intervenor can designate more than one representative to act on his behalf during this hearing.

APPLICANT COUNSEL GRATTAN: Applicant has no objection to that if he's identified for the record.

INTERVENOR BLACKWELL: I'm sorry, identify --

APPLICANT COUNSEL GRATTAN: Yeah, the applicant has no objection if you'll identify who you are and who you're with for the record.

INTERVENOR BLACKWELL: Once again, it's David Blackwell and I'm appearing on behalf of the intervenor, Mr. Chang.

APPLICANT COUNSEL GRATTAN: Thank you.

HEARING OFFICER TOMPKIN: I assume staff has no objection?

1 MS. WILLIS: No.

2 HEARING OFFICER TOMPKIN: You may

3 proceed.

4 CROSS EXAMINATION

5 BY INTERVENOR BLACKWELL:

6 Q You testified that your noise analysis

7 requires invoking the CEQA analysis; is that

8 correct?

9 A Yes.

10 Q And CEQA requires an analysis of

11 cumulative impacts; is that correct?

12 A Yes.

13 Q And did you -- The cumulative impacts

14 analysis requires you to account for probable

15 future projects; is that correct?

16 A Yes.

17 Q Okay. Did you analyze the effect of any

18 future development in the South Schulte specific

19 plan area?

20 A I didn't consider it as a cumulative

21 impact. I understand that you're talking about a

22 residential development. When residences go in,

23 there will be noise produced -- you know, traffic,

24 people going back and forth, living their lives in

25 their houses. But then, at the same time, much of

1 the ambient noise there is from the freeways,
2 particularly 580 to the southwest of the site.
3 Putting houses in there will insulate
4 the project site from some of that highway noise,
5 maybe to a considerable degree, I don't know.
6 Unless and until the houses are actually planned
7 and drawn and then someone like Mr. Greene sits
8 down at a computer, it's impossible to tell the
9 impact. So it's very questionable at this point
10 whether residential development at South Schulte
11 would increase or decrease noise levels near the
12 site.
13 Q How about the effect of residential
14 development in South Schulte upon where sensitive
15 receptors should be located?
16 A The project we're considering is to be
17 built in an environment right now that does not
18 include housing development in South Schulte. And
19 so I believe it would be unreasonable to require
20 measurements where there are no houses yet, and,
21 as far as I understand, there are not yet even
22 permits issued to build those houses. I think
23 that's beyond the requirement of a CEQA cumulative
24 impacts analysis.
25 Q And why do you believe it's beyond that

1 analysis?

2 A Because I don't believe that the housing

3 development you're talking of is far enough along

4 to be considered a real development under CEQA.

5 Q How far along does it have to be?

6 A Farther than that.

7 (Laughter.)

8 THE WITNESS: I would have to sit down

9 and bump heads with my attorney here to come up

10 with a more accurate answer, but my understanding

11 of CEQA is that the South Schulte planned housing

12 is not yet far enough along that I would be

13 required to consider it as a cumulative impact.

14 BY INTERVENOR BLACKWELL:

15 Q Are you familiar with the fact that

16 there is an urban management plan covering that

17 area?

18 A No.

19 Q Are you familiar with the fact that

20 Tracy certified an EIR for that urban management

21 plan?

22 A No.

23 Q Are you familiar with the fact that

24 there is a South Schulte specific plan for that

25 area?

1 A I've heard of that plan.
2 Q And are you familiar that there's been a
3 certification and EIR for that project area?
4 A No.
5 Q Okay. Is that far enough along?
6 A No, sir.
7 Q So are you saying you actually have to
8 have houses built in order to consider that?
9 A I'm saying that I stand by my cumulative
10 impact testimony.
11 Q Just to clarify, though, you're saying
12 there have to be homes built in order to consider
13 those for sensitive receptors?
14 MS. WILLIS: That was a
15 mischaracterization of his testimony.
16 INTERVENOR BLACKWELL: Then I apologize;
17 perhaps we can get some clarification.
18 HEARING OFFICER TOMPKIN: Why don't you
19 rephrase your question.
20 BY INTERVENOR BLACKWELL:
21 Q What level of development, then, is
22 necessary to determine where the sensitive
23 receptors should properly be placed for a noise
24 analysis?
25 A You're asking me to speculate and I

1 believe CEQA specifically excludes the requirement
2 to speculate.
3 Q Well, that's correct, and I believe it's
4 guideline 15145 deals with speculation. If you
5 feel there was speculation, did you document your
6 reasons for determining that any development in
7 South Schulte would be speculative?
8 A I just testified a few moments ago how I
9 took a conservative approach to establishing a
10 valid ambient background noise level, particularly
11 considering the likelihood that there may be
12 residential development near the site. I didn't
13 specifically read the South Schulte plan, I wasn't
14 aware that the EIR had been certified, but in
15 doing my analysis I did consider the possibility
16 that noise in the environment could be very
17 important in the near future.
18 Q And in considering that I believe you
19 testified that an increase of eight decibels would
20 be deemed a significant impact as far as your
21 analysis?
22 A I said that it could be deemed a
23 significant impact.
24 Q And what would make it a significant
25 impact?

1 A I don't want to let you draw me into
2 speculation any farther than this, thank you.
3 Q Well, I'm sorry, you said it could be a
4 significant impact, so there has to be some
5 parameter for what would make it a significant
6 impact, doesn't there?
7 A Well, if you could show me a plan
8 locating each house, show me the size of the
9 house, how many stories, how many feet, you
10 know -- Can you boil your question down into
11 something that I can understand? You've got me a
12 little bit confused here.
13 Q I'm sorry --
14 PRESIDING COMMISSIONER PERNELL: Would
15 you restate the question, please.
16 BY INTERVENOR BLACKWELL:
17 Q Well, I don't know if I can accurately
18 remember exactly what that question was, I don't
19 know if it can be read back, but I believe the
20 question was at what level of development is
21 necessary in order to analyze sensitive receptors?
22 MS. WILLIS: Actually, the question had
23 to do with the significance level of eight
24 decibels.
25 INTERVENOR BLACKWELL: Oh, I'm sorry --

1 MS. WILLIS: We had moved on to that,
2 and I think he was confused with -- back to your
3 other questions.
4 THE WITNESS: Do you want me to address
5 the number of eight decibels, or would that
6 satisfy you?
7 BY INTERVENOR BLACKWELL:
8 Q Well, actually, I believe your testimony
9 was eight decibels could cause a significant
10 impact. I'm simply trying to determine, from that
11 testimony, what -- how eight decibels do cause a
12 significant impact.
13 A It's generally accepted in the noise
14 business that an increase in noise level of five
15 decibels will be perceptible to most people, but
16 not to the extent of annoyance. An increase of
17 five decibels probably will not draw many
18 complaints. As the noise level increases beyond
19 five decibels, more and more people will notice it
20 and be annoyed by it and complain.
21 If you increase the noise level 50
22 decibels, I'm sure everyone would complain. If
23 you increased it five decibels, probably very few
24 people would complain, and there's a spectrum in
25 between.

1 It's impossible for me to sit here and
2 say, given the South Schulte development, how many
3 people would complain about the power plant noise
4 at eight decibels or at seven decibels or at ten
5 decibels.
6 Q Just so I'm clear, I'm not trying to be
7 argumentative, but the eight-decibel increase
8 would be caused by locating a sensitive receptor
9 closer to the project site?
10 MS. WILLIS: Could you rephrase your
11 question? And I just want to make sure you
12 understand that staff is proposing a level that
13 would be five db at the nearest sensitive receptor
14 and not eight. So I think there seems to be
15 questioning along eight as though that's what
16 staff has proposed, but that's not staff's
17 proposal.
18 INTERVENOR BLACKWELL: No, I understand
19 that.
20 BY INTERVENOR BLACKWELL:
21 Q Perhaps I'm assuming this correctly, but
22 if there was a sensitive receptor that was placed
23 closer to the proposed project site, would that
24 result in an increase in the applicable decibels?
25 A In general, the closer a receptor is to

1 the noise source, the more noise, the louder the
2 noise that receptor will receive.
3 Q And, just so I understand, then, the
4 sensitive receptors that you've located do not
5 account for possible development of the South
6 Schulte specific plan area; is that correct?
7 A Correct.
8 Q Okay. When you referred to the
9 mitigation of this possible significant impact,
10 one of the possible mitigations is not building
11 the project at all, moving it somewhere else;
12 isn't that correct?
13 A I don't believe so. I'm analyzing where
14 the Tracy peaker project at this location. People
15 testified last week to alternatives, including
16 alternative sites. I could refer you to that
17 testimony.
18 Q No, but I mean, in a general CEQA
19 analysis, if the significant impacts caused by a
20 project, one of the ways you can mitigate those
21 impacts is to actually move the project somewhere
22 else, particularly when you're talking about
23 noise; isn't that correct?
24 A My testimony, if my recommendations were
25 accepted by the committee and taken by the

1 Commission, there would be no significant adverse
2 noise impacts. So there would be no need to move
3 the project.
4 Q No, I fully understand that. I'm saying
5 if there were significant impacts --
6 PRESIDING COMMISSIONER PERNELL: Sir, I
7 think he's answered the question here. The fact
8 of the matter is, he's analyzing Tracy's peaker
9 power plant for noise, not an alternative site or
10 any of that. So if you have anything that's --
11 MS. WILLIS: May I clarify?
12 PRESIDING COMMISSIONER PERNELL: Yes.
13 MS. WILLIS: Just as a clarification,
14 our process as Commissioner Pernell indicated, our
15 staff reviews the power plant as proposed. We do
16 not have an option of moving the plant somewhere
17 else as mitigation.
18 We would conclude -- If, in fact, we
19 concluded there were adverse impacts that could
20 not be mitigated, that would be our conclusion,
21 that there would be significant adverse
22 unmitigatable impacts. But we would not propose
23 mitigation that would put the power plant in
24 another site. That is not part of our process.
25 That is not something we're allowed to do under

1 our process.

2 INTERVENOR BLACKWELL: All right, thank

3 you.

4 INTERVENOR SARVEY: Robert Sarvey.

5 CROSS EXAMINATION

6 BY INTERVENOR SARVEY:

7 Q Does CEQA require a cumulative impact

8 analysis on all reasonably foreseeable projects?

9 A I believe it does.

10 Q Okay. The Tracy Hills development is

11 directly across the canal. Did your analysis of

12 the cumulative impacts include this development?

13 COMMISSIONER LAURIE: Sir, don't answer

14 that question.

15 There is no evidence in the record that

16 the Tracy Hills project is directly across the

17 canal. You've stated that three times. If you

18 can produce evidence that it's directly across the

19 canal, then we will allow the question. That

20 evidence is not in the record.

21 INTERVENOR SARVEY: I entered the Tracy

22 Hills specific plan -- I believe it was on the

23 first or second day -- into the record. But I'll

24 withdraw the question, Mr. Laurie.

25 BY INTERVENOR SARVEY:

1 Q If a resident had a complaint about
2 construction noise, would the construction be
3 halted until the noise issue was resolved?
4 A Probably not. That's not the intention
5 of the noise complaint process that I've
6 recommended in my condition of certification.
7 Q So the resident would actually have to
8 put up with the nuisance of the noise until the
9 complaint was resolved; is that correct?
10 A I would hope -- Yes, but I would hope
11 that the construction noise problem would be dealt
12 with rather quickly. If there's a machine in bad
13 repair running around with a burned-out muffler,
14 that's something that can be taken off line right
15 away, and it should be and it better be.
16 We have on our staff people that are
17 called compliance project managers who follow
18 these projects during construction and afterwards
19 through the operating life. And these people are
20 accessible to you by an 800 phone number. If you
21 should file a noise complaint with the developer,
22 with the power plant owner, and don't get the kind
23 of response that you think you deserve, you call
24 that 800 number and you have our compliance
25 project manager on their back, wanting to know

1 what's going on. The compliance project in some
2 cases would automatically go out to the site and
3 threaten to do nasty things to the developer.
4 So we try to --
5 Q We don't want that.
6 (Laughter.)
7 THE WITNESS: Yeah.
8 BY INTERVENOR SARVEY:
9 Q Does a constant noise level differ from
10 noise levels that rise and fall in decibel levels?
11 Does it have a different effect?
12 A Well, the effect is it just -- it
13 becomes part of the background, it becomes part of
14 what we hear as the minimum. You know, when it
15 gets quiet, it doesn't get as quiet.
16 Q So, in your analysis of all of the
17 sensitive receptors, what was the lowest value
18 that you came across?
19 A Well, I took the values from the
20 applicant's application, and if you look in the
21 application for certification, Appendix E, I see
22 an L90 figure of 34 decibels at LT2, measured at
23 4:00 p.m. on the 14th of June of 2001. That looks
24 like about the lowest number.
25 Q And do you have any figures for what the

1 noise level will be at that particular site when
2 the plant is running?
3 A Yes. If my recommendations were
4 accepted by the Commission and the plant were
5 built as per my supplemental testimony, the noise
6 level there would be -- I'll be referring my
7 testimony to Noise four -- the resultant would be
8 40 decibels.
9 Q So the applicant actually is proposing a
10 higher figure than the 40 decibels for that
11 particular location, 42; is that correct?
12 A Yes. Under the applicant's proposal,
13 that situation noise level would be 43 decibels.
14 Q So under the assertions that you made
15 earlier that, of course, the applicant would want
16 to run this plant 8,000 hours because they're good
17 businessmen, that would lead to the conclusion
18 that this site that at one time experienced a 34-
19 decibel level will now always experience a 42-
20 decibel level at the plant, if the applicant has
21 his way with this noise?
22 A That's being a little harsh. Not
23 always. Always is an awfully big word.
24 Q Only when the plant is running.
25 A Yes.

1 Q Only 8,000 hours a year, 91 percent of
2 the year.
3 A We don't know how many hours, but
4 whenever the plant is running, that's the kind of
5 noise level you can expect.
6 Q Well, I was just running on the previous
7 assumption that they would run 8,000 a year, which
8 is a good assumption.
9 Did any of your, or excuse me. What
10 date did you complete your noise level survey?
11 A I did no noise survey. I relied on the
12 survey numbers provided by the applicant.
13 Q Okay. Boy, that sure took a lot of
14 questions out.
15 INTERVENOR SARVEY: I'm done. Thank you
16 very much.
17 PRESIDING COMMISSIONER PERNELL: Thank
18 you.
19 HEARING OFFICER TOMPKIN: Any redirect,
20 Ms. Willis?
21 APPLICANT COUNSEL GRATTAN: No more
22 intervenors?
23 HEARING OFFICER TOMPKIN: Sorry.
24 Mr. Grattan?
25 APPLICANT COUNSEL GRATTAN: Where to

1 begin?

2 Good afternoon, Mr. Baker, how are you?

3 THE WITNESS: I'm doing just fine, sir.

4 APPLICANT COUNSEL GRATTAN: Good, good.

5 It's nice to see you again, and before we start I

6 just want to add that not only has the Commission

7 been using certain assumptions for many decades,

8 but you've been around for those many decades and

9 I have a great amount of respect and regard for

10 you.

11 THE WITNESS: Nevertheless --

12 CROSS EXAMINATION

13 BY MR. GRATTAN:

14 Q Nevertheless --

15 (Laughter.)

16 BY MR. GRATTAN:

17 Q -- however, can you -- You've used --

18 You've stated, and I believe we agree with the

19 statement that L90 is commonly used as the measure

20 or the metric for background. Is it commonly used

21 as the measure for ambient?

22 A Ambient means that which exists. Okay,

23 you can measure the ambient background, you can

24 measure the ambient LEQ, you can measure the

25 ambient L10, the ambient L50, you can measure the

1 ambient L-anything. You can calculate a CNEL, a
2 community noise equivalent level; you can
3 calculate an LDN, a day/night level.
4 These are all ambient, if you're
5 referring to noise that comes from the existing
6 environment.
7 Q There are different ways of measuring
8 ambient.
9 A Yes, sir.
10 Q And are you aware of other entities
11 besides the Energy Commission which measure --
12 Take that back, I have to rephrase the question
13 here. What does CEQA use as the norm from which
14 to measure a significant impact? Is it ambient or
15 is it background?
16 A You're talking apples and kangaroos,
17 okay?
18 Q I'm just a poor country lawyer.
19 A Well, that explains it.
20 (Laughter.)
21 BY MR. GRATTAN:
22 Q I was told that this was -- apples or
23 kangaroos to the contrary notwithstanding by my
24 expert -- that this is a reasonable question to
25 answer. And what does -- Does CEQA require an L90

1 to be used as a measure of ambient?
2 MS. WILLIS: You've stated, asked two
3 questions.
4 APPLICANT COUNSEL GRATTAN: That's
5 correct.
6 MS. WILLIS: Which question would you
7 like answered?
8 APPLICANT COUNSEL GRATTAN: Well, let's
9 answer the second one.
10 BY MR. GRATTAN:
11 Q Does CEQA require that L90 be used as a
12 measure of ambient?
13 A I do not believe so.
14 Q Okay. Do the Energy Commission's
15 regulations require that?
16 A No, they do not.
17 Q So this is administrative practice over
18 the past couple of decades.
19 A Yes.
20 Q And in every case, every siting case
21 that you've been involved in, has the Energy
22 Commission used a difference of five dba from
23 ambient as presumptive of a significant impact?
24 A No.
25 Q And I believe I remember one, in fact,

1 that was in a quiet rural area where it was not
2 used, the Rio Linda case; do you remember that?
3 A I don't remember the specifics. I
4 managed to put that out of my memory.
5 (Laughter.)
6 BY MR. GRATTAN:
7 Q Was it used in High Desert?
8 A My memory is sitting in a file cabinet
9 in my office in Sacramento. If you want specific
10 answers from me, I would be happy to go back and
11 search my memory.
12 Q Can I -- I'd like to continue asking the
13 questions. If you don't know, that's fine. If
14 you don't have it before you, that's fine.
15 How about the Sutter project?
16 A Again, my memory is in a file cabinet.
17 I came prepared to deal with the Tracy project.
18 Any other projects you want specifics on, I'll
19 have to go back to look in my files.
20 Q But your statement was that the Energy
21 Commission has consistently used this for the past
22 20 years, consistently used the five dba as a
23 presumption of significance.
24 A No, I did not say that. If you'd like
25 clarification, I would be happy to offer it.

1 Q Please.
2 A Okay. We have for many, many years used
3 an increase in background noise level of five
4 decibels or more as an indicator that there may
5 indeed be a significant impact, at which point
6 we've then analyzed the situation. If the
7 increase in background noise levels from the
8 proposed project is less than five decibels, we
9 assume that there will not be a significant impact
10 and we then do not exercise ourselves.
11 Q And in this case, where we are, where
12 the Commission staff is measuring let's say the
13 departure point -- I won't get into background
14 ambient, but your departure point that you have
15 recommended is basically the quietest ten percent
16 of a given time period, correct?
17 A If you're referring to using the L90 as
18 opposed to the LEQ or the DNL, yes.
19 Q And in this case, where you have, number
20 one, recommended using the quietest ten percent as
21 the departure point, and the presumptive
22 significance level of five dba, what leads you to
23 conclude that a difference -- based on that
24 measurement, based on the very conservative
25 measurement of I believe it's eight dba, is a

1 significant impact? Or have you concluded that?
2 A If you recall, what I testified to a
3 little earlier this afternoon, I indicated why we
4 use the background or L90 noise level; it's
5 because the noise from an operating power plant is
6 unusually constant. It becomes and defines the
7 background, so it affects the background.
8 The background noise level is a very
9 important part of the ambient noise regime. It's
10 something that affects people's lives. If the
11 ambient background increases significantly, it
12 will -- people will notice it. And if it
13 increases enough, they will be annoyed by it.
14 So, again, that's the reason that we use
15 background, the L90. What was the rest of your --
16 As far as the decibels --
17 Q No, I don't.
18 A As far as the -- Excuse me, sir?
19 COMMISSIONER LAURIE: Commissioner
20 Pernell?
21 PRESIDING COMMISSIONER PERNELL:
22 Commissioner Laurie, please.
23 COMMISSIONER LAURIE: My understanding
24 is your testimony is that less than five dba
25 delta, there is a presumption of no significant

1 impact, correct?
2 THE WITNESS: That's correct.
3 COMMISSIONER LAURIE: Anything beyond
4 five, you study it on a case-by-case basis.
5 THE WITNESS: Yes, sir.
6 COMMISSIONER LAURIE: I think the
7 question is that the sheer number of eight; why
8 does that lead you to a conclusion of significant
9 impact? For example, if the number were seven or
10 six, would your recommendation be the same? Is
11 eight some magical number, or is it based upon
12 modeling or other professional rules that you're
13 aware of?
14 THE WITNESS: The eight is not a
15 specific line drawn in the sand or ascribed in
16 steel. It's of interest because it's greater than
17 five, so there's a potential for a significant
18 adverse impact here. It's less than 50, so it's
19 not unquestionably a significant adverse impact,
20 but we look at the situation.
21 We've dealt with -- I've dealt with
22 similar situations on previous siting cases. The
23 Metcalf project, with which you are I'm sure
24 painfully familiar, and --
25 COMMISSIONER LAURIE: I recall that

1 vaguely.

2 (Laughter.)

3 THE WITNESS: You managed to put some of

4 that out of your memory too, I'm sure -- and the

5 Three Mountain power project.

6 In both cases, the project was proposed

7 in a very quiet rural environment, and in both

8 cases there were relatively few sensitive

9 receptors near the project. In both of these

10 cases, the project proponent went out and reached

11 agreement with the owners of those residences

12 whereby the -- even though the power plant would

13 increase the background noise level at those

14 residences more than five decibels -- in the

15 Metcalf case, it would have been a ten-decibel

16 increase -- and at the Three Mountain power

17 project, six decibels.

18 The owners of the residences agreed that

19 if they found the noise annoying, the power plant

20 owner would then come in and mitigate at the

21 residence, install insulation, double-pane

22 windows, solid-core doors, perhaps even air

23 conditioning, whatever. As far as I've seen and

24 the testimony in this case, I have not heard any

25 evidence that the owner here has made any offers

1 to the nearby residents to mitigate their
2 residences.
3 As such, I see that there's nothing to
4 be gained at the residences, and so, in
5 conservatism, I'm saying a very conservative
6 approach would be to mitigate at the power plant
7 so that we don't exceed the five-db increase at
8 the residences. If the owner had cut deals with
9 these owners of these residences, then I would say
10 that eight decibels is probably acceptable, as
11 long as the people can find some relief in
12 insulation of their houses paid for by GWF.
13 COMMISSIONER LAURIE: I believe we are
14 going to have discussion among the parties as to
15 whether or not you are recommending a finding of
16 significance, which requires mitigation. And the
17 question that Mr. Grattan is posing -- I hate when
18 people do that --
19 APPLICANT COUNSEL GRATTAN: I don't
20 mind.
21 COMMISSIONER LAURIE: -- is why is it
22 the number eight that leads you to the conclusion
23 that it is significant? Is it possible, for
24 example, to have a delta of ten and it not be
25 significant? So what are the characteristics of

1 the number eight that makes it significant, as
2 opposed to seven, for example?
3 THE WITNESS: Well, I'm not comparing
4 eight to seven, sir. I'm comparing eight, which
5 is what the increase would be on a summer daytime
6 with the applicant's proposed project, to my
7 proposal in conservatism only increasing five.
8 Noise is a qualitative thing. It's not
9 fair to try to tightly circumscribe it with
10 numbers. We talk about numbers and decibels and
11 such, but noise is a gradation. It's a spectrum.
12 And whereas an eight-decibel increase in one
13 situation might be very significant, an eight-
14 decibel increase in another might not.
15 I'll be honest, I'm speculating here.
16 I'm speculating that if the project is built as
17 proposed and increases the ambient noise level
18 eight decibels at those residences, there is a
19 potential that the people will be annoyed. If the
20 developer had approached them and offered to
21 insulate their residences, I would say that that's
22 adequate assurance of mitigation and I would not
23 be at all concerned, just as I was not concerned
24 in Metcalf or in Three Mountain.
25 Absent that agreement, and I'm, again,

1 being conservative, I'm saying that it's more than
2 five so there is a potential. And there is no
3 fallback mitigation at the residence, so, again,
4 I'll use the C word, I'm being very conservative
5 here. I would hate to have somebody nail me up to
6 the wall and say this guy claimed that eight
7 decibels is and always will be a significant
8 adverse impact, because I don't believe that's
9 true. I just suspect that in this case it might
10 be.
11 COMMISSIONER LAURIE: Thank you,
12 Mr. Baker.
13 BY MR. GRATTAN:
14 Q Is that suspicion --
15 A Excuse me, I didn't hear you, sir.
16 Q Okay. Is that suspicion in any way
17 fueled by an analysis of a cost that might incur
18 to the developer to get down below five?
19 A As I explained in my first words here
20 this afternoon, CEQA requires a significant
21 adverse impact to be mitigated, either to the
22 point of insignificance or to the point feasible.
23 And CEQA specifically says that you consider
24 dollars when determining feasibility.
25 Now, I've also mentioned earlier today

1 that I can't determine how many dollars are
2 feasible and how many are not. Only the owner of
3 this project who has to sign the check can
4 determine, and I have to point to the owner to
5 determine feasibility.
6 And until we heard Mr. Greene's
7 testimony today, I never heard a number put on
8 that.
9 Q That's an acceptable answer, but you
10 have -- From what I hear, Mr. Baker, this five-dba
11 number is a number that sets a presumption. And
12 that even when you analyze whether the presumption
13 is applicable, even understanding that this five-
14 dba delta is from the lowest ten percent of
15 ambient sound environment, even then it seems like
16 it is not an objective number but a subjective
17 number, based upon some degree of annoyance I
18 believe your term was.
19 A Let me interrupt my answer to your
20 question by reminding you that I've previously
21 given my reasons for using the L90 for background
22 noise level as a basis of measurement. Now, to go
23 from there, as I've just mentioned in answering
24 Commissioner Laurie's question, I can't say with
25 absolute certitude that an eight-decibel increase

1 is going to be a significant adverse impact to a
2 significant number of people. I can't do that.
3 And, as far as forcing the applicant to
4 spend the money to bring the noise increase down
5 to five decibels, I have no idea if that's
6 economically feasible or not for the applicant.
7 The reason I proposed a five-decibel increase is
8 because I feel that if the increase were only five
9 decibels I have absolutely no question there will
10 not be significant adverse impacts. Eight is a
11 question.
12 I enjoy the extreme luxury of not being
13 the decision-maker here.
14 Q I think you've answered my question.
15 APPLICANT COUNSEL GRATTAN: Go ahead,
16 Commissioner.
17 COMMISSIONER LAURIE: Mr. Baker, on the
18 question of economic feasibility, under CEQA, if
19 you have a significant impact that is not
20 mitigated, CEQA requires findings of override;
21 does it not?
22 THE WITNESS: I believe so.
23 COMMISSIONER LAURIE: One of those
24 findings of permitting an impact that is not
25 mitigated to less than significant is economic

1 infeasibility; is that correct? Is that your
2 understanding?
3 THE WITNESS: That's my understanding.
4 COMMISSIONER LAURIE: And it would be
5 the Commission that has to make that finding; is
6 that not correct?
7 THE WITNESS: I don't know, sir. It's
8 possible. And I say, again, I don't know, but
9 it's possible that it could be up to the
10 applicant. The applicant could say to the
11 Commission, if you want us to spend this many
12 dollars, it will cost this many dollars to
13 mitigate, and if you force us to spend that we
14 cannot afford it and we will not build the
15 project.
16 COMMISSIONER LAURIE: But it's the
17 finding of the Commission, based upon the evidence
18 in the record; is that your understanding? If you
19 don't know, just say you don't know.
20 THE WITNESS: I don't know, sir.
21 COMMISSIONER LAURIE: Okay.
22 BY MR. GRATTAN:
23 Q Mr. Baker, can I ask you to put the
24 first chart back up, please, the first chart you
25 put on there.

1 Now, Mr. Baker, this chart, it says,
2 "Location, Near Tracy." It's not, in fact, the
3 applicant's measurements, right?
4 A Just for the record, again, this is the
5 diagram labeled, "Illustration of Hourly Noise
6 Metrics."
7 Q Hourly noise metrics at a place near
8 Tracy, not hourly noise metrics at -- using the
9 monitoring data that the applicant has submitted
10 near the project.
11 A That's correct.
12 Q Okay. Any idea -- Now, this is one
13 hour. Now, the applicant would be required, if he
14 were to demonstrate any scientifically significant
15 monitoring, the applicant would be required, under
16 the Commission's protocols, to do 25 hours of
17 monitoring?
18 A I'm sorry, what was the question there?
19 Q If the applicant were to follow the
20 Commission's protocols for monitoring, would not
21 the applicant be required not to do one hour but,
22 in fact, 25 hours?
23 A Yes, but the diagram --
24 Q That answered the question.
25 A Okay.

1 Q That answered the question. We'll get
2 to the -- Any idea at this location that is near
3 Tracy but in East Altamont, is that -- it's on the
4 other side of the --
5 A Yes.
6 Q -- on the other side of the Pass?
7 A No, it's on this side of the Pass.
8 Q Oh, it's on this side of the Pass.
9 A It's north and a little west of Tracy.
10 Q Any idea what those spikes might be?
11 A They could be a bird sitting on top of
12 the noise monitor and chirping. Or a cricket, you
13 know, at the foot of the monitor chirping. They
14 could be some kid coming by and throwing a rock at
15 the post that the monitor is mounted on, or it
16 could just be a vehicle driving by on a nearby
17 street. We see a maximum there of 57 decibels.
18 That could easily be a vehicle driving by nearby.
19 But it doesn't matter, because this
20 diagram was put on the wall simply to illustrate
21 some of the basic concepts of sound measurement,
22 not to illustrate anything pertaining to this
23 particular project.
24 Q But don't the spikes skew that a bit?
25 Don't those 20-db spikes skew it a little bit?

1 A Those 20-db spikes are present
2 everywhere. Wherever you measure noise you're
3 going to get spikes. You're going to get low
4 points and you're going to get high points, and
5 that's why we have different noise measurements.
6 The L90, the background noise level, is relatively
7 insensitive to these very short-term spikes. If
8 you measured the L10, the noise level that's
9 exceeded only ten percent of the time, that would
10 measure just those spikes. But we don't -- you
11 know, I'm not interested in the L10 because it has
12 no significance in power plant siting.
13 But the L90, one of its values, one of
14 its virtues in analyzing here is it's insensitive
15 to momentary spikes like that.
16 Q But the top line on there, the LDN, the
17 one which is a weighted number, that is sensitive
18 to those spikes; is that not correct?
19 A Well, yes, certainly. It, like the LEQ,
20 it includes all the energy and all the sound
21 measured over the interval.
22 Q Do you have any idea where the LDN line
23 would be if we used the applicant's monitoring
24 data from Tracy?
25 A No, I haven't looked at that, and

1 again --

2 Q Would it surprise you if it were

3 somewhere down in between 45 and 40?

4 A Not at all.

5 Q Okay. Can we put up the next chart,

6 please.

7 Just looking at the difference between

8 the applicant's proposal and the staff's proposal,

9 Summer Nighttime; now, would you agree that the --

10 and doesn't the -- Some of the regulatory systems

11 and ways of measuring noise impact agree that

12 nighttime is a more sensitive and more important

13 measurement than day?

14 A Yes, I will agree with you on that.

15 Q And looking at the difference between

16 the applicant's proposal and the staff's proposal,

17 summer nighttime, the applicant's proposal

18 indicates a 42-dba or -db, and the staff's

19 proposal indicates a 39. Would you view the

20 differences between those numbers, 39 and 42, can

21 you hear that difference? Can a normal person

22 hear that difference?

23 A You could hear the difference. You

24 could detect it. It wouldn't be obvious.

25 Q But even under the staff's application

1 of the five-db delta presumption of significance,
2 that three-db is below that, Summertime Nighttime?
3 A My attorney advises me that the word
4 "presumption" there is a red flag. Can you
5 restate your question without the P word?
6 Q I thought it was a presumption of
7 significance. Criteria for significance?
8 MS. WILLIS: Could I please clarify?
9 And I think Commissioner Laurie asked the
10 question. Below five decibels is a presumption of
11 not being significant. It's the -- The reverse is
12 not applicable.
13 APPLICANT COUNSEL GRATTAN: You're
14 correct. You're correct and thank you. I knew
15 that.
16 BY MR. GRATTAN:
17 Q Even given the Commission staff's
18 practice -- Well, this is below the Commission
19 staff's presumption of possible significance.
20 A Yes.
21 Q Thank you. One last question: Are you
22 aware of any agency in the State of California or,
23 for that matter, in the United States, which uses
24 L90 as the departure point for measuring changes
25 in a noise environment?

A No.

Q Just the Energy Commission staff.

A In my experience, but I have not made any kind of a survey.

Q Okay, thank you.

APPLICANT COUNSEL GRATTAN: That's all I have.

HEARING OFFICER TOMPKIN: Ms. Willis?

MS. WILLIS: Thank you. I just have a few questions on redirect.

REDIRECT EXAMINATION

BY MS. WILLIS:

Q First of all, Mr. Baker, just to follow up with Mr. Grattan's last question, are there any other agencies, state agencies in the State of California that cite power plants and that would analyze the noise impacts of power plants?

A Well, power plants, non-thermal power plants and power plants under 50 megawatts are cited by local authorities; how they analyze noise, I don't know.

Q And, to clarify, how about over 50 megawatts?

A Well, no, thermal power plants 50 megawatts and larger are done right here, and in

1 the past ten years I've had my fingers in all of
2 them.
3 Q Mr. Grattan also asked you a question,
4 whether CEQA required the use of an L90
5 measurement. Does CEQA require or dictate any
6 noise measurement standard?
7 A Not that I'm aware of.
8 Q And finally, could you briefly explain,
9 as far as -- Well, let me put it this way. My
10 understanding is that an increase of ten db would
11 be a doubling of the noise level; is that correct?
12 A Yes.
13 Q So could you explain what an addition of
14 eight decibels would mean.
15 A Nearly a doubling.
16 Q Okay.
17 MS. WILLIS: That's all I have.
18 HEARING OFFICER TOMPKIN: All right.
19 MS. WILLIS: At this time staff would
20 like to move --
21 APPLICANT COUNSEL GRATTAN: Very quick
22 redirect (sic)?
23 HEARING OFFICER TOMPKIN: We're trying
24 to wind this down, so --
25 APPLICANT COUNSEL GRATTAN: Very quick,

1 yes.

2 HEARING OFFICER TOMPKIN: -- very quick.

3 RECROSS EXAMINATION

4 BY MR. GRATTAN:

5 Q Given that -- We'll just look at CEQA

6 right now -- CEQA does not require that an L90 be

7 used, CEQA does not require that a five-dba be

8 used as the measure of possible significance or,

9 at least, the upper limit of non-significance.

10 What does CEQA have to say about being

11 able to presume that compliance with standards

12 means there aren't significant environmental

13 impacts?

14 A I'm quite sure I do not understand your

15 question.

16 Q Does CEQA say that if you comply with

17 standards, such as the County of San Joaquin, for

18 instance, if you comply with standards that there

19 is a presumption that there isn't a significant

20 impact?

21 A I don't believe CEQA says that.

22 Q Do the guidelines say that?

23 A I don't believe so.

24 Q You will acknowledge that this project

25 is three db below the most stringent standard that

1 is applicable save for the Energy Commission's?
2 Applicable in the City and County?
3 A In my testimony I agreed that the
4 project, if built as currently proposed, would
5 comply with all those LORS.
6 APPLICANT COUNSEL GRATTAN: Thanks.
7 HEARING OFFICER TOMPKIN: Ms. Willis?
8 MS. WILLIS: Yes. Staff would like to
9 move into evidence the section in the staff
10 supplement entitled Noise and Vibration.
11 HEARING OFFICER TOMPKIN: Any objection?
12 Hearing no objection, the section dealing with
13 Noise in the staff supplement will be admitted in
14 evidence.
15 (Thereupon, the witness was
16 excused from the stand.)
17 HEARING OFFICER TOMPKIN: If there is
18 nothing further in this area, we'll close the
19 record on Noise at this time.
20 We'll move on to Land Use.
21 Mr. Grattan?
22 APPLICANT COUNSEL GRATTAN: Yes, we --
23 INTERVENOR SELIGMAN: Madam Hearing
24 Officer, before you start, could I ask a
25 procedural question, please.

1 HEARING OFFICER TOMPKIN: Yes.
2 PRESIDING COMMISSIONER PERNELL: Yes.
3 INTERVENOR SELIGMAN: I, as you know,
4 have a -- the head of the San Joaquin County
5 Community Development Department as a witness and
6 the City of Tracy has some of its staff here.
7 From a procedural standpoint, I'm trying to
8 determine will we be able to complete the Land Use
9 evidence and testimony this evening?
10 PRESIDING COMMISSIONER PERNELL: In
11 response to that, the way these technical hearings
12 have been going, I would say no. However, we do
13 want to get started, and if there's need be, which
14 I think there will be, we will be here tomorrow
15 morning. Or would you prefer staying here until
16 3:00 in the morning?
17 INTERVENOR SELIGMAN: Well, it's not my
18 preference, but the point I'm trying to make is
19 every other item that has been considered by the
20 Commission has been done from beginning to end
21 during whatever session the Commission has started
22 it. I think that the Land Use issue, being a
23 rather critical issue to some of us, should
24 receive the same treatment, as opposed to being
25 broken up for whatever reasons, including time.

