

DOCKET
06-AFC-6

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STATE OF CALIFORNIA
State Energy Resources
Conservation and Development Commission

In the matter of
Eastshore Energy Center

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Docket Number 06-AFC-6
Reply Brief of
Robert Sarvey

A photograph of a handwritten signature in black ink on a light-colored document. The signature is cursive and appears to read "Robert Sarvey".

Signature 3-1-08

Introduction

Pursuant to the committees scheduling order of January 18, 2008 Intervenor Sarvey hereby submits his reply and override brief on contested issues for the Eastshore Energy Facility 06-AFC-6.

The Eastshore project will not comply with all Laws Ordinances Regulations and Standards.

The Eastshore project violates the newly approved NO₂ standard. (Exhibit 800 page 5, RT 12-17-07 page 104) On February 19, 2008 the office of administrative law approved the new NO₂ standard which goes into effect on March 20, 2008 before this project will be approved.

(<http://www.arb.ca.gov/research/aaqs/no2-rs/no2-rs.htm>) The projects maximum ambient NO₂ concentration is 314.2 ug/m³ **which is 97% of that standard.** (Exhibit 200 p. 4.1-23d, RT 12-17-07 page 104) When that maximum concentration is combined with background concentrations of 143 ug/m³ it will exceed the newly approved NO₂ standard of 338 ug/m³. **Background ambient concentrations as small as 24 ug/m³ when combined with the projects maximum NO₂ impacts would violate the new standard.** As the record reflects these background concentrations occur ever day of the year. (Exhibit 805) Staff and applicant have gambled that the new standard would not go into effect before the approval of the project. Staff and applicant have opined that if and when the new NO₂ standard becomes law it will require additional modeling to asses the projects impacts against the new standard due to the difficulty in modeling the reactivity of NO₂ in the analysis. (Applicant Opening Brief page 61, Rt 12-17-07 page 103:2-9) The applicant has the burden of proof to demonstrate that the project complies with all LORS (20 Cal Code Regs. Section 1723.5 (a)) The project will not comply with the new California Ambient Air Quality Standard for NO₂.

The project also does not comply with the federal and state standards for Best Available Control Technology (BACT). The District is allowing a particulate

matter emission rate of 1.3 to 1.9 pounds per hour per turbine. Facilities with similar equipment have achieved much lower emission rates. Evidence in the record includes source tests on identical equipment that demonstrate that the facility could reach a much lower particulate matter emission rate of .33 pounds per hour. (Exhibit 804 p. 11) A facility in San Joaquin Valley has been permitted with an emission rate of .75 pounds per hour. (Exhibit 804 p. 11) CARB staff obtained emissions testing data that demonstrated compliance with the more stringent limit of .029 g/bhp-hr or .75 pounds per hour at the San Joaquin Facility. (Exhibit 703) BAAQMD has admitted that CARB staff was able to obtain the data to demonstrate compliance with the lower limit. (Exhibit 803) A Lower Emission Rate of .029 g/bhp/hr for Particulate matter was recommended by CARB in comments on the PDOC. (Exhibit 703) Energy Commission staff recommended a lower PM limit in their comments on the PDOC (Exhibit 704) and confirmed under oath they think it is achievable. (RT 12-18-08 p. 116) The .029 g/bhp/hr per turbine is achieved in practice and similar facilities have been permitted at that level. (RT 12-17-08 p. 116, Exhibit 804 p. 11) Regulation 2-2-206 of the BAAQMD defines BACT as the more stringent of

206.1 The most effective emission control device or technique which has been successfully utilized for the type of equipment comprising such a source; or

206.2 The most stringent emission limitation achieved by an emission control device or technique for the type of equipment comprising such a source; or

The type of BACT described in Regulation 2-2-206.1,2 must be demonstrated in practice at an actual facility and approved by a local Air Pollution Control District. It is clear that both requirements have been met and the project does not comply with Best Available Control Technology. Staff suggests that the CEC has no authority over the BACT determination. (Staff Brief page 3) While it may be true that the CEC has no authority over the BACT determination by the BAAQMD they are required to determine if the project complies with all laws ordinances regulations and standards and address such noncompliance. (PRC Section 25523)

The Eastshore NO2 impacts are a significant impact under CEQA

Not only do the projects NO₂ emissions violate LORS they are a significant impact under CEQA that remains unmitigated. The new standard was established “to protect the youngest Californians and other vulnerable populations.” (Exhibit 701) The Applicant has chosen to provide only POC emission reduction credits in place of NO_x emission reduction credits so the project’s NO₂ impacts are not mitigated. The applicant has the burden of proof to demonstrate that the project will not have a significant impact on the environment. (20 Cal Code Regs. Section 1723.5 (a)) The record demonstrates that the project does violate the new NO₂ standard and that the non compliance is a significant environmental impact to asthmatics, children and infants. The ARB staff report justifying the new NO₂ standard outlines the serious health effect to asthmatics, infants and children from exceedences of the new NO₂ standard which prompted revision of the standard.

