

Robert Sarvey
501 W. Grantline Rd
Tracy, Ca. 95376
(209) 835-7162

DOCKET	
08-AFC-3	
DATE	APR 24 2010
RECD.	JUN 24 2010

State of California
State Energy Resources Conservation and Development Commission

In the Matter of:)	Docket # 08-AFC-3
)	
Marsh Landing Generating)	Petition for Commission Review of
Station)	the denial of Robert Sarvey's Petition
)	to intervene by the Marsh Landing
_____)	Committee

Background

On May 26, 2010 the Committee for the Marsh Landing Generating Station issued its notice of pre-hearing conference and evidentiary hearing two days before the Memorial Day Weekend. The notice set a deadline for intervention of June 1, 2010 which was five days after the notice was issued and the day after the Memorial Day Holiday. The timing of the notice before a three day weekend and providing five days to respond to the notice was totally inadequate public notice. On June 4, 2010 on a visit to the Commission website I discovered the May 26 notice. On June 4, 2010 I filed my petition to intervene in the project which was five working days after the notice was issued. On June 10 six days after I intervened the CEC Staff filed its Revised Staff Assessment. The notice for the hearing stated that intervenor testimony was due on June 20. I timely filed my testimony and about an hour later received an email from Mr. Kramer apologizing that he

had not notified me that he had denied my petition to intervene, although the other parties to the proceeding had been notified.

Pursuant to California Code of Regulations Title 20 Section 1207 (d) Robert Sarvey petitions the full Commission to overturn the decision of the siting committee and grant my petition to intervene at the June 30, 2010 Commission Business Meeting. The expedited treatment is necessary because the pre-hearing conference and the evidentiary hearing are scheduled for July 1, 2010.

Commission's Public information

As The Public Participation in the Siting Process Practice and Procedure Guide states; "A request to intervene must be filed no later than the pre-hearing conference, which occurs before the first evidentiary hearing."¹ My petition to intervene was filed on June 4, 2010 27 days before the pre hearing conference.

According to the summary of typical involvement in opportunities in Energy Commission Siting cases on the Commissions website the intervenor deadline is during the analysis phase around the time the FSA is issued.² I intervened six days before the Staff filed the Revised Staff Assessment which would be the functional equivalent of a Draft EIR in a normal CEQA proceeding. The Draft EIR is the typical time for the public to become involved in the process in most CEQA proceedings. The reason can be illustrated precisely by Staff's Assessment in this proceeding. In this case one of my major issues is the allowable ammonia slip limit for the Marsh Landing Project. In the

¹ **PUBLIC PARTICIPATION IN THE SITING PROCESS: PRACTICE AND PROCEDURE GUIDE** <http://www.energy.ca.gov/2006publications/CEC-700-2006-002/CEC-700-2006-002.PDF> Page 55

²[http://www.energy.ca.gov/public_adviser/summary_of_typical_public_involvement_opportunities_in_ene
rgy_commission_siting_cases.html](http://www.energy.ca.gov/public_adviser/summary_of_typical_public_involvement_opportunities_in_energy_commission_siting_cases.html)

Staff Assessment issued by the CEC Staff on April 26, 2009 CEC Staff recommended a 5 ppm ammonia slip limit. In the Revised Staff Assessment issued on April 10, 2010 six days after I intervened the CEC staff agreed to a 10 ppm ammonia slip for the project. The CEC Staff's position that a 5 ppm ammonia slip limit was appropriate changed after the deadline for intervention. A member of the public who has an issue with a change from the Staff Assessment to the Revised Staff Assessment is prevented from becoming a party to adjudicate his issue if the deadline for intervention is set before release of the Revised Staff Assessment. That is why it is inappropriate to set a deadline for intervention before the Revised Staff Assessment or as it should be called the Final Staff Assessment is issued.

Commission Precedent

Most importantly the CEC has always valued public participation³ and has allowed intervention up until the pre hearing conference. In the first siting case I was involved in Commissioner Pernell allowed six parties to intervene at the pre hearing conference.⁴ In the last siting case I was involved with the Eastshore Energy Center I intervened at the pre hearing conference. The associate member of the Committee was Commissioner Geesman who stated the Energy Commissions long standing policy:

1 ASSOCIATE MEMBER GEESMAN: But that's
2 apples and oranges in my book, you know. This is
3 the prehearing conference. **In fact, every**
4 proceeding that I have ever been aware of at the
5 Energy Commission, if somebody intervenes by the

³ "Public participation is encouraged at **every stage**, and our process requires substantially more opportunities for public participation and review than does the traditional CEQA process." Commission Decision Page 3 Tracy Peaker Project

⁴ Ena Aguire, Valley Land Company, Chuck Tusso, City of Tracy, Larry Cheng, Dennis Noble
http://www.energy.ca.gov/sitingcases/tracypeaker/documents/2002-01-24_TRANSCRIPT.PDF Page 9

6 prehearing conference we let them in. I don't
7 know what we gain by keeping them out.
8 Commissioner, it is your call but I want
9 to indicate to you, if he appeals this to the full
10 Commission I certainly intend to vote on letting
11 him in.⁵