1 So my request is that the entire Land
2 Use be heard at one level and, as I understand it
3 from what you have indicated, that all that we're
4 going to have available is tomorrow morning, for
5 whatever is going to occur, I would be concerned
6 if we're going to break up this one area as
7 opposed to the prior policies that you've had in
8 completing the entire area at one sitting.
9 PRESIDING COMMISSIONER PERNELL: Right.
10 Well, first of all, Land Use is everyone's concern
11 that's up at this dais, not just yours or your
12 client's, so let me say that. And secondly, I
13 have not indicated that the only time we would
14 deal with it is tomorrow. I've also indicated
15 that we would start Land Use now and complete it
16 tomorrow.
17 I understand your eagerness to conclude
18 these hearings at an early time frame; however, we
19 will start Land Use now and complete it tomorrow.
20 Commissioner Laurie?
21 COMMISSIONER LAURIE: Mr. Chairman, I
22 think that Mr. Seligman was asking that it not be
23 started tonight, but that it all be heard in one
24 day. And that's simply not feasible.
25 INTERVENOR SELIGMAN: Okay.

1 COMMISSIONER LAURIE: I am aware that
2 both you and I have to be back in Sacramento by
3 tomorrow afternoon, and it's simply going to take
4 more than four hours to get through the subject.
5 I don't know how we can not start it.
6 And I think the issue of getting through a whole
7 issue was just, it's more coincidental than -- we
8 simply cannot do this in four hours, which is all
9 we're going to have tomorrow.
10 PRESIDING COMMISSIONER PERNELL: Point
11 well taken. Any other comments in terms of
12 procedure?
13 INTERVENOR SELIGMAN: Is there a
14 possibility of starting earlier than 10:00
15 o'clock, then, tomorrow? No?
16 PRESIDING COMMISSIONER PERNELL: Can we
17 go off the record for a minute?
18 (Thereupon, a recess was held
19 off the record.)
20 PRESIDING COMMISSIONER PERNELL: We have
21 noticed the hearing to begin at 10:00 o'clock, and
22 so we couldn't just arbitrarily change that
23 notice. So the hearing will begin at 10:00
24 tomorrow. Hopefully we can get through as much of
25 this tonight as we can. I would certainly like to

1 get through applicant's presentation.
2 INTERVENOR SARVEY: I have one question,
3 and that's an inexperienced person's procedural
4 question. I have no witnesses in this issue and I
5 do have two exhibits that I want to introduce into
6 evidence so they may be discussed, so at what
7 point do I do that?
8 HEARING OFFICER TOMPKIN: You have no
9 witnesses?
10 INTERVENOR SARVEY: Well, I have no
11 witnesses in Land Use. I only have two --
12 HEARING OFFICER TOMPKIN: Could you
13 speak up? I'm sorry, I cannot hear you.
14 INTERVENOR SARVEY: I only have two
15 exhibits that I want to introduce into evidence,
16 and I was asking at what point do I introduce
17 these into evidence so I can discuss these issues?
18 HEARING OFFICER TOMPKIN: When we get to
19 the direct testimony or any proposed testimony by
20 intervenors which would be after the applicant and
21 staff have both made their presentations.
22 INTERVENOR SARVEY: So I would not be
23 able to ask applicant or staff any questions of
24 these exhibits?
25 HEARING OFFICER TOMPKIN: I'll have to

1 determine that if it comes up, but at this point
2 it's not in evidence and it's not appropriate at
3 this point in the proceedings.
4 INTERVENOR SARVEY: It's on my exhibit
5 list is all I ask. I'm not familiar with the
6 procedure and I'm just trying to clarify, that's
7 all.
8 PRESIDING COMMISSIONER PERNELL: My
9 thought is that it won't -- we won't get as far as
10 the intervenors tonight.
11 INTERVENOR SARVEY: Okay. Well, as I
12 said, this testimony is related to the questions I
13 would like to ask applicant and staff. If they're
14 not admitted into evidence, then I will not be
15 able to ask those questions.
16 PRESIDING COMMISSIONER PERNELL: And if
17 it's not in evidence, then it will depend upon
18 applicant and staff objecting.
19 INTERVENOR SARVEY: So we'll have to
20 rule on this.
21 PRESIDING COMMISSIONER PERNELL: Right,
22 when it comes up.
23 HEARING OFFICER TOMPKIN: Mr. Sarvey,
24 one possibility is that if you have a specific
25 question on your exhibits, during cross

1 examination maybe you could present those exhibits
2 to be marked for identification so that they're
3 available to the witness and maybe we can have
4 some flexibility there in terms of asking
5 questions if those exhibits are available. We'll
6 have to see how we proceed.
7 INTERVENOR SARVEY: I believe the
8 applicant has a duplicate insertion, but I don't
9 have his list in my hand, so --
10 HEARING OFFICER TOMPKIN: Keep that
11 possible procedure in mind and we'll see how we
12 can adjust for that.
13 INTERVENOR SARVEY: Thank you very much.
14 INTERVENOR SELIGMAN: Did I understand
15 you to say that the intervenors' witnesses will
16 not be heard tonight?
17 HEARING OFFICER TOMPKIN: It depends on
18 how far we get --
19 PRESIDING COMMISSIONER PERNELL: On how
20 this goes. I mean, I am desperately trying to
21 give everybody an opportunity to speak and make
22 their case. We don't know how long this is going
23 to go, but we do know that it has to be concluded
24 tomorrow.
25 HEARING OFFICER TOMPKIN: All right.

1 We'll proceed with Land Use. Mr. Grattan?
2 APPLICANT COUNSEL GRATTAN: Yes. I have
3 two witnesses here, Mr. Jim Adams from URS and
4 Jennifer Hernandez, and I'd like to put them on as
5 a panel. I think we can save time and --
6 HEARING OFFICER TOMPKIN: Is there any
7 objection from the other parties? Hearing no
8 objection, we will permit that.
9 APPLICANT COUNSEL GRATTAN: And what I
10 propose to do, with the committee's indulgence, is
11 to go through the qualifications and then get
12 Mr. Adams' testimony first, and proceed to
13 Jennifer Hernandez.
14 HEARING OFFICER TOMPKIN: We're going to
15 ask that the witnesses be sworn in at this time.
16 Whereupon,
17 JIM ADAMS and JENNIFER HERNANDEZ
18 Were called as witnesses herein and, after first
19 being duly sworn, were examined and testified as
20 follows:
21 DIRECT EXAMINATION
22 BY MR. GRATTAN:
23 Q Mr. Adams, can you give us your name,
24 address and current employment.
25 A Jim Adams. My work address is 500 12th

1 Street, Oakland, California, and I'm a senior
2 project manager with URS Corporation.
3 Q And can you briefly summarize your
4 qualifications and your role in this project.
5 A I have bachelor's and master's degrees
6 and also a doctorate from the University of Texas
7 at Austin. In addition, I have certificates in
8 environmental assessment and remediation, and
9 advanced environmental law and management from UC,
10 Berkeley. These programs included coursework in
11 planning law and CEQA.
12 I am a registered environmental
13 assessor, pursuant to requirements of the
14 California Office of Environmental Health Hazard
15 Assessment. I am an associate member of the
16 environmental law section of the California State
17 Bar.
18 I have 12 years of planning and
19 environmental experience. I have managed,
20 supervised, written or contributed to a wide
21 variety of projects in which a wide variety of
22 land use issues and CEQA compliance were involved,
23 including subdivision, lot line adjustment,
24 initial studies, negative declarations, which were
25 mitigated or not, and EIR's.

1 My role in the project, I performed the
2 land use analysis. This was the third Energy
3 Commission project for which I did that. I also
4 was assistant project manager, assisting Dave
5 Stein with production of the AFC in its entirety.
6 Q And maybe now I'd like to have Jennifer
7 Hernandez summarize her qualifications and her
8 role in the project.
9 A Good afternoon. My name is Jennifer
10 Hernandez. I'm at Beveridge and Diamond, a law
11 firm in San Francisco. I'm the managing partner
12 of the West Coast office of that law firm. It's
13 located at 456 Montgomery Street, 18th Floor, San
14 Francisco. I'm also the chair of the firm's
15 project development department.
16 With respect to qualifications, I'm a
17 land use and environmental law lawyer. I have an
18 undergraduate degree from Harvard University and I
19 received my law degree from Stanford. My law
20 practice encompasses complex land use project
21 permitting questions. I work for both public and
22 private sector clients.
23 I've written more than 40 articles on
24 environmental law topics and two books, including
25 one book on the California Environmental Quality

1 Act. I was also appointed by the President of the
2 United States to serve as the environmental law
3 member of the Presidio Trust for San Francisco. I
4 was a founding member of the executive board of
5 the California State Bar Environmental Law
6 Section.
7 I teach environmental and land use law
8 at Standard Law School, and also at the UC,
9 Berkeley and UCLA extension programs. And I serve
10 on several nonprofit boards, including Sustainable
11 Conservation and the California Center for Land
12 Recycling.
13 Q And can you tell us the role of the
14 testimony that you prepared, the purpose?
15 A Thank you. I was retained by GWF in
16 this project just recently to evaluate the land
17 use issues associated with this project and with
18 its application, under both the California Energy
19 Commission requirements and the California
20 Environmental Quality Act and local land use
21 requirements.
22 Q And now let's proceed with Mr. Adams.
23 Have you prepared and previously submitted written
24 testimony in the AFC?
25 A Yes. I prepared the Land Use testimony

as part of the applicant's testimony package, submitted on January 24th, 2002.

Q Are you sponsoring any exhibits at this hearing?

A Yes, I am. I'm sponsoring Section 8.4 of the original AFC, August 2001, including the figures 8.4-1 through 8.4-5. Also, Section 8.4 of the supplement AFC, October 2001, and supplemental Section 3.5 and Appendix D. Also, comments on the CEC staff assessment, January 2002; the mitigation agreement with American Farmland Trust, January 16th, 2002; the lot line adjustment, San Joaquin County, January 7th, 2002 is the docket date, I believe; and the letter from San Joaquin County Community Development Department regarding land use conformity submitted September 18th, 2001, which appeared in the supplement as Attachment 3.5-1, October 2001.

Q And can you affirm your testimony under oath today?

A Yes.

Q And do you have any corrections or modifications or explanations to that testimony?

A Yes, I have two minor clarifications. First, in the previously filed testimony, the word

"possibly" should be inserted in item, Roman numeral V(B), so that the sentence reads, "All possibly applicable plans and policies," and the rest of the sentence is fine.

Secondly, I would like to clarify a sentence in the Land Use section of the AFC. On page 8.4-16 of the Land Use section found in the supplement to the AFC, it includes I believe it's the second full paragraph on the page that includes the following sentence, "These land uses, although not adopted by the City of Tracy, would not be compatible with the TPP project if located near or adjacent to the project site."

This sentence needs to be clarified and should be replaced with the following text: "The South Schulte specific plan, no portion of which has been annexed by the City of Tracy, proposed residential zoning for the proposed TPP site. Construction of the TPP would place an industrial facility on a portion of land pre-zoned for residential use. If that pre-zoning was already annexed and adopted, the TPP would not be consistent with that designation; however, construction of the TPP would be compatible with the implementation of the remainder of the South

1 Schulte specific plan. Construction of the TPP
2 would be consistent and compatible with the
3 implementation of the Tracy Hills specific plan."
4 The remainder of that paragraph may
5 stand.
6 Q And before you summarize your testimony,
7 can you give us a chronology of your contacts with
8 the City of Tracy and the County of San Joaquin,
9 and your methodology for assessing local plans.
10 A A point of clarification: When you say
11 your contacts, do you mean the project team's?
12 Q I mean the project team's, excuse me.
13 A Certainly. My contact with the project
14 site began with an initial site visit with GWF and
15 Dave Stein on June 4th, 2001. Several days later
16 on June 7th I asked a member of the project team
17 to contact the county to confirm that the copy of
18 the San Joaquin County general plan that we had in
19 the office was the current version.
20 Some of the dates that I have in my
21 chronology, I'm actually uncertain as to the
22 specific date, but I know the general time frame
23 in which the contact took place. So, therefore,
24 at some point in early July, a representative of
25 GWF met with Chandler Martin at the San Joaquin

1 County Community Development Department.
2 My first contact with the County --
3 INTERVENOR BAKKER: I'm going to object
4 to this, definitely, if I may. We haven't gotten
5 an opportunity to have a look at the chronology
6 that GWF put together for this hearing. Perhaps
7 we could take a quick break and you could submit
8 it in writing?
9 APPLICANT COUNSEL GRATTAN: Yes. What
10 he is doing is using that to refresh his
11 recollection of these contacts, and we haven't
12 prepared this as an exhibit.
13 INTERVENOR BAKKER: He's relying on the
14 AFC and other documents, or --
15 APPLICANT COUNSEL GRATTAN: Well, he's
16 relying on his experience in serving the project
17 throughout its permitting. We'd be more than
18 willing to hand that out for you to look at.
19 INTERVENOR BAKKER: Well, I guess my
20 only objection is that he is offering testimony on
21 an issue in this proceeding and it wasn't prepared
22 in writing, and that issue would be the contacts
23 that have been made with the County of San Joaquin
24 and the City of Tracy. That wasn't part of his
25 written testimony earlier submitted.

1 APPLICANT COUNSEL GRATTAN: That is
2 correct, and it is correct that it is not part of
3 his written testimony. He is using that to
4 refresh his recollection and you are more than
5 willing to look at it after he's finished.
6 COMMISSIONER LAURIE: There is an
7 objection.
8 THE WITNESS: Okay.
9 HEARING OFFICER TOMPKIN: It is beyond
10 the scope of his written testimony, Mr. Grattan,
11 and, if I understand you correctly, you're making
12 an offer of what --
13 APPLICANT COUNSEL GRATTAN: What it may
14 be -- The Commission's practice, number one, has
15 been to allow great latitude in expansion of
16 verbal testimony beyond the written testimony,
17 particularly when the applicant has the burden of
18 proof. Number two, the issue has been put into
19 play earlier in Visual, and we didn't quite get to
20 it, appropriately so.
21 And number three, what he has in front
22 of him is merely his notes to refresh his
23 recollection with respect to the contact which
24 went on. I don't see any prejudice to this. He
25 could recite it very slowly, or we'll make this

1 available for the parties to look at. It is
2 merely being used to refresh his recollection.
3 INTERVENOR BAKKER: I think the
4 prejudice that I'm suggesting exists is the fact
5 that this issue is being -- He's testifying to
6 this issue not on cross examination but on direct.
7 We're going to raise these issues on cross. He
8 can answer the questions at that time.
9 We haven't had an opportunity to look at
10 his version of what the chronology is. And it
11 would have been helpful to us to have looked at
12 that and then been able to make contact with the
13 staffpeople that they claim to have spoken to, and
14 determine if their version of the events is
15 accurate. We're unable to do that.
16 COMMISSIONER LAURIE: Commissioner
17 Pernell and Madam Hearing Officer, I'm not
18 satisfied that any chronology, any question of
19 specific dates and times of meetings is at all
20 relevant. I don't believe that matter is before
21 the committee either at this time nor am I
22 satisfied that it is proper for future discussion.
23 I'm certainly interested, if there is an
24 indication that this witness says that they
25 received certain data or they spoke to somebody

1 specifically and, therefore, they're relying on
2 that information, that's relevant to me. The
3 chronology to me is not relevant to anything that
4 we currently have before us. Thus, I'm not
5 satisfied that it is appropriate for consideration
6 at this time.
7 HEARING OFFICER TOMPKIN: And I think
8 the committee would generally agree with that, so
9 what I would instruct at this point is please have
10 the witness limit his testimony to that scope
11 indicated by the committee.
12 APPLICANT COUNSEL GRATTAN: That's fine.
13 That's fine. My understanding is that this ruling
14 is based on the fact that applicant's contacts
15 with the City and with the County are irrelevant.
16 HEARING OFFICER TOMPKIN: Essentially,
17 yes, except to the extent that they relied on that
18 in taking whatever action we did to further this
19 topic.
20 BY APPLICANT COUNSEL GRATTAN:
21 Q Well, let's go right into your
22 testimony. Could you summarize your testimony,
23 please.
24 INTERVENOR BAKKER: Just briefly, would
25 it be okay if I moved the microphone down to the

1 table, or is --

2 HEARING OFFICER TOMPKIN: It's taped

3 down, number one, but also, it's problematic in

4 that other intervenors have to come up and speak

5 there because we have a limited number of

6 microphones.

7 INTERVENOR BAKKER: Okay.

8 HEARING OFFICER TOMPKIN: So it's better

9 to leave it there.

10 INTERVENOR BAKKER: Are there any other

11 mics available for the table?

12 HEARING OFFICER TOMPKIN: Unfortunately,

13 no. That table was added at the last moment.

14 INTERVENOR BAKKER: Okay, thank you.

15 HEARING OFFICER TOMPKIN: Mr. Grattan?

16 BY MR. GRATTAN:

17 Q Proceed, Mr. Adams, please.

18 A I believe the other part of your

19 question was as to the methodology that I used?

20 Q Yes, and that's part of your testimony,

21 I presume.

22 A The objective of the Land Use section is

23 to identify and evaluate potential conflicts

24 between the project and Land Use plans and

25 policies which are identified as LORS, and between

the project and existing and planned land uses. This includes identifying current property owners, current zoning ordinances, and reasonably foreseeable proposed developments or changes to LORS.

As part of my process in identifying the LORS and the reasonably foreseeable proposed developments, I did contact initially the County and I first obtained assessor maps from the office of the assessor, information about property owners also from the recorder, and then went to the Community Development Department and discussed recent conditional approvals, pending conditional approvals which might be in the pipeline, what the current and applicable of zoning regulations would be. And the nature of conditional approvals that would be required by our proposed project.

Once I determined that a portion of the City of Tracy was located within the CEC-prescribed one-mile radius around the project site, I made a similar contact with the City of Tracy and spoke with Bill Dean on July 3rd on the phone, and I sent him a letter based upon our conversation requesting to purchase copies of relevant city planning documents.

1 Those were mailed to me. His cover
2 letter was dated July 12th. And once I received
3 those, there were followup inquiries with both the
4 County and with the City over the next month or so
5 as I proceeded with the analysis.
6 Q Does that conclude your testimony?
7 A Yes.
8 APPLICANT COUNSEL GRATTAN: That's all I
9 have. What I'd like to do now is put on the
10 testimony of Jennifer Hernandez, and then we'll
11 offer them up as a panel for cross examination.
12 HEARING OFFICER TOMPKIN: You may
13 proceed.
14 BY MR. GRATTAN:
15 Q Can you let us -- Can you share with us
16 the documents or the exhibits that you're
17 sponsoring at this hearing?
18 A Yes. I have, in fact, prepared and
19 submitted written testimony on Land Use issues as
20 part of the applicant's testimony package. And I
21 am sponsoring the applicant's Land Use testimony
22 which was filed on February 13th of this year, and
23 a variety of land use documents: the City of
24 Tracy's Tracy Hills specific plan and the draft
25 and final environmental impact report for that

1 specific plan, the City of Tracy's South Schulte
2 specific plan, and the draft and final EIRs for
3 that document; the San Joaquin County land use
4 requirements, which include the general plan, the
5 land use ordinances, including zoning, and adopted
6 administrative development standards; a
7 September 18th, 2001 letter from the San Joaquin
8 County Community Development director to the CEC
9 on this project.
10 The City of Tracy land use requirements
11 including the general plan, also sometimes called
12 the urban management plan and their land use
13 ordinances; the San Joaquin County agency
14 referrals and their initial study and negative
15 declaration with findings for the approved Well
16 Head power project. This was a project located on
17 an adjacent parcel; it was subsequently dropped by
18 the project applicant after being approved.
19 And then finally, site maps that are
20 attached to my written testimony that indicate the
21 current zoning districts in the areas surrounding
22 the project, and residential development
23 constraints on the proposed site which supplement
24 the figures one through five from Section 8.4 of
25 the AFC.

1 Those include figures that are
2 identified in my testimony as figure six, the
3 zoning district surrounding the Tracy power
4 project; figure seven, residential development
5 constraints; and figure eight, California project
6 map from the Energy Commission's web site.
7 I'll also be referring to the general
8 plan from the City of Tracy's current general
9 plan, and that is part of the document called the
10 general plan, but there is a map.
11 Q Now, the City of Tracy and County of San
12 Joaquin documents, those are public documents and
13 by your sponsoring them, I take it you're not the
14 author of these documents nor did you have any
15 role in their preparation.
16 A That's correct.
17 Q And these are part of the public record.
18 You previously submitted written
19 testimony. Can you affirm that testimony under
20 oath today?
21 A Yes, I can.
22 Q Do you have any corrections or
23 modifications?
24 A No.
25 Q And could you please summarize your

1 testimony.

2 A Yes, thanks very much. I'll be talking

3 actually about six Land Use issues today. I'd

4 like to briefly summarize what they are, and then

5 we'll go through them one by one.

6 The first item is that I reviewed the

7 County of San Joaquin Community Development

8 Department director's letter and the role

9 therefore of the department, and concluded that it

10 had a sufficient factual and legal basis to

11 evaluate the project and conclude in its letter

12 that the project first complied with the San

13 Joaquin County development title and general plan,

14 was consistent with the Williamson Act, and would

15 appropriately mitigate for the loss of

16 agricultural lands.

17 The second item I'd like to address is

18 the fact that, based on my opinion upon review of

19 the record, the San Joaquin County Development

20 Department staff had the authority to make and

21 communicate these conclusions to the Energy

22 Commission.

23 Third, the San Joaquin Land Use

24 ordinances are, in fact, the controlling LORS in

25 this project, and the LORS under which the Land

1 Use consistency requirements of the project must
2 be analyzed under applicable CEC and CEQA
3 requirements.
4 Fourth, that the staff assessment
5 appropriately analyzed, exhaustively analyzed the
6 City of Tracy's adopted Land Use requirements,
7 including the City's sphere of influence under
8 CEQA and under CEC requirements.
9 Fifth, that under CEQA the project as
10 conditioned in the CEC staff assessment is not
11 inconsistent with the adopted City of Tracy plans
12 and with the City's sphere of influence.
13 And finally, on behalf of the project,
14 the record demonstrates from my perspective that
15 the Tracy Hills project and this project are
16 compatible land uses, and that the Tracy Hills
17 project is not speculative.
18 Q Can we start off here with your comments
19 on the County's letter of September 18th to the
20 CEC, which is part of the record here in this
21 proceeding.
22 A Sure. The record includes a letter
23 dated September 18th, 2001 to the Commission
24 staff. The purpose of the letter is to comply
25 with the Public Resources Code Section 25519(f),

as well as the Commission regulations at Section 1744, that the Commission staff review project information submitted by the local land use jurisdiction and evaluate that information to determine whether the project was, in fact, consistent with applicable LORS.

The Commission's inquiry to the County and the County's response was, from my perspective, entirely consistent with the statutory and regulatory requirement. The County then applied the applicable LORS which, for the County in this case, were appropriately the development title, which is really the zoning code and related requirements, and the general plan to figure out whether the project, in fact, did comply with the County's requirements.

I'm going to just step through the rationale that the County and the record shows was used. First, the project site was in a zoned agricultural district. That's from the general plan. The project is classified as a major utility service, and that kind of project is a permitted project in the general plan with a form of permit called a site approval. It's frankly less elaborate of a form of permit than a use

1 permit, but site approval is the form of permit
2 that this land use required in this zoning
3 district.
4 COMMISSIONER LAURIE: And site approval
5 is discretionary permit?
6 THE WITNESS: Yes, it is.
7 The County also understood, recognized,
8 reflected in the record that this is a Commission
9 jurisdictional project, and so the form of
10 approval it would have to give, if it was not
11 Commission jurisdictional site approval, the
12 County was not being asked to give and, in fact,
13 did not give in this case; it did not make the
14 discretionary permit decision, but it reviewed
15 applicable LORS to figure out whether it would
16 qualify for a site approval, the discretionary
17 permit decision.
18 The standards for approving a site
19 approval for this project are set out in the
20 versions of the code, all of this is in the
21 development title Section 9 of the County's Code
22 when there are three findings that must be made.
23 First, that the source of the power requires
24 locating the use in an area designated as
25 agricultural or resource conservation; second,

that the use will not have a significantly detrimental effect on agricultural activities, and third, that the site of the use can be rehabilitated for agricultural production, or for another permitted use if the power source is temporary.

The County's September 18th letter communicated to the CEC staff the County's conclusion that these findings "can be made" -- That's a quote from the letter, quote, "can be made" for this project. And the County's letter identified the facts on which the County relied in making this determination.

And when I say determination I don't mean to use the word "findings" and I don't mean to use the word "approval," I mean to use the word "determination." The County staff concluded, based on looking at their own requirements, that this project would have qualified for this kind of approval but it did not, the County did not approve this project.

For example, the County determined that the power source finding was predicated on the site's proximity to existing natural gas, electric transmission and water infrastructure, and the

1 fact that this proximity of the project to these
2 existing infrastructure features would lessen the
3 expense and reduce the environmental and
4 agricultural impacts of this project.
5 And, if I could, I'd like to draw your
6 attention just briefly to one of the exhibits that
7 we've previously admitted to explain just where
8 this project is and what those findings were
9 predicated on or appear to have been predicated
10 on.
11 This is the one-mile-wide radius of the
12 site, and this is the project site, this area
13 that's located here. This orange band --
14 HEARING OFFICER TOMPKIN: Counsel, could
15 you just briefly identify that document for the
16 record?
17 THE WITNESS: Sure. This is entitled
18 Figure Seven. The title we've given it is
19 Residential Development Constraints of the Project
20 Site, but the information from it has been
21 prepared by Mr. Adams and was introduced. So
22 we'll call it Figure Seven for the record.
23 This orange band is a series of natural
24 gas and petroleum pipeline that cut through this
25 boundary of the project site. And again, the

1 project site is here (indicating). This red band
2 is a transmission line corridor, an occupied high
3 transmission line corridor, PG&E lines. And
4 finally, the purple is the location of the canal,
5 buffer off the canal, and a source of water for
6 the project.
7 So these three infrastructure features
8 referenced in the County's letter were used to
9 support the County's finding as to the power
10 source. The County's other findings with respect
11 to agricultural issues included Williamson Act and
12 non-Williamson Act requirements, but effectively
13 concluded that the project would be a minimal
14 impact on the loss of agricultural land at a mere
15 ten acres, actually.
16 And that because of the combination of
17 being required to do an agricultural easement with
18 the American Farmland Trust for an equivalent
19 amount of acreage to be preserved in perpetuity
20 and the fact that this was to be a 30-year project
21 and was being required to post financial assurance
22 and do project restoration at the end of its life,
23 that those cluster of features which I'll call the
24 agricultural mitigation requirements or the
25 agriculture land mitigation requirements more than

1 made up for the project's impacts to agriculture.
2 The County separately, in its letter of
3 the 18th and then, again, quite in detail,
4 evaluated the project's compliance with the
5 Williamson Act requirements. This property was
6 Williamson Act enrolled at the time the letter of
7 September 18th was written, but a notice of non-
8 renewal of the Williamson Act had been filed back
9 in 1992, and, in fact, as of March 1st the project
10 site was dropped as Williamson Act land. And so
11 it is no longer Williamson Act land.
12 The County did not rely on the future
13 expiration of the Williamson Act; it instead made
14 findings that even if the Williamson Act applied,
15 which it did, in fact, at the time the County
16 wrote its letter, the project met the Williamson
17 Act requirements for siting this power plant.
18 Those requirements are set forth in the
19 combination of the Williamson Act itself and also
20 the County's implementing regs under the
21 Williamson Act.
22 COMMISSIONER LAURIE: Excuse me,
23 Ms. Hernandez, does the expiration of the
24 Williamson Act contract affect the underlying
25 zoning?

1 THE WITNESS: No, it does not.
2 COMMISSIONER LAURIE: Thank you.
3 THE WITNESS: The County determined that
4 even if the Williamson Act had been applicable,
5 the Act itself as a matter of state law authorizes
6 utility uses on Williamson Act land. So the state
7 law does, in fact, allow for utility uses on
8 Williamson Act land.
9 With respect to the County's
10 implementation ordinances under the Williamson
11 Act, the County likewise authorizes utility
12 facilities on Williamson Act agricultural land
13 under some circumstances. Those circumstances
14 were enumerated by the County, and the County's
15 findings or conclusions or comments or evaluation,
16 but determination is the word I'd like to stay
17 with, confirmed that these conditions for
18 Williamson Act land usage for this project would
19 be met in this case, and those findings included
20 that the use may not significantly compromise the
21 long-term productive agricultural capability of
22 the property or other contracted land.
23 The County looked at the agricultural
24 mitigation requirements, that combination of the
25 easement and the closure and restoration

1 requirements and determined that this project
2 would qualify. The County also examined the
3 required finding that the use may not
4 significantly displace current or foreseeable
5 agricultural operation of the parcel.
6 The County determined that there were no
7 current agricultural uses of the parcel, and that
8 the project, in fact, benefitted the County's
9 other agricultural uses by displacing a mere ten
10 acres of land to create 169 megawatts of
11 electricity for use by agricultural as well as
12 non-agricultural users. Finally, the County
13 looked at its stock of agricultural land at
14 630,000 acres and determined that ten acres was an
15 insignificant or less-than-significant loss under
16 those circumstances.
17 Based on the review of the County's
18 letter and review of all of the applicable land
19 use requirements, it's my judgment that the
20 County's conclusions with respect to LORS are more
21 than supported by substantial evidence in the
22 record. The rationale for the County's
23 conclusions is, in fact, presented in their
24 September 18th letter, which included attachments.
25 And a very important feature of the way

1 that agencies are to interpret their own laws and
2 regs has come to be known as the Chevron Deference
3 Document, or the Chevron Deference Doctrine, after
4 a United States Supreme Court case in which the
5 EPA was given substantial deference in
6 interpreting the quite detailed technical laws and
7 regs that EPA is supposed to look at. The court
8 said, you know, Congress asked you guys to figure
9 this stuff out, and we are giving you, the
10 administering agency, substantial deference in
11 interpreting and applying your own statutes.
12 Based on that United States Supreme
13 Court deference to an administering agency, the
14 California Supreme Court affirmed that that
15 doctrine also applied to California agencies,
16 including California agencies interpreting CEQA.
17 The United States Supreme Court citation is
18 Chevron v. NRDC at 467 US 837, a 1984 case. The
19 California Supreme Court decision was the Western
20 States Petroleum Association v. Air Resources
21 Board case, a 1995 case, 9 Cal 4th, 559.
22 The reason this is relevant is because
23 the County's findings could be questioned, and, in
24 fact, were questioned with respect to, for
25 example, the power source. Does the County's LORS

1 require that this parcel be used because of some
2 unique power source that was available here and
3 not anywhere else? The County's interpretation of
4 its own ordinances was afforded deference by the
5 CEC staff, as it should have been under applicable
6 legal requirements. They put in the Chevron
7 Deference Doctrine.
8 But we didn't stop there in looking at
9 this record. We are always curious as to whether
10 the County is applying something complicated like
11 this for the first time, or whether there have
12 been prior applications of these LORS to this kind
13 of project, and, if so, what those prior
14 applications looked like.
15 We found that only five months earlier,
16 this county had approved a project called the Well
17 Head power project on an adjacent site, and I'd
18 like to show you where that is. This is the
19 boundary of the project site (indicating). The
20 Well Head property was a small property, couple
21 acres, and a non-Commission-jurisdictional
22 project, it was under 50 megawatts, but it was
23 owned by the same owner, same parcel.
24 The Well Head power project was subject
25 to identical legal requirements under the County

1 of San Joaquin's zoning and general plan. The
2 Well Head project went through the full county
3 lead agency CEQA process. The Well Head project
4 received a negative declaration approval and a
5 site approval, the form of permit that the County
6 requires.
7 The County also, as is required for
8 county lead agency projects, under the County's
9 notice requirements for applications of this type,
10 provided not one but two notices to the City of
11 Tracy as to its conclusion, the County's
12 conclusion that this Well Head project was, in
13 fact, consistent with applicable land use
14 requirements. The City did not object.
15 To give you a little more background on
16 that issue, the two agency referrals that the
17 County provided to the City of Tracy were dated
18 March 8th, and the second was dated March 26th of
19 this past year, March 26th, 2001. That project
20 approval did not propose any land use mitigation
21 requirements; it was not a mitigated negative
22 declaration, it was a negative declaration. In
23 the County's initial study, the County asked the
24 initial study question will the project conflict
25 with existing or planned land uses? Is the

1 project in conflict with any adopted plans?
2 The County answered those questions
3 negatively, which is to say the project will not
4 conflict with existing or planned land uses,
5 and --
6 INTERVENOR BAKKER: I'd like to object
7 to this line, or just the Well Head issue, on the
8 grounds of its relevance, to the Commission's
9 determination as to --
10 APPLICANT COUNSEL GRATTAN: Well, the
11 Well Head case or the Well Head experience is
12 extremely relevant. The position which has been
13 articulated here by the intervenors for the
14 project is that the Commission must consider the
15 City of Tracy's land use ordinances, laws,
16 regulations, and standards.
17 INTERVENOR BAKKER: Is the Well Head --
18 APPLICANT COUNSEL GRATTAN: Just a
19 second, please, I'm sorry, John.
20 HEARING OFFICER TOMPKIN: Let him
21 finish.
22 INTERVENOR BAKKER: Pardon me.
23 APPLICANT COUNSEL GRATTAN: And in this
24 case, the Commission stands in the place of the
25 County. If the County did not apply the City of

1 Tracy's LORS and if the City of Tracy did not
2 object, that certainly has some relevance for how
3 this Commission is going to act.
4 INTERVENOR BAKKER: The Well Head
5 project is a different project than this, than the
6 peaker plant project. Perhaps you can explain to
7 us what the nature of the Well Head project is, so
8 we can get a better idea of its relevance to this
9 particular plant, size --
10 HEARING OFFICER TOMPKIN: Power-
11 generated project of less than 50 megawatts. I
12 would have to look at the application
13 documentation, which I'd be glad to do, to tell
14 you whether it was 49 or 40 or some other number,
15 but it was less than 50 so it was not Commission-
16 jurisdictional.
17 The Well Head project was on --
18 HEARING OFFICER TOMPKIN: Can I stop you
19 right there, Counsel?
20 THE WITNESS: Sure.
21 HEARING OFFICER TOMPKIN: I'll interrupt
22 on this. We have a pending motion before you go
23 further.
24 PRESIDING COMMISSIONER PERNELL: Can we
25 go off the record, please.

(Thereupon, a recess was held off the record.)

HEARING OFFICER TOMPKIN: There is a motion regarding the relevance of the testimony regarding the Well Head project. The committee has conferred and we will overrule the objection.

THE WITNESS: We looked at the Well Head project in particular for this question of has the County consistently applied its LORS requirements to power projects that have the same legal requirements. The legal requirements that apply to this project are the same legal requirements that applied to the Well Head project, except insofar as the County was the lead agency for the Well Head project because it was below 50 megawatts.

We also found the information about the City of Tracy's involvement through the County's consultation process to be of concern, and we verified that, in fact, as the County ordinances themselves require, where the County is the lead agency such as with the Well Head project, the City of Tracy received notice directly from the County as to that project and as to that project's conclusion on land use, which again, the question

is will the project conflict with existing or planned land uses, is the project in conflict with any adopted plans.

Those questions were all answered no, and the City of Tracy, which received two notices on this project, did not contest that. The Well Head project was approved on April 13th. It was subsequently dropped by its sponsors following approval but there were no challenges filed.

Beyond the Well Head project, we look forward as to see what the County did with this project following its September 18th letter, and, in fact, the County then did a lot line adjustment approval for this project in December. Under the County's ordinances, lot line approvals may only be approved if the line adjustment meets several requirements, including conformity with zoning and building regulations and consistency with established land use plans and policies.

So with respect to the lot line approval that was granted by the County to this project, the finding was made by this County that this project, in fact, met the LORS.

The lot line adjustment requirement also is a statutory -- is governed by the Subdivision

1 Map Act statutory requirements. Under the
2 Subdivision Map Act, similar to local agencies,
3 must evaluate whether the parcels resulting from
4 the lot line adjustment will conform to local
5 general plan and zoning and building ordinances.
6 Again, this project qualified.
7 Finally, we looked at the issue of
8 whether other agencies, not intervenors, had
9 looked at any of the County's conclusions beyond
10 what the Commission staff did, which was quite
11 comprehensive, and the Department of Conservation
12 filed a comment letter that affirmed that the
13 project did comply with the Williamson Act
14 requirements, which are LORS that are under the
15 Department's jurisdiction.
16 Based on our review of this information,
17 we believe that the County did, in fact, apply its
18 LORS to this project appropriately, consistent
19 with its other actions, both before and after the
20 September 18th letter.
21 BY MR. GRATTAN:
22 Q The issue of the authority of the County
23 staff to make these comments and communicate them
24 to CEC staff, did they need authorization from the
25 Board of Supervisors, based upon common practice

1 in the area?

2 A Well, both with respect to common

3 practice in the area and with respect to the

4 Commission's requirements and with respect to the

5 County's requirements, we made the inquiry as to

6 whether the County staff had complied with its own

7 procedural requirements in issuing the

8 September 18th letter, starting first with the

9 Commission's own requirements, the Public

10 Resources Code Section 25519(f), as I previously

11 mentioned, requires that CEC staff ask local

12 agencies to comment on LORS consistency. The

13 Commission is itself for making the LORS finding.

14 There is no requirement in the statute

15 that applies to the Commission that requires that

16 the local jurisdiction's findings be affirmed by a

17 decision-making body at an elected or appointed

18 level, so the state statute is silent with respect

19 to needing Board of Supervisors, City Council or

20 even Planning Commission approval. It's left to

21 the locals.