Cumulative impacts occur from the Russell City Projects violations of the new NO₂ standard.

The newly approved Russell City Project also violates the new NO₂ standard when its maximum concentrations are combined with background levels (Russell City FDOC page 20, Staff FSA Russell City Energy Project page 4.1-7 01-AFC-7) in the project area and it lies approximately 3,000 feet from the EEC. The Russell City project also substitutes POC ERC’s for the majority of its NO_x mitigation. The Russell City Project’s potential to emit 134.6 tons of NO_x emissions are mitigated by 46.2 tons of 1985 ERC/s from San Francisco. The two projects have the potential to emit 190 tons per year of NO_x with virtually no NO_x mitigation. The projects could take turns violating the standard on different days which is a severe cumulative impact on the environmental justice community that has a demonstrated prevalence of asthma and air pollution related disease (RT 12-17-07 page 368, 369) This is exactly the population that the new NO₂ standard was created to protect (Exhibit 701) The negative health impacts from the EEC and the cumulative impacts of the EEC and the Russell City Project will be a significant impact to the health of the minority population

that lives, works and attends colleges and elementary schools near the project. This project individually and cumulatively will impose a disproportionate share of negative environmental consequences from industrial operations on a minority population in violation of the Federal Law and 1998 EPA guidelines. The energy commission cannot override this noncompliance with federal environmental justice laws.

Staffs Environmental Justice Analyses does not consider violation of the new NO2 standard.

Staff has testified that its analyses have not identified any significant impacts to the minority community near the power plant. Staff has failed to examine the health impacts from the violation of the new NO2 standard which was approved by the office of administrative law on February 19, 2008. (12-17-07 page 104) Staff has testified that they are closely watching to see if the new standard is approved so they can examine NO2 impacts in relation to the new standard. The standard is now law.

Public Health

The applicant has argued that Staff's condition Public Health 1 which requires the testing of four of the reciprocating engines and a subsequent Health Risk Assessment is not necessary. Because of the variability of the performance of these engines the committee should adopt staff's recommendations to test four engines. Exhibit 702 the EPA emission factors for reciprocal engines states:

It should be emphasized that the actual emissions may vary considerably from the published emission factors due to variations in the engine operating conditions. This variation is due to engines operating at different conditions, including air-to-fuel ratio, ignition timing, torque, speed, ambient temperature, humidity, and other factors. It is not unusual to test emissions from two identical engines in the same plant, operated by the same personnel, using the same fuel, and have the test results show significantly different emissions. This variability in the test data is evidenced in the high relative standard deviation reported in the data set.

(Exhibit 702 page 3.2-3)

Exhibit 804 page 108 is an email from Brian Lusher to Alvin Greenberg. This email demonstrates the great variability of the emissions of the toxic air contaminants inherent in these engines. This is further evidence in the record which supports staff's conclusion that at a minimum four of these engines should be tested.

"I sent you the formaldehyde data with some substantial statistical analysis that showed the mean and the Std deviation were on the same order of magnitude. One engine was high and would cause problems since it is so different from the others."

(Email from Brian Lusher to Alvin Greenberg October 10, 2007 Exhibit 804 page 108)

In fact it was the BAAQMD that suggested testing multiple engines because of the high variability of the engines emissions in the first place. Staff merely took the data from the District and followed the BAAQMD recommendation to test multiple engines due to the variability of these emissions.

"You may want to consider testing some number of engines and using that data to estimate cancer risk and hazard indices. If the results were not near the ten in one million or hazard indices near 1 level then no more testing. You should consider having a statistical screening combined with some risk data."

(Email from Brian Lusher to Alvin Greenberg October 10, 2007 Exhibit 804 page 108)

Staff's Condition of Certification Public Health 1 should be adopted by the committee as the record demonstrates these engines have a high variability in emissions. Testing only one engine does not provide the statistical confidence that the health risk assessment will accurately reflect the health impacts of all fourteen engines. The first engine tested could be the lowest emitting engine of the group and testing all of the engines would be prudent since the toxic air contaminate emission levels from these engines is not known. Staff's condition is prudent and feasible and provides the necessary information to ensure that the projects TAC emissions will not cause a significant impact to the health of the residents, workers and student in the project area.

