

DOCKET

09-AFC-3

DATE MAY 05 2011
RECD. MAY 05 2011

STATE OF CALIFORNIA
Energy Resources Conservation
and Development Commission

Application for Certification for the)
Mariposa Energy Project)
)
_____)

Docket No. 09-AFC-3

Applicant's Response to Comments Submitted

On

The Presiding Member's Proposed Decision

May 5, 2011

ELLISON, SCHNEIDER & HARRIS L.L.P.
Greggory L. Wheatland
Jeffery D. Harris
Samantha G. Pottenger
2600 Capitol Avenue, Suite 400
Sacramento, California 95816
Telephone: (916) 447-2166
Facsimile: (916) 447-3512

Attorneys for Mariposa Energy Project

INTRODUCTION

In the interest of a full record, Mariposa Energy Project, LLC (“Applicant”) submits the following comments in response to the comments of Intervenors on the Presiding Member’s Proposed Decision (“PMPD”) that were filed on April 28, 2011. Many of the Intervenors’ comments do not assert errors of fact or law in the PMPD, but simply repeat arguments that were raised in their briefs. Where these Intervenors do allege errors of fact or law, they often fail to acknowledge that these allegations are addressed and rejected in the PMPD. In a few instances, however, Intervenor comments do allege errors of fact or law that may not be addressed in the PMPD. We respond to these allegations below.

DISCUSSION

I. The MEP Proceeding Has Been Conducted in Full Compliance With the Warren-Alquist Act.

In his comments on the PMPD, Intervenor Robert Sarvey opines, for the first time in this proceeding, that “the entire proceeding has not been conducted in compliance with the Warren Alquist Act.”¹ As discussed below, this novel opinion is without merit.

A. The Commission properly formed the MEP Committee pursuant to the Public Resources Code.

Mr. Sarvey asserts that “the composition of the Committee with only one Commissioner itself, fails to satisfy the requirements of the California Public Resources Code section 25211, and faults the Committee for being “comprised of only one Commissioner throughout the evidentiary hearing phase.”² However, Mr. Sarvey’s assertion mistakenly conflates the statute regarding formation of a committee and the regulations regarding the conduct of business by a committee on behalf of the Commission.

Public Resources Code section 25211 provides that the Commission “*may* appoint a committee of not less than two members of the commission to carry on investigations, inquiries, or hearings which the commission has power to undertake or to hold.”³ There is no requirement under either the Public Resources Code or the Commission’s regulations that a committee, once

¹ Robert Sarvey’s PMPD Comments, p. 1, 09-AFC-3 (filed April 28, 2011) (“Sarvey PMPD Comments”).

² Sarvey PMPD Comments, pp. 1-2.

³ Pub. Resources Code § 25211.

formed, maintain a specific number of commissioners. In fact, the Commission's regulations provide that a "quorum" of a committee is one member, and this member is entitled to conduct proceedings in accordance with the Public Resources Code and Commission's regulations.⁴ In this proceeding, the MEP Committee was properly formed with the appointment of not less than two Commissioners pursuant to the Public Resources Code, and thereafter, the Committee has properly conducted business with a quorum of at least one member pursuant to regulation.⁵ Thus, there is no violation of the Warren-Alquist Act.

B. The PMPD was properly prepared and signed.

Mr. Sarvey also contends that "a violation" of Public Resources Code section 25211 occurred "as the PMPD is signed [sic] by only one Commissioner."⁶ It should be noted that neither Public Resources Code section 25211 nor the Commission's regulations require more than one signature on the proposed decision of a presiding member. Commission regulations require only that the proposed decision be prepared by the presiding member.⁷ The Commission's regulations also allow any one Commissioner to propose an "alternative decision," thus providing further evidence that a proposed decision offered by a single Commissioner is permissible.⁸ In this case, the PMPD was prepared by Commissioner Douglas, the presiding member. Thus, Mr. Sarvey is incorrect in alleging that the PMPD violates the Warren-Alquist Act.

C. No ex parte communication occurred at the March 7, 2011 evidentiary hearing.

Mr. Sarvey alleges that an ex parte communication occurred during the March 7, 2011 evidentiary hearing.⁹ As explained in Applicant's *Opposition to the Petition for Reconsideration by Intervenor Rob Simpson*, there is no evidence that an ex parte communication took place¹⁰, let alone a "blatant ex-parte communication" as alleged by Mr. Sarvey.¹¹

⁴ 20 C.C.R. § 1204(a),(b); 20 C.C.R. § 1702.

⁵ http://www.energy.ca.gov/business_meetings/2009_agendas/agenda_2009-08-26.html ; http://www.energy.ca.gov/business_meetings/2009_minutes/2009-08-26_MINUTES.PDF .

⁶ Sarvey PMPD Comments, p. 2

⁷ 20 C.C.R. §§ 1726, 1749.

⁸ 20 C.C.R. § 1727(c).