22 As Mr. Hulse himself testified in

23 writing, the County's September 18th letter

24 provided identification and information on the San

25 Joaquin County ordinances and regulations. This

1 is consistent with requests routinely made by
2 other agencies, so as affirmed by the County again
3 in this process, consistency with land use
4 requirements is something that is routinely
5 handled by the County staff.
6 We also looked through the County's own
7 ordinances, and the fact is that this county has
8 divvied up responsibility for land use
9 implementing activity between the Board of
10 Supervisors, the Planning Commission, the Planning
11 Department director and the staff, and, in fact,
12 the Department is responsible -- I'm sorry, the
13 Planning and Development Services Division of the
14 Department is responsible to, quote, "consult and
15 advise with public officials," close quote,
16 regarding the general plan, and, quote,
17 "administer the general plan." The fact is this
18 consultative role is delegated by County ordinance
19 to staff.
20 The staff is not omnipotent. There are
21 several checks and balances provided for in the
22 County's own ordinance in case the staff goes out
23 past where the County thinks they should be at the
24 Planning Commission or at the Board level. In
25 particular, the County may review and challenge

1 any action taken by the director within ten days
2 after the date of the action.
3 We found it compelling, frankly, that
4 the County Board of Supervisors received a
5 presentation on this project, the Board of
6 Supervisors received a presentation on this
7 project on September 25th, just a few days after
8 the letter of the 18th had been sent. The County
9 Board took no action to object to the letter that
10 had been sent or otherwise challenge or trigger
11 the appeal provisions.
12 The Board of Supervisors also had the
13 option, under the same staff delegation
14 arrangement, for challenging the lot line approval
15 that was given to this project. And again, the
16 Board took no action to object.
17 The action of the Well Head site
18 approval for the Well Head project that we just
19 described briefly was also a staff action. It was
20 a staff-approved project, appropriately under the
21 County's code. And neither the Planning
22 Commission nor the Board of Supervisors objected
23 to either the negative declaration or to the site
24 approval.
25 Based on this information, we think that

1 the record demonstrates that both by local
2 ordinance and by Commission rules, the staff is
3 appropriately authorized to comment on local LORS
4 with respect to this project; in fact, it did so;
5 and the checks and balances in place at the County
6 for County decision-makers above the staff and
7 director level to challenge those staff actions
8 were not triggered. There were no objections
9 filed.
10 Quite recently the County, in fact,
11 opposed the project, adopted a resolution opposing
12 the project. Even that resolution did not contest
13 the contents of the letter; it opposed the project
14 until certain concerns were addressed, and I'm not
15 commenting on that at this time.
16 So, in sum, we believe the County staff
17 did have the legal authority, that it was, in
18 fact, entirely normal practice for them to make
19 this kind of comment letter to the Commission.
20 Q Were the San Joaquin County general plan
21 and development title requirements, were they the
22 controlling land use laws, ordinances, standards,
23 and regulations for this project?
24 A Yes. And again, we made the inquiry
25 based on both what the Commission requirements are

1 and what CEQA is. Those are two different
2 inquiries, although they come to the same result.
3 Under the Commission's regulations,
4 Commission staff must evaluate an applicant's
5 compliance with all applicable -- It's bolded on
6 paper, it's hard to bold in speech, but all
7 applicable federal, state, regional and local
8 laws, regulations, and standards.
9 The staff comprehensively completed its
10 own evaluation of local land use requirements and
11 concluded that the project was located within the
12 land use jurisdiction of the County, and,
13 accordingly, that the County requirements
14 constituted the appropriate LORS for the project.
15 CEQA is, in fact, more expansive with
16 respect to a land use inquiry. One of the eight
17 questions that CEQA makes you ask about land use
18 is like LORS, and the CEQA question that is like
19 the Commission's LORS standard is whether the
20 project would conflict with any applicable land
21 use plan, policy or regulation -- applicable, just
22 like the Commission's. But the CEQA requirement
23 goes on to say, "of an agency with jurisdiction
24 over the project."
25 So the CEQA standard is actually even

1 more clear that it is the agency with the
2 underlying jurisdiction -- in this case, the
3 County. Because the County or because the project
4 site is located in the County, the County's land
5 use requirements, in fact, comprise the
6 appropriate scope of this inquiry for this prong,
7 this one of eight-part prong of the CEQA analysis.
8 So we think that the County requirements
9 are, in fact, the appropriate scope of the LORS
10 inquiry for this project, and we'll get to it in
11 just a minute. It's not the end of the inquiry,
12 especially with respect to CEQA, because the CEQA
13 process does bring in the sphere of influence as
14 well as the other plans of the City of Tracy.
15 Q And now I turn you to the CEC staff
16 assessment. Did this appropriately analyze the
17 project in relation to the City of Tracy's adopted
18 land use plan and approved sphere of influence
19 under the California Environmental Quality Act?
20 A And that is, in fact, I believe, the
21 question that goes to the heart of the dispute, or
22 at least the dispute as it's been framed around
23 land use, as I understand it from the record.
24 In 1994, this property was included
25 within the boundary of an approved sphere of

1 influence. The sphere of influence concept really
2 was created to try to create more orderly planning
3 by cities who would -- it was thought and, in
4 fact, turned out to be true -- inevitably grow
5 past their boundaries and people would want to be
6 located near city services and infrastructure.
7 So the LAFCO, the Local Agency Formation
8 Commission, process was set up, actually quite
9 some time ago, to review and approve city requests
10 to establish growth boundaries effectively or
11 planning boundaries for future growth of a city.
12 That process is called and the result of that
13 process is called the city sphere of influence.
14 It's very common. It has an interesting non-
15 effect, unless you do something quite different.
16 Mere designation of a sphere of
17 influence does not create land use jurisdiction
18 for the city, because the second and legally
19 critical step of the sphere of influence and LAFCO
20 process is annexation. Once land is annexed into
21 a city from the county, the city, not the county,
22 is the land use jurisdiction that is in control.
23 Before annexation there has been no seeding of
24 land use jurisdiction from a county to a city.
25 The LAFCO process actually allows for

1 cities and counties to reach agreements on shared
2 jurisdiction or even on deferrals of county
3 jurisdiction to cities. By agreement, the city
4 and county can, in fact, assign more
5 responsibility, more jurisdiction to the city pre-
6 annexation than would otherwise be the case.
7 There was no such agreement in this case.
8 The sphere of influence was just that.
9 It did not go beyond the sphere of influence
10 designation to assign or provide any land use
11 jurisdiction to the City of Tracy, as is
12 authorized by statute; that step was not done.
13 PRESIDING COMMISSIONER PERNELL:
14 Commissioner Laurie?
15 COMMISSIONER LAURIE: Has there been or
16 did the City take action to pre-zone areas within
17 the sphere of influence?
18 THE WITNESS: Yes, it did; in fact, both
19 in its general plan, which it adopted in
20 connection with the LAFCO determination, and then
21 in two specific plans that are at issue here -- I
22 haven't frankly looked all around the city's
23 sphere, but with respect to the two areas that are
24 specific here, the city went past the general plan
25 pre-zoning into specific plan pre-zoning.

1 COMMISSIONER LAURIE: And, in your
2 opinion, what is the legal import of pre-zoning
3 for projects other than annexation?
4 THE WITNESS: With respect to both the
5 Commission LORS determination and with respect to
6 the LORS-like prong of the eight-pronged CEQA
7 analysis -- so with respect to the Commission
8 requirements for LORS and with respect to the CEQA
9 LORS-like prong -- the answer is as in annexation,
10 the City's general plan and the City's two
11 specific plans are not applicable plans and, in
12 fact, are not legally significant to those
13 inquiries, to the LORS inquiries.
14 COMMISSIONER LAURIE: Thank you.
15 THE WITNESS: I think that it would be
16 helpful to see how this project site, in fact,
17 relates to the City's pre-zoning activities. This
18 map is from the City of Tracy's general plan, and
19 has a couple of markings on it which I'll explain.
20 This marking is the sphere of influence
21 boundary (indicating), not the city limit
22 boundary, but the sphere of influence boundary.
23 HEARING OFFICER TOMPKIN: Is this a
24 previously submitted document?
25 THE WITNESS: This is from the City's

general plan. It has not been previously submitted. The document -- The general plan has been previously submitted. This map is part of that document. We've used a highlighter because in this case this is a dotted black line that's hard to line.

INTERVENOR BAKKER: I'm going to briefly object to this, because I'm not sure that that -- City staff has informed me that that is not the general plan map. I just want to clarify where that map came from.

HEARING OFFICER TOMPKIN: Can you refer to it in the documents that have been --

THE WITNESS: Sure, we'll do that. If I can continue while we're getting you the citation from the general plan, there is already a dark line which is hard to see. We colored it green. This is the sphere of influence line. This is the project site (indicating).

The black line is the South Schulte specific plan area --

INTERVENOR BAKKER: I need to make an objection --

PRESIDING COMMISSIONER PERNELL: Just a minute, please.

1 THE WITNESS: I'm sorry, this --
2 PRESIDING COMMISSIONER PERNELL: Let's
3 identify where the map came from.
4 THE WITNESS: Oh, sure.
5 PRESIDING COMMISSIONER PERNELL: That is
6 your objection?
7 INTERVENOR BAKKER: That's my objection.
8 I think the underlying -- The underlying map came
9 from the general plan. Is that your statement,
10 and then the applicant has drawn on the boundary
11 lines and --
12 THE WITNESS: The green line is from the
13 general plan map, and is green only because it was
14 hard to see the dotted black line.
15 INTERVENOR BAKKER: Okay.
16 THE WITNESS: But it's the underlying
17 general plan map --
18 INTERVENOR BAKKER: Okay, thank you.
19 THE WITNESS: -- marked in green for
20 clarity, but we didn't create any information
21 here.
22 INTERVENOR BAKKER: Great.
23 APPLICANT COUNSEL GRATTAN: If you would
24 like to approach that map, any of you, more
25 closely to see that we've done it in green

1 accurately, you're more than welcome.
2 THE WITNESS: The South Schulte specific
3 plan area, which is from the South Schulte
4 specific plan which you've also introduced into
5 the record, is noted in black. This is the South
6 Schulte specific plan area.
7 You'll note that outside the South
8 Schulte planning area, outside these boundaries we
9 have general plan pre-zoning already established.
10 The City of Tracy's pre-zoning outside the South
11 Schulte specific plan area is industrial -- That's
12 the stripes -- surrounding the existing industrial
13 parcel. The City's pre-zoning outside the South
14 Schulte specific plan area, this is all
15 industrial.
16 Under the South Schulte specific plan,
17 the City has actually adopted a low-density
18 residential development pattern here, and more
19 industrial here (indicating). But under the
20 applicable pre-zoning requirements of the City of
21 Tracy, which are either in their general plan
22 outside the South Schulte planning area or in the
23 South Schulte planning area, the stripes is
24 industrial, the project site is here, this is low-
25 density residential, and, just to put you on the

1 map, the Red Bridge development project, the
2 residential development project that's already
3 built is here, within the existing Tracy city
4 limits.
5 So, to continue, for purposes of CEQA,
6 the relevant inquiry, legal inquiry as to the
7 status of these plans is are they applicable.
8 And, in fact, we've concluded, after having looked
9 at the annexation records and the LAFCO findings
10 on sphere of influence, that neither the City or
11 County entered into the form of agreement that
12 would give the City any jurisdiction in these pre-
13 zoned areas. And so the County's jurisdiction
14 remains exclusive.
15 I'd like to draw briefly your attention
16 to three forms of CEQA authority for this
17 proposition, beyond my opinion. The first is
18 Appendix G of the CEQA guidelines which asks the
19 question does the project conflict with any
20 applicable land use plan, policy, or regulation of
21 an agency with jurisdiction over the project. For
22 reasons we've already discussed, we've concluded
23 that while this plan has been -- the South Schulte
24 specific plan has been adopted, the City does not
25 have jurisdiction in this area, having not entered

1 into the form of agreement with the County that
2 would give it any such agreement pre-annexation.
3 The courts have looked at this issue and
4 have again affirmed that plans that are not
5 applicable, plans that aren't legally applicable
6 are not applicable for purposes of this CEQA
7 analysis. So the existence of a draft plan or a
8 plan by an agency that has no jurisdiction is not,
9 in fact, an applicable plan for purposes of CEQA
10 compliance. And I'd bring your attention to the
11 Chaparral Greens v. City of Chula Vista case, a
12 1996 case at 50 Cal Ap 4th, 1134.
13 Finally, it's routine for people who
14 write CEQA books, including me, to quote the books
15 of other people who write CEQA books. It's
16 considered polite. The CEQA book called "Practice
17 Under the Environmental Quality Act," which was
18 written by Steve Koska and Mike Zisky, both fine
19 fellows, opines that an applicable plan is a plan
20 which has been adopted and, thus, legally applies
21 to the project. That's not what we have here with
22 the specific plans adopted by the City of Tracy,
23 but with respect to the City of Tracy's general
24 plan requirements, since it's not legally
25 applicable until the annexation process is

1 complete, unless the City and County agree
2 otherwise, and they have not done so.
3 So with respect to the LORS, the
4 applicable land use requirement, based on both the
5 Commission requirements and on this CEQA prong of
6 the land use requirement, we've concluded that the
7 County's LORS and not the City's LORS should be
8 evaluated. That's not to say the City's plans
9 have no place in the CEQA evaluation because they
10 do, and they were appropriately put in that place,
11 we think, by the Commission staff.
12 And that gets to the next issue, which
13 is, well, what else does CEQA require? What are
14 these other prongs? First, CEQA requires a bunch
15 of additional questions to be raised: Does the
16 project result in the physical division of an
17 established community? The record for this
18 project includes references that somehow this
19 project would divide a residential community.
20 Now, CEQA uses the term "established
21 residential community" for this question. Does
22 the project divide an established community? That
23 to us means a community that it in place, not a
24 community that is forecast or planned. Currently,
25 the residential development activity is limited to

1 the single-family homes that are identified as
2 yellow dots. The Red Bridge project is up here,
3 it's a more dense development obviously, but we
4 could not see any way that you could look at the
5 project site and this pattern of residential homes
6 and conclude that this project divided a community
7 of residences.
8 There was also suggestion that the
9 project built in this location would preclude the
10 Tracy Hills project from being connected, from the
11 kind of connectivity required to the City of Tracy
12 through the South Schulte specific plan area. The
13 City of Tracy -- I'm sorry, the Tracy Hills
14 specific plan project in its current annexation
15 status, which is partial, is connected physically
16 to the current City of Tracy boundaries. That
17 connectivity would be enhanced as the rest of
18 Tracy Hills gets annexed. Obviously, if South
19 Schulte is also annexed; otherwise, it's fairly
20 isolated through its southern component.
21 However, it's hard to see how this site,
22 at the extreme edge of this South Schulte planning
23 area, has any relationship to connectivity of the
24 Tracy Hills specific plan area to the City of
25 Tracy planning area. So with respect to the

1 argument raised about this project dividing Tracy
2 Hills from the City of Tracy, we don't see it.
3 So the second question, and actually the
4 rest of these questions that CEQA requires be
5 asked with respect to land use are pretty routine
6 in comparison and raise no issues. The next is
7 whether the project would conflict with any
8 applicable habitat conservation plan or natural
9 community conservation plan. Staff has
10 appropriately confirmed that there is no such
11 conflict and we agree.
12 The next question CEQA asks is whether
13 the project will increase the use of recreational
14 facilities. Staff has confirmed that since there
15 is no population growth associated with the
16 project, there is no increase in demand for use of
17 recreational facilities; we agree.
18 Does the project include recreational
19 facilities that would adversely affect the
20 environment? The project does not include those
21 facilities, so that's not relevant. Does the
22 project convert farmland to non-ag uses, and the
23 staff went through the agricultural mitigation and
24 impact analysis that I've previously referenced
25 and concluded that that impact would, in fact, be

1 mitigated to a less-than-significant level.
2 Six, does the project conflict with the
3 Williamson Act contract or agricultural use
4 zoning? Same responses. Or induce the conversion
5 of farmland to non-agricultural uses? Again, the
6 same responses.
7 So with respect to the more expansive
8 set of questions that CEQA requires be asked and
9 answered, beyond just LORS, CEQA asks a bunch of
10 other questions on land use, the staff has
11 thoroughly gone through those. We found only
12 comprehensive and accurate analysis.
13 So then the next prong for CEQA is
14 cumulative impacts, and this is where it is. This
15 is where future projects live. Future reasonably
16 foreseeable projects are supposed to be considered
17 in association with not this project, but future
18 projects, cumulative contribution to an
19 environmental effect.
20 CEQA has gotten clearer of late, the
21 last five, six years, in how to do a cumulative
22 impacts analysis. And the most conservative way
23 of doing it is to actually find new projects that
24 are proposed and list them, and that's exactly
25 what the staff did here. Staff came up with a

1 table that -- let's see, table three in the Land
2 Use table, page 3.4-23, which includes a lengthy
3 list of reasonably foreseeable development
4 projects. Those development projects included
5 build-out of the South Schulte planning area and
6 build-out of the Tracy Hills specific plan area.
7 From a legal perspective, I have to say
8 that the staff's list was quite generous. It is
9 plenty fine to make an independent evaluation of a
10 proposed future project and conclude that it is
11 simply too speculative because it hasn't legally
12 happened, it may not, because it's not financially
13 feasible and may never be.
14 With respect to the South Schulte
15 planning area, which doesn't have an
16 infrastructure plan let alone a financing plan for
17 getting to infrastructure, I think that there may
18 have been -- in fact, I think there would have
19 been justification for saying that this was too
20 speculative. The staff did not take that course,
21 although there is case law supporting it.
22 The staff included the South Schulte
23 planning area, as well as any other project, as
24 far as we could tell, that anybody ever talked
25 about, and evaluated in some painful detail the

1 kinds of things that could be done to make sure
2 that this project, which is the, after all,
3 extension, the contiguous extension of an
4 industrial area, in an area that's surrounded by
5 zoned industrial areas, what could this project do
6 to mitigate potential impacts.
7 Here I would say the staff found the
8 answer in the author of the specific plans, which
9 is to say the City of Tracy. The City of Tracy,
10 in the two specific plans at issue -- South
11 Schulte and Tracy Hills -- in the EIR's for those
12 specific plans prepared and certified by the City
13 of Tracy, the City knows that it is not a good
14 idea, that it is an incompatible land use to put
15 residential next to industrial. The City of Tracy
16 acknowledges this in its general plan document or
17 in its two specific plan documents.
18 And yet, as you can see, the City has,
19 in fact, put residential next to industrial in a
20 couple of places, and there are a few more that
21 aren't on the map as we've drawn it. But the City
22 proposed mitigation for this potential significant
23 land use impacts in the two specific plan
24 documents. That mitigation is to limit
25 residential densities in areas where public health

1 and safety or aesthetic factors would impact the
2 quality of life for future residents -- That's in
3 the South Schulte specific plan -- so we've got a
4 lower density residential pattern that's approved
5 in these areas that abut existing and planned
6 residential, or industrial.
7 But then, even more importantly, both
8 the Tracy Hills specific plan and the South
9 Schulte specific plan include policies that are
10 also included in the EIR that require developments
11 to buffer less desirable effects impacts on
12 neighboring uses. So the City of Tracy endorses
13 the use of buffering between incompatible land
14 uses.
15 The Commission staff, likewise, endorsed
16 the use of buffering. There is no magic to what
17 buffering is: It's either space or it's aesthetic
18 features like trees or other stuff, set-backs.
19 But buffering between incompatible residential and
20 industrial uses is what the City of Tracy said was
21 appropriate for when that abutment occurs, and
22 that's what the Commission staff has said is
23 appropriate and we agree.
24 COMMISSIONER LAURIE: Before we move on
25 to impacts --

1 THE WITNESS: Sure.
2 PRESIDING COMMISSIONER PERNELL:
3 Commissioner?
4 COMMISSIONER LAURIE: -- referring to
5 Land Use table three --
6 THE WITNESS: Of the Commission staff
7 report?
8 COMMISSIONER LAURIE: Yes.
9 THE WITNESS: Yes.
10 COMMISSIONER LAURIE: -- where it lists
11 the development project and then it lists the
12 signs in acreage not units --
13 THE WITNESS: Right.
14 COMMISSIONER LAURIE: -- how do you
15 measure the impact of a project defined by size
16 rather than units? Because, in theory, it could
17 be one unit per 40, 60, 120 acres.
18 THE WITNESS: We believe that this table
19 is a shorthand description of a lot of additional
20 information, and that the reference to the South
21 Schulte specific plan is, in fact, inclusive of
22 the plan itself, which calls out densities,
23 different development amounts for residential
24 versus non-residential; different amounts for
25 farms, different amounts for schools. And, in

1 fact, describes a quite compelling vision of the
2 new community.
3 We saw this as a summary table, not an
4 exhaustive description.
5 COMMISSIONER LAURIE: So it is your
6 opinion that, in order to fully analyze cumulative
7 impact, that you have to know approximate number
8 of units, rather than merely size of the project
9 itself.
10 THE WITNESS: Yes, and the document
11 South Schulte specific plan plus its accompanying
12 certified EIRs does provide that level of detail.
13 COMMISSIONER LAURIE: Thank you.
14 BY MR. GRATTAN:
15 Q I guess what we have left here,
16 Jennifer, is can you give us a conclusion based
17 upon, summarize this analysis here in a paragraph?
18 A Yes. I believe that the County
19 appropriately evaluated LORS and that that
20 evaluation was appropriately considered by the
21 staff in compliance, full compliance with both the
22 Commission requirements and CEQA.
23 I also believe that the Commission staff
24 and its analysis absolutely appropriately
25 evaluated and generously evaluated full build-out

of the specific plans of South Schulte and Tracy Hills, particularly South Schulte, as a reasonably foreseeable future project in the cumulative impact section of this analysis, again in compliance with both CEQA and the Commission's requirements.

Q And in a cumulative impact analysis under CEQA, is the same level of detail required as for the project itself?

A No, specifically it is not. It need not be as detailed nor need mitigation measures be as detailed.

APPLICANT COUNSEL GRATTAN: The panel of witnesses is available for cross examination.

HEARING OFFICER TOMPKIN: Does staff wish to question the witnesses?

MS. WILLIS: Staff does not, thank you.

HEARING OFFICER TOMPKIN: We'll proceed to questions by the intervenors.

INTERVENOR BAKKER: I'd like to bring one of the microphones over to this table and the applicant offered the use of his microphone, so if we could do that -- Not the taped-down microphone, but the other microphone. Could you hold one --

Commissioner Pernell, could we go off

the record?

PRESIDING COMMISSIONER PERNELL: Off the record, please.

(Thereupon, a recess was held off the record.)

HEARING OFFICER TOMPKIN: Before we proceed with the cross examination by the intervenors, Ms. Hernandez, we were looking for a copy of your written testimony that was filed and we have not been able to locate it. And so we're asking do you have a copy of that available today that we can mark as an exhibit?

We'll go ahead and mark this testimony as Exhibit 56 for identification.

(Thereupon, the above-referenced document was marked as Staff's Exhibit 56 for identification.)

INTERVENOR BAKKER: Thank you. Before we get started, I just wanted to check --

HEARING OFFICER TOMPKIN: Would you start by identifying yourself for the record.

INTERVENOR BAKKER: John Bakker, on behalf of the City of Tracy.

Before we get started, I wanted to inquire of the committee as to whether or not

we're going to be taking an evening break.

PRESIDING COMMISSIONER PERNELL: It is my intention to have the cross on the panel of witnesses, and then we will retire for the evening.

INTERVENOR BAKKER: Okay.

COMMISSIONER LAURIE: Could we have a time estimate from the intervenors, an approximate estimate of time -- not an approximate estimate, a real estimate?

(Laughter.)

INTERVENOR BAKKER: I would suggest it would take at least two hours; is that accurate? And the reason why I suggest perhaps taking a break now is because some of the information we've heard tonight from Ms. Hernandez is new to us; it wasn't reflected in any of the documents we've seen in the staff report, the staff assessment or the AFC. Ms. Hernandez's testimony was fairly conclusory, her written testimony, and she elaborated on it fairly extensively in her testimony just now.

So we would like to have an opportunity to evaluate that.

PRESIDING COMMISSIONER PERNELL: All

1 right. Is there any objection to taking a break
2 now?
3 COMMISSIONER LAURIE: Well, Commissioner
4 Pernell, the City wants two hours. I'm interested
5 in what the other intervenors --
6 INTERVENOR SARVEY: I reserved four
7 hours, Mr. Laurie.
8 COMMISSIONER LAURIE: Well, you'll
9 reserve as many hours --
10 INTERVENOR SARVEY: In my preconference
11 hearing statement, I reserved four hours.
12 COMMISSIONER LAURIE: -- as many hours
13 as the chair is able to give you.
14 INTERVENOR SARVEY: Thanks, Mr. Laurie.
15 COMMISSIONER LAURIE: You're welcome.
16 INTERVENOR SELIGMAN: A lot depends on
17 what is asked by the City of Tracy, which would
18 determine what I am or am not going to ask in
19 order to avoid repetitiveness. So it's difficult
20 to make a conclusion on that without knowing
21 exactly how far the City of Tracy is going with
22 this.
23 INTERVENOR BAKKER: Just for the
24 committee's information, the intervenors have
25 coordinated amongst themselves to sort of minimize

1 the cumulative effect of our questioning, so my
2 estimate of two hours was based on my estimate of
3 the questioning of these gentlemen as well.
4 INTERVENOR SARVEY: I agree.
5 PRESIDING COMMISSIONER PERNELL: All
6 right. On the question of taking a break before
7 we begin, why don't we take a 15-minute break.
8 Thank you.
9 (Thereupon, a recess was held
10 off the record.)
11 PRESIDING COMMISSIONER PERNELL: We are
12 back on the record. Ms. Tompkins?
13 HEARING OFFICER TOMPKIN: All right.
14 We'll proceed with the cross examination of the
15 witnesses at this time. Mr. Bakker?
16 INTERVENOR BAKKER: Thank you. John
17 Bakker, on behalf of the City of Tracy.
18 Before we get started, I wanted to
19 formally object to the witnesses or to
20 Ms. Hernandez's oral testimony that we just heard
21 on the basis that it was beyond the scope
22 generally of her written testimony. I appreciate
23 the committee's giving us an opportunity, about a
24 half-hour to prepare our cross examination and get
25 some cross examination together, but, for the most

1 part, the testimony that we heard this evening was
2 far beyond what was set forth in her written
3 testimony.
4 Her written testimony was essentially a
5 one-page list of conclusions, based on the issues
6 raised by the City of Tracy and various other
7 intervenors on the Land Use issue in this matter.
8 What we got on oral testimony was sort of fleshing
9 out how she reached those conclusions. We didn't
10 have an opportunity to evaluate the basis on which
11 she based her conclusions, and we think that
12 that's the purpose of submitting written testimony
13 before the hearings. And that is to give the
14 parties an opportunity to evaluate the written
15 testimony prior to the hearing.
16 So we just wanted to make that objection
17 formally for the record. Thanks.
18 HEARING OFFICER TOMPKIN: Thank you,
19 Mr. Bakker.
20 CROSS EXAMINATION
21 BY INTERVENOR BAKKER:
22 Q Ms. Hernandez, I'm just going to get
23 started on the first of your conclusions
24 concerning the Community Development Department
25 letter of September 18th.

1 A Yes.
2 Q I'm going to focus on the first of the
3 subconclusions in your testimony and that is that
4 the TPP complies with the San Joaquin County
5 development title and San Joaquin County general
6 plan. In doing this analysis, did you review the
7 Commission regulations, siting regulations?
8 A No, I did not -- the Energy
9 Commission's --
10 Q Energy Commission siting regulations.
11 A Yes, with respect to the Land Use
12 issues, not comprehensively otherwise.
13 Q Okay. I would like to direct your
14 attention to Regulation 1714, if I could. I'm
15 sorry, I meant to direct you to 1714.3.
16 A Yes, I'm here.
17 Q Have you ever reviewed this section?
18 A No, I have not.
19 Q Would you like to -- Could you review it
20 now? I don't know if we should read it, have
21 someone read it into the record, or perhaps I
22 could just summarize it.
23 APPLICANT COUNSEL GRATTAN: We can take
24 notice.
25 THE WITNESS: Sure.

1 INTERVENOR BAKKER: Okay. Yeah, I guess
2 I'd request that the Commission take official --
3 or the committee take official notice of this,
4 Section 1714.3.
5 HEARING OFFICER TOMPKIN: We will take
6 notice of the section.
7 BY INTERVENOR BAKKER:
8 Q Is it your contention that the
9 September 18th letter satisfied the requirements
10 of this section?
11 A It's not my understanding that the
12 Commission has an ability to order a local
13 official to go into any elaborate levels of
14 detail.
15 Q Okay.
16 A With respect to the statutory LORS
17 requirements, which were --
18 Q Just before we get any further, I guess
19 we sort of need to summarize for the record
20 exactly what Section 1714.3 says. Can you do that
21 for us?
22 A Well, actually, since you just brought
23 it to my attention now, I'd be more comfortable if
24 you would do the summary to the points that you
25 are most interested in.

1 Q I would be happy to do that. 1714.3
2 essentially directs an agency requested by the
3 Commission to evaluate an application for
4 certification to prepare a document and present it
5 to the Commission that identifies each aspect of
6 the proposed site over which the agency would have
7 jurisdiction but for the Energy Commission's
8 jurisdiction.
9 It asks the agency to list and summarize
10 the nature of those LORS and it asks that the
11 agency describe the nature and scope of the
12 information requirements that the agency would
13 otherwise require the applicant to produce before
14 approval was given for a particular project.
15 It also directs that the agency conduct
16 a preliminary analysis and provide comments and
17 recommendations to the Commission regarding the
18 design, operation and location of the facilities.
19 COMMISSIONER LAURIE: Question: When
20 you were making reference to the agency, you're
21 making reference to the local agency.
22 INTERVENOR BAKKER: Exactly.
23 COMMISSIONER LAURIE: Thank you.
24 INTERVENOR BAKKER: Thank you for
25 clarifying that.

1 The preliminary analysis shall be
2 limited to that necessary to advise the Commission
3 on whether there is a reasonable likelihood that
4 the proposal will be able to comply with the
5 agency's applicable laws or concerns.
6 And then subdivision (e) of 1714.3
7 requires that the agency submit to the Commission
8 the results of the agency's analysis for hearing.
9 BY INTERVENOR BAKKER:
10 Q Ms. Hernandez, is it your testimony that
11 the letter of September 18th complied with this
12 requirement of Commission regulations?
13 COMMISSIONER LAURIE: Hold one moment,
14 please.
15 PRESIDING COMMISSIONER PERNELL: We'll
16 go off the record.
17 (Thereupon, a recess was held
18 off the record.)
19 PRESIDING COMMISSIONER PERNELL:
20 Commissioner Laurie has a question.
21 COMMISSIONER LAURIE: Explain the
22 propriety or the basis of the question. What is
23 the relevance of the question if the County did or
24 did not comply with the section?
25 INTERVENOR BAKKER: Commissioner Laurie,

are you suggesting that this section doesn't apply for some reason?

APPLICANT COUNSEL GRATTAN: Commissioner Laurie, we're also prepared to address the relevance of it.

COMMISSIONER LAURIE: Well, I just -- Just a moment. I'm asking you what is the relevance to this witness's testimony on whether the County complied with 1714.3?

INTERVENOR BAKKER: Perhaps the question is better asked of the County; however, I just wanted to find out if the witness was aware of a Commission requirement, a general requirement as far as I'm concerned, that agencies that otherwise would have jurisdiction to issue a determination of compliance.

APPLICANT COUNSEL GRATTAN: May I respond? I think I can provide a little bit of help here. Section 1714.3 relates to Section 1714 of the regulations. Section 1714, in turn, only applies to facilities which require a certificate of public convenience and necessity from the Public Utilities Commission. So it's not really even relevant.

INTERVENOR BAKKER: I'm sorry, I don't

1 have a copy of 17 -- I'm sorry, 1413?
2 APPLICANT COUNSEL GRATTAN: 1714. It's
3 the section to which 1714.3 refers.
4 INTERVENOR BAKKER: Oh, all right. And
5 what subdivision are you referring at 1714?
6 APPLICANT COUNSEL GRATTAN: (a).
7 INTERVENOR BAKKER: Okay.
8 THE WITNESS: I did testify as to the
9 basis of my conclusion for the LORS finding, which
10 is Section 1744, which speaks to review of
11 compliance with applicable laws and the comment
12 process that is undertaken at that point. And
13 then also, the statutory requirement for the LORS
14 analysis at 25509(f).
15 INTERVENOR BAKKER: I'm sorry, I'm still
16 trying to sort out the previous comment from
17 counsel for the applicant.
18 BY INTERVENOR BAKKER:
19 Q It's my understanding that under
20 subdivision (c) of 1714, the executive director
21 would have been required to submit or transmit a
22 copy of the notice of application to any agency
23 with jurisdiction, that would otherwise have
24 jurisdiction. Subdivision (a) only applies to, it
25 only talks about transmitting an application to

1 the Public Utilities Commission.
2 COMMISSIONER LAURIE: Counsel,
3 Mr. Grattan is right. 1714 makes reference to a
4 certificate of public convenience and necessity
5 rather than an application for certification.
6 So Commissioner Pernell, did we go off
7 the record?
8 PRESIDING COMMISSIONER PERNELL: We're
9 now back on, and we're trying to establish the
10 relevance to the question of does -- and I think
11 that's what we I'm giving you some latitude to do.
12 INTERVENOR BAKKER: I can take this up
13 with the staff, then, and the County, but I just
14 want to ask a question of the applicant's witness,
15 and that is the following:
16 BY INTERVENOR BAKKER:
17 Q Is it your understanding that typically
18 the Commission staff or the Commission asks local
19 agencies that would otherwise have jurisdiction to
20 prepare determinations of compliance?
21 A Determinations of compliance is not
22 something I'm familiar with, but I don't believe
23 it applies in this case, but I will defer to
24 others on that issue.
25 Q Okay, thank you.