LORS OVERRIDE

The majority of the discussions on the LORS override on this project have centered on the non compliance of the EEC with specific land use LORS of the City of Hayward and Alameda County. The approval of the new State NO₂ standard by the Office of Administrative Law on February 19, 2008 (<http://www.arb.ca.gov/research/aaqs/no2-rs/no2-rs.htm>) establishes a new State Ambient Air Quality Standard for NO₂. The projects maximum ambient NO₂ concentration is 314.2 ug/m³ **which is 97% of the new standard.** (Exhibit 200 p. 4.1-23) **As explained above the project will violate the new NO₂ standard repeatedly as the background ambient air concentrations are higher than 24 ug/m³ every day of the year. (Exhibit 805)** The Commission must now find in accordance with PRC Section 25523 (d) (1) that the project does not conform with the new State NO₂ Standard. The projects BACT determination is also a violation of state and federal (40CFR Section 51.165) LORS and the commission is required to make that finding under Section 25523 (d) (1). The Federal NSR regulations may not be overridden. (Cal Code Section 25525) The BACT determination must be revised for the project to comply with Federal NSR guidelines or the project may not be certified.

The projects violation of the NO₂ standard and the PM-10/2.5 BACT determination violate the EPA Environmental Justice Guidelines and Executive Order 12898. The EEC will as explained above cause violations of this new NO₂ standard that will impact the minority community that lives works and attends school near the project. The Commission does not have the authority to override Federal Environmental Justice regulations and therefore must apply mitigation measures which will reduce the projects ambient air quality impacts for NO₂ and particulate matter. Feasible mitigation measures include increasing stack height. All parties agree that increasing the stack height will lower ambient air concentrations. (RT 12-17-08 p. 96) The record demonstrates that good engineering practice stack height is 120 feet (Exhibit 6 p. 2) and increasing stack height will lower NO₂ and PM ambient air concentrations. Increasing the stack height is a prudent and feasible mitigation measure which possibly could reduce the projects air quality impacts to a level of insignificance. Requiring a more

stringent emission limit for PM-10 emissions will also mitigate the significant and extremely large PM- 10/2.5 air quality ambient concentrations. (Exhibit 800) As the record reflects this is also a prudent and feasible measure. The BAAQMD has allowed an extremely high emission rate for these engines even though lower emission rates have been permitted and achieved in practice and are contained in other air district and ARB BACT determinations. (Exhibit 803, 804,804 p. 11)

There is substantial evidence in the record from Dr. Zannetti's testimony that the mitigation provided for particulate matter will not be effective. (RT 12-17-07 145,145) Staff and applicant also have disagreements on the amount and location of the SO2 ERC's which call into question the project's particulate matter mitigation. The committee should require increased stack height and a lower particulate matter emission rate to erase all doubts of any possible significant PM-10/2.5 impacts. The committee should also require real time particulate matter reductions in the affected community. This could be accomplished with the woodstove program in combination with the proposed mitigation measures in exhibit 806.

The violations of the NO2 standard and the extremely high PM-10/2.5 ambient air concentrations demonstrate a disproportionate impact to a minority community in violation of Federal regulations which the Commission lacks the authority to override. (Cal Code Section 25525) The projects BACT determination is also a violation of state and federal (40CFR Section 51.165) LORS and the commission is required to make that finding under Section 25523 (d) (1). The Federal BACT/LEAR regulations may not be overridden. (Cal Code Section 25525) The BACT determination is also an environmental justice issue that must be addressed.

Override of State LORS

The applicant opines in his override brief that the project violates no LORS. (Eastshore Applicant Override brief pages 1-8) As explained above the project violates Federal air quality and environmental justice LORS. The project also

violates the City of Hayward's General Plan, conditional use permit requirements and the regulations which protect the airport approach patterns. The committee may override any State of California, County of Alameda, or City or Hayward LORS but cannot override any Federal regulations that are violated as explained above. The following discussion applies only to the state and local laws that the committee may determine non compliance with.

Public Convenience and Necessity

In order to override any LORS noncompliance the commission must find that the project is needed for the public convenience and necessity. "Section 25519 provides a template for the evaluation of public convenience and necessity:

Section 25519 states "for any proposed site and related facility requiring a certificate of convenience and necessity, the commission shall transmit a copy of the application to the Public Utilities Commission and request the comments and recommendations of the Public utilities Commission on the economic, financial, rate, system reliability, and service implications of the proposed site and related facility."