⁹ Sarvey PMPD Comments, p. 2.

¹⁰ Applicant's *Opposition to the Petition for Reconsideration by Rob Simpson*, 09-AFC-03, pp. 5-9 (April 15, 2011).

¹¹ Sarvey PMPD Comments, p. 2.

D. All parties, including Intervenors, were provided ample opportunity to submit direct testimony.

Mr. Sarvey also alleges that “the Committee allowed direct testimony by the Staff and applicants[sic] witnesses but did not allow any of the Intervnors[sic] witnesses to provide direct testimony.”¹² In fact, the Committee provided all parties, including Mr. Sarvey, ample opportunity to submit direct written testimony and this testimony was received in evidence.¹³ Furthermore, the Committee permitted Mr. Sarvey’s own witness, Dick Schneider, to provide additional direct oral testimony at the evidentiary hearings on February 24, 2011, despite the fact that such direct testimony was not pre-filed pursuant to the Committee’s Order.¹⁴ Mr. Sarvey’s assertions are clearly wrong. The MEP evidentiary hearings were properly conducted, and there has been no violation of the Warren-Alquist Act.

II. The PMPD Properly Concludes That MEP Complies With All Applicable Laws, Ordinances, Regulations, and Standards.

A. The Commission has complied with state and federal environmental justice LORS.

Mr. Sarvey asserts that the PMPD “does not comply with State and Federal LORS for the conduct of an environmental justice analysis”, and alleges that “a proper environmental justice analysis” utilizing the policies established by the State Lands Commission “has not been conducted.”¹⁵ This assertion is not supported by the evidentiary record.

As established in the evidentiary record and as explained in Applicant’s Opening Brief, federal guidance from the EPA provides a three-step screening process to conduct an environmental justice analysis to ensure that there are no disproportionately high and adverse human health or environmental effects on minority populations and low-income populations. The first step is to conduct a screening-level analysis to determine whether there is a minority or

¹² Sarvey PMPD Comments, p. 1.

¹³ For example, *see* Exs. 400, 600, and 1000.

¹⁴ 2/24 RT 327-329; Order Granting Intervenors CalPilots and Rajesh Dighe’s Petition for Minor Modifications to Project Schedule, 09-AFC-03 (Dec. 23, 2010).

¹⁵ Sarvey PMPD Comments, pp. 10-12.

low income population (more than 50%) in the affected area.¹⁶ Mr. Sarvey focuses the entirety of his criticism on the first step of the analysis, alleging that “Staff and applicant never identified a minority population and never examined the pockets of minorities and the impacts of the MEPO [sic] on those areas.”¹⁷ Mr. Sarvey’s assertion is not supported by the evidentiary record, as the screening-level analysis conducted by Applicant indicated the presence of minority populations in 15 out of 112 census blocks.¹⁸ Mr. Sarvey ignores that the PMPD expressly concluded “there is enough evidence in the record to suggest that Mountain House may be close to having a 50 percent minority population”, and assumed for the purposes of the environmental justice analysis that the Mountain House Community Services District (“MHCS D”) is a minority population.¹⁹

The second step examines whether a project would result in high and adverse human health or environmental impacts.²⁰ If high and adverse human health or environmental impacts are identified, the third step examines the spatial distribution of these impacts to determine whether those impacts disproportionately affect a minority or low-income population.²¹ In this case, the PMPD concluded that there are no environmental justice concerns because there are no significant adverse environmental impacts from MEP, therefore there are no disproportionate impacts on any minority populations, including MHCS D.²² By following the three-step analysis set forth by the EPA, the PMPD has properly conducted its environmental justice analysis.

B. The intent of the environmental justice policies set forth by the State Lands Commission have been satisfied throughout the course of the MEP proceedings.

Mr. Sarvey asserts that the environmental justice policy of the State Lands Commission “represents what the State of California considers a proper environmental justice analysis for its departments.”²³ The environmental justice policy of the State Lands Commission is applicable only to staff under the purview of the State Lands Commission and is not the policy of the “State

¹⁶ 3/7 RT, p. 32; also see Text of Executive Order With Proposed Guidance, p. 25. A “minority” is defined as a member of the following population groups: American Indian or Alaskan Native; Asian or Pacific Islander; Black, not of Hispanic origin; or Hispanic.

¹⁷ Sarvey PMPD Comments, pp. 11-12.

¹⁸ Ex. 1, Appendix 5.10-A; Ex. 4, 3/7 RT, p. 33. There were no indications of a low-income population in the six-mile radius around the Project. 3/7 RT, p. 33.

¹⁹ PMPD, p. 11.

²⁰ 3/7 RT, p. 33.

²¹ 3/7 RT, p. 33.

²² 3/7 RT 33; Ex. 1, Ex. 4; Ex. 301.

²³ Sarvey PMPD Comments, p. 10.

of California.” While these policies can be instructive, they are not binding on the California Energy Commission.