1 A You did, though, get citations to what I
2 do believe applies, 1744 and also Public Resources
3 Code 25519(f).
4 Q Correct. Thank you.
5 A Sure.
6 Q You mentioned in your testimony that in
7 your review of the applicable county codes, that
8 this project would otherwise require site approval
9 by the County; is that correct?
10 A That is correct.
11 Q Was there anything in the -- Now, do you
12 understand the nature of site approval findings or
13 the site approval requirements under County I
14 guess development regulations?
15 A It's called the development title.
16 Q Development title.
17 A Right. It is what I have reviewed.
18 Q Okay, and can you explain to the
19 committee what it is or what findings are required
20 to grant site approval?
21 A I went through the findings during my
22 testimony, but maybe I can just step back and
23 describe the program.
24 Q Okay.
25 A It's in ag zones, agricultural zones,

1 under, and these are all references to Title IX,
2 the development title. In Title IX, Section
3 605.6, utility services are permitted in
4 agricultural zones.
5 Q Okay.
6 A Permittable uses, the form of permit is
7 set out in table 9-605.2, which calls out various
8 forms of permits required for different kinds of
9 projects. The form of permit called out for
10 utility service projects is called site approval.
11 Q Okay.
12 A The site approval review and approval
13 process is set out in Section 9-818.3 of the
14 County's code. Site approvals are approved by the
15 director, based on staff review with notice, where
16 the director is, in fact, the lead -- or where the
17 County is, in fact, the lead agency.
18 Q Okay.
19 A And the approval itself by the director,
20 as the reviewing authority, is set out in Section
21 9-818.6.
22 Q Okay. Did the September 18th letter
23 make the findings required by 9-818.6?
24 A These are the three findings?
25 Q I'm sorry, 9-818.6 actually contains

1 five findings.
2 A Okay, let's go through them. These are
3 for, as I'm reviewing the section that you
4 referred me to that relates to use permits not
5 site approvals. Use permits my understanding are
6 a separate form of approval. The site approval --
7 Q If I may, I'm reviewing a version of the
8 County, I guess the regulations or the development
9 title --
10 A Right.
11 Q -- Section 9-818.6, entitled Findings.
12 It reads, "Prior to approving an application for a
13 site approval" --
14 A Right.
15 Q -- "the review authorities shall find
16 that all of the following are true." I thought
17 you told us that --
18 A I'm sorry, that's exactly right.
19 Q Okay. Go ahead.
20 A And so the answer to the question was,
21 or the question as I'm hearing it was did the
22 September 18th letter make the site approval
23 findings on this list?
24 Q Correct, that's my question.
25 A The answer to the question is no, it

1 commented on the LORS standards and whether the
2 project would qualify for the LORS standards. It
3 did not make the findings needed to actually
4 provide for a site approval, since a site approval
5 was neither asked for nor required for this
6 project. That is a jurisdictional finding.
7 Q Okay, thank you. With regard to the
8 letter of September 18th, the September 18th
9 letter, can you show us where in the letter a
10 determination is made that the project, the TPP
11 project is consistent with the County's LORS?
12 A The first bolded heading of the letter
13 says Local Laws, Ordinances, Regulations, and
14 Standards.
15 Q Okay.
16 A That paragraph that follows, that goes
17 through the recitation, without the citations that
18 I've previously given to you about the site's
19 general ag zoning, the permitted utilities in that
20 general ag category, and the form of permitting
21 that is, in fact, allowed, which is site approval.
22 Then the paragraph goes on to say and refer to a
23 couple of attachments, Attachments A and B, which
24 make more detailed findings.
25 The letter goes on to say that the

1 Community Development Department finds that the
2 proposed use is consistent with the development
3 title special use regulations, etc., and then the
4 referenced Attachments A and B go through in some
5 relatively gruesome detail what that means, and
6 I'd be glad to restate that if you'd like.
7 Q No, that's fine, thank you.
8 COMMISSIONER LAURIE: Let me note that
9 the witness's testimony stands; however, and
10 you're free to ask questions if it's not clear,
11 but the attached findings go through the statutory
12 findings.
13 THE WITNESS: Exactly.
14 COMMISSIONER LAURIE: And I'm making
15 reference to the bottom paragraph of page two,
16 where it goes through the findings one by one, and
17 I believe the -- Well, I don't want to be
18 testifying --
19 INTERVENOR BAKKER: If I may,
20 Commissioner Laurie, that is the special use
21 regulations findings that are required for a power
22 plant. I would suggest to you that those are in
23 addition to the findings that I am talking about
24 here that are required for a site approval. That
25 would be for any project that requires site

1 approval, these five findings have to be made.
2 COMMISSIONER LAURIE: Okay.
3 INTERVENOR BAKKER: These three findings
4 from 9-605.6(d) on page two of the attachment to
5 the September 18th letter are only with respect to
6 a power generating facility, okay?
7 BY INTERVENOR BAKKER:
8 Q Does the County development, or does the
9 September 18th letter make a statement anywhere
10 that the TPP project complies with all applicable
11 County LORS?
12 A You're asking me to testify as to the
13 text of this letter?
14 Q I'm just asking you if this letter
15 actually makes a statement that the TPP project
16 complies with applicable County LORS.
17 A The letter goes through sequentially the
18 series of issues it needed to evaluate in
19 determining whether or not this project complied
20 with the County LORS.
21 Q Okay.
22 A I do not see a conclusion --
23 Q Let me just reference you to the
24 second --
25 A I believe I just answered --

1 PRESIDING COMMISSIONER PERNELL: Excuse
2 me, let her finish.
3 INTERVENOR BAKKER: Oh, I apologize.
4 THE WITNESS: I do not see a paragraph
5 or a sentence entitled Conclusion at the end.
6 Instead, I see a series of relatively lengthy
7 paragraphs for each subheading, each of which
8 does, in fact, find compliance.
9 APPLICANT COUNSEL GRATTAN: Thank you.
10 THE WITNESS: And so, it would be hard
11 for me to assume that there was anything other
12 than compliance, based on the letter -- in fact,
13 what the letter says is compliance.
14 INTERVENOR BAKKER: Okay, thank you.
15 BY INTERVENOR BAKKER:
16 Q Given the first two sentences of the
17 letter, how is it that you concluded that the
18 County was offered a -- Well, let me just read a
19 couple of phrases from the letter. It says, "you
20 requested a written discussion of the following
21 three items," and then it includes conformance and
22 consistency with LORS.
23 Does that suggest to you that the
24 Community Development director understood that he
25 was making a determination of whether this project

1 complies with LORS, with the County's LORS?
2 A The term LORS is unusual, as you know,
3 or as I believe you know, in local land use
4 practice. It has special meaning under the
5 Commission procedures. The very first bullet of
6 the County's letter is Conformance/Consistency
7 with Local Laws, Ordinances, Regulations, and
8 Standards (LORS). It's hard for me to imagine
9 that someone would simply invent that term without
10 having been told about it and what it means from
11 the Commission.
12 Q I guess the point of my question,
13 Ms. Hernandez, and correct me if I'm wrong, I'm a
14 bit confused. It seems to me the applicant is
15 asserting that this letter is a determination of
16 compliance from the County that states that this
17 project complies with the County's applicable
18 LORS. But from reviewing the letter, there is no
19 way I can determine that that's what the County
20 thought they were doing, and I -- we have no way
21 of knowing whether the County understood that
22 that's the role that they were playing in
23 evaluating their rules and regulations.
24 The County, it seems to me, understood
25 that the Energy Commission had exclusive

1 jurisdiction over this project and didn't
2 understand their role.
3 HEARING OFFICER TOMPKIN: Now, what is
4 your question, counsel?
5 INTERVENOR BAKKER: Well, I'd like the
6 applicant or Ms. Hernandez to explain why she
7 thinks that this is a determination of compliance,
8 or a statement from the County that they believe
9 this project complies with the County's LORS. And
10 I use that term LORS just because it's a term
11 that's used at the Commission. Forgive me if it's
12 confusing.
13 THE WITNESS: Well, it's absolutely not
14 confusing, actually. I think it has a quite
15 unique meaning that is specific to this proceeding
16 and the fact that that meaning and that term is
17 reflected in the County's own letter suggests to
18 me that the Commission staff did the job that they
19 were supposed to do when asking for these
20 comments, which was, in fact, was to explain what
21 they were, in fact, going to be used for.
22 If you'd like me to go through again, I
23 can, as to each of the criteria that was looked
24 at. I'd also like to just bring your attention, I
25 referenced it a couple of times but the applicable

1 statute says, "Upon receipt of an application" --
2 and the Commission, in fact, received the AFC, the
3 application for this proceeding the month before
4 that letter came out -- "Upon receipt of the
5 application, the Commission shall forward the
6 application to local governmental agencies, having
7 land use and related jurisdiction in the area of
8 the proposed site and related facility." That's
9 my understanding of what occurred.
10 The statute goes on to say these local
11 agencies shall review the application and submit
12 comments on, among other things, design of the
13 facility, architectural, etc., and other
14 appropriate aspects of design, construction,
15 operation for all site-related facilities. That's
16 my understanding of what happened, and, in fact, I
17 think that's accurate.
18 Q Okay. Do we have any documentation of
19 or does the applicant or do you have any knowledge
20 of any documentation from the Commission staff
21 requesting that the County prepare an analysis of
22 the project's consistency with LORS? For
23 instance, requesting this letter; do we have the
24 documentation? Do we know what it is the
25 Commission staff asked the County to prepare?

1 A The first paragraph of the letter says
2 the letter is in response to your phone
3 conversations and facsimile transmission. I have
4 not seen the facsimile transmission. Ms. Kerrie
5 Sullivan of the Commission staff is the person
6 that the County noted they had spoken to.
7 Q Right.
8 A I'm sorry, Ms. Sullivan is in the County
9 staff, but she was the person to whom the
10 Commission staff had spoken.
11 Q So you're not aware of what it is
12 exactly the Commission asked for from the County,
13 exactly.
14 A I certainly wasn't in the room. What
15 the letter says is something that's quite unique
16 for Commission proceedings, which is conformance/
17 consistency with local laws, ordinances,
18 regulations, and standards. That's a Commission
19 proceeding term, and the letter goes on to explain
20 the determinations made by the County staff in
21 response to a request.
22 Q Okay.
23 A So I believe the document speaks for
24 itself, it is a LORS determination.
25 Q The point of my question is to simply

1 suggest that your testimony -- Well, let me back
2 up. Your testimony suggested that this letter was
3 the County's final determination of the project's
4 consistency with LORS; is that correct?
5 A It's my understanding that the County's
6 only comment on the issue of LORS, in writing or
7 orally, is a County resolution opposing the
8 project based on certain concerns not having been
9 met. That resolution did not address the issue of
10 LORS or reopen the question of whether this letter
11 was inaccurate; quite the contrary.
12 Q Okay.
13 A That was sought and did not, in fact,
14 get approved as an amendment to the resolution by
15 opponents.
16 Q Is it your testimony that you believe
17 that County staff thought this was the final,
18 their final determination of the project's
19 consistency with LORS?
20 PRESIDING COMMISSIONER PERNELL: I'm
21 going to have to object to that. I think she's
22 answered the question.
23 INTERVENOR BAKKER: Okay. I'll move on.
24 COMMISSIONER LAURIE: Mr. Chairman, if I
25 may --

1 PRESIDING COMMISSIONER PERNELL:
2 Commissioner Laurie?
3 COMMISSIONER LAURIE: -- I am interested
4 in any information solicited from this witness or
5 otherwise that the project does not comply with
6 LORS. And I would suggest counsel direct your
7 questions in that regard.
8 INTERVENOR BAKKER: Okay.
9 BY INTERVENOR BAKKER:
10 Q If we may, can we just walk through the
11 findings required by -- for site approval? That's
12 at 9-818.6 of the County development title?
13 A And these are the findings to restate
14 what we have discussed now. These are the
15 findings that are required for the County to
16 actually issue the site approval permit --
17 Q Right.
18 A -- which is not an act that they have
19 taken nor is it an act that they were required to
20 take.
21 Q And why would that be?
22 A Because they are not required to
23 actually make the policy determination as to
24 whether or not the project should be approved,
25 they're being asked by the Commission staff,

1 pursuant to the Public Resources Code, to comment
2 on the issue of LORS. And that's what they did.
3 That commentary did not need to extend
4 by statute or reg to the question of the policy
5 findings in the site approval.
6 Q Were the Commission to approve this
7 project, would the Commission have to make these
8 sub-findings in the site approval, the site
9 approval findings at 9-818.6?
10 A Since it's not clear to me that the
11 Commission even knows what these local site
12 approval findings are, I wouldn't presume to speak
13 for them. I would simply say that these are not
14 the same statutory requirements for when or
15 whether a project generating power over 50
16 megawatts is, in fact, to be approved or is
17 approvable or not.
18 These findings for site approval by the
19 County of San Joaquin differ from the statutory
20 mandate given by the Legislature to the
21 Commission.
22 Q Are you aware of the requirement that
23 the Commission must find that the project complies
24 with applicable LORS?
25 A I'm aware of that requirement. I'm also

1 aware of the requirement that the Commission can,
2 in fact, approve notwithstanding non-compliance
3 with LORS under specified circumstances.
4 Q Okay, thank you. So in making that
5 finding, would not the Commission have to make
6 these subfindings?
7 A The findings that you're referring to,
8 under Chapter 9-818 from my perspective are policy
9 determinations about whether or not a project can
10 be approved. Now, stepping back, I will note that
11 the Well Head project, which did, in fact, receive
12 site approval qualified for these policy findings.
13 These policy findings were not among the findings
14 that this county was asked to comment on by this
15 Commission under the Commission's procedures, and
16 I believe that was inappropriate.
17 Q If I may, Ms. Hernandez, if you look at
18 these findings carefully, they're based on the
19 specific sites and, for instance, whether the
20 project would be injurious to the property
21 improvements of adjacent properties, that's in
22 subdivision (d), and in subdivision (e), whether
23 the use is compatible with adjoining land uses.
24 Another finding is (c), which requires,
25 which states that the site --

1 PRESIDING COMMISSIONER PERNELL: Excuse
2 me, is this a question?
3 INTERVENOR BAKKER: It is a question.
4 PRESIDING COMMISSIONER PERNELL: And
5 what is the question? It appears to be that
6 you're reading something from --
7 INTERVENOR BAKKER: I am reading from
8 the findings that are required by the County
9 building codes.
10 PRESIDING COMMISSIONER PERNELL: Right,
11 and what is your question of her?
12 BY INTERVENOR BAKKER:
13 Q My question would be what is the
14 relevance of the County's findings with regard to
15 the Well Head project since this is a different
16 site and a different project that we're discussing
17 today, the TPP project?
18 A To go back -- Well, actually some kind
19 soul gave me, the Well Head project is at the
20 corner of this project. It is identical, in terms
21 of the applicable requirements under LORS. It's
22 also subject to and qualified for and received
23 site approval, which does, in fact, require these
24 additional findings be made.
25 I do not see these findings as LORS. We

1 could disagree on that.
2 Q Okay. Ms. Hernandez, how big was the
3 project that the County approved, as far as
4 megawatts go?
5 A It was less than 50. I do not know how
6 many less than 50 it was.
7 Q Okay, and do you know if it was a
8 natural gas-fired power plant or what kind of
9 power plant it was?
10 A That information --
11 Q What its noise characteristics might be,
12 its visual impacts?
13 A The --
14 PRESIDING COMMISSIONER PERNELL:
15 Ms. Hernandez, if you don't know, just simply
16 state you don't know.
17 THE WITNESS: I don't know, but I do
18 know that the County made a variety of findings on
19 all of those issues.
20 PRESIDING COMMISSIONER PERNELL: Okay,
21 thank you.
22 BY INTERVENOR BAKKER:
23 Q So you don't agree that the County or
24 that the Commission, in approving this project,
25 would have to make these subfindings in 9-818.6?

1 Can you explain why?
2 A First off, I believe the Community
3 Development director did a very fine job of
4 explaining what LORS were, and, in fact, explained
5 them and concluded why this project qualified.
6 So --
7 Q Well, Ms. Hernandez, I thought you
8 testified earlier that the Community Development
9 director did not make the findings required by
10 9-818.6.
11 A And I have also I think explained with
12 some detail that the findings required by 9-818.6
13 are policy findings for the actual site approval
14 permit. That is not a permit that this county was
15 asked to give, nor is it a permit that this county
16 has jurisdiction to give. Those are ultimate
17 findings for policy purposes.
18 The subfindings for power plants are, in
19 fact, the LORS in this circumstance.
20 Q Ms. Hernandez, are you familiar with the
21 concept of a conditional use permit?
22 A Yes, I am.
23 Q What is the purpose of a conditional use
24 permit?
25 A The purpose of a conditional use permit

1 is to describe those conditions under which use,
2 which is not as of right but as is appropriate and
3 a matter of policy as articulated, various
4 policies, is or isn't going to be allowed; a
5 discretionary permit which can be approved or
6 denied. It's a permit that is allowed for various
7 land uses.
8 It's a policy call as to whether or not
9 a project should proceed independent of whether
10 the project actually meets each of the criteria,
11 as contrasted with, say, a ministerial permit,
12 which you get to do if you meet the standards, no
13 matter what.
14 Q Okay.
15 A A use permit is discretionary. It's a
16 policy call.
17 Q Ms. Hernandez, would you consider these
18 findings that are required by 9-818.6 to be
19 similar to condition use permit findings?
20 A Conditional use permit findings vary
21 dramatically by jurisdiction. I can now review --
22 Q I would agree with you.
23 A Thank you. They look, upon first blush,
24 to be very close, if not identical, to the use
25 permit findings that follow.

1 Q Oh, unfortunately, I don't have a copy
2 of the County's conditional use permit findings,
3 but I was just going to state that I believe they
4 are identical to the findings that are required
5 for site approval. You may be able to confirm
6 that for me.
7 A Well, they look darned close.
8 Q Okay, thank you. Now, isn't the purpose
9 of a conditional use permit to analyze the impact
10 of a project -- of a particular use on its
11 surroundings, and determine whether or not, based
12 on the particular site, the use would be
13 appropriate in that particular site, in a general
14 sense. Would you agree with that?
15 A I actually say that the purpose of most
16 planning department decisions is to make that kind
17 of evaluation, whether it's for a building permit
18 or a grading permit or a site approval or a use
19 permit, or even a specific plan or general plan.
20 The issues of compatibility must be evaluated.
21 Q Okay.
22 A Some are more a matter of right than
23 others. In this county, site approval is broken
24 out as a form of approval that does not require a
25 public hearing, it does not go to the Planning

1 Commission.
2 Q Okay.
3 A A use permit is procedurally different
4 in this county, because both of those steps must
5 be taken, both the public notice, and the Planning
6 Commission decision are required for use permits.
7 That is not the case for site approvals.
8 Q Okay. But this project, this site is
9 not permitted as a matter of right in the County;
10 is that correct?
11 A That's right. It's approvable by site
12 approval as opposed to by use permit or whatever.
13 It's approvable by the staff, by site approval.
14 Q And either -- Well, and the County staff
15 would have to determine whether or not this
16 project or whether or not they could make the
17 findings required for site approval. Does not the
18 Commission have to make that determination? If
19 the County is not going to make it, who is going
20 to make it? Someone has to make those findings in
21 order to find that the project complies with the
22 County's laws, ordinances, rules, regulations, and
23 standards?
24 A I think you're asking me to tell you
25 that the County was supposed to also make the

1 bottom line policy findings that are encompassed
2 in 9-818.6, the findings they would make with the
3 site approval. And, in fact, I don't believe
4 that's the case under the LORS requirements. I
5 think the County identified LORS, went through
6 systematically and evaluated the project in
7 comparison to the LORS, and reached a conclusion
8 which is embodied in the rest of the record.
9 Q So anytime --
10 COMMISSIONER LAURIE: Excuse me,
11 Counsel, Mr. Chairman, if I may?
12 INTERVENOR BAKKER: Oh, I'm sorry.
13 PRESIDING COMMISSIONER PERNELL:
14 Commissioner Laurie?
15 COMMISSIONER LAURIE: The question has
16 already been asked and answered, but I'll ask one
17 more time: In your professional opinion, under
18 the rules of the Warren Alquist Act that is
19 applicable to the Energy Commission, does the
20 Energy Commission have to make a special finding
21 as set forth in either the condition use permit
22 section or the site approval section? Do you have
23 an opinion on that question?
24 THE WITNESS: I believe, under the
25 Warren Alquist Act and its implementing

1 requirements, that the policy decisions embedded
2 in the site approval findings are not those to be
3 made by the Commission, that the LORS standards
4 are the actual substantive standards set out, not
5 the policy call at the end of the day. The policy
6 call at the end of the day is the Commission's to
7 make or not, not the County's.
8 COMMISSIONER LAURIE: That's --
9 BY INTERVENOR BAKKER:
10 Q And I thought that's what I asked you,
11 is whether or not the Commission has to make these
12 subfindings in 9-818.6.
13 COMMISSIONER LAURIE: Counsel, the
14 witness has said no. In her opinion, her opinion
15 is the Commission does not have to make those
16 findings.
17 THE WITNESS: To the extent I misspoke,
18 I meant to say that the Commission makes the
19 policy findings, not the County, for CEC-
20 jurisdictional projects such as this.
21 COMMISSIONER LAURIE: Okay. Well, now,
22 I'm sorry, now I'm confused. Is it your opinion
23 that, in order to approve this project and find
24 compliance with LORS, the Commission must make the
25 specific findings as set forth in those

1 subsections?

2 THE WITNESS: Absolutely not. The

3 Commission is under direction from the Legislature

4 in the statutes as to what findings you must make

5 to approve or not a power plant project.

6 COMMISSIONER LAURIE: Thank you.

7 Counsel?

8 BY INTERVENOR BAKKER:

9 Q And what findings are those? I thought

10 we already went over this --

11 A One moment, please. No, we will find

12 the Commission findings for approval. That was

13 actually outside the scope of my testimony, so it

14 will take a little digging.

15 I'm advised by counsel, who practices in

16 front of the CEC, that these findings requirements

17 are throughout the Code. He has brought to my

18 attention Section 25523 of the Public Resources

19 Code, which set out written decision content

20 requirements which appear to be a subset of the

21 findings that the Commission is required to make.

22 But I confess I am not an expert on the issue of

23 what findings the Commission needs to make, in

24 terms of the policy calls at the end of the day.

25 Q Thank you. And I was referring to

1 25523(d)(1).
2 PRESIDING COMMISSIONER PERNELL: Of
3 what?
4 INTERVENOR BAKKER: Of the Warren
5 Alquist Act.
6 THE WITNESS: And that's findings
7 regarding the conformity of the proposed site and
8 related facilities with standards adopted by the
9 Commission?
10 BY INTERVENOR BAKKER:
11 Q And you can skip down, there's --
12 A "If the Commission finds that there is
13 non-compliance with any state, local, or regional
14 ordinance, it shall consult and meet. If the non-
15 compliance cannot be corrected," is that what
16 you're talking about?
17 Q Well, actually I was talking about the
18 findings regarding conformity of the proposed site
19 and related facilities with, skip down a couple of
20 lines, with other relevant local, regional, state
21 and federal standards, ordinances or laws. That's
22 the typical finding or the main finding the
23 Commission has to make in approving the project.
24 A I'm not aware that there is a difference
25 between the term "relevant" as used in this

1 process and "applicable." From my perspective,
2 the issue is whether --
3 Q I wasn't suggesting there was. I may do
4 that later on in my cross examination of you --
5 A Fair enough.
6 Q -- but at this point I was just asking
7 you what are the findings the Commission has to
8 make.
9 A I believe those are a subset of the
10 findings, but, as I mentioned, I am also advised
11 that there are finding requirements elsewhere in
12 the Code and I am not an expert on that.
13 Q Ms. Hernandez, are you familiar with the
14 Topanga case? It's a famous California Supreme
15 Court case?
16 A Sure, "Bridging the Gap."
17 Q Can you explain to us how the
18 Commission -- Well, can you explain to us the
19 principles set forth in the Topanga case?
20 COMMISSIONER LAURIE: Excuse me,
21 Mr. Chairman?
22 PRESIDING COMMISSIONER PERNELL:
23 Commissioner Laurie?
24 COMMISSIONER LAURIE: Sir, can I have
25 some foundation? I don't want to go into an

1 explanation of the Topanga case and indicate the
2 populous for the next hour unless there is some
3 foundation you can present to us as to why the
4 Topanga case is relevant, and what your line of
5 questioning --
6 INTERVENOR BAKKER: I'd be happy to do
7 that. What I was --
8 COMMISSIONER LAURIE: Also, as a matter
9 of practice, please let those who are speaking
10 finish their sentence. Thank you.
11 INTERVENOR BAKKER: I'd be happy to do
12 that. The Topanga case deals with the findings
13 that are required when an agency approves a land
14 use project, an adjudicatory land use project.
15 And I believe that principal applies here, and I
16 was hoping that -- and it's my belief that the
17 Topanga case would require the Commission to make
18 the subfindings within the County's Code before it
19 could make the general finding that this project
20 complies with all applicable LORS.
21 COMMISSIONER LAURIE: And that's a legal
22 argument that the City intends to make?
23 INTERVENOR BAKKER: Correct, and I was
24 asking applicant's witness, who is testifying, as
25 to her opinion about whether or not the subfinding

needed to be made. I just wanted to get her opinion on that issue.

COMMISSIONER LAURIE: You've already asked the question three times, and in her opinion the answer is no.

INTERVENOR BAKKER: Okay. We can move on, unless the witness wants to answer the question.

COMMISSIONER LAURIE: I --

THE WITNESS: I teach this stuff. I can go on for hours.

(Laughter.)

INTERVENOR BAKKER: Thank you.

PRESIDING COMMISSIONER PERNELL: We don't have that much time.

(Laughter.)

HEARING OFFICER TOMPKIN: The question has been asked and answered, I'm going to ask counsel to move on.

PRESIDING COMMISSIONER PERNELL: Thank you.

BY INTERVENOR BAKKER:

Q Ms. Hernandez, in your testimony you talked a little bit about deference to agency determinations of their own regulations and the

1 Chevron Doctrine.
2 A Yes.
3 Q Is that principle absolute or do courts
4 have authority to -- for instance, in
5 California -- to analyze the findings of an agency
6 and determine whether or not they are consistent
7 with law?
8 A Well, there is certainly an abusive
9 discretion standard that goes to the question of
10 whether an agency has gone beyond the bounds of
11 what it is lawfully authorized to do. I used that
12 principle to illustrate the point that there was a
13 disagreement, at least at some level, between the
14 County's interpretation of the first of the
15 special findings, which is how necessary the
16 source of power has to be, and the Commission's
17 interpretation, which seemed to be a little more
18 questioning about whether this project met that
19 criteria. But the Commission staff deferred in
20 its analysis, I think appropriately, to the
21 locals.
22 The point that I'd also just focus on in
23 that case is that not only was there an
24 appropriate deference given, but that deference
25 was part of and consistent with the County's own

1 application of these requirements in the immediate
2 past with the Well Head project, which did, in
3 fact, qualify for these same findings. It would
4 have been closer to an abusive discretion had the
5 County taken the same legal requirements and
6 applied them in different ways to adjacent power
7 projects within a six-month span of time, five
8 months.
9 To your knowledge, did the court review
10 the decision made by the County on the Well Head
11 project?
12 A No one objected to that approval,
13 certainly not a court.
14 Q Okay. Is it possible that the County's
15 decision could have been overturned in the Well
16 Head project, based on the fact that its decision
17 didn't comply with the County's own rules? I'm
18 just asking you whether or not the County's
19 discretion to interpret its own laws is absolute
20 or not?
21 A Oh, it's absolutely not absolute, and
22 the Supreme Court of the United States and the
23 Supreme Court of California have affirmed that.
24 But in technical issue areas, or in issue areas
25 that seem a little complicated or a little vague

1 or a little ambiguous, deference is, in fact,
2 given to the agency.
3 And there is a long line of cases in
4 administrative law and it affirms that. I just
5 brought the two top guns at the US and California
6 Supreme Court to your attention.
7 Q Okay, thank you. Did you review the
8 County's findings, or I guess it would be County
9 staff's findings with respect to the Well Head
10 project?
11 A I reviewed the negative declaration and
12 the findings that accompanied site approval, and
13 also the findings that are embedded in the initial
14 study that is part of the negative declaration,
15 yes.
16 Q Okay, thank you. Now, are you aware of
17 how the County has applied its standards elsewhere
18 in the County? I guess what I'm asking is are you
19 aware of any other examples of the County
20 interpreting those special use regulations with
21 respect to power generating facilities elsewhere
22 in the County, or do we only have one example?
23 A I think we have two: We have the Well
24 Head project, and then we have the September
25 letter applied to this project. I'm not aware of

1 any others.

2 Q Okay, thank you. So this is not a

3 longstanding, we don't have a longstanding

4 interpretation of the County's I guess ambiguous

5 regulations?

6 A I'm not sure I'd agree they're

7 ambiguous, but the Commission staff questioned the

8 meaning of the one term or the one provision.

9 Q Okay, thank you. Now, Ms. Hernandez, on

10 this issue of what the controlling land use laws

11 are for this particular site, you testified that

12 because the Commission I guess it was regulations

13 stated that the Commission needs to consider all

14 applicable laws, therefore, the City of Tracy's

15 laws didn't apply; and we talked briefly about the

16 provisions within Section 25523 of the Warren

17 Alquist Act that states that the Commission needs

18 to find that the project conforms with other

19 relevant local, regional, state, and federal

20 standards.

21 Do you think that would include -- Do

22 you think the phrase relevant would include the

23 City of Tracy's land use laws, as opposed to the

24 phrase applicable?

25 A Well, I think that to the extent the

1 term relevant is ambiguous, we're going to now
2 look at the regs. My understanding is the regs
3 make clear it's applicable; however, the fact is
4 the Commission staff did consider the City of
5 Tracy's land use laws in the context of the
6 cumulative impacts evaluation of the build-out of
7 the two locations, and did, in fact, find that
8 there was potential incompatibility of land uses,
9 and did, in fact, suggest mitigation of that.
10 I think the rest of the findings with
11 respect to these issues is now left to the
12 Commission's own discretion. It's a policy
13 matter.
14 Q I guess, then, I should ask you a
15 foundational question. Assuming that the City's
16 general plan applies to the property or the site,
17 would the site be consistent with the City's
18 general plan?
19 A I can't make that first assumption, that
20 the City's general plan applies to the site.
21 Because as that term is used, applicable, applies,
22 identical for this purpose, it means legally
23 enforceable. And the City's plan has no legal
24 import until or unless the City and County agree
25 otherwise or the City completes annexation.

1 Q Fair enough. Assume that the site, the
2 territory within the site that encompasses the
3 site is annexed to the City, okay?
4 A If, in the future, the annexation is
5 completed as contemplated by the South Schulte
6 specific plan, is that the question you're
7 beginning?
8 Q Right.
9 A Okay.
10 Q Would the site or would the project be
11 consistent with the City's general plan or UMP,
12 which is the urban management plan, as the City
13 calls is, would the project be consistent with the
14 UMP?
15 A Well, you know, I have to ask you
16 whether the South Schulte specific plan, which
17 post-dates the UMP, is consistent with the UMP,
18 whether there were conforming amendments made. I
19 actually don't know the answer to that question.
20 Q Well, I guess we could back up and I'll
21 ask you whether, assuming that the site is annexed
22 into the City, whether the project would be
23 consistent with the South Schulte specific plan?
24 A The answer to that question is no.
25 Q Okay.

1 A The South Schulte specific plan calls
2 for low-density residential, although it also says
3 various things about -- Let me make sure I'm
4 reading from South Schulte, as opposed to Tracy
5 Hills. But it says things about limiting
6 residential densities in areas where public health
7 and safety or aesthetic factors would impact the
8 quality of life for future residents. It also
9 says something about the use of buffers, same as
10 the Tracy Hills specific plan, which has required
11 developments to buffer less desirable effects
12 impacts on neighboring uses.
13 And I have to say, just as a land use
14 permitting person --
15 Q Ms. Hernandez, I think the extent of my
16 question was just whether or not the TPP project
17 was consistent with the City's South Schulte plan.
18 A And I'm trying to answer your question.
19 It is because the South Schulte plan is more than
20 just a designation on a map. The South Schulte
21 plan has a set of other policies and requirements,
22 including keeping people away from aesthetic or
23 other issues that are incompatible and using
24 buffers.
25 Moreover, just as a land use person, as

1 I was starting to say, the idea of locating
2 residences on top of or inside these oil and gas
3 pipelines, including I understand leaking oil,
4 underneath or very close to these high-power
5 transmission lines or right at the canal with its
6 water quality and habitat issues, the true
7 residential developability of this site I would
8 question.
9 It is zoned. It is zoned in the South
10 Schulte plan for low-density residential. In my
11 opinion, the other policies in the South Schulte
12 plan would pretty much preclude its use for
13 certainly any kind of dense low-density
14 residential.
15 Q Ms. Hernandez, is it your understanding
16 that it's the City's role to do planning in this
17 area and that it's the Commission's role to
18 determine -- Well, we're assuming still that the
19 site has been annexed to the City -- that it's the
20 City's role to do the planning for the area and
21 that it's the Commission's role to determine
22 whether or not a site or the project conforms with
23 the City's planning that it's already done for the
24 area?
25 A You know, you're asking me to make a

1 huge leap, which is to give the City the
2 jurisdiction it lacks.
3 PRESIDING COMMISSIONER PERNELL: Let me
4 interrupt here. Counsel, we're concerned about
5 facts, not assumptions. Now, you're going down a
6 path that assumes that the City has already
7 annexed the property, and I would ask that you
8 stick to the facts of the case so that we can get
9 an accurate record and make a determination.
10 INTERVENOR BAKKER: I just wanted to
11 make a, I just want to get a foundational question
12 out.
13 BY INTERVENOR BAKKER:
14 Q And that is that it's your understanding
15 that the power plant project would be inconsistent
16 with the City's specific plan were the site
17 annexed to the City?
18 A And the answer to that question is no, I
19 don't agree with that, because you're asking me to
20 reduce a quite elaborate and quite well-done,
21 frankly, plan into a map showing dots. The South
22 Schulte specific plan is more than a map showing
23 dots representing residential construction. It's
24 a very coherent and nicely done set of policies
25 that lead to the building of a new community.

1 Those policies include buffering and
2 keeping people from living away from dangerous
3 things. You can't, I believe, look at the non-
4 power plant constraints on this site -- the oil
5 and gas pipelines, the transmission lines and the
6 canal. You can't look at those features
7 independent of the power plant and the South
8 Schulte specific plan, and plop a bunch of people
9 who would live there. I don't believe the South
10 Schulte specific plan would do that.
11 Q Okay. So but would a power plant
12 project in that area, if it were in the City,
13 would it require a specific plan amendment?
14 A It would not conform to the zoning
15 provision of the specific plan, so yes, it would.
16 Q Okay, thank you. Getting back to the
17 terminology used in the Warren Alquist Act
18 regarding relevant and applicable, do you think
19 the phrase relevant has broader meaning than
20 applicable in this context?
21 A That's not my understanding.
22 Q Okay. So you don't have any knowledge
23 of that?
24 A Well, my understanding is that it means
25 applicable, relevant has the same meaning as

1 applicable.
2 Q Okay. I'd like to refer you to another
3 provision in the Commission regulations, if I may.
4 This is Appendix B, and bear with me for a moment.
5 Appendix B to -- I'm not sure what chapter it is,
6 so just one moment.
7 A I have Appendix B.
8 Q Appendix B to the Commission
9 regulations, it's a particular chapter of the
10 Commission regulations. It's headed Appendix B,
11 Information Requirements for an Application.
12 A I'm with you, Counsel.
13 Q Okay. Thank you very much. And I guess
14 this is at Section G(3)(a)(2).
15 A Yes.
16 Q Can you read that for us?
17 A From the beginning?
18 Q Well, just G(3)(a)(2), so I guess you
19 would read from G --
20 A Well, generally speaking, what this
21 requires is information requirements for an
22 application. Section G speaks to environmental
23 information that must be provided by the
24 applicant. Section (3) speaks to land use
25 requirements or land use information to be

1 required by an applicant. And Section (2) says a
2 discussion of any trends in recent zoning changes
3 and potential future land use development.
4 Q Does that section suggest to you that
5 potential, that the City's planning, that it's
6 already done for the area would be relevant for
7 the Commission's determination of whether or not a
8 project complies with relevant local laws?
9 A To the extent you're trying to use the
10 term as it is used here, which is a discussion of
11 any trends, and create a bridge to the concept
12 that relevant means more than applicable, I'm not
13 going there.
14 Q Okay.
15 A Relevant from my perspective continues
16 to mean applicable; however, what you're getting
17 to with relevance is, in fact, decisional, bottom-
18 line policy calls.
19 Q Right.
20 A It is not at all unusual -- in fact,
21 it's normal -- for an applicant and for the
22 environmental disclosure document to be quite
23 broad in what they set out in order to create the
24 fullest context. But then the policy call at the
25 end of the day is the Commission's, based on the

1 factors set out in the Warren Alquist Act. And I
2 don't believe the Warren Alquist Act requires the
3 Commission to consider non-applicable legal
4 requirements at the LORS level.
5 Q Okay. Can I direct your attention to I
6 guess it's G(3)(b).
7 A I don't see a (3)(b), I see a (4)(b).
8 Q Actually, I think it's (3)(b), because
9 it --
10 A No.
11 Q Well, it's right underneath (4), so --
12 A (4)(b).
13 Q Can you read that for us?
14 PRESIDING COMMISSIONER PERNELL: Is
15 there a question you have for her? We're not
16 going to get into reading segments from the Warren
17 Alquist Act.
18 INTERVENOR BAKKER: I'm trying --
19 PRESIDING COMMISSIONER PERNELL: Let me
20 just say this. I've been giving you discretion
21 here. The cross examination is asking the witness
22 questions, not having them read documents. Ask
23 her a question.
24 INTERVENOR BAKKER: Okay.
25 BY INTERVENOR BAKKER:

1 Q Does this provision state that an
2 application shall require a discussion of the
3 proposed facility, the compatibility of the
4 proposed facility with any present, expected land
5 use, and conformity with any long-range land use
6 plans adopted by any federal, state, regional, or
7 local planning agencies?
8 A That's the first sentence of this, which
9 calls for a discussion. The second sentence says
10 that the discussion shall identify the need, if
11 any, for variances or any measures that would be
12 necessary to make the proposal conform with
13 permitted land uses. And, from my perspective,
14 that again draws the distinction between what
15 needs to be discussed, and then the bottom line,
16 is this permitted, is it applicable? Does, in
17 fact, it comply with LORS?
18 And, if so, the second sentence here
19 clarifies that the discussion shall identify the
20 need, if any, for variances or measures that would
21 be necessary.
22 Q Okay.
23 A You called out buffers here as an
24 appropriate measure, for an example.
25 Q Okay, thank you. You referred to in

1 your testimony to some decisions under CEQA
2 dealing with the meaning of applicable land use
3 plans.
4 A Right.
5 Q Of what relevance are those provisions
6 to the Commission's determination of what
7 constitutes relevant land use laws in making its
8 finding that the project is in conformity with
9 those land use laws?
10 A Well, again, I'm not flexible on the
11 notion that relevant means anything more than
12 applicable for Commission decision-making
13 purposes. But the Commission also has obligations
14 under CEQA. And CEQA has a provision that is very
15 LORS-like in using very similar terms.
16 And the case I cited was really getting
17 to the issue of did the Commission comply with the
18 CEQA requirement that looks a lot like LORS, and a
19 court has said in that context, in the CEQA
20 context, that applicable means legally in effect
21 and enforceable. And that is not what we have
22 with the South Schulte specific plan.
23 Q Okay, thank you. Is it your opinion
24 that the CEC cannot consider the City's planning
25 documents in passing on whether or not the project

1 conforms with applicable LORS or relevant LORS?
2 A I believe the City or the Commission
3 staff at least went to great length to discuss the
4 City's planning documents generally, and concluded
5 that they were appropriately considered in the
6 cumulative effects analysis and did, in fact,
7 raise an incompatibility of use issue and that
8 could be solved.
9 Q I guess my question is more whether or
10 not the Commission could find that the City's
11 planning documents are applicable LORS.
12 A I believe that the Commission would be,
13 frankly, abusing its discretion in finding that
14 non-enforceable, non-applicable LORS were LORS. I
15 think that that's not what the statute says.
16 Q Thank you. I just have one final
17 question for you. Do you feel that this project
18 will have the effect of frustrating the City's
19 planning for this area?
20 A Well, where's that little thingy? This
21 is the South Schulte specific plan. It sort of
22 bears an odd resemblance, if you have a major
23 imagination, to a weird Texas kind of thing.
24 (Laughter.)
25 BY INTERVENOR BAKKER:

1 Q I would agree with that.
2 A Anyway, so here we are off in the
3 panhandle, which even Texans would agree is
4 different territory, or is that the panhandle? I
5 don't know.
6 Q I think that's it.
7 A Is that the panhandle? You know, I just
8 don't go down there very often.
9 In any event, in terms of the
10 connectivity of a community and the build-out of a
11 community and all of the community features and
12 the land use features of the community -- In fact,
13 we have a nice -- Well, that's all right, let's
14 not bother -- this is at the edge. Not only is it
15 at the edge, but it is at an extremely constrained
16 edge, based on existing infrastructure. I see
17 this parcel, frankly, as being stranded out of
18 development for residential, kind of in
19 perpetuity.
20 Now, I have to say that the buffer
21 between this project and that low-density
22 residential is going to depend on how this low-
23 density residential is planned. Low-density
24 residential has numbers of residences that can be
25 built per acre, but there is also all kinds of

1 design features that can be played with, in terms
2 of how those residences are accommodated.
3 So I don't see, frankly, any problem
4 with achieving the residential totals as called
5 for in the South Schulte specific plan area by
6 taking out ten acres of low-density residential in
7 a site with these kinds of physical constraints
8 that pre-exist.
9 INTERVENOR BAKKER: Thank you. I don't
10 have anything further.
11 PRESIDING COMMISSIONER PERNELL: Thank
12 you, Counsel.
13 HEARING OFFICER TOMPKIN: Any additional
14 questions by intervenors?
15 INTERVENOR WEED: Oh, yeah. Sorry about
16 that.
17 (Laughter.)
18 HEARING OFFICER TOMPKIN: Mr. Weed?
19 INTERVENOR WEED: Thank you. Michael
20 Weed, representing Larry Chang.
21 APPLICANT COUNSEL GRATTAN: For the
22 record, I've got no redirect here.
23 INTERVENOR WEED: Oh, excuse me.
24 HEARING OFFICER TOMPKIN: Please
25 proceed.