The first three components of the analysis the economic, financial and rate components of the project are unknown because the Commission and the parties other than the applicant have no idea what the cost per megawatt that the ratepayers must pay for each kilowatt of electricity that the EEC will produce. (RT 1-14-08 page 18) This function of determining consumer benefit is a critical part of the public convenience and necessity analysis and is usually conducted by the ratepayer advocate for the Public Utilities commission. Unfortunately the Energy Commission has no ratepayer advocate division and even if it did it lacks the information to determine if the project will financially benefit consumers particularly in light of the fact that the cost per megawatt for this project is unknown and the applicant is unwilling to share this information. (RT 1-14-08 page 18) In addition to not knowing the cost per kilowatt of the generation of the EEC, the Commission is also unable to ascertain what generation would replace the EEC if it was not sited. One of the defects of the current siting process is that the costs of generation is kept confidential in the RFP which hampers the CEC's

ability to determine if the project actually benefits the public from an economic standpoint. The CEC could potential study what generation would displace the EEC but this could be a time consuming process. Testimony in the record demonstrates that currently Hayward and San Leandro are fed through the existing 115 network which comes transformed out from the 230 network to which the Russell City Project will be connected. (RT 1-14-08 page 30) With the approval of the Russell City Project we can assume that enough electricity will be generated to meet the immediate needs of the Hayward area since the Russell city Project is 560 MW and the EEC is much smaller. Unfortunately once again we do not know the cost per kilowatt of the Russell City Energy Center's production. Looking at the CEC cost estimates for combined cycle power as opposed to simple cycle power on the "Commissions Levelized Cost of Electricity Generation by Resource" page (http://www.energy.ca.gov/electricity/levelized_cost.html) we can estimate the cost of combined cycle power at 10.22 cents per KWH as opposed to the simple cycle cost at 59.9 cents KWH. The cost to provide the simple cycle power is 5 times higher than to provide the power from a combined cycle project so it would appear that even considering the projects line loss savings of 7 to 9 MW per year the consumer would be in a better position to continue to receive power through the bulk 230 network assuming that reliability can be maintained. The next important factor to consider according to section 25519 is the "system reliability, and service implications of the proposed site and related facility." As staff testified they were not able to determine if the project eliminated any transmission or reliability upgrades so from the record the committee can assume that no glaring reliability or transmission issues would occur if the project were not certified. (RT 1-14-08 page 17,22) Currently the project area is served through the 230 bulk transmission line so it appears reliability would not suffer without the EEC. One of the major problems in the long term procurement process in the CPUC is that the RFP's do no specify the interconnection point for proposed power plants. This can lead to siting a power plant where it will be underutilized but from the record we can't ascertain that information. Cal-ISO has recommended that the Long Term Procurement process include

interconnection points in the RFO. The record reflects that the RFO for the Eastshore project included no interconnection point. (RT 1-14-08 page 84, 85) Staff was able to determine that the project did increase reactive margin so that should be a benefit that the Committee could consider in as a positive factor in the override.

From the point of view of the state wide procurement goals PG&E was required to procure 2,200 MW of power in the 2004 long term procurement proceeding. PG&E requested and received authorization to enter into 2,250 MW of long term contracts exceeding their target by 50 MW which would not be considered excessive. In addition to those 2,250 MW of contracts PG&E also obtained ownership of the Contra Costa 8 project in a settlement with Mirant. This additional 530 MW was procured outside of the Long Term Procurement Proceeding so the PG&E service area will definitely have adequate power to meet its current and future needs. There is concern that the PG&E has over procured natural gas generation and this will lead to increased costs for utility ratepayers. The state's goals of increasing renewable energy and the associated reduction of greenhouse gases could also suffer because of the over procurement of natural gas generation. The 2007 IEPR in response to AB 32 has identified reductions in greenhouse gases as one of the states most important goals.

AB 32 marks a significant change in California's energy policies. Before its passage, energy policy makers focused on stabilizing and/or minimizing energy costs, ensuring supply, limiting dependence on imports and fossil fuels, protecting the environment, and benefiting the state's economy. AB 32 upped the ante: California is obligated to meet its previous energy goals, but it must do so while reducing the volume of CO₂ emissions. Slowing global warming requires meeting energy needs with zero- or low-carbon energy sources. IEPR page 1

Because of PG&E's over procurement of natural gas generation it could be beneficial to the public not to build the EEC and rely on the current bulk 230 line to continue to supply the project area. It is possible that the plant will not be

needed for local reliability and it appears that it is certainly not needed for the PG&E service area.