Petitioner does have a valid interest in the proceeding

The ruling denying my intervention states, “Petitioner's interests are not relevant to the above-captioned proceeding.” This is untrue. As decided in the Tesla Power Plant proceeding where ALJ Kramer was Staff's attorney who advocated the position, 70% of the emissions from a source in the Antioch or Pittsburg area impact the Tracy area, where petitioner lives with his family.⁶ Petitioner filed an identical petition to intervene in the Oakley Proceeding⁷ citing the exact same interests.⁸ The ruling to grant intervention in the Oakley Proceeding states, “Petitioner's stated interest is relevant to the above-captioned proceeding.”⁹

No party is harmed by Petitioner intervention

⁵ http://www.energy.ca.gov/sitingcases/eastshore/documents/2007-11-26_TRANSCRIPT.PDF Page 11

⁶ Commission Decision Tesla Power Project page 148

http://www.energy.ca.gov/sitingcases/tesla/documents/2004-06-22_FINAL.PDF

“Staff relied on analyses prepared by CARB, SJVUAPCD, and Staff's previous review of the East Altamont Energy Center (01-AFC-4). In the East Altamont case, Staff estimated that 70 percent of emissions in the Pittsburg/Antioch area (east of the Carquinez Strait) contribute to ozone and PM₁₀ levels in the northern San Joaquin Valley. (Ex. 51, p. 4.1-39.)”

⁷ Docket # 09-AFC-04 Petition for Intervention Robert Sarvey Item #4 “Petitioner has an interest in the proceeding because the project will impact the Tracy Area where the petitioner and his family live. The CEC Staff, ARB, and the BAAQMD determined in the East Altamont Energy Center Proceeding. 01-AFC-4 that 70% of all emissions emitted in the Contra Costa Area impact Tracy.”

⁸ Compare to Marsh landing Petition Docket # 08-AFRC-3 Petition for Intervention of Robert Sarvey Item # 4 “Petitioner has an interest in the proceeding because the project will impact the Tracy Area where the petitioner and his family live. The CEC Staff, ARB, and the BAAQMD determined in the East Altamont Energy Center Proceeding. 01-AFC-4 that 70% of all emissions emitted in the Contra Costa area impact Tracy.”

⁹ http://www.energy.ca.gov/sitingcases/oakley/notices/2010-05-13_Order_Granteeing_PTI_to_Intervene.pdf

Since my petition to intervene I have met all of the Committees deadlines and filed my testimony by June 21, 2010 pursuant to the Committee's direction. My participation has not slowed the proceeding so no harm to the applicant or Staff has occurred. I am fully prepared to file a timely pre- hearing conference statement and attend the July 1 pre-hearing conference. I am asking for no delays in the schedule.

Further as the record for the proceeding reflects the applicant has already acknowledged my interests in this proceeding and is aware of my issues. On June 4, 2010 the applicant filed a 12 page response to my comments on the Preliminary Determination of Compliance that I filed on April 30, 2010.¹⁰ The applicant is also aware of the issues that I have raised at the CPUC which are the same issues I am raising in this proceeding. As the applicant stated in his opposition to my petition, "Mr. Sarvey provided opening testimony on February 22, 2010, reply testimony on March 10,2010, and briefs on April 14, 2010 and April 22, 2010. He discussed the MLGS in all of these documents, and in several places he cited the September 2009 AFC amendment filed by Mirant Marsh Landing in this proceeding. In his briefs filed at the CPUC, Mr. Sarvey also quoted conditions contained in the Preliminary Determination of Compliance ("PDOC") for the project that was released on March 24, 2010 by the Bay Area Air Quality Management District ("BAAQMD)."¹¹ The applicant's response to my petition to intervene demonstrates that the applicant is aware of the issues I am raising as they have been raised at the CPUC and the Air District where the applicant has participated.

¹⁰ http://www.energy.ca.gov/sitingcases/marshlanding/documents/applicant/2010-06-04_Applicant_Responses_to_Comment_by_Local_Clean_Energy_Alliance_PDOC_TN-56994.pdf Pages 29-40

¹¹ http://www.energy.ca.gov/sitingcases/marshlanding/documents/applicant/2010-06-14_Applicants_Opposition_to_PTII_for_Robert_Sarvey.pdf Page 3

The Staff claims to be aware of my issues and claims to have already responded to my issues in the Revised Staff Assessment. In their opposition to my petition for intervention staff states, “Furthermore, although Mr. Sarvey did not file his comments on the project with the Energy Commission, his comments on the PDOC, as well as the applicant’s responses, were reviewed and addressed as deemed necessary in the Revised Staff Assessment.”¹² As the record reflects both staff and applicant claim to have already responded to my issues so it would be appropriate to adjudicate the issues at the scheduled July 1, 2010 evidentiary hearing or at a subsequent hearing scheduled by the Committee.