1 CROSS EXAMINATION

2 BY INTERVENOR WEED:

3 Q Just to address your last point, the

4 effects of placing a power plant in a residential

5 development go beyond the mere elimination of the

6 ten acres which the plant physically occupies; is

7 that correct?

8 A Well, I'm so glad you asked that

9 question, because the one exhibit I just didn't

10 get to that was introduced in my testimony is from

11 the Commission's own web page. And it sets out

12 the real story of power plants, which is not the

13 notion that they're these noxious uses off in the

14 middle of nowhere, and by existing they not only

15 drop property values but they create major

16 hazards.

17 I've got a power plant in Berkeley,

18 that's where I live. And, in fact, you see that

19 power plants are clustered where people are. And

20 the reason that's the case is because folks like

21 the Commission and the Air Resources Board and the

22 Regional Water Control Quality Boards and

23 everybody else has been doing a heck of a lot over

24 the last 20 years to make these sites look like

25 industrial buildings and not behave in any noxious

fashion.

So I shudder to think what home prices are in Berkeley, although I understand they're less than they are in Red Bridge, so I don't get it, but there you have it. But I know that we're spending a lot of dough on housing next to our power plant. And I know you are too.

And the Red Bridge community came up next to or not far from the existing Biomass power plant, which is in that existing industrial area. It didn't seem to do much to discourage that brand-new community. One more right next to it of a frankly more modern design and just burning gas instead of biomass, I'm not an economist, but I think you can't look at this pattern of power plants, the existing Biomass facility and the success of the Red Bridge project to date, and conclude that power plants mean the end of civilization, quite the contrary.

HEARING OFFICER TOMPKIN: Would you identify for the record this last exhibit that you're referring to?

THE WITNESS: Sure. I believe we called this Exhibit or Figure Eight in the testimony.

HEARING OFFICER TOMPKIN: Thank you.

1 THE WITNESS: Thank you. Thank you for
2 asking that.
3 BY INTERVENOR WEED:
4 Q I'm glad to have asked. Isn't it
5 correct that before Mr. Adams made his
6 modifications to his prior testimony that it was
7 written in the applicant's own application that
8 the land use as contemplated by the City land use
9 documents, quote, "would not be compatible with
10 the TPP if located near or adjacent to the project
11 site"? And further stated that "If adopted, the
12 proposed TPP project would take precedence over
13 any future proposal for mixed or residential uses
14 in the area"?
15 APPLICANT COUNSEL GRATTAN: If I can
16 interject here, I believe that I would object to
17 the question, because I believe that question has
18 been asked and answered, and that's my objection.
19 It was answered when Mr. Adams revised his
20 testimony explicitly to deal with that comment.
21 THE WITNESS: Although I could also go
22 through again the answer that I gave to counsel
23 for the City, which is to explain that this would
24 be inconsistent if all South Schulte was, was a
25 map, and plenty consistent if you read the rest of

1 it, except with respect to the map, which would
2 require an amendment.
3 BY INTERVENOR WEED:
4 Q If we could turn to the County letter of
5 I believe it's September 18th; is that correct?
6 The findings required for locating a power plant
7 in the agricultural zone, and there's been some
8 discussion, I believe the exact requirement of the
9 finding is that the source of the power requires
10 locating the use in an area designated
11 agricultural.
12 Can you explain what the source of the
13 power is for this plant that requires its location
14 in an agricultural location?
15 A Actually, I think it's even more
16 important to just restate what the County found,
17 what the Commission staff thought about it and
18 what the record actually reflects. The County
19 found that the proximity of the project to the gas
20 pipeline, plus its proximity to the transmission
21 line and the canal, made the infrastructure, the
22 combination of infrastructure to this project very
23 compelling to this site.
24 And that is broader than the concept of
25 source of power -- not all infrastructure, just

1 source -- and necessity. And there is an
2 elaborate discussion in the staff assessment which
3 I concur with, which is that the County doesn't
4 use the term "necessity" to mean it can only go
5 here and nowhere else, because that would sort of
6 suggest that, well, goodness, you couldn't build a
7 lateral that was more than a foot long off of a
8 gas pipeline, and that's not the way the County
9 interprets it, and I think their interpretation is
10 reasonable under Chevron -- the case, not the
11 pipeline.
12 Q I would suggest that the County
13 conclusion regarding the availability of
14 infrastructure go to an efficiency argument and
15 not to a requirement argument in any way. It
16 seems to me, and I'll repeat my question, isn't
17 there a plain meaning that the source of the power
18 requires location of the use in an area designated
19 agricultural? Is there anything about the source
20 of this power, natural gas, which is readily
21 available in many locations, that requires its
22 location in an agricultural location?
23 A Well, I think you're asking me sort of
24 an iteration of the you only look at one thing
25 fallacy. And here I'd just like to draw your

1 attention to the County's general plan, which
2 speaks to agricultural lands and compatible uses,
3 permittable uses, and says that agricultural areas
4 should be used principally for crop production;
5 however, that can be expanded where the uses
6 requires a location in an agricultural area
7 because of, here's the quote, "unusual site area
8 requirements, operational characteristics,
9 resource orientation, or because it is providing a
10 service to the surrounding agricultural area."
11 And this is the broader context in which
12 that term "necessary" was interpreted and applied
13 by the County, again not just for this project but
14 for the preceding Well Head project. And I think
15 that's an appropriate backing, if you will, is
16 that you go back to the general plan which serves
17 as the constitution in our land use system, to
18 interpret the provisions in the administrative and
19 implementation codes, including the development
20 title.
21 Q I'm not sure that my question has been
22 answered, but you mentioned that in its discussion
23 of and the County's determination that this was
24 properly located within an agricultural zone, that
25 the CEC staff showed deference which you felt was

1 appropriate. But isn't it correct that in the
2 staff assessment, the staff openly questioned the
3 conclusion and even suggested supplemental
4 hearings on the issue because of their concerns
5 about the adequacy of the finding?
6 APPLICANT COUNSEL GRATTAN: I believe we
7 would object to that as beyond, it's beyond the
8 competency, amazingly enough, of this witness to
9 testify to.
10 INTERVENOR WEED: Okay.
11 BY INTERVENOR WEED:
12 Q You concurred with or answered
13 Commissioner Laurie's question that the site
14 approval that the County would have to go through
15 in order to approve a power plant was a
16 discretionary approval; is that correct?
17 A The site approval process is
18 discretionary, yes.
19 Q Right. And would you characterize the
20 scope of the findings or determinations, whatever
21 word you choose to put to them, in the County's
22 letter of September 18th to be as broad of the
23 scope of issues that the County would consider
24 upon a site approval application?
25 A The County's letter did not get to the

1 policy call, as to whether or not the County would
2 approve or not this project. The County's letter
3 got to LORS, locally applicable, the rest of it.
4 And, in fact, the County's letter was complete
5 with respect to LORS, for reasons I've already
6 discussed, in my judgment.
7 Q In its staff assessment, the Commission
8 staff said that it asked the County Community
9 Development Department to make the equivalent
10 findings that would be required for a conditional
11 use permit. So I'll ask the question again in
12 that context: Do you think that the
13 September 18th letter in any way approaches the
14 scope of issues that the County could have
15 considered in approving the power plant in its
16 independent jurisdiction?
17 A Could you point me to a section in
18 the --
19 Q I'm afraid I can't. I know that it's in
20 the staff assessment. Perhaps the staff can help
21 us. I recall reading in the staff assessment, but
22 the question was phrased that the County was asked
23 to make the findings --
24 A Right.
25 Q -- substantially equivalent to a

1 conditional use permit.
2 A Yes. I mean, I see the sentence here,
3 and I think that's a fairly accurate summary of
4 it. And when considering a conditional use permit
5 application, what the County has said is for this
6 kind of -- well, not for considering a conditional
7 use permit application -- what it said is here are
8 the comments that we are making with respect to
9 LORS, and whether or not the Commission would you
10 guys actually approve this if you had that right
11 when making this statement is something I don't
12 know the answer to.
13 Q Okay, but would you agree that the scope
14 of issues that the County could consider on the
15 application for a conditional use permit could
16 theoretically extend well beyond the issues
17 discussed in the September 18th letter?
18 A Well, I think to the extent what you're
19 asking is could the County, at the staff level,
20 have made policy calls beyond LORS about whether
21 the project was a good idea or not, and was that
22 really what the Commission staff was asking, I
23 don't think that's what happened, and I don't
24 think that's what's necessary or appropriate under
25 the Warren Alquist Act.

1 Q No, my question was whether they could
2 have considered, the County could consider a scope
3 of issues beyond those stated or discussed in the
4 September 18th letter.
5 A Well, I think the County said what it
6 thought LORS were, and I think the Commission
7 staff independently evaluated whether the County
8 made the right call in that regard and so did the
9 applicant, and I think that we're agreed.
10 Q I feel like my fairly simple questions
11 aren't being answered, but if the -- you've
12 indicated that the staff has authority to approve
13 a site approval application in the County. But
14 obviously, the staff also has the discretion to
15 ask the Planning Commission or the Board of
16 Supervisors to consider the site approval
17 application, if they feel the issues are beyond
18 the scope of what should be handled in an
19 administrative proceeding; is that correct?
20 A That is correct.
21 Q Okay.
22 A I believe that the site approval section
23 requires or allows a step up to the Planning
24 Commission. I'm not sure it allows a step up --
25 Right, the director could decide to rule or submit

1 to the Planning Commission. The director can't,
2 on his or her own initiative, refer all the way up
3 to the Board of Supervisors. That's 92159.
4 Q And, in your opinion, did you consider
5 it likely that the Community Development
6 Department would not rule on a 50-megawatt plant
7 on its own but would more likely defer that
8 decision to either an elected or appointed body?
9 A Well, they didn't for Well Head.
10 Q I'm not talking about Well Head, I'm
11 talking about a project of this scope, which is
12 well beyond the Well Head project.
13 A Well, the project fell into the same
14 category. The Commission --
15 Q Certainly, factually the distinctions
16 are huge. That's why the Commission --
17 COMMISSIONER LAURIE: Commissioner
18 Pernell?
19 PRESIDING COMMISSIONER PERNELL:
20 Commissioner Laurie?
21 COMMISSIONER LAURIE: Speculative, sir.
22 I would ask, I think the committee would entertain
23 an objection that it's speculation, and I would
24 support that.
25 APPLICANT COUNSEL GRATTAN: I was

1 falling asleep there, yes. We will object based
2 on speculation.
3 HEARING OFFICER TOMPKIN: I'll sustain
4 that. Next question.
5 BY INTERVENOR WEED:
6 Q You indicated in your testimony that the
7 Board of Supervisors had the opportunity to object
8 to the September 18th letter and they took no
9 action. You also referred to a recent Board of
10 Supervisors hearing about the peaker plant. Do
11 you recall hearing testimony from the supervisors
12 that they had no knowledge or were unaware of the
13 letter at that time?
14 A I don't actually recall any references
15 to the letter. I do recall that the Board members
16 did remember the September 25th presentation that
17 went some hour or so by the GWF team --
18 Q And do you recall --
19 A -- presenting the project and presenting
20 the I believe approval track and the role of the
21 CEC. That hearing in front of the Board was on
22 September 25th, the letter was on the 18th. I
23 don't presume to get into the middle of the
24 County's own proceedings, but --
25 Q And do you recall the statements by the

1 supervisors at that hearing that they did not
2 understand that they were directly -- their
3 understanding was that they were not being asked
4 to take any action at that hearing, that it was
5 simply an informative presentation upon which they
6 were not asked to take any action?
7 A I do recall them, in fact, being clear
8 on hearing a lot about the project, including the
9 role of the CEC and what-not on the 25th, and not
10 being asked to take action at that time.
11 Q And their understanding was that they
12 were not being asked, right. And at the most
13 recent Board of Supervisors hearing on this issue,
14 you obviously recall the resolution that was
15 adopted and I think the policy decisions of the
16 County were clearly stated in a five-nothing
17 resolution opposing the project; is that correct?
18 A Opposing the project, but not going to
19 where you and your colleague actually wanted them
20 to go, which was to recant or rescind or revoke
21 the letter. And that was interesting to me. I
22 think that --
23 COMMISSIONER LAURIE: Mr. Chairman, the
24 records and proceedings of the Board of
25 Supervisors are not before the committee but for

1 the resolution.

2 INTERVENOR WEED: Thank you, correct.

3 My question was going to just the implications

4 that the Board took no action as if there were

5 some imprimatur of approval by the Board by not

6 making a statement against --

7 COMMISSIONER LAURIE: I would suggest,

8 too, sir, that that involves speculation.

9 INTERVENOR WEED: Okay. I attempted to

10 clarify the speculative aspect of that by the

11 subsequent actions of the Board where I think it's

12 fairly unequivocal.

13 BY INTERVENOR WEED:

14 Q You've stated that you feel that the

15 County LORS control and because of the

16 unenforceability of the City land use plans, that

17 they're not, quote, unquote, applicable to the

18 proceedings and they did not need to be -- a

19 finding of consistency with those LORS is not

20 necessary. And you cited CEQA and some of your

21 interpretations of CEQA.

22 Can you explain the consistency of your

23 position with the provisions of the Government

24 Code relating to the sphere of influence? The

25 project is located within the City's sphere of

1 influence and the Government Code section states
2 that the point of adopting the sphere of influence
3 is to ensure, and I'm quoting, "that development
4 within the sphere occurs in a manner that reflects
5 the concerns of the affected city, and is
6 accomplished in a manner that promotes logical and
7 orderly development of areas within the sphere."
8 Isn't that inconsistent with your
9 conclusion, based on your CEQA analysis, that the
10 City's LORS are not applicable?
11 A Well, if you could give me a citation to
12 that, I'd like to put that statement in the
13 context of the Government Code provisions that
14 affirm over and over again that sphere of
15 influence does not create jurisdiction by cities
16 in unannexed areas.
17 Q I'm not stating that it confers
18 jurisdiction. The citation is Section 56425(b),
19 and what I'm stating is that the purpose of
20 adopting a sphere of influence or asking you, if
21 you're not ignoring the Government Code statute
22 which states that the purpose of adopting a sphere
23 of influence is to ensure that the concerns of the
24 affected city are addressed?
25 A I'm sorry, could you give me that cite

1 again? 56 --

2 Q What I've got here, I hope it's correct,

3 is 56425.

4 PRESIDING COMMISSIONER PERNELL: Also, I

5 think that the witness has testified that she

6 thought that staff took into consideration the

7 City's influence, in terms of the development

8 project.

9 BY INTERVENOR WEED:

10 Q Cumulative impacts of the City, in the

11 cumulative impacts analysis; is that where that

12 consideration was given?

13 A That's when it was most elaborately

14 given.

15 PRESIDING COMMISSIONER PERNELL: That's

16 what she stating, yes.

17 THE WITNESS: That's right.

18 INTERVENOR WEED: Okay. Because it's --

19 THE WITNESS: It's also addressed in the

20 Underlying Setting section, or I think it is. In

21 any event, we're trying to find the Government

22 Code provision you referenced, but the fact is I

23 believe that the CEC staff explained how this

24 project could be made consistent, and, in fact, I

25 think when you read the whole of the South Schulte

1 specific plan, it is or can easily be made
2 consistent, given the rest of the policies in that
3 document.
4 BY INTERVENOR WEED:
5 Q Is it consistent with the urban
6 management plan which zones this property as low-
7 density residential, a zoning district in which no
8 power plant can be located?
9 A The answer to that question is if you
10 just look at the map and call that the only
11 requirement of the specific plan or the UMP, the
12 answer is no. On the other hand, you've got to
13 look a little bit at the rest of the UMP, and in
14 particular --
15 Q My question has been answered. I don't
16 feel I need anymore.
17 A Well, actually, I'd like to answer it,
18 if I could. You asked a question about the UMP.
19 This is all currently UMP-zoned
20 industrial. This is the South Schulte specific
21 plan residential. This is Tracy Hills down here.
22 I mean, the fact is we've got, in the South
23 Schulte specific plan, the City having residential
24 next to the City's industrial UMP. Now, obviously
25 they had something in mind there, and, in fact,

1 the EIR for the South Schulte specific plan called
2 this out as an inconsistent land use, which may or
3 may not be effectively buffered by the existence
4 of what is that, the canal or road? I can't quite
5 see it. But called out, in fact, buffering and
6 other techniques, but called it out as an
7 inconsistent land use.
8 So it's not the case that there is, you
9 know, some uniform residential layout out there,
10 this is a quite broad boundary of Texas, if you
11 will that is next to UMP-designated industrial.
12 Q My question is directed toward the
13 project in question that we're considering
14 tonight, and it is zoned under the urban
15 management plan as low-density residential.
16 That's the project that we're considering, that's
17 the land we're considering, and under that zoning
18 a power plant would not be permitted.
19 A Under the zoning, per se.
20 Q Correct, that was my question.
21 A Look at this boundary, how short this is
22 relative to this.
23 COMMISSIONER LAURIE: Ms. Hernandez,
24 you're not responding to a question.
25 THE WITNESS: I'm sorry.

1 INTERVENOR WEED: Thank you,
2 Commissioner.
3 THE WITNESS: I apologize, I do like the
4 map.
5 (Laughter.)
6 BY INTERVENOR WEED:
7 Q I wonder whether the staff cumulative
8 impact analysis, which you indicated you felt was
9 quite thorough and did consider that that was a
10 location where the City LORS were analyzed
11 thoroughly I think was your characterization of
12 something close to that. If, in fact, as we heard
13 from not only the applicant's but the staff's
14 expert witnesses on both Noise and Visual Impacts,
15 stated that they ignored those plans.
16 So how, in fact, could the actual
17 project impacts have been thoroughly analyzed when
18 the expert witnesses that are advising these
19 groups, the applicant and the staff have stated,
20 at least on those issues -- I'm not going to
21 square it to every issue on the agenda, but the
22 ones that we've heard today, they ignored the
23 City's land use policies.
24 A As I would view your characterization of
25 the land use policies as LORS, you're assuming

1 something that simply isn't the case. Those
2 aren't LORS, they're appropriately and were
3 considered as future development projects in the
4 cumulative impact section.
5 The build-out of those areas was
6 identified as a project, and that's not the same
7 as identifying the plans as LORS. I don't believe
8 the plans are LORS.
9 Q I'm just -- My question is related to
10 your statement that the City's LORS were
11 thoroughly analyzed and considered by staff in the
12 cumulative impact section, and I'm questioning
13 whether that can be done when the expert witnesses
14 that are brought in to analyze the impacts admit
15 that they ignored them.
16 A If I used the term City LORS, I
17 misspoke. I don't believe I used the term, but if
18 I did, I misspoke. What I meant to say and what I
19 believe I have said is that the City's build-out,
20 under the specific plans of those areas, was
21 identified appropriately and considered as
22 cumulative future projects in that portion of the
23 staff assessment.
24 Q As we've heard discussed here tonight,
25 the City has invested a huge effort in its

1 planning processes, not only in time and money,
2 staff, consultants, etc., they have adopted the
3 urban management plan that deals with this
4 property. An EIR was certified for that. They
5 have adopted the South Schulte specific plan for
6 which an EIR was similarly certified.
7 Given that amount of planning,
8 processing, investment that the City has made, do
9 you feel, from a planning perspective as an expert
10 in planning, that the ability for a single project
11 to come in and essentially undermine that planning
12 process is a correct result?
13 A I don't believe it undermines for
14 reasons of its location on the edge, and for
15 reasons of its existing, and from my perspective
16 immutable site constraints.
17 COMMISSIONER LAURIE: I think, Counsel,
18 the question has been asked and answered. Counsel
19 asked the same question of the witness.
20 INTERVENOR WEED: Very good. I'm
21 finished, thank you.
22 HEARING OFFICER TOMPKIN: We're going to
23 proceed with Mr. Seligman.
24 INTERVENOR BAKKER: Can I just make a
25 quick comment about my -- I failed to cross

1 examine Mr. Adams because we were kind of focused
2 on Ms. Hernandez, and I hope I could ask Mr. Adams
3 some questions after we're done with
4 Ms. Hernandez?
5 HEARING OFFICER TOMPKIN: I'm going to
6 defer that determination until after Mr. Seligman.
7 INTERVENOR WEED: If I could, I
8 neglected to mention that the Chang co-counsel
9 would like to ask just a few questions, if that's
10 possible.
11 HEARING OFFICER TOMPKIN: It seems that
12 we're backtracking. I don't want to bounce
13 between counsel. You could confer --
14 INTERVENOR WEED: I'm done, I'm finished
15 with her.
16 PRESIDING COMMISSIONER PERNELL: Okay.
17 Then that's -- You're done, and both of you are
18 representing the same client?
19 INTERVENOR WEED: That's correct. Yes,
20 we are.
21 INTERVENOR BLACKWELL: But the client is
22 not done.
23 INTERVENOR WEED: Right.
24 INTERVENOR BLACKWELL: I have questions
25 on separate subject matters of separate -- to ask

1 some questions of Mr. Adams, for example, on
2 behalf of the intervenor. So it's not duplicative
3 cross examination.
4 PRESIDING COMMISSIONER PERNELL: Okay.
5 Proceed.
6 INTERVENOR BLACKWELL: Thank you. David
7 Blackwell, on behalf of intervenor Chang.
8 CROSS EXAMINATION
9 BY INTERVENOR BLACKWELL:
10 Q Ms. Hernandez, earlier this evening you
11 testified that the lot line adjustment that the
12 County previously approved was an example of the
13 County's, in essence, support of the peaker plant
14 project; is that correct?
15 A No, I didn't say support. What I said
16 was that the approval of the lot line adjustment
17 requires a finding that's very similar to LORS, in
18 terms of consistency with other applicable
19 requirements. And so it was another indication
20 that the County was making a consistent
21 determination with respect to LORS on not just
22 one, but several occasions.
23 Q I see. And you testified that the
24 County, for example, made a determination that the
25 lot line adjustments complied with the provisions

1 of the general plan; is that correct?
2 A I believe that is one of the statutory
3 requirements, or the regulatory requirements.
4 Actually, it's statutory in the Subdivision Map
5 Act, and it's a regulatory requirement in the San
6 Joaquin Code.
7 Q So your testimony, then, is that under
8 the Subdivision Map Act, before January 1st, 2002,
9 there had to be a determination that a lot line
10 adjustment complied or was consistent with the
11 general plan; is that correct?
12 A Actually, the requirement in the statute
13 is that the locals had to make a determination as
14 to whether it was compliant or not, and it was the
15 local requirement that makes it require that it be
16 compliant.
17 Q With the local general plan.
18 A That's right.
19 Q All right. And you also testified that
20 the -- at that time the County made a
21 determination that the lot line adjustment
22 complied with CEQA; is that correct?
23 A I don't know that they actually made a
24 finding with respect to CEQA. I haven't seen a
25 CEQA finding on the lot line adjustment. That's a

1 ministerial act, as I understand it, in this
2 county -- No, it's not -- Well, I'm not sure,
3 actually.
4 Q A CEQA determination is ministerial?
5 A No, no, I'm sorry, the lot line
6 adjustment I believe in this county is a
7 ministerial act. You get it if you qualify. And
8 if that's the case, then it's statutorily exempt
9 from CEQA.
10 Q Right, but just so I'm clear, then, so
11 was there a determination -- I mean, you just
12 testified that there was a requirement that the
13 lot line adjustment complied with the local
14 general plan before January 1st of 2002; is that
15 your testimony?
16 A We could go through the sections. The
17 County approved a lot line adjustment. A lot line
18 adjustment may only be approved if the line
19 adjustment meets several requirements, including
20 conformity with zoning and building regulations,
21 and consistency with established land use policies
22 and standards. That's in the section of the codes
23 at 9-872.2, 9-872.3 and 9-210.2.
24 Q How about the Subdivision Map Act?
25 A The Subdivision Map Act speaks to the

1 question of what requires the agency to determine
2 whether or not the parcels will meet. That's
3 Government Code 66412(d). But that's not a -- A
4 lot line adjustment is not automatically a
5 discretionary action that pulls the CEQA trigger.
6 It depends on what the County actually has
7 provided for in its ordinance.
8 And I believe in this county it's a
9 ministerial project, although I defer to the
10 County on that. I have not seen CEQA
11 documentation in connection with the lot line
12 adjustment approval.
13 Q I'm sorry, just so I'm clear, though,
14 are you saying that under the Subdivision Map Act,
15 when the County made the lot line adjustment
16 approval they were required to determine that the
17 lot line adjustment complied with the local
18 general plan?
19 PRESIDING COMMISSIONER PERNELL: I think
20 she's answered that she doesn't know what the
21 County's --
22 INTERVENOR BLACKWELL: I'm asking what
23 the general plan requires, what the Subdivision
24 Map Act requires, Commissioner.
25 PRESIDING COMMISSIONER PERNELL: Okay.

1 THE WITNESS: "An advisory agency or
2 local agency shall not impose conditions or
3 exactions in its approval of lot line adjustments
4 except to conform to the local general plan." So
5 I think what the Subdivision Map Act says
6 precisely is that you can only approve a lot line
7 adjustment if you've added conditions to assure
8 compliance with the local general plan. That's
9 66412(d) of the Government Code.
10 BY INTERVENOR BLACKWELL:
11 Q And was that the same version of
12 66412(d) that was in effect when this lot line
13 adjustment was granted by the County?
14 A I don't know. I think it was just
15 amended.
16 Q Yes. Are you familiar with Senate Bill
17 497?
18 A Not offhand.
19 Q Senate Bill 497 did amend that provision
20 of the Subdivision Map Act, which did require the
21 general plan consistency. But it did not require
22 that when this approval was granted by the County.
23 COMMISSIONER LAURIE: Excuse me, a
24 question, Counsel?
25 PRESIDING COMMISSIONER PERNELL:

1 Commission Laurie.

2 COMMISSIONER LAURIE: Are you

3 challenging the legality of the boundary line

4 adjustment?

5 INTERVENOR BLACKWELL: No, I'm

6 challenging --

7 COMMISSIONER LAURIE: Because my

8 impression would be that the Act is conclusively

9 legal unless successfully challenged, and it was

10 not.

11 INTERVENOR BLACKWELL: No, Commissioner,

12 I'm not challenging the legality of the approval

13 of the lot line adjustment. My point is the

14 approval of the lot line adjustment in no way

15 indicates that there is a County approval of the

16 project, or the lot line adjustment under LORS,

17 because prior to this, January 1st, 2002, lot line

18 adjustment was simply a ministerial act. You

19 didn't have to look at the general plan, you

20 didn't have to comply with CEQA, it was a check

21 the box.

22 So my concern is that the applicant's

23 witness is bringing this lot line adjustment into

24 her testimony to make it sound like, well, the

25 County has already undergone this type of analysis

1 and this --

2 COMMISSIONER LAURIE: Would you not,

3 sir, have to look at the ordinances in effect at

4 the time, and if the ordinance in effect at the

5 time required a finding of consistency with

6 zoning, which is what a boundary line adjustment

7 ordinance would ordinarily call for, and that

8 finding was made, then perhaps that is a

9 conclusion that you have to reach as to what

10 finding it was that they made for the boundary

11 line adjustment?

12 INTERVENOR BLACKWELL: Well,

13 Commissioner, with regard to the compliance with

14 the local zoning and building, what you do is when

15 you do a lot line adjustment, all the County looks

16 at -- all they did look at before Senate Bill 497

17 was whether or not it fit the boundary

18 requirements of the zoning.

19 COMMISSIONER LAURIE: Or --

20 THE WITNESS: That's just not accurate,

21 based on what the County Code provides.

22 INTERVENOR BLACKWELL: I'm talking about

23 the Subdivision Map Act.

24 THE WITNESS: The Subdivision Map Act is

25 a state-enforceable requirement. In addition to

1 the Subdivision Map Act there are County
2 requirements as to what can or can't be approved
3 by a lot line adjustment.
4 The County's requirements say you can
5 approve a lot line adjustment, it shall be
6 reviewed for conformity with zoning and building
7 regulations of the County. Only conditions or
8 exactions that are necessary to conform to said
9 zoning and building regulations or require
10 prepayment, etc., facilitate, etc., may be
11 imposed.
12 So the fact is that we have the
13 conformity finding here in the County Code. So if
14 your point is that there wasn't an analogous state
15 law at that time I'll concede that, as a matter I
16 guess of argument, but I don't know the answer to
17 that question.
18 BY INTERVENOR BLACKWELL:
19 Q Well, it doesn't sound to me,
20 Ms. Hernandez, that what you just cited from the
21 County Code requires any general plan consistency
22 requirement.
23 A "Necessary to conform to said zoning and
24 building regulations," zoning regulations.
25 COMMISSIONER LAURIE: And, Counsel,

1 zoning has to be consistent with the general plan.
2 THE WITNESS: Exactly.
3 COMMISSIONER LAURIE: So if you're
4 consistent with zoning, you're consistent with the
5 general plan.
6 INTERVENOR BLACKWELL: Not necessarily,
7 Commissioner, I disagree with that. Because what
8 it is --
9 THE WITNESS: You'd have unlawful
10 zoning.
11 INTERVENOR BLACKWELL: -- if you proceed
12 with the zoning with regard to the lot size, that
13 has nothing to do with whether you comply with the
14 other elements or policies of the general plan.
15 It's a much more simple analysis. It's a very
16 simple -- Like I said, back then it was a
17 ministerial analysis and that's -- we don't need
18 to get into 497 here. All I'm -- because that
19 becomes a much more discretionary process now.
20 COMMISSIONER LAURIE: Would you dispute
21 the fact that the boundary line adjustment
22 concludes that the project was consistent with
23 zoning?
24 INTERVENOR BLACKWELL: If they made that
25 finding, I'm not arguing against what the finding

1 was, Commissioner. That's not my point. I'm not
2 challenging the legality of that lot line
3 adjustment finding. My whole point is just to
4 point out that you're comparing apples and
5 oranges. If you're comparing the lot line
6 adjustment back before January 1st, 2002, you're
7 talking about a ministerial act; to say that that
8 should lead us to believe that the County is going
9 to approve a peaker power plant because it
10 complies with the general plan, etc., it's a leap
11 of faith that I don't think is warranted.
12 That's simply my point. I'm not
13 challenging the underlying approval under the lot
14 line adjustment. We can move on from that.
15 PRESIDING COMMISSIONER PERNELL: Well,
16 let's do, because the County doesn't approve
17 peaker power plants, the Commission does.
18 INTERVENOR BLACKWELL: Right.
19 PRESIDING COMMISSIONER PERNELL: All
20 right.
21 BY INTERVENOR BLACKWELL:
22 Q Ms. Hernandez, you also testified with
23 regard to the Well Head project, I believe, and
24 you said in that case, the County approval
25 involved a full CEQA process and a site approval

1 process; is that correct?
2 A There was an approved negative
3 declaration without mitigation, and an approved
4 site approval permit.
5 Q Okay. When the County performed that
6 analysis, are you aware of their analysis of the
7 noise impacts of the Well Head project?
8 A I can quote pieces of the initial study.
9 Noise is what you're particularly interested in?
10 Will the project expose people to high noise or
11 vibration levels, over 65-db LDN for residential
12 uses or 75-db LDN for industrial uses at the
13 property line? Answer, no. And that was
14 forwarded to the City of Tracy on March 8th and
15 26th, I believe, or notice of this neg dec was
16 forwarded.
17 Q Okay. And I believe you've gone and
18 testified quite a bit earlier this evening that so
19 far for the TPP, the County has not performed a
20 full CEQA analysis nor have they gone through the
21 entire site approval process; is that correct?
22 A The County lacks the jurisdiction to do
23 so.
24 Q All right. So we're kind of comparing
25 apples and oranges again, aren't we?

1 A No, as far as I'm concerned. The answer
2 to -- If the question is did they go through the
3 site approval process and reach some conclusions
4 with respect to LORS for Well Head, the answer is
5 yes, they did.
6 And the answer to the same question here
7 is did they go through the LORS evaluation for
8 this project, stopped short of site approval
9 because they lacked that jurisdiction, stopped
10 short of CEQA because they lacked that role, but
11 did, in fact, they make the LORS findings and were
12 those LORS findings consistent with the findings
13 they made in the Well Head proceeding? And the
14 answer is yes.
15 Q Right, but the Well Head proceeding is
16 obviously a separate proceeding than the Tracy
17 peaker power plant. We're talking about two
18 different projects where you are going to have
19 different factual findings, correct?
20 A Well, I think the issue as to LORS is
21 fairly legalistic, it's is it a permitted use in
22 this ag location to put power generating projects?
23 And, for example, the issue of necessity for
24 sources of power was asked and answered in that
25 proceeding, and that was a question that the

1 Commission staff had is, is the County
2 interpreting this right?
3 The interpretation of that requirement
4 in both proceedings was the same, as a matter of
5 law, independent of the facts or the differences
6 in design of the two projects.
7 Q But there may be factual analyses that
8 are different, obviously, because they're two
9 different projects.
10 A Of course.
11 Q Okay.
12 INTERVENOR BLACKWELL: I'd like to ask
13 Mr. Adams a few questions. I notice he was the
14 first witness called, but he's been fairly quiet
15 this evening, so I'd like to bring him back in to
16 this.
17 BY INTERVENOR BLACKWELL:
18 Q You testified during your qualifications
19 that you hold an undergraduate degree and
20 postgraduate degree, but you didn't state what
21 subject matter that was.
22 A I hold a bachelor's degree in music, a
23 master's of music, and a doctorate of musical
24 arts.
25 Q Do you hold any degrees at the

1 undergraduate or postgraduate level in planning?
2 A Undergraduate degrees, no.
3 Q Any postgraduate degrees in planning?
4 A No. I did state the two certificate
5 programs that are relevant to the subject matter,
6 and I did mention the 12 years of experience that
7 I've had in this area.
8 Q But a certificate isn't the same as an
9 undergraduate degree, is it?
10 A No.
11 Q In your written testimony that you
12 submitted not long ago states that you "reviewed
13 the consistency of the TPP with the plans and
14 policies of both San Joaquin County and the City
15 of Tracy"; is that accurate?
16 A I'm sorry, there was some noise. I
17 didn't hear the end of the question.
18 Q What I did is I read from your written
19 statement, and I'll read it again: "I reviewed
20 the consistency of the TPP with the plans and
21 policies of both San Joaquin County and the City
22 of Tracy"; is that an accurate statement?
23 A Yes.
24 Q Okay. And what plans and policies from
25 Tracy did you review as part of your analysis?