Other factors that the commission has traditionally considered in an override determination are the environmental impacts of the power plant. The evidence in the record demonstrates that impacts from the Eastshore projects ambient air quality impacts are the largest air quality impacts that have been modeled in a CEC proceeding. (Exhibit 800) The project has the potential to violate the State PM 2.5 annual standard, the State PM-10 annual standard and the newly promulgated State NO₂ standard. (Exhibit 200 p. 4.1-23, RT 12-17-07 p. 102,103) This is unprecedented in CEC siting cases and all this will be borne by a minority community that the CEC has just sited another facility in the Russell City Energy Center which is within 3,000 feet of the proposed project. The project has no mitigation for its NO₂ impacts and there is substantial evidence in the record from Dr. Zannetti’s testimony, an air quality expert with over 30 years of modeling experience, that the mitigation provided for particulate matter will not be effective. (RT 12-17-07 145,145) The project has substantial environmental impacts due to the proposed use of reciprocating engines which have much higher emission rates than other technologies commonly used in CEC projects. (Exhibit 800, Birdsall RT 12-17-08 p. 100,101) Compared to the modern gas turbines like the LM-6000 used in the SFERP the reciprocating engines emission rates are much higher as demonstrated from the table from Exhibit 806 below.

Emission Rate of Eastshore Compared to the SFERP

Pollutant	Eastshore Emission Rate ²	SFERP Emission Rate ¹	Ratio
NOx	.019 lb/MMbtu	.009 lb NOx/MMbtu	211%
CO	.030 lb/MMbtu	.0089 lb CO/ MMbtu	337%
VOC	.033 lb/MMbtu	.0025 lb VOC/MMbtu	1,320%
PM-10	33.96 lb/Hr	7.5 pound/ hr	450%
SO ₂	.0032 lb/MMbtu	.0028 SO ₂ /MMbtu	114%

1 http://www.energy.ca.gov/sitingcases/sanfrancisco/documents/applicant/2005-08-30_%20SFPUC_COMMENTS.PDF

2 <http://www.energy.ca.gov/sitingcases/eastshore/documents/applicant/afc/volume01/Section%208.1%20Air%20Quality.pdf>

Prudent and feasible alternatives

Assuming the committee weighs all the relevant factors and makes the determination that the project is needed for the public's "convenience and necessity" the Committee must then determine if there are more prudent and feasible means of achieving the public needs. **It is clear from the record that an alternative site will not meet the project's objectives but is equally clear in the record that the project could be sited at another location, interconnected to another substation and still meet the public's needs and avoid the non-compliance with the City of Hayward's Land Use LORS and the significant impact under CEQA to the Hayward Airports operations. (RT 1-14-08 page 84, line 21-23, page 86 line 22,23)** Accordingly the Commission should not override the project's non-compliance with LORS because there are prudent and feasible means of meeting the public's objectives at an alternative location. (PRC Section 25525)

Conclusion

The committee should not approve the Eastshore Project because of its violations of air quality LORS and its impacts to the minority community. The applicant has not met the burden of proof that the project meets all LORS and avoids significant impacts to the environment. The project is not needed for the public's convenience and necessity and there are more prudent and feasible means to provide this power without interfering with the City of Hayward's and the County of Alameda's land use plans in the project area.

BEFORE THE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT COMMISSION
OF THE STATE OF CALIFORNIA

APPLICATION FOR CERTIFICATION
FOR THE EASTSHORE ENERGY CENTER
IN CITY OF HAYWARD
BY TIERRA ENERGY

Docket No. 06-AFC-6

PROOF OF SERVICE
(Revised 1/18/2008)

INSTRUCTIONS: All parties shall either (1) send an original signed document plus 12 copies or (2) mail one original signed copy AND e-mail the document to the address for the Docket as shown below, AND (3) all parties shall also send a printed or electronic copy of the document, which includes a proof of service declaration to each of the individuals on the proof of service list shown below:

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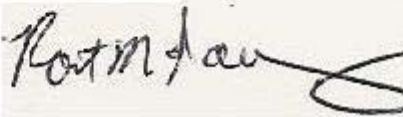
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DECLARATION OF SERVICE

I, Robert Sarvey , declare that on 3-3-08 I transmitted electronic copies of the attached Reply Brief of Robert Sarvey addressed to those identified on the Proof of Service list above consistent with the requirements of the California Code of Regulations, title 20, sections 1209, 1209.5, and 1210. All electronic copies were sent to all those identified on the Proof of Service list above. I declare under penalty of perjury that the foregoing is true and correct.



Robert Sarvey