There is also a lot of rhetoric from the Staff and the applicant about this case being almost two years old but in fact the project being proposed now was proposed on September 22, 2009 which is less than nine months ago. The rush to judgment appears to be centered on a letter from the applicant’s attorney sent on April 8, 2010 claiming that an immediate decision is necessary to comply with contractual obligations.¹³

The proposed decision in A. 09-09-021 which would provide contract approval for the Marsh Landing Project is being heavily disputed. As the proposed decision states on page 1, it will not appear on the Commission’s agenda sooner than July 8, 2010. The Commission may act then, or it may postpone action until later.”¹⁴ After Commission approval it will be another 30 days before the decision is final. It is almost certain that a re-hearing request will be filed and possibly a lawsuit by PG&E or Radback the

¹² http://www.energy.ca.gov/sitingcases/marshlanding/documents/2010-06-10_staff_opposition_to_petition.pdf Page 2

¹³ <http://www.energy.ca.gov/sitingcases/marshlanding/documents/index.html>

¹⁴ <http://docs.cpuc.ca.gov/efile/PD/118600.pdf>

developer of the Oakley Generating Station. The rush to judgment seems more centered on preventing public involvement at the CEC than meeting development milestones.

Conclusion

Petitioner respectfully requests that the Full Commission overturn ALJ Kramer's decision to deny petitioners intervention at the June 30, 2010 business meeting for the following reasons which demonstrate good cause.

- 1) The Commissions document that provides guidance to the public in Energy Commission Proceedings clearly states, "a request to intervene must be filed no later than the pre-hearing conference, which occurs before the first evidentiary hearing."¹⁵
- 2) The Commission has always allowed intervention at or before the pre- hearing conference.¹⁶
- 3) My interest in the proceeding is relevant and a ruling exists to that effect in the Oakley Project.¹⁷
- 4) Staff and Applicant are fully aware of my issues and claim to already have responded to them so there is no harm to any other parties.
- 5) There is still no Final Determination of Compliance from the BAAQMD.
- 6) It will be several months and possibly years before the Marsh Landing Contract Approval at the CPUC is final due to the controversial decision.

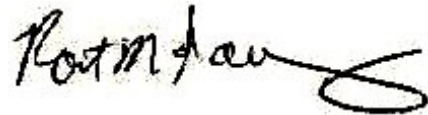
¹⁵ **PUBLIC PARTICIPATION IN THE SITING PROCESS: PRACTICE AND PROCEDURE GUIDE** <http://www.energy.ca.gov/2006publications/CEC-700-2006-002/CEC-700-2006-002.PDF> Page 55

¹⁶ http://www.energy.ca.gov/sitingcases/eastshore/documents/2007-11-26_TRANSCRIPT.PDF Page 11

¹⁷ http://www.energy.ca.gov/sitingcases/oakley/notices/2010-05-13_Order_Granteeing_PTI_to_Intervene.pdf

- 7) I intervened six days before the Revised Staff Assessment was issued and Staff has altered its position on my issues from the original Staff Assessment.
- 8) I filed my testimony on January 21 according to the Committee's schedule and have met all the Committees deadlines since I intervened and I request no delays in the proceeding.
- 9) The notice provided for the deadline on intervention allowed only three business days to intervene which is inadequate public notice.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Robert Sarvey", written in a cursive style. The signature is positioned above a horizontal line.

Robert Sarvey April 24, 2010

DECLARATION OF SERVICE

I, Robert Sarvey, declare that on June 24 , 2010, I served and filed copies of the attached (08-AFC-3) Petition for Commission Review of the denial of Robert Sarvey’s Petition to intervene by the Marsh Landing Committee. The original document, filed with the Docket Unit, is accompanied by a copy of the most recent Proof of Service list, located on the web page for this project at:

[\[http://www.energy.ca.gov/sitingcases/marshlanding/Marshlanding_POS.pdf\]](http://www.energy.ca.gov/sitingcases/marshlanding/Marshlanding_POS.pdf). The document has been sent to the other parties in this proceeding (as shown on the Proof of Service list) and to the Commission’s Docket Unit, in the following manner:

(Check all that Apply)

For service to all other parties:

sent electronically to all email addresses on the Proof of Service list;
 by personal delivery or by depositing in the United States mail at Sacramento, California with first-class postage thereon fully prepaid and addressed as provided on the Proof of Service list above to those addresses **NOT** marked “email preferred.”

AND

For filing with the Energy Commission:

sending an original paper copy and one electronic copy, mailed and emailed respectively, to the address below (preferred method);

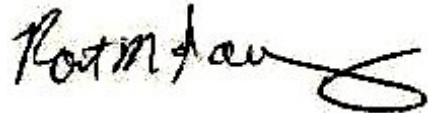
OR

depositing in the mail an original and 12 paper copies, as follows:

CALIFORNIA ENERGY COMMISSION

Attn: Docket No. 09-AFC-4
1516 Ninth Street, MS-4
Sacramento, CA 95814-5512
docket@energy.state.ca.us

I declare under penalty of perjury that the foregoing is true and correct



Robert Sarvey