1 A The documents that I requested from the
2 City of Tracy Planning Department. I first called
3 them to ask them what was relevant. I obtained a
4 copy of the City's general plan, which people
5 around here call the UMP. Also, the zoning
6 ordinance that the City enforces, and I received
7 copies of two specific plans, Tracy Hills and
8 South Schulte.
9 Q And in your original declaration and
10 witness statement, which I believe is dated on or
11 around January 23rd of this year, you said based
12 upon that review, you had concluded that the
13 project is consistent with, quote, "all applicable
14 plans and policies, including the City of Tracy
15 Hills, Tracy Hills specific plan and the South
16 Schulte specific plan."
17 Was that your testimony at that time?
18 APPLICANT COUNSEL GRATTAN: Well, I'm
19 just going to object to that in that it's been
20 asked and answered. But since you -- since I
21 caught the last phrase at that time, I think the
22 witness can answer.
23 THE WITNESS: At that time meaning which
24 time?
25 BY INTERVENOR BLACKWELL:

1 Q When you signed this document under
2 penalty of perjury.
3 A When I signed the document under penalty
4 of perjury, that was my testimony, right.
5 Q And when did you -- And tonight you
6 stated that you wanted to insert the word
7 "possibly" between the words "all" and
8 "applicable"; is that your testimony this evening?
9 A That's a clarification that I felt was
10 appropriate to add.
11 Q And when did you decide that that
12 clarification was necessary?
13 A I don't know.
14 Q Within the last week?
15 A Well, obviously, since the time that
16 this declaration was signed.
17 Q Right, but was it within the last week?
18 PRESIDING COMMISSIONER PERNELL: I think
19 the witness has said he doesn't know.
20 INTERVENOR BLACKWELL: Well, I was just
21 asking for a little --
22 BY INTERVENOR BLACKWELL:
23 Q You're not sure about it, I'm just
24 trying to narrow it down a little bit.
25 A Well, I did say I don't know, and then I

1 added the logical conclusion, that obviously since
2 the point in time that this was signed.
3 Q And why did you change your testimony?
4 A Because I think it's an appropriate
5 clarification to add.
6 Q And is that based upon conversations you
7 had with somebody?
8 A There have been conversations. I
9 suppose -- I'm not sure.
10 Q I mean, did this just spring up in your
11 own mind, or did someone say, look, that's
12 problematic?
13 A No. No one said that.
14 Q But did anyone suggest that you change
15 it?
16 A The context that I recall is that I made
17 the suggestion about the other clarification to
18 the text in the AFC, and that counsel suggested
19 that this word be added here.
20 Q I see. Because under your original
21 definition, you were stating that the South
22 Schulte plan was an applicable plan for
23 determining project consistency, right?
24 APPLICANT COUNSEL GRATTAN: We're
25 getting to the point where I'm going to object.

1 We're beginning to badger the witness and we're
2 also asking for legal conclusions of the witness.
3 You're talking about the word
4 "possibly."
5 INTERVENOR BLACKWELL: No, I'm talking
6 about -- If I may, what I'm talking about is an
7 expert witness's sworn testimony at one point
8 saying that the Tracy LORS were applicable LORS to
9 now saying that the Tracy LORS are possibly
10 applicable LORS, which is a clear backing off of
11 that prior statement.
12 APPLICANT COUNSEL GRATTAN: I'm
13 unwilling to accept that statement, which is not a
14 question for the record, and I'm going to lodge my
15 objection and I would like a ruling on it, please.
16 INTERVENOR BLACKWELL: No, I'm not
17 making a statement to the witness, I'm making a
18 statement to the Commission to give you an offer
19 of proof to this objection.
20 HEARING OFFICER TOMPKIN: I'll sustain
21 the objection. You can move on.
22 INTERVENOR BLACKWELL: I guess this
23 question can be addressed to the panel, it's not
24 really to one specific person.
25 BY INTERVENOR BLACKWELL:

1 Q My understanding is that one or both of
2 you did review Tracy as part of your analysis; is
3 that correct?
4 WITNESS ADAMS: Yes.
5 WITNESS HERNANDEZ: Yes.
6 BY INTERVENOR BLACKWELL:
7 Q Okay. And you also reviewed the South
8 Schulte specific plan; is that correct?
9 WITNESS ADAMS: Yes.
10 BY INTERVENOR BLACKWELL:
11 Q And Tracy's local ordinances?
12 WITNESS ADAMS: The local zoning
13 ordinances --
14 BY INTERVENOR BLACKWELL:
15 Q Yes.
16 WITNESS ADAMS: -- yes.
17 WITNESS HERNANDEZ: I actually just
18 reviewed the two specific plans in the UMP.
19 BY INTERVENOR BLACKWELL:
20 Q I guess I'll direct this to Mr. Adams.
21 I think doing a shotgun maybe can get a little
22 confusing here, but Mr. Adams, were you aware of
23 the general hierarchy of land use regulations
24 under California law?
25 A Yes.

1 Q And so the general plan is the
2 preeminent land use document in the City of Tracy;
3 is that correct?
4 A I agree.
5 Q And that the specific plan is secondary
6 and must be consistent with the general plan; is
7 that correct?
8 A I agree.
9 Q And that the zoning must be consistent
10 with both of them; is that correct?
11 A I agree.
12 Q Ms. Hernandez, do you disagree with any
13 of those three questions?
14 A No.
15 Q Okay.
16 A It is the case, though, that often
17 things fall apart and there is inconsistency,
18 which then has to be worked out, but --
19 Q Now, what is the land use --
20 WITNESS ADAMS: I was just saying we
21 could note one example of this is that the South
22 Schulte plan proposes this as industrial, to act
23 as a buffering from the existing industrial. In
24 the general plan, this is considered and proposed
25 to be mixed-density residential.

1 BY INTERVENOR BLACKWELL:
2 Q And the general plan governs, correct?
3 WITNESS HERNANDEZ: I think I answered
4 the -- Counsel for the City's question is I
5 haven't reviewed how the South Schulte specific
6 plan has been incorporated or not into the general
7 plan. I took that as freestanding, applicable
8 document, and that may or may not be accurate. To
9 the extent it's inconsistent with the general
10 plan, I don't know the answer.
11 BY INTERVENOR BLACKWELL:
12 Q No, I'm not asking whether or not you
13 feel it's consistent or inconsistent, I'm just
14 asking, as a general proposition, the specific
15 plan is inconsistent with the general plan, the
16 specific plan -- I'm sorry, the general plan is
17 what trumps, right?
18 A You know, that is a complicated question
19 but the answer is generally correct. It trumps
20 and it trumps with chaos, at times. And so how it
21 trumps, whether it really trumps, those for me are
22 questions of fact that I would want to see the
23 findings and the approval documents with respect
24 to the South Schulte specific plan to figure out
25 how it was integrated or not into the general

1 plan.
2 Q I'm sorry, I'm just asking, all things
3 being equal in a vacuum, the general plan, if it's
4 consistent with the specific plan, the general
5 plan trumps, correct?
6 HEARING OFFICER TOMPKIN: I think we're
7 becoming repetitive. Why don't you go on and ask
8 your next question.
9 INTERVENOR BLACKWELL: Well, all I'm
10 asking for is a direct -- If anyone answered the
11 question, I'd be happy to move on.
12 HEARING OFFICER TOMPKIN: Please do.
13 BY INTERVENOR BLACKWELL:
14 Q What is the land use designation under
15 the Tracy's UMP for that, the Tracy peaker site?
16 Not the surrounding sites, but that site?
17 WITNESS HERNANDEZ: For the UMP?
18 WITNESS ADAMS: Under the UMP?
19 INTERVENOR BLACKWELL: Yes.
20 WITNESS HERNANDEZ: Let's look it up.
21 The map of the UMP that we have predates the
22 specific plan. My general understanding and
23 expectation would be that the general plan would
24 have been amended to reflect the specific plan
25 status and would now somehow be zoned SP or

1 something similar under the UMP. I don't know
2 whether that was done.
3 Was it done?
4 BY INTERVENOR BLACKWELL:
5 Q I'm asking you.
6 A Well, I'm asking you back.
7 (Laughter.)
8 WITNESS HERNANDEZ: I don't know the
9 answer to the question you're asking.
10 HEARING OFFICER TOMPKIN: Witnesses
11 can't ask questions.
12 WITNESS HERNANDEZ: We have the current
13 general plan map, we have the South Schulte
14 specific plan, we have combined that information
15 on the map in front of you. I don't know the
16 legal answer to the question, does the general
17 plan trump or not the South Schulte specific plan
18 with respect to the project site, and is there a
19 consistency?
20 BY INTERVENOR BLACKWELL:
21 Q Actually, my pending question is what
22 the land use designation is under the UMP.
23 A Under the current UMP map, which may or
24 may not be an accurate map with respect to the
25 South Schulte specific plan area, it's low

1 residential. I don't know whether that is
2 accurate, with respect to the post-UMP specific
3 plan adoption.
4 If what you're saying is that the
5 specific plan area is subordinate to the UMP,
6 which frankly it should be under constitutional --
7 you know, it is the land use, the general plan is
8 the land use framework for the County -- If the
9 general plan was never amended to reflect the
10 specific plan, we have spent a lot of wasted time
11 on the South Schulte specific plan.
12 Is it or is it not conforming tot he
13 general plan at this time? You don't know.
14 Q I'm not here to testify.
15 A Oh, just trying to advance the --
16 Q Maybe we can ask someone on direct --
17 No, because actually, I mean, I asked the
18 Commission to direct the witness to just answer
19 it, it's a very simple question, what the land use
20 designation is under the UMP. I'm not asking for
21 overall policies --
22 PRESIDING COMMISSIONER PERNELL:
23 Ms. Hernandez, do you know the answer, yes or no?
24 THE WITNESS: I have on the map, but I
25 don't know whether it's accurate or not because it

1 predates the specific plan.
2 PRESIDING COMMISSIONER PERNELL: Okay.
3 Then I think the witness has answered that she has
4 a map that she doesn't know is accurate. She's
5 under sworn testimony, so she can't specifically
6 say at this point.
7 BY INTERVENOR BLACKWELL:
8 Q Mr. Adams, do you have an answer to that
9 question?
10 A I know what the map says.
11 Q Low-density residential?
12 A Yes.
13 Q Do you have an opinion as to what the
14 land use designation under the UMP would be for
15 the Tracy peaker plant, what type of use that is?
16 A I haven't evaluated that. We assume
17 industrial, but we haven't evaluated that. We can
18 answer jointly, if you'd like.
19 Q Do you have anything to add to that
20 answer?
21 A No.
22 Q So you don't know what the land use
23 designation is under the general plan, and you
24 don't know what the land use designation would be
25 for the TPP; is that correct?

1 A I would say that's a mischaracterization
2 of my answer.
3 Q You're guessing as to what the land use
4 designation is under the UMP, right?
5 WITNESS HERNANDEZ: Let us again say we
6 have a map that is called the UMP for this area.
7 It predates --
8 WITNESS ADAMS: Which CEQA provided to
9 us.
10 THE WITNESS: -- which predates the
11 specific plan. It calls for low-density
12 residential on this site. We have a specific plan
13 for the same location which post-dates the UMP
14 which calls for a different, actually set of
15 requirements than the general plan does for the
16 entirety of the planning area.
17 It has been my assumption that the City
18 of Tracy amended or updated its UMP to reflect the
19 specific plan; if it has not, that is something I
20 don't know.
21 BY INTERVENOR BLACKWELL:
22 Q I mean, that's an assumption, correct?
23 A It is an assumption. I just said it
24 again.
25 Q All right. Do you know what --

1 Mr. Adams, do you know what land uses are
2 compatible in the low-density residential
3 designation of the UMP?
4 WITNESS HERNANDEZ: We will now look
5 that up. Yeah, the UMP is different than the
6 zoning regs.
7 COMMISSIONER LAURIE: The question for
8 the witness was do you know. If the witness does
9 not know, I would suggest that the witness testify
10 that the witness does not know.
11 THE WITNESS: I do not know, and I would
12 question its applicability.
13 PRESIDING COMMISSIONER PERNELL: Thank
14 you, Commissioner Laurie.
15 BY INTERVENOR BLACKWELL:
16 Q So, therefore, is it safe to assume that
17 you do not know whether a use such as the power
18 plant would be consistent with a low-density
19 residential land use designation; is that correct?
20 A Under the zoning code, it is
21 inconsistent.
22 Q I'm asking about the land use
23 designation.
24 A In the general plan, I do not know. In
25 the zoning code, which I have not analyzed, it is

1 inconsistent. I'm assuming the zoning code and
2 the general plan are consistent, but that too is
3 an assumption.
4 Q Now, if the use is inconsistent with the
5 land use designation, that use is inconsistent
6 with the general plan; isn't that correct?
7 A I'm sorry, what?
8 Q If a proposed use is inconsistent with a
9 land use designation for that site, then that use
10 is inconsistent with the general plan; isn't that
11 correct?
12 A You're assuming the general plan has
13 legal validity in this area and it does not.
14 Q I'm not asking about whether this is
15 LORS or not, I'm talking about in general, under
16 the Tracy, under --
17 APPLICANT COUNSEL GRATTAN: We're
18 lapsing into the realm of a hypothetical question
19 here, and I'm going to object to it.
20 COMMISSIONER LAURIE: Well, excuse me,
21 Counsel. This is an expert witness. You're
22 allowed to have hypothetical questioning.
23 Madam witness, if a project is
24 inconsistent with the land use element of the
25 general plan, is it inconsistent with the general

1 plan?

2 THE WITNESS: Yes, it is.

3 COMMISSIONER LAURIE: Okay, thank you.

4 INTERVENOR BLACKWELL: Thank you. Thank

5 you for your indulgence, I have nothing further.

6 PRESIDING COMMISSIONER PERNELL: Thank

7 you.

8 I think it's your turn.

9 INTERVENOR SELIGMAN: Yes.

10 HEARING OFFICER TOMPKIN: Mr. Seligman.

11 INTERVENOR SELIGMAN: Last but not

12 least.

13 CROSS EXAMINATION

14 BY INTERVENOR SELIGMAN:

15 Q My questions are going to be addressed

16 to my colleague, Ms. Hernandez, and I beg the

17 indulgence and Ms. Hernandez if I skip around, but

18 I'm trying to consolidate this and basically ask

19 questions based on her, the testimony that she's

20 given extensively to the other counsel. But I can

21 assure you, Ms. Hernandez and the Commission, I

22 will not be asking you about UMP, general plans,

23 or zoning.

24 (Laughter.)

25 BY INTERVENOR SELIGMAN:

1 Q In connection with the issue of the lot
2 line adjustment that you testified to, are you, by
3 your testimony, suggesting that that lot line
4 adjustment was approved by San Joaquin County
5 because of the pending power plant site?
6 A If the question is did this project
7 prompt the lot line adjustment application --
8 Q No.
9 A -- and was it made in connection with
10 this project?
11 Q No. My question was in the ministerial
12 act that was made by the San Joaquin County as to
13 whether or not a lot line adjustment was
14 appropriate, are you suggesting that San Joaquin
15 County considered that decision because of the
16 request for this power plant, or was it solely
17 based on other factors such as the size of the
18 parcel being requested to adjust, and whether or
19 not it was consistent with zoning laws?
20 A The application was prompted by this
21 project. The approval decision was made based on
22 zoning and building code and other requirements.
23 Q Again, so would it be fair to say that
24 San Joaquin County, in making its approval, was
25 not concerned about why it was applied for, but

1 solely as to whether or not it met the existing
2 requirements of county laws?
3 A Yes, those were the standards that
4 applied to lot line adjustments.
5 Q Thank you.
6 A They were applied to this project.
7 Q So, from the County's standpoint, it had
8 nothing to do as to why it was done; it's a
9 question of whether or not it applied, correct?
10 A Well, the County --
11 Q Why the applicant made the request had
12 nothing to do with the decision by San Joaquin
13 County as to whether or not it should be approved.
14 A I'm not sure --
15 COMMISSIONER LAURIE: Mr. Seligman, it
16 is the committee's understanding that, at least in
17 San Joaquin County, the approval of a lot line
18 adjustment is ministerial --
19 THE WITNESS: Right.
20 COMMISSIONER LAURIE: -- and, therefore,
21 does not involve policy decisions.
22 THE WITNESS: Right.
23 INTERVENOR SELIGMAN: All right.
24 BY INTERVENOR SELIGMAN:
25 Q Moving on, what do you base your

1 testimony on the fact that the Board of
2 Supervisors have the authority to act on the
3 letter signed by Mr. Hulse on September 18th,
4 2001?
5 A Sure. Section 9-215.13, so of the
6 development title of the San Joaquin County Code,
7 if you go to 9-215.13, that provides a direct
8 authority by the Board of Supervisors to call into
9 question acts by the director of any kind.
10 Q And what do you consider acts? Do you
11 consider discussions by the director to be acts?
12 A It's very broad. Any decision by the
13 planning director, rule on application or
14 submit -- Let me see, I'll just go to it.
15 The Board of Supervisors may call up for
16 review any decision of the Planning Commission or
17 planning director made pursuant to this chapter.
18 Q Again, my question is, do you believe
19 that discussion by a planning director is a
20 decision by the planning director?
21 A I think the letter set out the planning
22 director's determination -- I don't want to use
23 the term "findings." I think that that letter was
24 perfectly appealable or reviewable by the Board of
25 Supervisors because there is no definition of the

1 term "decision." And I think to the extent that a
2 conclusion was reached by the planning director
3 that the Board disagreed with, it had the
4 authority under this section to call that up and
5 review it.
6 Q Are you basing that solely on just your
7 opinion?
8 A Of this language, yes, I am.
9 Q Okay. Do you have the letter in front
10 of you at all?
11 A Yes.
12 Q Directing your attention to the first
13 page of that letter, without getting involved at
14 this point in the enclosures, isn't it a fact that
15 all that Mr. Hulse was doing was to respond to a
16 request for a written discussion of three items?
17 A He was responding to a request for a
18 written discussion --
19 Q Okay.
20 A -- but what he responded with was a set
21 of attachments --
22 Q Please, just answer my question.
23 A I am answering your question.
24 Q Is he -- Is the letter --
25 A Is he responded to that written request

1 for a discussion with a set of determinations that
2 are attached and included with the letter.
3 Q Where does anything in this letter say
4 that they are determinations of the position of
5 the County, as opposed to a discussion of what
6 presently exists in the County ordinances
7 affecting agricultural property for a power plant?
8 A The third or fourth sentence in the
9 first full paragraph says, "The Community
10 Development Department finds that the proposed use
11 is consistent with the development title special
12 use regulations as stated in Attachment A, and
13 that the Community Development requirements,
14 standard Development requirements for power
15 generating facilities are attached to Attachment
16 B."
17 Then you go to A, and it speaks at
18 length of the Williamson Act compatibility,
19 permitting requirements on ag land, loss of prime
20 ag land. And you go to Attachment B and there is
21 more, including Noise.
22 Q So you're suggesting that the position
23 that's contained in this letter, that it was the
24 intent of Mr. Hulse as director of the San Joaquin
25 County planning department, Community Development

1 Department, to make decisions in connection with
2 that issue; is that your testimony?
3 A If you use the term "decision" to mean
4 approval, obviously that's not the case. If you
5 use the term "decision" to mean a decision by
6 someone as to what their view is, then obviously
7 that is the case.
8 Q Now, are you saying that it was a
9 decision on his part as opposed to a discussion on
10 his part, as he noted in the first part of his
11 letter? I mean, you have been --
12 A In the first part of his letter, he
13 notes that he was asked for a discussion. In the
14 first paragraph of his letter, he says he makes
15 some findings. And I think in his testimony, he's
16 clarified, in fact, that he has made
17 determinations as to conclusions.
18 COMMISSIONER LAURIE: Excuse me,
19 Counsel. The letter is written in the English
20 language and we are to interpret it in the English
21 language. You intend to call Mr. Hulse --
22 INTERVENOR SELIGMAN: Yes.
23 COMMISSIONER LAURIE: -- and he will
24 offer his interpretation, and that may or may not
25 be relevant evidence. Until you do that, we have

1 to read the language as it is presented.
2 Speculation as to what other interpretation may be
3 applied I do not think is relevant.
4 INTERVENOR SELIGMAN: All right.
5 BY INTERVENOR SELIGMAN:
6 Q Ms. Hernandez, did you have any
7 discussion with Mr. Hulse in connection with the
8 contents of his transmittal?
9 A No.
10 Q Throughout your answers to questions
11 that were asked by virtually everybody, you have
12 made a distinction as to what your opinion is as
13 to the contents of LORS; am I correct? A
14 distinction between the issue of Section 9-605.6
15 and Section 9-818.6 of the County regulations?
16 And if I recall your testimony, you indicated that
17 LORS was limited just to the contents of Section
18 9-605.6 as opposed to being included, having
19 included the findings that are set forth in the
20 other section; is that basically your testimony?
21 A LORS don't include the policy findings
22 in the site approval section, whichever that was.
23 They do include the LORS standards as set forth,
24 which are beyond -- just to be clear about it --
25 they are beyond simply the special use findings

1 that do go to the ag and the zoning and the site
2 approval requirements and what-not, there's a
3 collection of things that constitute LORS.
4 But the policy findings in site
5 approval, from my perspective, go beyond LORS.
6 Q Is there anything in the existing
7 statute or the existing regulations relating to
8 this Commission's authority that makes that
9 distinction?
10 A The policy determination is to be made
11 by the Commission for its site approvals are
12 different than the policy determinations that are
13 applicable to the County under the site approval
14 requirements of the County.
15 Q I'm going to ask my question again.
16 A They're different.
17 Q As it relates to LORS, is there anything
18 in the statute in which this Commission is
19 functioning under or in the regulations that have
20 been adopted implementing that statute that makes
21 the distinction that you have just testified to?
22 A Applicable land use standards and the
23 rest, do you or do you not comply is the question
24 from my perspective of LORS. Do you, having
25 complied, want to approve this project or not, is

1 the question for policy approval. I believe the
2 statute, the CEC statute does distinguish between
3 LORS and the policy call at the end of the day.
4 And LORS are laid out and we can go through that
5 again if you'd like.
6 Q No, but doesn't LORS involve some policy
7 considerations?
8 A Some policy considerations. It involves
9 the application by the local planning department
10 as to how the applicable standards are or aren't
11 met by this project.
12 Q Does that involve some policy
13 considerations by the local agency?
14 A I think it involves interpretations.
15 I'm not sure if it involves policy considerations.
16 I think the standards themselves serve as the
17 policy.
18 Q Could it involve policy considerations
19 by the local agency?
20 A I assume so.
21 Q All right. If it could involve policy
22 considerations by the local agency, why wouldn't
23 Section 9-818.6 also apply?
24 A I don't think it does in this case. You
25 were asking me a hypothetical about whether you

1 could structure something as a LORS and call it a
2 policy consideration. From my perspective, LORS
3 are the policy, and the question is how those
4 policies are applied to the project.
5 As an implementation question that's
6 asked of the local agency CEC.
7 Q Again, is that based on your opinion or
8 is it based on some authority?
9 A It's based on the authority set forth in
10 the Public Resources Code 25519, is it?
11 COMMISSIONER LAURIE: Counsel, we have
12 spent an hour arguing. It is the witness's
13 opinion. Now, it is the intervenor's opinion that
14 the findings are, in fact, applicable, and you
15 will be making that legal argument in your closing
16 argument.
17 INTERVENOR SELIGMAN: I'd like to do one
18 followup question on that, if I may, Commissioner.
19 Ms. Hernandez has considerable analogy to the Well
20 Head project, in terms of its site approval and
21 the findings that were made for that project by
22 staff.
23 BY INTERVENOR SELIGMAN:
24 Q Why would the findings in the Well Head
25 project be any different than the findings should

1 be in this project?
2 A Because in Well Head, the County was
3 exercising its policy discretion to approve or not
4 the project. In this project, they were
5 exercising their implementation authority as to
6 how to improve or how to interpret the policies
7 that are LORS to this project. And they made
8 conclusions about LORS and this project and
9 communicated those to the CEC staff without making
10 the policy call that they made in Well Head as to
11 whether or not they wanted the project.
12 Q All right. I'll go on.
13 Is it my understanding that you
14 indicated that site approval does not require a
15 public hearing under -- within San Joaquin County?
16 A Under the site approval procedures, that
17 is the case. That's one of the two distinctions
18 that is drawn between the Planning Commission
19 and -- I mean, sorry, use permit and site approval
20 requirements. There is a staff review with notice
21 procedure which, in fact, does include notice
22 requirements for some forms of site approval,
23 and --
24 Q Do you know if this could involve a
25 public hearing?

1 A This project, if it came to the County
2 as the lead agency, is that the question?
3 Q Yes.
4 A Well, it's a power project that is
5 subject to the site approval requirements.
6 Q Could it involve a public hearing or are
7 you saying that would not be allowed?
8 A Oh, it would certainly be allowed; it's
9 just not required.
10 COMMISSIONER LAURIE: Do you mean -- Are
11 you saying, are you asking at the discretion of
12 the County --
13 THE WITNESS: Sure.
14 COMMISSIONER LAURIE: -- does the County
15 have the discretion to order a public hearing?
16 INTERVENOR SELIGMAN: Certainly, right.
17 THE WITNESS: Sure.
18 BY INTERVENOR SELIGMAN:
19 Q All right. So you're not suggesting
20 that this would suddenly be limited to a decision
21 by the director; am I correct?
22 A It is, unless the director decides
23 otherwise by kicking it up to the Planning
24 Commission, or someone appeals it, or unless the
25 Board of Supervisors picks it up and says they

1 want to handle it differently.
2 Q All right, thank you. In connection
3 with your testimony on the jurisdiction of the
4 County, exclusive jurisdiction of the County, as
5 opposed to the City of Tracy, you testified I
6 believe that the County controls on this; am I
7 correct?
8 A The County's land use jurisdiction
9 controls, that's correct.
10 Q All right. Does that -- And to that
11 extent I would agree with you, believe it or not.
12 But does that mean --
13 A A point of light.
14 (Laughter.)
15 BY INTERVENOR SELIGMAN:
16 Q Thank you, even though we went to
17 different schools.
18 A So it goes.
19 Q But does that mean that even though the
20 County is the controlling authority on the issue
21 of LORS, whatever that ultimately means by this
22 Commission, that it should not be considering the
23 rules and ordinances that might conflict from
24 another local agency that might be involved in
25 this particular area, such as the City of Tracy?

1 A Well, you know, it's an interesting
2 question which is perfectly possible if the County
3 and City had reached some form of agreement on how
4 to apply or not the specific plans in a
5 preannexation context. And they are free, the
6 City and County are free to reach such an
7 agreement and implement it. They have not done
8 so.
9 Q But they made -- Isn't it true that they
10 made a referral to the City of Tracy in connection
11 with the Well Head project, as you had testified?
12 A Yes. And, in fact, that referral is
13 required under the staff review with notice
14 procedure that applied, and let's see here, the
15 notification requirements under staff review with
16 notice is 9-215.8 --
17 COMMISSIONER LAURIE: And your referral
18 was done because the County was the lead agency.
19 THE WITNESS: And the referral was done
20 because the County was the lead agency. So it's
21 required here, it's required quite expressly here.
22 It's also obviously a CEQA issue.
23 BY INTERVENOR SELIGMAN:
24 Q And I gather from your testimony that
25 you do not believe it should have been required in

1 this setting, even though the CEC is the lead
2 agency?
3 A Clearly not required in this setting,
4 absent some other form of agreement between the
5 City and the County, express agreement.
6 Q When you say it's clearly not required,
7 on what statutory authority or regulatory
8 authority do you base that opinion on?
9 A The CEC's own proceedings dictate what
10 it is that local agencies such as the County are
11 required to do or are supposed to do, which is
12 comment back. And that's exactly what they did.
13 There is no consultation. More importantly, there
14 is no way to create LORS where none exists.
15 In other words, you can't take a draft
16 or a non-applicable or non-enforceable plan or
17 policy and, presto, make it a LORS as part of the
18 CEC program. You certainly can't do it
19 arbitrarily for this proceeding and this
20 proceeding alone.
21 Q Are you suggesting that in the event
22 that CEC staff ascertained that there were
23 existing land use conflicts between the City of
24 Tracy and the County on this particular project
25 that it did not have any obligation to explore

1 that issue with the City?
2 A It has the obligation and, in fact, it
3 did do the exploration. And, in fact, I mean, I
4 think we've again asked and answered this, it's
5 not like this record isn't replete with
6 information about the City of Tracy's plans and
7 sphere. But within an unannexed state, those
8 plans and sphere designation don't have legal
9 significance in the LORS determination.
10 Q To what extent is there anything in the
11 record that's replete with comments that were made
12 at the request of staff by the City of Tracy on
13 these particular projects that you had previously
14 testified to?
15 A The staff assessment of January 31st,
16 the most recent and longest of the versions, is
17 quite replete with references to the City of
18 Tracy's land use plans, policies and
19 disagreements.
20 Q No, that's not answering my question.
21 To what extent does the staff assessment reflect
22 any input from the City of Tracy on any of those
23 projects?
24 A The staff report speaks for itself. I
25 don't know how much beyond the staff report the

1 staff had contact.

2 APPLICANT COUNSEL GRATTAN: I think that

3 the question goes beyond the experience of this

4 witness, and it's certainly a dandy question to

5 ask staff, CEC staff with respect to their

6 procedures and what, in fact, was done here.

7 INTERVENOR SELIGMAN: If I can respond

8 to that, Ms. Hernandez has been qualified as an

9 expert witness and has been making extensive

10 testimony on what she thought was right with

11 regard to the assessment and the extent to which

12 there was reference in the assessment on projects

13 under the jurisdiction of the City of Tracy.

14 And I think that I have the right to ask

15 those questions as to what input the City of Tracy

16 made with -- if she knows -- with regard to those

17 projects.

18 APPLICANT COUNSEL GRATTAN: If she

19 doesn't know, can she answer I don't know?

20 PRESIDING COMMISSIONER PERNELL:

21 Mr. Grattan --

22 HEARING OFFICER TOMPKIN: Yes. To the

23 extent you have personal knowledge of the extent

24 of that input you can answer, but don't speculate

25 and it's not necessary to read the document.

1 THE WITNESS: Thank you.
2 The knowledge I had is from the document
3 itself, which does quote from Mr. Dean and from
4 others. There are headings in the document
5 referring to the two specific plans for the City
6 of Tracy and the staff reports as to the status of
7 its analysis.
8 BY INTERVENOR SELIGMAN:
9 Q So your answer is totally based on the
10 contents of the staff assessment --
11 A That's right.
12 Q -- is that correct?
13 A That's correct.
14 Q All right. Did you, in answer to a
15 question, indicate that the Commission would be
16 abusing its discretion if it considered Tracy's
17 LORS in its decision-making process?
18 A I think you can't use the term "LORS" in
19 connection with the Tracy land use plans. If, in
20 fact, they're LORS, then the Commission has to
21 consider them. The Commission also is considering
22 them in the context in which they're lawfully
23 considered, which is cumulative impact analysis
24 under CEQA.
25 Q Do you believe that the Commission has

1 the discretionary authority to decide whether or
2 not the City of Tracy's plans, general plans and
3 statutes and ordinances should be considered
4 before a decision is made on this project?
5 A I mean, it's a legal call as to whether
6 non-applicable plans are LORS, and I believe the
7 answer to that legal call is they're not, and
8 accordingly it would be an abuse of the discretion
9 for the Commission to call them LORS. That's a
10 legal call being made.
11 Q So it's your opinion that this
12 Commission would have no discretionary authority
13 to make that requirement; am I correct?
14 A No discretionary authority to decide
15 that the City of Tracy general plan and the City
16 of Tracy specific plan were LORS for this project,
17 that is correct.
18 Q They should not be considered; am I
19 correct?
20 A It's not the same thing.
21 Q No, considered as part of LORS.
22 A Not considered as part of LORS.
23 Q All right.
24 A LORS is a land use analysis that
25 includes a bunch of stuff under CEQA including the

1 specific plan, but these are not LORS. So not
2 LORS is different from not considered.
3 Q Do you think that the Commission has the
4 authority to require the land use issues raised by
5 the City of Tracy to be considered in its overall
6 deliberations?
7 A Of course.
8 Q In what context?
9 A CEQA.
10 Q Would you pursue your answer, on what
11 basis in CEQA as opposed to the Commission's
12 rules?
13 A The cumulative effects analysis under
14 CEQA is the appropriate place to look at
15 reasonably foreseeable future development
16 activities. And these projects are reasonably
17 foreseeable future development activities.
18 The Commission's rules also do encompass
19 CEQA compliance.
20 Q To what extent do you believe that there
21 was, other than the mentioning of the projects and
22 the schedule that you had also referred to, to
23 what extent do you believe that there was analysis
24 made on the cumulative impact issue, as it relates
25 to all of these projects?

1 COMMISSIONER LAURIE: Excuse me,
2 Counsel. That's outside of the scope of this
3 witness. That was a question for the cumulative
4 impact analysis. That is outside of the scope of
5 this witness's testimony.
6 BY INTERVENOR SELIGMAN:
7 Q In your opinion as an expert, what is
8 your opinion as to what should be included in a
9 discussion of cumulative impacts?
10 A Reasonably foreseeable future
11 development projects. On a list is fine;
12 otherwise, projections in a general plan and
13 policy would also be fine, with respect to
14 population density and land use patterns.
15 Q Just talking about limiting it to a list
16 or to some limited comments or to a more thorough
17 analysis?
18 A Well, there's -- It begins with what
19 they are, and then you have to analyze what
20 whatever they are does in connection with the
21 project that's under consideration, so there's a
22 cumulative effects analysis, and then there's a
23 question of what goes into that analysis. These
24 are all cumulative effects questions.
25 Q And should that analysis be included?

1 A Of course, and was.
2 Q All right. We won't get into that
3 debate. I guess that will be part of the argument
4 later on as to whether it was and to what extent.
5 In connection with the letter and the
6 transmittal from Mr. Hulse dated September 18th,
7 2001, was it your testimony that the sole purpose
8 of this letter was to identify what would be
9 required in San Joaquin County, if this project
10 were under its jurisdiction and located in a
11 general ag zone?
12 A He went beyond identifying, as he should
13 have. He did discuss and, in fact, he made some
14 conclusions about his analysis, the staff did and
15 he did, and those were all reflected in the
16 letter.
17 Q So it's your opinion that he went beyond
18 just a discussion of what was required, but that
19 he made conclusions as to his opinion as to
20 whether or not that was --
21 A He went beyond identification to
22 discussion, and in his discussion he reached
23 conclusions.
24 Q All right. Was there anything in the
25 letter in which Mr. Hulse would conclude that this

1 would be an appropriate project at that particular
2 site?
3 A The way the question is phrased, it asks
4 me to put myself into his mind as to the policy
5 call, about whether or not this project is a good
6 idea. I don't know the answer to that.
7 Q Is there anything in this letter that
8 leads you to that, to any opinion as to that?
9 A Well, my opinion is that it complies
10 with LORS, which means that it would have to go to
11 the decision-making body, which was him, by the
12 way. I don't think he actually reached that
13 conclusion in the letter.
14 Q Do you believe he reached any conclusion
15 as to the merits or demerits of this particular
16 project?
17 A No, I think he made a LORS
18 determination, not the policy call as to whether
19 he would actually approve or not a site approval
20 permit.
21 Q One final, couple of questions, all
22 related to the one issue. You made reference to
23 the fact of buffers that were noted in the event
24 that this project were located at this site and
25 made reference to that, that was in the staff

1 report as well; am I correct in that?
2 A Yes.
3 Q Are you also aware of the fact that
4 staff indicated that a power plant is an
5 industrial use that should be located in an
6 industrial zone?
7 A Certainly if it's an industrial use,
8 let's look at the reference again --
9 Q Are you aware that staff made that
10 observation?
11 A Could you refer me to the page?
12 Q Yes, 3-4-17 where I believe there is a
13 provision in there that staff considers the
14 electric power plant to be an industrial land use,
15 logically located in industrial zoning districts.
16 A Sure.
17 Q Pardon me?
18 A Yes, I do.
19 Q Okay.
20 A I see that sentence.
21 INTERVENOR SELIGMAN: I have nothing
22 further. Thank you.
23 COMMISSIONER LAURIE: Madam Hearing
24 Officer, before you continue, I feel obligated for
25 purposes of the record to make a series of

1 disclosures at this point.
2 Mr. Hulse, you'll recall, was a witness.
3 I must disclose that I am personally acquainted
4 with Mr. Hulse because, oh, in the early 1980s
5 Mr. Hulse was Community Development director of
6 Eldorado County at the same time that I was chief
7 assistant head counsel of Eldorado County. I have
8 not had an ongoing relationship with Mr. Hulse
9 since that time.
10 Secondly, in 1974 I was an employee in
11 the position of a staff intern for the county
12 counsel's office in San Joaquin County. I have
13 not had any kind of continuing relationship with
14 that office substantially since that time.
15 Between 1983 and 1987 I was an attorney
16 with the law offices of Hefner, Stark and Marois,
17 counsel for AKT Development. I'm sure at some
18 time during that period I worked on projects
19 involving AKT Development. I have not had any
20 ongoing relationship professionally or socially
21 with AKT nor with that law firm substantially
22 since that time.
23 I do not believe I'm in conflict of
24 interest in this regard. Counsel is certainly
25 free to offer objection thereto, which I will

1 contest.

2 (Laughter.)

3 INTERVENOR BLACKWELL: If I may -- Oh,

4 excuse me, Mr. Sarvey. I wanted to address the

5 pending request I had to cross examine Mr. Adams

6 at some point, but it looks like Mr. Sarvey is

7 ready, I apologize.

8 INTERVENOR SARVEY: You can go ahead.

9 HEARING OFFICER TOMPKIN: Is it going to

10 be --

11 INTERVENOR BLACKWELL: It will be brief,

12 ten minutes at most.

13 HEARING OFFICER TOMPKIN: All right.

14 I'll permit that, if that's acceptable to

15 Mr. Sarvey, and we'll conclude with Mr. Sarvey.

16 INTERVENOR BLACKWELL: Thank you.

17 CROSS EXAMINATION (RESUMED)

18 BY INTERVENOR BLACKWELL:

19 Q Mr. Adams, did you review -- I guess in

20 your testimony you concluded that the project

21 would comply with all of the County's LORS,

22 correct?

23 A Correct.

24 Q Okay. On what analysis did you base

25 that conclusion?

1 A Correct, upon receipt of the special use
2 permit that would be required.
3 Q So it was based on the conclusions in
4 the County's September 18th letter?
5 A No, it was based upon a review of the
6 County's general plan, the County's zoning
7 ordinance, conversations I'd had with the County
8 planning staff as to what permits would be
9 required for the project, but for the CEC's
10 exclusive jurisdiction.
11 Q Okay. So you reviewed all of the
12 applicable zoning code provisions or I guess
13 development title provisions that we discussed
14 this evening.
15 A Yes.
16 Q Okay, thank you. Did you prepare the
17 Land Use section of the AFC and the supplement to
18 the AFC?
19 A Yes.
20 Q Okay. In the supplemental AFC you noted
21 that the proposed project is an allowable use,
22 pursuant to the receipt of site approval; that was
23 at page 8.4-10. Can you explain what site
24 approval means under the County development
25 regulations?

1 A I think we've been through that.
2 Q I'm asking you if you -- Have you
3 independently analyzed whether or not the site
4 approval findings can be made for this project?
5 A I did discuss those site approval
6 requirements with Chandler Martin from the
7 County's department, yes.
8 Q Okay. And did you reduce that to
9 writing, your discussion with Mr. Martin?
10 A I believe it's written in the Land Use
11 section.
12 Q It is, okay.
13 A I recite what the three necessary
14 findings are in the text.
15 Q Let me just move on. Also, in the
16 supplemental AFC you stated that GWF initiated the
17 application process for site approval in August
18 2001. To your knowledge, is that statement still
19 accurate? Did GWF ever initiate a site approval
20 or an application with the County?
21 A They initiated discussions with the
22 County as to the three necessary findings.
23 Q Your testimony said that GWF initiated
24 the application process. Are you saying that they
25 did not submit an application, they just engaged

in discussions with the County about submitting an application?

A I asked the client whether -- I pointed out to them what findings would be necessary for the site approval, and asked them whether they wanted me to pursue those discussions with the County, and the client said that no, they would initiate discussions with the County.

Q So at some point it was the applicant's understanding that they needed to go through the site approval process. That's what this statement here says. It says that GWF initiated the application process for site approval; are you --

APPLICANT COUNSEL GRATTAN: That's before counsel came on board.

INTERVENOR BLACKWELL: Is that testimony, or --

COMMISSIONER LAURIE: Pose your question, Counsel.

BY INTERVENOR BLACKWELL:

Q Are you retracting your statement that was made in the supplemental AFC?

A I think you probably need to take it in context, because at the end of each one of those sections, as to the analysis related to the

1 elements that comprise the project, the very last
2 paragraph of each of those sections closes with
3 just about the last sentence, which includes a
4 clause, "but for the exclusive jurisdiction of the
5 Commission."
6 Q Mr. Adams, I don't think there's any way
7 to interpret around this statement in the
8 supplemental AFC. I mean, this is at 8.4-9.
9 APPLICANT COUNSEL GRATTAN: I believe
10 the witness has answered the question and I
11 believe we're entering into argumentative
12 statements and I'm going to object.
13 HEARING OFFICER TOMPKIN: Actually,
14 there's no pending question, so I'll ask counsel
15 to pose a question.
16 INTERVENOR BLACKWELL: Well, I think I
17 asked Mr. Adams if he was retracting the statement
18 that was made in the supplemental AFC at 8.4-9.
19 HEARING OFFICER TOMPKIN: Mr. Adams?
20 THE WITNESS: I mean, I note at the top
21 of the page following the heading Agency
22 Approvals, the first clause there is "but for the
23 CEC's exclusive jurisdiction."
24 HEARING OFFICER TOMPKIN: So is your
25 answer yes or no?

1 COMMISSIONER LAURIE: Excuse me,
2 counsel --
3 The question is very simple. You made
4 the statement in the supplemental AFC that the
5 client is initiating an application for a site
6 approval; is that still your testimony?
7 APPLICANT COUNSEL GRATTAN: That's not
8 what it says.
9 THE WITNESS: That's not what it says.
10 We can't find it.
11 COMMISSIONER LAURIE: Okay. Counsel,
12 why don't you cite specifically what the
13 supplemental AFC says and then we can ask the
14 question for you.
15 INTERVENOR BLACKWELL: Okay.
16 COMMISSIONER LAURIE: And, Counsel, by
17 the way, unless you're going to make the legal
18 argument that, in your view, the client or the
19 applicant is legally obligated to go through the
20 site approval process, I don't think the question
21 is relevant.
22 INTERVENOR BLACKWELL: Okay. I'd be
23 happy to move on; unfortunately, I can't find the
24 provision I was referring to at this point.
25 THE WITNESS: Well, we found one. It's

1 on page 8.4-10 at the end of the first full
2 paragraph there.
3 INTERVENOR BLACKWELL: Correct. That
4 was the question I referred to in my -- That was
5 the provision I referred to in my first question.
6 COMMISSIONER LAURIE: Counsel has
7 withdrawn the question.
8 INTERVENOR BLACKWELL: Correct.
9 BY INTERVENOR BLACKWELL:
10 Q Now, it's my understanding of your
11 testimony that GWF never received site approval
12 from the County; that's correct?
13 A (No audible response.)
14 Q Okay. Did you ever follow up with the
15 County on whether the findings for a site approval
16 could be made?
17 A As I said a minute ago, I asked the
18 client whether they wanted me to pursue that, and
19 was told that they would pursue those discussions
20 directly.
21 Q With the County or with the --
22 A Did I follow up with?
23 Q Okay, thank you, Mr. Adams.
24 HEARING OFFICER TOMPKIN: Are you done,
25 Mr. Blackwell?

1 INTERVENOR BLACKWELL: Yes, that's it.
2 Thank you.
3 HEARING OFFICER TOMPKIN: Mr. Sarvey?
4 CROSS EXAMINATION
5 BY INTERVENOR SARVEY:
6 Q You stated in your testimony that you
7 have extensively reviewed the Well Head Electric
8 file?
9 A I've got the documentation on the agency
10 referral package, which includes the list of
11 agencies that received copies of the County's
12 decision to approve the project based on a neg
13 dec, I've reviewed the initial study, and I've
14 reviewed the findings and conclusions on the
15 initial study which references site approval.
16 Q Were you aware that the Community
17 Development Department, when they were analyzing
18 this Well Head Electric project, that they were
19 under the governor's executive orders which
20 require all agencies to provide applications in an
21 expedited manner, it is an order that all state
22 and local agencies are hereby authorized to
23 shorten review proceedings to seven days for
24 environmental documents that are not subject to
25 CEC jurisdiction?

APPLICANT COUNSEL GRATTAN: Well, objection; relevance to this project?

HEARING OFFICER TOMPKIN: How is that relevant, Mr. Sarvey?

INTERVENOR SARVEY: I was wondering if --

APPLICANT COUNSEL GRATTAN: I'm sorry, Bob.

INTERVENOR SARVEY: You already objected, John. That's my first question.

HEARING OFFICER TOMPKIN: If you move a little closer to the mic, I'm having a hard time hearing you.

INTERVENOR SARVEY: It's relevant in terms of the frame of mind or the circumstances that this particular application, the Well Head file was reviewed under.

THE WITNESS: Well, I'm not aware in detail, at least, of the governor's directives or how they applied to this project. I am aware that this project underwent more than seven days of environmental review, simply because the agency notices for the City of Tracy and others were done twice, three weeks apart.

HEARING OFFICER TOMPKIN: Thank you.

1 Next question?
2 BY INTERVENOR SARVEY:
3 Q On your review of the file at the
4 Development Department, did you notice anything
5 unusual about the file?
6 A I didn't review the file. I reviewed
7 the documents I referenced, and no, I didn't
8 notice anything unusual about them.
9 Q Were you aware that the Well Head file
10 in the Community Development Department was
11 commingled with other projects?
12 A I'm sorry, I missed that?
13 Q Were you aware that the Well Head file
14 in the Community Development Department was
15 commingled with other projects?
16 A No, I was not aware of that. I have not
17 seen the file.
18 Q Okay. In the Well Head file it states
19 that in the County findings that the project was
20 not in the City's sphere of influence, nor was it
21 within two miles of the City of Tracy; were you
22 aware of that?
23 A Where is that?
24 Q I have the document if you'd like to see
25 it.

1 A Yes, please. I don't see where this
2 says what you've said.
3 Q It states, "Is the project within the
4 sphere of influence or within two miles of any
5 city," and the answer to that question checked
6 under general considerations is no.
7 A That is correct.
8 Q Then are you aware that that project
9 area is in the City of Tracy's sphere of
10 influence?
11 A I was citing, that's correct, that's
12 what this form says, and obviously the project is
13 within the sphere of influence. This was an error
14 in this form.
15 Q So would you --
16 A It was an error apparently not caught by
17 the County or the City.
18 Q And it also states that the project was
19 not within two miles of any city; is that correct?
20 A Same question, same problem.
21 Q Do you feel that would have any effect
22 on the County's findings in approving this Well
23 Head project?
24 A I can't speculate on that.
25 Q Have you seen the January 23rd, 2002

1 letter to the CEC concerning the Well Head
2 project?
3 A No.
4 PRESIDING COMMISSIONER PERNELL: What's
5 the relevance?
6 INTERVENOR SARVEY: I'm going to present
7 it.
8 BY INTERVENOR SARVEY:
9 Q Is it unusual for a 49-megawatt peaking
10 facility to submit its documents to the CEC?
11 MS. WILLIS: A point of clarification?
12 PRESIDING COMMISSIONER PERNELL: State
13 your point.
14 MS. WILLIS: If I could see --
15 PRESIDING COMMISSIONER PERNELL: We need
16 a mic.
17 MS. WILLIS: Okay, thank you. If we
18 could see the letter, if it pertains to water --
19 Does it pertain to water?
20 In our last -- In our data responses to
21 Mr. Sarvey's comments, I believe we submitted the
22 corrected letter. It is to Richard Latori, which
23 is a wrong name, and it says California Energy
24 Commissioner. He's a staff water analyst, and it
25 says regarding the Well Head power plant, and it

1 was apparently in regards to Tracy peaker project.
2 So we had called the San Joaquin County
3 Public Health Services and had them submit a
4 corrected letter, and that was submitted as part
5 of the data responses. So this was actually not
6 about Well Head.
7 INTERVENOR SARVEY: Exactly, and I'm
8 offering --
9 PRESIDING COMMISSIONER PERNELL:
10 Exactly.
11 (Laughter.)
12 PRESIDING COMMISSIONER PERNELL: You
13 knew this?
14 INTERVENOR SARVEY: I'm offering this as
15 proof of the fact that the San Joaquin County
16 Community Development Department had these files
17 commingled and was very confused on these two
18 projects.
19 PRESIDING COMMISSIONER PERNELL: That
20 could have been stated.
21 THE WITNESS: This is from the
22 Environmental Health Division, not from the
23 Community Development Department.
24 INTERVENOR SARVEY: Yeah, you're right.
25 BY INTERVENOR SARVEY:

1 Q Would the fact that the Well Head
2 Electric file disclosed that the City was not,
3 that this project was not in the City's sphere of
4 influence, that the City of Tracy was not within
5 two miles of this city, would that indicate to you
6 that perhaps the Development Department was
7 confused about this project?
8 A I don't know the answer to that
9 question.
10 Q Can you speculate?
11 HEARING OFFICER TOMPKIN: Well, we've
12 engaged in so much speculation tonight, let's not,
13 so I'll sustain that objection.
14 (Laughter.)
15 INTERVENOR SARVEY: Okay.
16 BY INTERVENOR SARVEY:
17 Q Have you seen the findings of the County
18 in this Well Head document, and I'll give this to
19 you and offer this also for you, number three
20 under findings for approval of a power generation
21 facility, the site of the use -- Let me hand it
22 out first so you can follow.
23 A Is this at the end of the neg dec? Is
24 that the document you're referring to? Findings
25 for site approval? Right, this is the page?

1 Actually, I have a different document.
2 Q Under item number three, "The site of
3 the use can be rehabilitated for agricultural
4 production or permitted use in the ag zone if the
5 power source is temporary." The bullet after
6 that: "This finding can be made because the power
7 plant is not temporary."
8 PRESIDING COMMISSIONER PERNELL: Then
9 where are you identifying the document --
10 INTERVENOR SARVEY: This came out of the
11 Well Head Electric file from the Community
12 Development Department. It was initialed and
13 signed by the gentleman that gave it to me from
14 the Community Development Department. His card is
15 attached. And I offer it as proof of the
16 confusion in relation to this particular file, and
17 also in connection with the GWF file since both
18 files were commingled.
19 HEARING OFFICER TOMPKIN: Mr. Sarvey, I
20 think you've already asked several questions
21 regarding the confusion, and the witness has
22 testified she doesn't know what occurred there.
23 Maybe you can reserve this for argument.
24 INTERVENOR SARVEY: Well, I'm just
25 establishing the fact that -- what were the

1 circumstances this decision was made, since it's
2 such a big part of madam attorney's argument that
3 they made the correct findings. I'm establishing
4 that they did not make the correct findings and
5 that they were very confused. The files were
6 commingled, the findings that they had made are
7 incorrect, and as far as I'm concerned, I don't
8 think that this -- Well, I'm not going to say
9 that, but what I'm establishing is that this file
10 is definitely commingled and the findings that
11 were made in this file are incorrect.
12 THE WITNESS: Or the document that I
13 reviewed and submitted into evidence for Well
14 Head, it had a different page called Findings of
15 Approval, which was consecutively numbered with
16 the rest of the documentation I received, and I
17 don't know the source.
18 INTERVENOR SARVEY: This is the original
19 from the file.
20 THE WITNESS: I'm afraid that's
21 inconsistent with the rest of the file which I
22 have.
23 INTERVENOR SARVEY: Which is exactly my
24 point, exactly my point.
25 THE WITNESS: Well, I have --

1 HEARING OFFICER TOMPKIN: Well,
2 Mr. Sarvey, this is the witness and she can
3 testify to her knowledge. The problem with that
4 is we don't have a -- you're not under oath,
5 you're not testifying.
6 Would you like me to mark this as an
7 exhibit?
8 INTERVENOR SARVEY: Yes, I would.
9 HEARING OFFICER TOMPKIN: And maybe we
10 pass it around for identification.
11 INTERVENOR SARVEY: And if I could
12 appeal to the Commissioner that tomorrow when
13 Mr. Hulse that he bring these files with him from
14 the Community Development Department so that we
15 can get to the bottom of this and find out the
16 real truth on this issue.
17 PRESIDING COMMISSIONER PERNELL: Are
18 you -- I'm sorry?
19 INTERVENOR SARVEY: I plead to the
20 Commissioner, is it possible when Mr. Hulse
21 testifies tomorrow that he can bring these files
22 from the Community Development Department and that
23 we can get down to the bottom of why this file is
24 commingled with incorrect information and
25 incorrect answers to the statements?

1 PRESIDING COMMISSIONER PERNELL: Is he
2 on the witness list?
3 INTERVENOR SARVEY: Yes, he is,
4 tomorrow, sir.
5 PRESIDING COMMISSIONER PERNELL: I'm
6 sure he's going to bring all relevant
7 documentation, but if not, you're going to remind
8 him, I'm sure.
9 INTERVENOR SARVEY: Okay. Can
10 Mr. Pernell direct him to bring it, please?
11 PRESIDING COMMISSIONER PERNELL: I would
12 just say that he would bring all relevant
13 information, but knowing your aggressiveness, I'm
14 sure he'll have the documents.
15 INTERVENOR SARVEY: Thank you,
16 Mr. Pernell.
17 HEARING OFFICER TOMPKIN: Okay, and what
18 I'll do is just for purposes of identifying this
19 document for the record I'll mark it as
20 Exhibit 57.
21 (Thereupon, the above-referenced
22 document was marked as Staff's
23 Exhibit 57 for identification.)
24 PRESIDING COMMISSIONER PERNELL: And the
25 document that I am marking is entitled Findings

1 for Approval of a Power Generating Facility.
2 HEARING OFFICER TOMPKIN: And that's
3 simply for identification since Mr. Sarvey is
4 contending there is a conflict with a document
5 that has been previously submitted on behalf of
6 the applicant.
7 PRESIDING COMMISSIONER PERNELL: Other
8 questions, Mr. Sarvey?
9 INTERVENOR SARVEY: Yes.
10 BY INTERVENOR SARVEY:
11 Q Under the San Joaquin County Development
12 Department title, it requires that the site of the
13 use can be rehabilitated for agricultural
14 production or permitted use in ag zone if the
15 power source is temporary.
16 Examining this document, do you feel
17 that they made the proper conclusion?
18 A For which project are we talking about
19 now?
20 Q The Well Head Electric.
21 A And that's the document you just handed
22 to me?
23 Q That I just handed you, yes.
24 A That is not consistent with the document
25 I have, the Well Head.

1 Q Thank you.
2 A Well, I --
3 APPLICANT COUNSEL GRATTAN: That wasn't
4 the answer.
5 THE WITNESS: I believe the answer is if
6 this applies to Well Head, can a power plant site
7 be rehabilitated after its life? And the answer
8 to that question is of course, it can. This
9 project is being required to do so.
10 BY INTERVENOR SARVEY:
11 Q No, I believe I said, the question is
12 this finding can be made because the power plant
13 is not temporary, and that was the findings of the
14 Community Development Department according to this
15 document, which I have extracted with the help of
16 the Community Development Department, and
17 Mr. Hulse will prove that all for us tomorrow,
18 hopefully.
19 HEARING OFFICER TOMPKIN: And was that a
20 question, Mr. Sarvey?
21 INTERVENOR SARVEY: Just a statement
22 of --
23 HEARING OFFICER TOMPKIN: Okay. Why
24 don't you ask your next question.
25 INTERVENOR SARVEY: I'm sorry.

1 BY INTERVENOR SARVEY:
2 Q You testified that GWF made a
3 presentation to the County Board of Supervisors,
4 and subsequently the County development department
5 appropriately approved the conditional use of the
6 GWF peaker plant; is that correct?
7 A No. I said that on September 18th the
8 County Development Department issued a letter
9 responding to the Commission's request for a LORS
10 analysis, and that letter had a variety of
11 contents. On the 25th, a few days after the
12 letter, the GWF group presented, in an hour-long
13 presentation to the Board of Supervisors, this
14 project, including its CEC approval track. It was
15 not an action item, no action was taken by the
16 Board of Supervisors.
17 Q Were you aware that immediately after
18 that meeting Dr. Marenco had issued a statement to
19 the CEC that was docketed that he opposed this
20 project unconditionally?
21 A I was made aware of that when I attended
22 a board meeting of the Board of Supervisors a
23 couple of months ago, a month or so ago. I had
24 not seen that letter.
25 Q I'll try to produce it for you in all

1 this mess.

2 At the aforementioned meeting that you

3 attended at the Board of Supervisors, they put up

4 to a vote to oppose this project. Do you recall

5 what the vote was opposing this project?

6 APPLICANT COUNSEL GRATTAN: Objection;

7 relevance. The issue here is whether the project

8 complies with LORS, not whether the project was

9 supported or not supported by the Board of

10 Supervisors.

11 INTERVENOR SARVEY: The witness has

12 stated that the Board of Supervisors had made no

13 objection to this project at this time, and I

14 wanted to introduce into evidence, one, that

15 Mr. Marenco had objected immediately and, as a

16 matter of findings, that the entire board had

17 rejected this project five-nothing in a meeting

18 that she attended.

19 APPLICANT COUNSEL GRATTAN: That's not

20 what the witness said. The witness said that the

21 board did not object to the findings of LORS

22 consistency, and there is a difference.

23 BY INTERVENOR SARVEY:

24 Q At the meeting you attended --

25 HEARING OFFICER TOMPKIN: I'll sustain

1 that.

2 APPLICANT COUNSEL GRATTAN: I object.

3 HEARING OFFICER TOMPKIN: It

4 mischaracterizes testimony.

5 INTERVENOR SARVEY: Sorry.

6 HEARING OFFICER TOMPKIN: You need to

7 rephrase it or ask your next question.

8 BY INTERVENOR SARVEY:

9 Q At the meeting that you attended, did

10 the Board of Supervisors vote five to nothing to

11 oppose this project?

12 APPLICANT COUNSEL GRATTAN: Objection;

13 relevance.

14 HEARING OFFICER TOMPKIN: You may

15 answer.

16 THE WITNESS: Yes, they did.

17 BY INTERVENOR SARVEY:

18 Q Thank you. Do you still maintain that

19 the County Board of Supervisors does not oppose

20 this project because Community Development did not

21 inform them of their September 18th, 2001 letter?

22 A I have never said that the Board of

23 Supervisors did not oppose this project. I'm

24 sorry, I am now getting tired.

25 The way you initially phrased that

1 question, you misstated what I did say. I said
2 that the Board of Supervisors did not take action
3 on September 25th or at any time thereafter, as
4 far as I'm aware, to contest or otherwise revoke
5 the comments, determinations, conclusions set
6 forth in the September 18th letter.
7 Q In light of the fact of the five-oh vote
8 against the project, would that, in your
9 professional opinion, be considered an objection
10 to the project?
11 PRESIDING COMMISSIONER PERNELL:
12 Mr. Sarvey, we have a resolution from the Board of
13 Supervisors indicating that they oppose the
14 project, so I think at least this committee
15 realizes that the Board of Supervisors oppose the
16 project.
17 INTERVENOR SARVEY: What I'm trying to
18 establish, Mr. Pernell, is that one of the Board
19 of Supervisors initially opposed this project
20 immediately, and that the Community Development
21 Department approved this project without their
22 knowledge, and that they do, in fact, oppose this
23 project and the only reason that this is not on
24 the record is because the Community Development
25 Department did not communicate the findings to

1 them that they had transmitted to the CEC. That's
2 all I'm trying to establish.
3 PRESIDING COMMISSIONER PERNELL: Right,
4 and what you're doing is cross examining a
5 witness, and I don't think that she has knowledge
6 of what you're trying to establish.
7 Can you ask a question that is relevant
8 to land use?
9 INTERVENOR SARVEY: I apologize,
10 Mr. Pernell.
11 BY INTERVENOR SARVEY:
12 Q You questioned the compatibility of
13 South Schulte with the habitat around the canal in
14 relation to wildlife. Do you feel that a power
15 plant is more compatible with the habitat than a
16 residential development?
17 A I never questioned the South Schulte
18 habitat nexus.
19 Q No, I believe your exact words were that
20 you felt the City of Tracy was not quite right by
21 approving residential projects where this habitat
22 was so critical; I believe those were your exact
23 words.
24 A I am confident that those were not even
25 close to anything I spoke. I spoke about habitat

1 issues exactly once this evening, and that was in
2 connection with one question under the CEQA
3 guidelines relating to land use that speaks to
4 inconsistency with habitat conservation plans and
5 natural community conservation plans, HCPs and
6 NCCPs. The answer to that question was this
7 project did not conflict with either HCPs or
8 NCCPs, and that is as much as I've said tonight
9 about habitat.
10 Q So you're testifying that you did not
11 make a statement in relation to the South Schulte
12 project in relation to wildlife and habitat being
13 inappropriate?
14 A Oh, in connection with the Riparian area
15 by the -- Sure, the buffer.
16 Q Thank you.
17 A Sure. Well, that's a different
18 question. This issue --
19 Q Earlier --
20 A No, I'm -- You asked a question and I'd
21 like to answer --
22 Q You answered it fine, thank you.
23 A Sure. We talked about the fact that
24 alongside this canal is a presumptive buffer, and
25 the question is whether the South Schulte plan was

1 going to get people right up to the canal or
2 whether there was going to be a setback. And the
3 answer is I think there's going to be a setback.
4 We can talk about that in greater detail, but I
5 don't see that the prezoning of this area, given
6 the presence of the canal, is inappropriate. The
7 rest of the South Schulte plan certainly provides
8 for opportunities to buffer it and otherwise
9 protect the habitat out there.
10 Q We'd have to read the record to get the
11 exact statements.
12 A Fair enough.
13 Q And I don't think we need to go back to
14 that, so I'll just move on to the next question.
15 Earlier when we were discussing the Well
16 Head file, we talked about the governor's
17 executive order on page three, and it states,
18 "Moreover, the proposed temporary conversion is
19 under ten acres and is balanced by the State of
20 California's critical energy supply shortage, and
21 the consistency with the governor's recently
22 signed executive orders, D26-01 and D28-01, and
23 Senate Bill Number 26, all of which direct the CEC
24 and all other state and local agencies to expedite
25 the review of new power generating facilities."

1 Were you --
2 PRESIDING COMMISSIONER PERNELL: What
3 are you reading from?
4 INTERVENOR SARVEY: I'm getting ready to
5 ask my question. Oh, that's from the page three
6 of the findings on the Well Head project.
7 PRESIDING COMMISSIONER PERNELL: What's
8 the date on it?
9 THE WITNESS: That's not a document I've
10 seen or referred to or read.
11 INTERVENOR SARVEY: Okay.
12 PRESIDING COMMISSIONER PERNELL: All
13 right, so --
14 BY INTERVENOR SARVEY:
15 Q Are you aware of the requirements of the
16 governor's executive order to expedite power
17 plants?
18 A In general, but I do not know whether
19 that even applies to this project, or whether it
20 even applied to the Well Head project. That was
21 not the scope of what I looked at.
22 Q Were you aware that the GWF peaker plant
23 was operating under the governor's executive
24 orders when the Community Development staff
25 reviewed this project?

1 A I'm not aware that the GWF project has
2 ever been operating.
3 Q Pardon me?
4 A You asked the question was I aware of
5 whether the GWF project was operating under the
6 executive orders. I'm not aware that it was ever
7 operating --
8 Q Was being -- Excuse me, was being
9 processed under the governor's executive orders,
10 I'm sorry.
11 A And certainly, I was not aware, am not
12 aware as to the applicability of the executive
13 order to this project. That was not within the
14 scope of my land use inquiry.
15 Q Thank you. How long was the GWF
16 application before the Community Development
17 Department before it was, as you say, not approved
18 but I forget the exact words you used.
19 A Before the letter of September 18th came
20 out?
21 Q Yes.
22 A I don't know when the County received
23 it.
24 Q Were you aware that it was only three
25 weeks?

1 A That wouldn't surprise me, since it was
2 dated August 16th, 15th, and the letter came out
3 on the 18th of September.
4 Q In your experience, how long does it
5 usually take to do a full CEQA analysis on a
6 project of this magnitude?
7 A A full CEQA analysis was not what was
8 called for. I don't know what a full CEQA
9 analysis of this project would have taken. If it
10 was an EIR it could have taken a year.
11 Q So you really hadn't had experience
12 in -- when something was under expedited review
13 about the length of time it takes to process an
14 application?
15 A There is nothing I know about the
16 expedited review process that is relevant to what
17 I've testified to tonight.
18 Q Well, were you aware that Mr. Hulse
19 reviewed this project for ten minutes before he
20 instructed his staff to issue the letter of
21 September 18th, 2001 on which you base your
22 opinion that the County made these findings?
23 COMMISSIONER LAURIE: The committee
24 doesn't consider that relevant, sir.
25 INTERVENOR SARVEY: It's relevant into

1 the state that the application was under expedited
2 review and all of the details were not allowed to
3 come out and all of the findings were not made.
4 HEARING OFFICER TOMPKIN: There's no
5 evidence in the record to that effect yet, so I'll
6 sustain that objection.
7 INTERVENOR SARVEY: Okay. Mr. Hulse
8 will clarify that for us tomorrow, thank you.
9 BY INTERVENOR SARVEY:
10 Q The City will be required to provide a
11 buffer zone around the TPP. Would you call that a
12 significant impact under CEQA?
13 A The City isn't being required to do
14 anything. The Commission staff has suggested that
15 the City's concerns about land use compatibility
16 can be addressed with additional buffer space or
17 features, and I think that's an appropriate
18 response to that cumulative impact question. And
19 that's what it is, it's a response to a cumulative
20 impact question.
21 Q And would that be considered a direct
22 impact of TPP, the CEC was going to require the
23 City to do that?
24 A It's a potential cumulative effect,
25 whether there be land use incompatibilities, it is

1 mitigatable by buffers or other design features,
2 within the control, by the way, of the City, if,
3 in fact, the City decides to annex at some future
4 point and develop.
5 Q You stated that you felt the CEC staff
6 did a great job in identifying all reasonably
7 foreseeable development projects in the list of
8 reasonably foreseeable projects in the staff's
9 supplement, January 31st, 2002; is that correct?
10 A I actually said that I thought that they
11 were generous in what they decided to include on
12 that list. I thought that there were reasons why
13 some of those projects could have been excluded
14 from the list because they were quite speculative,
15 speculative because of legal or financial or other
16 uncertainties. And South Schulte, from my
17 perspective, falls right at that line. There is
18 no financing plan, there is no infrastructure
19 plan, and there is no indication of imminent, let
20 alone, foreseen annexation.
21 Q If they were to miss a large project in
22 their analysis, would this make this analysis
23 incomplete?
24 A It depends on when the large project is
25 identified and in what form it's identified. Lots

1 of people have lots of ideas over time; that
2 doesn't make them a project requiring CEQA review.
3 Q Would it be a violation of CEQA if they
4 were to miss a large project and not complete it
5 in their Land Use analysis?
6 A I'm only prepared to answer that
7 question in the context of your describing the
8 kind of project it is. If someone has an idea, if
9 someone funds a study, if someone decides to
10 propose something but has no control over the
11 project or property in which they're proposing it,
12 those would all be examples of projects that I
13 think don't rise to the level of requiring a
14 cumulative effects analysis.
15 Q What if it was a current project that's
16 under construction at the present time?
17 A Current project under construction at
18 the time could actually conceivably be part of the
19 setting. It wouldn't necessarily at all be so
20 questionable that it was in the cumulative effects
21 list, it would be considered as part of the
22 baseline.
23 Q Are you aware of the Plan C development
24 that's currently underway in Tracy, it's 5,000
25 homes which will increase the Tracy population by

1 20 percent?
2 A I am not. Where is this project,
3 relative to the Tracy Hills -- or Tracy peaker
4 project?
5 Q Thank you.
6 A Actually, the question of geographic
7 nexus to the Tracy Hills project is quite -- or
8 Tracy peaker project is quite relevant to whether
9 it has to be included on the cumulative effects
10 list. There has to be an intersection between the
11 effects of a future project and the effects of
12 this project in order to really need to consider
13 it; hence, the proximity issue. Is it proximate?
14 Q Very.
15 A Fair enough.
16 Q As a matter of fact, Red Bridge is part
17 of the Plan C project.
18 Can the County request --
19 A Was Red Bridge not included?
20 Q Red Bridge was included.
21 HEARING OFFICER TOMPKIN: Well, we're
22 not going to engage in a question-and-answer --
23 INTERVENOR SARVEY: Okay, I'll move on,
24 thank you.
25 HEARING OFFICER TOMPKIN: Mr. Sarvey,

1 your next question?
2 BY INTERVENOR SARVEY:
3 Q Is the County of San Joaquin required to
4 do an environmental impact analysis on this
5 project?
6 A No, it's not. CEQA responsibility for
7 this project lies with the Commission.
8 Q Can the County request to delay the
9 proceedings while they complete their
10 environmental review?
11 A Since they're not required to do an
12 environmental review, I don't know what their
13 authority is to request a delay for a non-required
14 review. I also don't know the Commission
15 proceedings well enough to know who can request a
16 delay for what.
17 Q The letter that Mr. Hulse sent on
18 September 18th, 2001 had attached a statement of
19 findings. It does not say a statement of
20 determinations. On what basis do you reclassify
21 this statement as a statement of determinations?
22 A I was trying to use a neutral term,
23 because findings has legal weight which may or may
24 not be appropriate, and what was, in any event,
25 requested was an evaluation. That evaluation

1 included conclusions. If you want to use the term
2 conclusions instead of determinations, that's
3 fine. I believe it's synonymous with the term
4 findings, as Mr. Hulse intended those to be read,
5 but the concept of findings goes to a legalistic
6 conclusion which I know people have objected to.
7 From my perspective, they are
8 conclusions. If you want to make them
9 determinations, if you want to make them findings,
10 those have equal legal meaning from my perspective
11 in this proceeding.
12 Q So you would agree that Mr. Hulse sent a
13 statement with an attached statement of findings,
14 in your opinion.
15 A Yes, they were styled as findings,
16 titled Findings.
17 Q In the Well Head file under loss of
18 prime agricultural land, the statement is made,
19 "Moreover, the proposed temporary conversion is
20 under ten acres and is balanced by the State of
21 California's critical energy supply shortage, and
22 the consistency with the governor's recently
23 signed executive orders, D26-01 and D28-01, and
24 Senate Bill Number 26, all of which direct the CEC
25 and all other state and local agencies to expedite

1 the review of new power generating facilities."
2 Do you feel that that could possibly
3 impact the County's findings under these
4 conditions?
5 HEARING OFFICER TOMPKIN: Regarding an
6 estimation of expedited review, this witness has
7 no basis for knowledge in that area essentially
8 relevant to this proceeding and so stated. And so
9 I'll ask you to ask your next question.
10 BY INTERVENOR SARVEY:
11 Q Under Williamson Act compatibility
12 findings in Mr. Hulse's letter of September 18th,
13 page two, it states, "The use of nine acres from
14 the 40-acre for a power plant will not
15 significantly compromise the long-term production
16 of agriculture capability of this contracted
17 parcel or parcels on any other contracted land."
18 Taking this statement into
19 consideration, would the noise and construction
20 and operation emissions from a power plant be a
21 significant impact to other farmland?
22 A I believe that's addressed in the
23 Lloyd's assessment, which I'm not commenting on, I
24 believe.
25 Q Well, in terms of this land use?

1 A In terms of the land use issue, I think
2 that it's supportable, and, in fact, supported
3 that ag uses can co-exist on adjacent parcels.
4 Q And, in your opinion, they would not
5 affect the adjacent farmers or the farmland?
6 A That's right.
7 Q Under the existing use that's been
8 defined by GWF, they will have a title into 100
9 acrefeet of water and the other 30 acres will be
10 farmed with well water. Could this, in your
11 opinion could this bring on some possible CEQA
12 land consequences and thereby limit the adjacent
13 land owners' use of their wells?
14 APPLICANT COUNSEL GRATTAN: I'm going to
15 object to this. This was dealt with in great
16 detail during our Water, when the Water witnesses
17 were here.
18 HEARING OFFICER TOMPKIN: I think this
19 is outside the scope of the testimony. I'll
20 sustain that objection.
21 INTERVENOR SARVEY: What took you so
22 long to object, John?
23 APPLICANT COUNSEL GRATTAN: I'm just
24 hired, Bob.
25 INTERVENOR SARVEY: Thanks, you've been

1 an excellent witness.
2 THE WITNESS: Thank you.
3 PRESIDING COMMISSIONER PERNELL: Thank
4 you.
5 INTERVENOR SUNDBERG: I waive my
6 testimony tonight.
7 (Laughter.)
8 PRESIDING COMMISSIONER PERNELL: Thank
9 you.
10 HEARING OFFICER TOMPKIN: Is there
11 anything further for this witness?
12 APPLICANT COUNSEL GRATTAN: Yes, I would
13 move the applicant's testimony and the following
14 exhibits.
15 APPLICANT COUNSEL KARP: Before asking
16 you to mark the exhibits and moving them into
17 testimony, I'd like to go back to something that
18 we talked about, about 6,000 hours ago. It was
19 Number 48, the air quality conditions that were
20 requested by staff. That was identified and
21 wasn't yet admitted into evidence, and staff
22 wanted time to look at it. So I was curious of
23 staff's position.
24 MS. WILLIS: Staff has reviewed the
25 conditions and has absolutely no objection to it.

1 We're also willing to clarify that these
2 conditions are not required for mitigation but are
3 merely memorialized in the community benefit
4 package.
5 APPLICANT COUNSEL KARP: Correct.
6 HEARING OFFICER TOMPKIN: Hearing no
7 other objection, Exhibit 48 will be admitted.
8 (Thereupon, the above-referenced document,
9 marked as Staff's Exhibit 48 for
10 identification, was received into evidence.)
11 APPLICANT COUNSEL KARP: Now, because of
12 one exhibit that has already been marked, I'm
13 going to move back and forth just for a moment
14 between Ms. Hernandez's testimony, the exhibits
15 sponsored with that and the exhibits sponsored
16 with Mr. Adams. So the first one, just to
17 clarify, is Exhibit 56, Ms. Hernandez's testimony
18 filed on February 13th. That was already
19 admitted, as well as, I believe --
20 HEARING OFFICER TOMPKIN: Actually,
21 Exhibit 56 is marked for identification.
22 APPLICANT COUNSEL KARP: Right, marked
23 for identification, correct. Then Mr. Adams, on
24 behalf of applicant, also sponsored the following
25 exhibits: Section 8.4, including five figures,

8.4-1 through 8.4-5 of the original application, August 2001; that has already been admitted as Exhibit One.

Then Section 8.4 of the supplemental application, October 2001; Sections 3.5 and Appendix D as well. That supplement is already Exhibit Two. And then comments on the CEC staff assessment, January 2002, the Land Use portions; that is already Exhibit Three.

Then we're on new numbers now, so this would be, let's see, you had already marked, I believe --

HEARING OFFICER TOMPKIN: This is 58.

APPLICANT COUNSEL KARP: Yes, because 57 was identified as a Sarvey exhibit, correct?

HEARING OFFICER TOMPKIN: Correct.

APPLICANT COUNSEL KARP: So then 58 is the mitigation agreement with American Farmland Trust dated January 16th, 2002. That was identified on our previous exhibit list as 20.

HEARING OFFICER TOMPKIN: That will be marked as Exhibit 58 for identification.

(Thereupon, the above-referenced document was marked as Staff's Exhibit 58 for identification.)

1 APPLICANT COUNSEL KARP: And then
2 Exhibit 59, new number, lot line adjustment with
3 San Joaquin County we believe docketed on
4 January 7th, 2002. That's identified on our
5 exhibit list as Exhibit 21.
6 HEARING OFFICER TOMPKIN: The lot line
7 adjustment will be marked as 59 for
8 identification.
9 (Thereupon, the above-referenced
10 document was marked as Staff's
11 Exhibit 59 for identification.)
12 APPLICANT COUNSEL KARP: And then Number
13 60, a letter that has received a lot of
14 discussion, it's the letter from the San Joaquin
15 Community Development Department regarding Land
16 Use Conformity submitted September 18th, 2001.
17 That was also contained to the supplement to the
18 application, specifically Attachment 3.5-1, of
19 October 2001. It is also on our previous witness
20 (sic) list as Number 22. That would be Number 60.
21 HEARING OFFICER TOMPKIN: Counsel, I
22 think you said it was contained in what document?
23 APPLICANT COUNSEL KARP: Contained in
24 the supplement to the application, Attachment
25 3.5-1, October 2001, but we think it should be

1 marked -- it's had so much discussion and it's
2 going to be the subject of a lot of testimony
3 tomorrow as well. It should probably be marked as
4 a separate exhibit, we would suggest, Number 60.
5 HEARING OFFICER TOMPKIN: All right, we
6 can do that. That will be marked as Exhibit 60
7 for identification.
8 (Thereupon, the above-referenced
9 document was marked as Staff's
10 Exhibit 60 for identification.)
11 APPLICANT COUNSEL KARP: Now, back to
12 the exhibits sponsored by Ms. Hernandez. A number
13 of these that I'm going to go through now are of
14 various specific plans, land use requirements and
15 so on that have already been discussed
16 extensively. Whether you admit them as exhibits
17 or take notice of them I will leave that for you,
18 but perhaps we should mark them.
19 HEARING OFFICER TOMPKIN: And have these
20 already been docketed? I don't have that --
21 APPLICANT COUNSEL KARP: Yeah, we're
22 not, don't believe they've been docketed. These
23 are various plans that have been adopted by the
24 City of Tracy or San Joaquin County. The question
25 is do we mark them as specific exhibits or do we

1 just read them in and take notice of them?
2 They've been referred to by all parties.
3 HEARING OFFICER TOMPKIN: Since it's
4 your document, I'll be --
5 APPLICANT COUNSEL KARP: Okay. I would
6 suggest we mark them, and we'll make them
7 available.
8 HEARING OFFICER TOMPKIN: By that you
9 mean provide a copy to the Commission.
10 APPLICANT COUNSEL KARP: Yes. So
11 Exhibit 61 is the City of Tracy's Tracy Hills
12 specific plan and draft and final Environmental
13 Impact Report.
14 HEARING OFFICER TOMPKIN: That will be
15 marked Exhibit 61 for identification.
16 INTERVENOR BAKKER: A point of
17 clarification. That's three separate documents.
18 I'm not sure you want to mark them as a single
19 exhibit.
20 APPLICANT COUNSEL KARP: I agree.
21 Maybe, if it's acceptable to Commission and all
22 parties, if we could take notice of those, all of
23 these documents as being existing adopted
24 documents, and then when it comes time for
25 argument or briefing, we can brief on those

because everybody agrees to take notice of them.

Would that be acceptable? We're talking about a lot of copying, when there are already copies with Commission staff, all intervenors have copies, we have copies.

INTERVENOR BAKKER: I believe the City has some copies and we could provide those for the Commission's evidentiary record, if that's what you're requesting.

HEARING OFFICER TOMPKIN: Yes, if we could get a separate copy, so I know that I have a complete set of documentation that's been referred to and there is no objection from the other parties, why don't we do it that way.

APPLICANT COUNSEL KARP: That would be great, because there would be lots of copies to make.

HEARING OFFICER TOMPKIN: So you don't want that marked as 61?

APPLICANT COUNSEL KARP: No, but thanks, and thanks, Counsel, for the City on that.

HEARING OFFICER TOMPKIN: All right.

APPLICANT COUNSEL KARP: Let me clarify, then, the items that we're talking about taking notice of, and I will read them as separate

1 documents: The City of Tracy's Tracy Hills
2 specific plan, the draft Environmental Impact
3 Report, and I'll start saying EIR; draft EIR on
4 the Tracy Hills specific plan, and the final EIR
5 on the Tracy Hills specific plan.
6 Another set of documents for notice
7 would be the City of Tracy's South Schulte
8 specific plan, the draft EIR on that plan, and the
9 final EIR on that plan.
10 The next set of documents, and it's a
11 large set of documents, would be the San Joaquin
12 County land use requirements, including the
13 general plan, land use ordinances, and adopted
14 administrative development standards.
15 INTERVENOR BAKKER: Just another point
16 of clarification. That's several documents. Are
17 you going to submit the entire development title
18 and the general plan, are those going to be
19 separate exhibits or --
20 THE WITNESS: Just the development
21 title.
22 APPLICANT COUNSEL KARP: The development
23 title.
24 THE WITNESS: Plus the general plan.
25 INTERVENOR BAKKER: And the general

1 plan?

2 APPLICANT COUNSEL KARP: Yes, correct.

3 INTERVENOR BAKKER: Thank you.

4 HEARING OFFICER TOMPKIN: Would you

5 repeat that for me, it's the San Joaquin County

6 land use requirements --

7 APPLICANT COUNSEL KARP: Requirements.

8 HEARING OFFICER TOMPKIN: -- including

9 the general plan --

10 APPLICANT COUNSEL KARP: General plan.

11 HEARING OFFICER TOMPKIN: -- land use

12 ordinances --

13 APPLICANT COUNSEL KARP: And the

14 development title of the land use ordinances. And

15 then -- Excuse me for a second. And City of Tracy

16 land use requirements, and that will be the

17 general plan/UMP, the urban -- I like saying

18 that -- UMP, the urban management plan, and the

19 zoning ordinance.

20 And then the Well Head power project has

21 been discussed and we're also submitting this.

22 Now, this would be a new exhibit.

23 INTERVENOR BAKKER: I think we may want

24 to object to the Well Head, because that wasn't

25 served on the parties. None of us have seen it.

1 APPLICANT COUNSEL KARP: Well, we have
2 copies that we can make available. There was an
3 objection on the relevance and admissibility of
4 the Well Head testimony and the Commission hearing
5 officer ruled that was admissible. So either the
6 objection was overruled -- Now, it is public
7 documents. We could also take notice of those and
8 make copies available.
9 HEARING OFFICER TOMPKIN: Would there be
10 an objection to handling it that way?
11 INTERVENOR BAKKER: I understood it
12 copies are going to be made available to us?
13 APPLICANT COUNSEL KARP: Yes, we'll do
14 that. And then do you have an objection to an
15 exhibit if we do it that way or to the notice?
16 INTERVENOR BAKKER: No.
17 APPLICANT COUNSEL KARP: No objection to
18 an exhibit?
19 INTERVENOR BAKKER: No objection to an
20 exhibit, that's fine.
21 APPLICANT COUNSEL KARP: Okay. All
22 right, and we will make copies available, and to
23 the Commission and staff as well.
24 HEARING OFFICER TOMPKIN: So we're going
25 to mark this as Exhibit 61.

1 APPLICANT COUNSEL KARP: Exhibit 61.
2 HEARING OFFICER TOMPKIN: And what are
3 we marking again?
4 APPLICANT COUNSEL KARP: We are marking,
5 it will be a package of documents that will come
6 as Exhibit 61. It will be San Joaquin County's
7 agency referrals, and the initial study and
8 negative declaration with the findings for the
9 Well Head power project April 13th, 2001. That
10 Exhibit 66 will come as a package -- Exhibit 61,
11 I'm sorry.
12 HEARING OFFICER TOMPKIN: All right.
13 (Thereupon, the above-referenced
14 document was marked as Staff's
15 Exhibit 61 for identification.)
16 APPLICANT COUNSEL KARP: Now, the
17 application for certification is already
18 Exhibit One. What we'd like to do is specifically
19 have introduced the site maps that were attached
20 to the testimony by Ms. Hernandez, which
21 supplement figures 1-5 from Section 8.4 of the
22 AFC. The AFC is already Exhibit One.
23 HEARING OFFICER TOMPKIN: For
24 clarification are you saying those site maps are
25 currently part of Exhibit One or are solely

1 attached to Ms. Hernandez's testimony?
2 APPLICANT COUNSEL KARP: It's the large-
3 scale drawings that were up, and it's specifically
4 figure six, which is identified as the zoning
5 district surrounding the Tracy peaker project;
6 figure seven, which was residential development
7 constraints of the proposed site, and figure
8 eight, the California power project map, which is
9 from the CEC's web site, all referred to in
10 Ms. Hernandez's testimony.
11 HEARING OFFICER TOMPKIN: Now, are
12 those, 8-by-11s of those attached to Exhibit 56?
13 APPLICANT COUNSEL KARP: Correct.
14 HEARING OFFICER TOMPKIN: And you want
15 that admitted as part of Exhibit 56?
16 APPLICANT COUNSEL KARP: That would be
17 fine, and they are also incorporated in
18 Exhibit One, which is the application.
19 INTERVENOR BAKKER: If I may, I'd like
20 to interpose an objection with regard to figures
21 six and seven. These maps or site plans show
22 aerial photos, but we don't have any, we don't
23 know when those aerial photos were taken. To our
24 knowledge, they're not fairly reflective of the
25 current status of development in Tracy.

1 The City is prepared to introduce an
2 exhibit tomorrow that sort of updates the aerial
3 photos for this area. I guess to the extent that
4 they're submitted just for the purpose of showing
5 the zoning districts in the area, that would be
6 appropriate.
7 With regard to the residential
8 constraints, I would object to that on the grounds
9 of relevance. I think that that consideration of
10 whether that's an appropriate site for residential
11 development is a decision to be made by the City
12 of Tracy or the County of San Joaquin and not by
13 the Commission, so I would object to that on the
14 grounds of relevance.
15 APPLICANT COUNSEL GRATTAN: Number one,
16 this was in the original document. It's been
17 before the public for months now. Number two, the
18 issue of whether this site is an acceptable or
19 appropriate site for residential development has
20 been raised and it's been raised by the
21 intervenors, and I think the applicant is entitled
22 to defend itself as to the appropriateness of this
23 site.
24 So I think it's extremely relevant.
25 INTERVENOR BAKKER: I think that a point

1 I would make in response is that the City has
2 designated that area as residential, and we've
3 asserted that a power plant project would be
4 inconsistent with those land use designations
5 under our general plan and specific plan. We
6 think that the role of the City is to do planning,
7 but it's not the role of the Commission to do
8 planning in determining what site is appropriate
9 for residential use.
10 That's the grounds for my relevancy
11 objection.
12 HEARING OFFICER TOMPKIN: Well, it seems
13 to me that these diagrams were primarily used to
14 supplement her testimony and provide a clearer
15 understanding to everyone here about what's going
16 on, to the extent they were used for that purpose
17 I am going to admit them, but it will be with the
18 understanding that it is to supplement and help
19 explain her testimony.
20 It certainly doesn't preclude the City
21 from introducing its own information in contesting
22 the determination that was made by this witness.
23 INTERVENOR BAKKER: Madam Hearing
24 Officer, on behalf of intervenor Chang, my
25 supplements, the City's objection, particularly to

1 aerial photograph six, it purports to depict the
2 residential development constraints at the
3 proposed site; however, it's an outdated
4 photograph which does not accurately represent the
5 development that is currently sitting in that
6 area.
7 HEARING OFFICER TOMPKIN: Okay. Well,
8 I'll note your objection, but I'll also note that
9 that information was not solicited during the
10 examination of this witness, and it's -- you know,
11 I'll accept your representation. No one asked her
12 about when that photograph was taken, to my
13 recollection, and I'll note that and, like I'd
14 indicated previously, you have an opportunity to
15 introduce your conflicting evidence, and the
16 committee and the Commission will look at that
17 evidence to make a determination, based on the
18 evidence that's actually produced at hearing.
19 INTERVENOR BAKKER: Just for clarity,
20 the exhibits are just being introduced as
21 demonstrative testimony?
22 HEARING OFFICER TOMPKIN: Essentially,
23 yes.
24 INTERVENOR BAKKER: Okay, thank you.
25 APPLICANT COUNSEL KARP: And they're

1 going to be part of Exhibit 56.
2 HEARING OFFICER TOMPKIN: They will be
3 part of Exhibit 56.
4 APPLICANT COUNSEL KARP: And then our
5 last exhibit to be marked is the map that
6 Ms. Hernandez had been referring to, which really
7 is portions of the general plan from the City's
8 current general plan UMP that has areas colored in
9 and shows the existing site and various proposed
10 plans for projects in and around the site.
11 HEARING OFFICER TOMPKIN: So you want to
12 mark this as a separate exhibit?
13 APPLICANT COUNSEL KARP: A separate
14 exhibit, Number 57.
15 HEARING OFFICER TOMPKIN: Aren't we on
16 62?
17 APPLICANT COUNSEL KARP: Yes, we are.
18 INTERVENOR BAKKER: I'm going to object
19 to this exhibit as well for the same reasons, and
20 suggest that it simply be admitted as an exhibit
21 clarifying the testimony of the witness. We don't
22 have any -- Okay, that's acceptable to me now.
23 APPLICANT COUNSEL KARP: If that's
24 acceptable, then actually I would suggest that
25 rather than a separate exhibit number we move it

in under 56.

HEARING OFFICER TOMPKIN: Actually, I believe that's rather confusing. I'd rather mark it separately and simply clarify for the record that it's for a limited purpose.

APPLICANT COUNSEL KARP: Okay, that's fine.

HEARING OFFICER TOMPKIN: And this is a portion of the City plan; is that correct?

THE WITNESS: City of Tracy.

APPLICANT COUNSEL KARP: That's correct, City of Tracy general plan.

INTERVENOR BAKKER: If I may just clarify for the record, as it stands in looking at this, there doesn't seem to be a legend for the various shadowing that's on the exhibit, and I don't know if that was clarified in the testimony and I don't know if that's going to be fairly reflected in the record, so I don't know if there's any way we can fix that, or -- Perhaps the arrows all refer to, point to the --

HEARING OFFICER TOMPKIN: I think that, you know, what we'll have to do is, because this is supplementing her testimony, was clarifying her testimony, will be clarified with it wasn't --

1 will not, and that will simply have to stand.
2 APPLICANT COUNSEL KARP: Thank you.
3 (Thereupon, the above-referenced
4 document was marked as Staff's
5 Exhibit 62 for identification.)
6 APPLICANT COUNSEL KARP: So applicant
7 would move the exhibits identified into evidence.
8 HEARING OFFICER TOMPKIN: Any
9 objection -- Also remembering the limits that have
10 been set with respect to the diagrams, is there
11 any objection to the offered testimony and
12 evidence? Hearing no objection, the Exhibits 56,
13 58, 59, 60, 61 and 62 will be admitted in
14 evidence, and noting the limitations on 56 and 62,
15 as previously stated.
16 (Thereupon, the above-referenced documents,
17 marked as Staff's Exhibits 56 & 58-62 for
18 identification, were received into evidence.)
19 HEARING OFFICER TOMPKIN: All right.
20 With that, I believe we're done with
21 these witnesses.
22 (Thereupon, the witnesses were
23 excused from the stand.)
24 PRESIDING COMMISSIONER PERNELL: Thank
25 you. We're just about done here.

1 Tomorrow we will continue the Land Use
2 with the applicant -- with the staff presenting
3 its witnesses.
4 At this time the committee would like to
5 hear from the community, and I would also ask that
6 if there are any elected officials or
7 representative of elected officials, we would
8 offer that you come forward first; if not or if
9 you don't have anything to say, then we would ask
10 that the public come and give their comments.
11 INTERVENOR SELIGMAN: Mr. Pernell,
12 before you do that, how long will be going
13 tomorrow? Because I know you made reference to
14 the fact that you have to be in Sacramento in the
15 afternoon, so from a time standpoint it would help
16 us to know when you're going to end this, if it's
17 not already -- if everything isn't finished by
18 that point?
19 PRESIDING COMMISSIONER PERNELL: I think
20 we should end by 2:00 o'clock.
21 INTERVENOR SELIGMAN: Thank you.
22 INTERVENOR BLACKWELL: Commissioner
23 Pernell, on behalf of intervenor Chang, I
24 unfortunately half to object to this latest
25 decision by the Commission, because from what I

1 understood this morning when this --
2 PRESIDING COMMISSIONER PERNELL: What
3 latest decision, I'm sorry?
4 INTERVENOR BLACKWELL: That you want the
5 public comment to occur tonight. Because earlier
6 today you said public comment was going to occur
7 after all of the subject matters had been
8 concluded, because we had a lot of witnesses who
9 left with the understanding that they wouldn't
10 have to give their comment until tomorrow.
11 PRESIDING COMMISSIONER PERNELL: Okay.
12 Well, there is public comment after every meeting
13 that we've had in Tracy. I always allow the
14 public a chance to comment. That's not going to
15 preclude them from commenting tomorrow.
16 INTERVENOR BLACKWELL: Thank you.
17 PRESIDING COMMISSIONER PERNELL: Is
18 there anyone in the audience who would like to
19 comment at this time?
20 SPEAKER WILLIAMSON: Commissioners and
21 staff, Brad Williamson again, business
22 representative from IBEW.
23 We've heard testimony concerning the
24 Owens Brockway glass plant and the Biomass plant
25 in regard to location. We've heard testimony

stating that the chosen location for the peaker plant is not suitable. The area where the two existing facilities are located and where the peaker plant has chosen to be located could only be called industrial, an area the City must recognize as industrial since they have designated an area within their sphere of influence and in close proximity to the two existing plants as being suitable for industrial zoning.

And if they recognize the area as industrial, given their proposed designation within the South Schulte development sphere of influence, why would they question the land use of the County property adjacent to the glass plant and to the Biomass plant that is cited as the location for the peaker plant?

The governor created the process for the creation of peaker plants, and the Department of Water Resources contracted for the Tracy peaker plant. All laws, ordinances, regulations, and standards have been met and, in many ways, exceeded by the applicant. Please build the plant. Thank you.

PRESIDING COMMISSIONER PERNELL: Thank you.

HEARING OFFICER TOMPKIN: Thank you. The next person will be Susan Sarvey.

How about Greg Pace?

UNIDENTIFIED SPEAKER: These people went home because they thought there was no comment.

PRESIDING COMMISSIONER PERNELL: I think we all wish we were home.

(Laughter.)

PRESIDING COMMISSIONER PERNELL: Okay.

HEARING OFFICER TOMPKIN: Chuck Tuso.

INTERVENOR TUSO: I'm going to go back to early this morning when we started out with Visual. And so to my wife, my children, and I, the key observation point is our home. We strategically designed and built our home to have a view of the surrounding hills, especially Mount Diablo. That view was key in our decision to build our home at that location. The positioning of the proposed peaker plant is in our direct line of view of Mount Diablo. This is not a fleeting view, this is a 24-hour-per-day view.

My question is, will this facility improve or obstruct our view of Mount Diablo, and how will our view be mitigated?

PRESIDING COMMISSIONER PERNELL: Is that

to the committee?

INTERVENOR TUSO: To the applicant.

HEARING OFFICER TOMPKIN: Would the applicant respond to that.

APPLICANT COUNSEL GRATTAN: My reading of the testimony and hearing of the testimony is that the impact to the view is not a significant impact, and we'll be pleased, as we've tried to do and will do again, to meet with you and see what we can do to screen that, to further screen that plant. And we pledge that.

INTERVENOR TUSO: Yeah, my question is how the plant is going to affect my view, since I strategically built my house to have that view of Mount Diablo, how will we mitigate my view of Mount Diablo from my home?

APPLICANT COUNSEL GRATTAN: I think we answered that.

HEARING OFFICER TOMPKIN: Applicant has indicated that they're willing to meet with you and to try to reach some kind of resolution, and there has been testimony here today regarding the applicable measures that have been taken to comply with Visual Resource standards, but we appreciate your comment. And certainly, it's something that

1 will be given consideration when the committee
2 looks at the issue.
3 INTERVENOR TUSO: Thank you very much.
4 HEARING OFFICER TOMPKIN: Thank you.
5 James Hamrick?
6 SPEAKER HAMRICK: Good evening. I'm
7 James Hamrick. I'm the Regional Environmental
8 Manager for Owens Illinois.
9 HEARING OFFICER TOMPKIN: And could you
10 spell your name for the record, please.
11 SPEAKER HAMRICK: H-a-m-r-i-c-k.
12 Owens Illinois is one of the world's
13 leading manufacturers in glass containers and
14 plastic packaging products. We're the leading
15 manufacturer of glass containers manufactured in
16 the US. During these proceedings, the public
17 comments, there have been statements made about
18 Owens Illinois that are not accurate, and I would
19 like to present some facts regarding OIM and Tracy
20 plants.
21 Owens Illinois has 18 glass plants in
22 the US. Some are in large metropolitan areas such
23 as the Oakland plant and others in smaller
24 communities similar to Tracy. We take pride in
25 what we do and how we operate our facilities.

I've been with Owens Illinois for 25 years. I've been a plant engineer at three different facilities. I've worked in Winston-Salem, North Carolina; Charlevoix, Michigan; Huntington, West Virginia; and the Tracy facility since 1994. One of my duties as the plant engineer was to maintain environmental compliance measures, to monitor and report the facility compliance with applicable laws, ordinances, regulations, statutes and permit conditions.

Forty years ago, in 1962, Owens Illinois started production in Tracy. Currently the plant employs approximately 385 people with an annual payroll of $15.6 million. The plant spends in excess of one million annually for products and services from local businesses. The Tracy plant was named plant of the year in 1999 and 2001, and has received the Miller Brewing Partners in Excellence award for the last three years.

Owens Illinois is an environmentally conscious company. Owens Illinois's policy is to comply with all laws and environmental regulations and we do so at our facilities. In 1998 Owens Illinois voluntarily installed an electrostatic precipitator, even though our operating permits or

1 regulations did not require it. The cost of this
2 installation was over $3.5 million. The
3 precipitator is 95 percent efficient at removing
4 particulate.
5 In November of 2000 OI voluntarily
6 submitted an application for authority to
7 construct with the Air District for installation
8 of continuous emissions monitors for NOx and SOx.
9 September 2001 the ATC was granted. This
10 equipment is in the process of being installed.
11 The cost of this project was in excess of
12 $200,000.
13 In the application Owens Brockway agreed
14 to operate on the ESP or the precipitator at all
15 times except for 144-hour maintenance period
16 annually. Once the installation of the equipment
17 is complete and is certified, we will be operating
18 under these new permit conditions.
19 The plant's NOx emissions data given
20 during this hearing and used for modeling was from
21 1999. The NOx emissions from this plant in Tracy
22 have been reduced more than 30 percent since 1999.
23 The OI facility is very transparent to regulatory
24 agencies. Regulatory agencies routinely visit and
25 perform inspections, self-monitoring reports are

filed with the regulatory agencies as required.

Forty years ago, one of the reasons the Owens Illinois plant site was selected was due to the fact that it was outside of the City in a rural area, and it was zoned as industrial. OI would prefer to have industry immediately adjacent to our property rather than a residential development. OI does not oppose the Tracy peaker plant, as long as they are permitted and comply with state and federal regulations.

Thank you.

PRESIDING COMMISSIONER PERNELL: Thank you.

HEARING OFFICER TOMPKIN: Paula Buenavista? And I'd ask you to please spell your name for the record.

SPEAKER BUENAVISTA: Okay, last name Buenavista, B as in boy, u-e-n-a-v as in Victor, i-s-t-a, Buenavista.

HEARING OFFICER TOMPKIN: Thank you.

SPEAKER BUENAVISTA: I'll be short and sweet.

PRESIDING COMMISSIONER PERNELL: Thank you.

SPEAKER BUENAVISTA: The Council members

of the City of Tracy voted against the peaker power plant project. The San Joaquin County Board of Supervisors voted against the peaker power plant project. I have petitions with signatures and address of a thousand Tracy residents who are against the Tracy peaker power plant project as well. I respectfully urge you to take this information, which I perceive to be critical, in the decision-making process.

I would also like to note, just from a Commission hearing operations standpoint, I would like to point out that during these proceedings, up to this point, this being probably the earliest of times, the time slots available for public comment were what I would consider unreasonably late in some cases, in the evening, for example, midnight. I consider this to be a bit late for Tracy residents, especially since it has been established that Tracy is a commuting community, and I believe the people of Tracy have the same rights to be heard as GWF, the applicant.

And I would like to ask if I may be able to submit these petitions into evidence. Is this possible or does it need to be submitted through an intervenor?

HEARING OFFICER TOMPKIN: We can accept that and we'll docket it.

SPEAKER BUENAVISTA: Okay. Thank you very much.

PRESIDING COMMISSIONER PERNELL: Could you bring it up here, please?

SPEAKER BUENAVISTA: Oh, I didn't know if I had to wait until the very end.

PRESIDING COMMISSIONER PERNELL: Thank you.

HEARING OFFICER TOMPKIN: Robert Sarvey?

INTERVENOR SARVEY: The will of 500,000 people is represented by our Board of Supervisors. I can't understand how their opinion can be ignored by not being informed on the GWF peaker plant approval because of miscommunication between the staff and the Board.

Our rights are just as important as the rights of the businessmen of GWF, and I would hope you would take that into consideration in making that decision. I would also like to add that Owens Brockway glass has been a very good neighbor. They employ a lot of people. We would not want to see them leave, and we're happy to have them here in Tracy. Thank you.

PRESIDING COMMISSIONER PERNELL: Thank you.

HEARING OFFICER TOMPKIN: Les Serpa? And would you please spell your name for the record.

SPEAKER SERPA: I'm Les Serpa, and the first name is L-e-s, and the last name is S-e-r-p-a, and the address is 447 Villon Court, Tracy.

And my concern is all of you and all of us know what happened one day for the space shuttle coming out of Florida. Everybody got in a hurry, all the brass. They had to fire that thing off with the frozen O rings, and you see what happened to the crew. And that's what's going to happen here, as this thing is ramrodded down Tracy's neck. You're going to get some probably really civil disobedience over this plant.

Owens Illinois's glass plant is out of the question. It's out there, it does a good job, it calls the proper authorities when they have a problem. It doesn't do like the wood chip plant, who hides what happens at that plant. And in the future we're going to remove that chip plant.

Now, in 1946, and I notice the maps that

you people handed out on Thursday, those maps showed the city 42 years ago. Three miles south of the city was missing. That three miles lines up with this power plant that they want to put in there, put out there.

Now, if you'll just look at this map that you have out there today, and you look to the east of where they want to put that plant, you'll see like a scrubby area up against the railroad tracks there. Well, in 1946 they were out there digging a pond, and my dad was interested in buying some land there. And they told him, well, we wouldn't really advise you to buy right here because this pond is going to be for the ducks in the wintertime. And he says, for the ducks? He says, yeah, we're putting in an area here that's a wildlife preserve, and we're going to go to the west and extend it out that way for the animals and birds and what-not.

And so they put that in there, and in its all-fired hurry to get this plant in there, I don't know if this thing is getting addressed or where the Department of Fish and Game is here on this. That really concerns me.

But I think they ought to slow this

thing down and do it correctly, and make sure that things are taken care of. Because I noticed on your maps on Thursday that there's four areas way out in the country where the pipeline and the power lines cross. That would be a sufficient and a good place to put this plant, and that's what they should search for is something like that.

And if they're using the excuse that they can only put it where the pipeline and the power lines cross, there's an area out there about 40 miles out that they have a plant out there that only exists on the power lines. But we don't have any qualms about Owens Illinois glass, but we do have about the wood chip plant. It's very noisy to the Red Bridge community out there. If you go out there at night, you'll hear it. It's a noisy plant and it's a dirty plant, and they have many, many fires out there. I spent 35 years in the fire service for the City of Tracy and four years on the City Council, and I've seen a lot of things happen at that plant.

So we need to slow this thing down and don't end up like that space shuttle. Thanks.

PRESIDING COMMISSIONER PERNELL: Thank you.

HEARING OFFICER TOMPKIN: Dawn Serpa, and would you spell your name for the record.

SPEAKER DAWN SERPA: Yes. Dawn Serpa, D-a-w-n, S-e-r-p-a.

HEARING OFFICER TOMPKIN: Thank you.

SPEAKER DAWN SERPA: I am the president of the Sirlan Companies, a real estate development home building and commercial building company. We are located in Tracy at 85 East Tenth Street, and we've been doing business in Tracy for about ten years now.

I represent the 300 current residents at Red Bridge. At build-out it will be about a thousand. I do not disagree with power plants. You know, I'm obviously a businessperson. I'm realistic, I understand the challenges that we were faced with last year, and I do appreciate the challenges that each of you are faced when you make these decisions that you have to make that obviously affect other people's lives.

I'm in support of the Tesla plant. I think that's a wonderful location. I don't think it impacts human beings, certainly not innocent human beings that didn't see it coming.

My position on this plant is this: It's

that I just can't understand the total lack of respect for the City of Tracy's urban management plan and sphere of influence. As a real estate developer and a company that holds a California real estate broker's license, I am required by the Department of Real Estate to disclose potential growth opportunities in open space. That disclosure at Red Bridge has consisted of the zoning plans and things that are outlined in the urban management plan.

Basically, these -- You know, it's very difficult to get people to trust you in the development and home building industry, as you can imagine. And all you've really got is your word. And I have 300 people there right now who took my word for it with the disclosure and made a decision that will affect them for many years to come. Most of them worked all their lives to be able to buy homes there.

You know, we have the active people in military duty that can be called to fight for us on our behalf in Afghanistan at any time, we have one gentleman who is wheelchair bound and lived in his very small Kaufman and Broad house for about ten years. He could never cook, he could never

1 take a shower, he could never do anything without
2 assistance from his wife. And now he has a home
3 that's totally completely universally designed so
4 that he can get around, he can actually have a
5 life.
6 So I just want to remind you that these
7 are real human beings that you're impacting. And
8 I know you don't make these decisions lightly, but
9 I would like to ask that the CEC just ask this
10 applicant to move this plant further away from the
11 city limit. Thank you.
12 PRESIDING COMMISSIONER PERNELL: Thank
13 you. Okay, I think that's all the cards we have,
14 and at this time we would like -- Oh, yes, we have
15 Ms. -- Please come forward, Ms. Sarvey.
16 SPEAKER SARVEY: Hi again. I'm Susan
17 Sarvey, S-a-r-v-e-y. I'm a little confused
18 because I'm not a lawyer, but these are just some
19 of my impressions from this evening.
20 My understanding from everything that
21 was talked about tonight was that somehow or
22 another Well Head set some kind of precedent here
23 for power plants. The power plant we're talking
24 about is bigger than Well Head ever was, so what
25 does Well Head have to do with it? But it

1 evidently does, so we're going to say that it's
2 part of the process because you guys think it is.
3 To me, as a person, that file being
4 mixed up, everything being confused, how can you
5 accept -- how can you make decisions based on
6 anything to do with Well Head when it wasn't
7 straight? If you bought a house, Commissioner
8 Pernell, from her and you accidentally put her
9 address on it, would you still own her house?
10 You'd have a lawsuit, it wouldn't really be her
11 house. Wrong address. You'd be fighting over who
12 got the money.
13 So I'm really confused about how this
14 file can be commingled, how this file ever really
15 came up, because it's not even the right-size
16 plant. And if it is really as important as it was
17 made to sound here tonight, I don't think it's
18 fair to the County or to the City of Tracy that
19 this was the precedent-setting decision and no one
20 from the CEC or whoever they had to talk to said,
21 now, we know we don't have to go to the CEC for
22 approval, but you have to understand when you give
23 us approval, you are now setting a precedent with
24 the CEC. I don't think anybody ever said that to
25 those people.

1 And I listened to people say there was
2 discussion in this letter, and then I heard
3 attorneys say, well, discussion is fact. That's
4 not true. That's like playing telephone.
5 Discussion is the exchange of ideas.
6 There are some really difficult land use
7 things that I'm having a problem with. You know,
8 they brought up the whole thing about the soccer
9 fields. Whoever dreamed up -- That's a horrible
10 land use idea, in my opinion. Let's put all these
11 thousands of kids right on the other side of Owens
12 Brockway, the Biomass plant, the peaker plant, let
13 them suck fumes, when I already told you that I
14 had the evidence from the American Lung
15 Association that says on their web site right now,
16 if my kid is in Tracy running in 90-degree heat or
17 greater, he's doing permanent lung damage. And
18 they've admitted, they're going to admit 96
19 percent of 2.5.
20 My kid's going to play soccer, suck that
21 into his lung and have it in there for the rest of
22 his life, and if you have a young child, they play
23 soccer generally from the time they're four or
24 five until they're 18. So I'm going to be kissing
25 him goodbye, burying him in the ground by the time

he's 30, because it's going to coat his lungs and he's not going to be able to oxygenate his lungs, he's going to have interstitial lung disease. It's just crazy.

And we come in here, and the County tells you we represent 500,000 people or however many people they are, and that they're against it. The City is against it. Paula comes in here and tells you she has a thousand people that are against it. What is land use about? It's about what the people want to use the land for. The people don't want to use the land for this.

If there is nobody living here because nobody likes it being here, who needs the electricity? I just don't understand. I mean, and is the reality that we're making all this electricity for the Bay Area, like I keep hearing rumors about? Oh, it's going on the ISO and they're selling it in the Bay Area?

Well, if it is so clean, go build it in the Bay Area. They need the power, they want it, it's clean, let them have it. We don't want it. We can make our own power. I'm putting solar in my house, I have solar on my store, you know. We are not stupid people here, we can figure this

1 out. We've got windmills up there that nobody
2 ever turns on for some reason.
3 And then Les brings up the whole thing
4 about wildlife. If that's a preserve and nobody
5 really wants to discuss what's really out there,
6 but I was just talking to people today in town who
7 have never gone out there and walked around and
8 went and walked out there, and they said, oh, my
9 gosh, I saw birds and animals I've never seen
10 before in my whole life anywhere. You need to go
11 walk out there, it's beautiful. There's
12 endangered species there, whether anybody wants to
13 admit it or not, there's stuff you've never seen
14 when you've been walking around Oakland and
15 Berkeley and San Francisco. They're there. I
16 don't know if they're somewhere else, but they're
17 there, things that I've never seen anywhere else.
18 They need to be protected.
19 Those animals need to be protected, our
20 people need to be protected, our children need to
21 be protected. And, like I said, you're right, I'm
22 not an attorney, I don't understand the process.
23 But the way you're making these decisions on land
24 use are just really confusing me. Because it's
25 like common sense is not a part of this process,

and I'm sorry, but that's really how I feel.

Thank you.

PRESIDING COMMISSIONER PERNELL: Thank you. All right, if there's no one -- Yes, yes. Is there anyone else before -- We're going to have to adjourn sometime before tomorrow at 10:00 --

(Laughter.)

PRESIDING COMMISSIONER PERNELL: Would you state your name for the record.

SPEAKER CHUN: My name is Lance Chun, C-h-u-n. Good evening, Commissioner Pernell; good evening, Commissioner Laurie.

Previously, I had a scheduling conference. I think I made a statement and I came to the defense of the CEC Commissioners and the staff in that I said the people that were here were pretty angry, and I said it might have been misdirected anger at the Commission, at the staff because at that time our City Council and the San Joaquin Board of Supervisors had not voted, and I appealed to the public to go and talk to our Council and our Board of Supervisors to let them know that we don't want the power plant to be built here.

Now that indeed, unanimously, both the

1 Board of Supervisors and the City Council have
2 come out and made resolutions saying that we don't
3 want it here, you know, what else can we do as the
4 public? You say you want us to participate and it
5 is open to the public, but what more can we do?
6 We have to go through elected officials and they
7 are elected officials. You guys were appointed by
8 the governor, so we couldn't directly alter the
9 outcome of whether you're in this position or not.
10 So all we can do right now is ask when
11 you actually make your decision to please think
12 about the little people. I couldn't hire a
13 lawyer, but I've been at all these meetings
14 listening to everything, and I really urge and
15 hope you guys will think about the average citizen
16 who can't have a lawyer representing them attend
17 this meeting.
18 Thank you.
19 PRESIDING COMMISSIONER PERNELL: Thank
20 you. Okay. I don't see anyone else coming
21 forward, so applicant, do you have anything?
22 APPLICANT COUNSEL GRATTAN: We'd like to
23 thank the City of Tracy and the County for their
24 hospitality and we enjoyed the dialogue tonight,
25 and good night, everybody. We thank the

1 Commission for its stamina and staff as well.
2 PRESIDING COMMISSIONER PERNELL: Staff?
3 MS. WILLIS: No.
4 PRESIDING COMMISSIONER PERNELL:
5 Commissioner Laurie?
6 COMMISSIONER LAURIE: No, sir.
7 PRESIDING COMMISSIONER PERNELL: If
8 there is nothing else to come before this
9 committee, this committee is adjourned until
10 10:00 a.m. tomorrow morning, and we will take up
11 Land Use with staff presenting its witnesses.
12 Thank you. Good night.
13 (Thereupon, the hearing was
14 adjourned at 11:05 p.m.)
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CERTIFICATE OF REPORTER

I, DUNCAN FANKBONER, an Electronic Reporter, do hereby certify that I am a disinterested person herein; that I recorded the foregoing California Energy Commission public 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 workshop, nor in any way interested in outcome of said hearing.

IN WITNESS WHEREOF, I have hereunto set my hand this 1st day of April, 2002.