Nevertheless, even assuming for the sake of argument that the State Lands Commission policies were applicable to the California Energy Commission, it is clear that the Energy Commission has satisfied both the spirit and the letter of these conditions. For example, a State Lands Commission policy directs its divisions to “Identify[]relevant populations that might be adversely affected by Commission programs or by projects submitted by outside parties for its consideration.”²⁴ The MHCS D was identified at the outset of this proceeding by both Staff and Applicant as a “relevant population”. The potential impacts on MHCS D are expressly identified in the Application for Certification, Staff Assessment, and Supplemental Staff Assessment. Most importantly, regardless of the demographic nature of the community, Applicant and Staff found no adverse impacts from MEP on MHCS D.

Another State Lands Commission policy directs its Staff to seek out “community groups and leaders to encourage communication and collaboration.”²⁵ The primary community group and leader in MHCS D is the MHCS D Board of Directors. Both the Applicant and the Energy Commission ensured that MHCS D received actual and timely notice of this proceeding and requested comments from MHCS D on MEP’s Application for Certification. At the Informational Site Visit, the Presiding Member of the Committee expressly invited MHCS D to contact the Staff.²⁶ Community leaders, such as Mr. Lamb and Mr. Singh, two directors of the MHCS D Board, have actively participated in this proceeding, along with Mr. Dighe, an active member of the MHCS D community. Their participation confirms that the Energy Commission has successfully sought out and obtained the participation of community leaders.

C. MEP, as an electrical facility, is a compatible use under the Williamson Act.

Mr. Sarvey asserts that the Committee must “override the County’s Agricultural Preserves Objectives, Uniform Rules and Procedure Section”, based on his opinion that the Uniform Rules only permit electrical facilities “accessory to other permitted uses”²⁷ as a compatible use. However, Mr. Sarvey ignores the fact that Government Code section 51201(e)

²⁴ http://www.slc.ca.gov/policy_statements/Env_Justice/Environmental%20Justice%20Policy%20Final%20Web.pdf

²⁵ http://www.slc.ca.gov/policy_statements/Env_Justice/Environmental%20Justice%20Policy%20Final%20Web.pdf

²⁶ 10/01/09 RT 101-102.

²⁷ Sarvey PMPD Comments, p. 4.

provides that compatible uses are defined in either local rules or by the Williamson Act itself. In this case, the Williamson Act expressly recognizes electric facilities as a compatible use, and the evidentiary record establishes that Alameda County has never made a finding to the contrary.²⁸ Additionally, the Uniform Rules cited by Mr. Sarvey expressly recognize that compatible uses are defined by both the Williamson Act and the Alameda County Rules itself.²⁹

D. Alameda County Fire Code Section 503.1.2.1 applies to residential developments, not infrastructure such as MEP.

Mr. Sarvey criticizes the PMPD for “ignor[ing] MEP’s noncompliance” with Alameda County’s Standards for Subdivision and Site Development Review for Agricultural Parcels,³⁰ as Mr. Sarvey alleges that the length of MEP’s access road would violate Alameda County Fire Code Chapter 5 Section 503.1.2.1.³¹ However, MEP does not involve a subdivision. Therefore, Alameda County’s subdivision standards are not applicable to this project. Additionally, Mr. Sarvey mischaracterizes the applicability of Alameda County Fire Code Section 503.1.2.1 to MEP. The plain language of Section 503.1.2.1 clearly states that the section applies to residential developments, not infrastructure such as MEP. Therefore, as neither the subdivision standards nor Fire Code section 503.1.2.1 are applicable to MEP, the length of the access road is not in conflict with County applicable LORS.

E. ECAP Policy 246 does not require a particular emergency response time for MEP.

Mr. Sarvey also asserts that MEP violates ECAP Policy 246, claiming that “The MEP as a heavy industrial use should have a response time of 15 minutes from Alameda County to comply with Policy 246.”³² There are two problems with this statement. First, MEP is not a heavy industrial use. The Alameda County Code defines “industrial” as “development for the purpose of manufacture or fabrication of products, the processing of materials, the warehousing of merchandise for sale or distribution, research and development of industrial products and

²⁸ Gov. Code § 51238; 2/24 RT 151.

²⁹ Alameda County Agricultural Preserves, Objectives, Uniform Rules and Procedures, II(C)(3)(h). http://www.acgov.org/cda/planning/landuseprojects/documents/Uniform_Rules-AgPres.pdf.

³⁰ Sarvey PMPD Comments, p. 4.

³¹ Sarvey PMPD Comments, p. 5.

³² Sarvey PMPD Comments, p. 5.

processes, and the wholesaling of merchandise.”³³ The generation of electricity necessary to provide a utility service for the public does not constitute the type of development contemplated by the ordinance, nor are public facilities or infrastructure such as MEP included within this definition. Second, Mr. Sarvey misrepresents the purpose of Policy 246. Policy 246 does not require a particular response time for any type of development. Rather, Policy 246 provides that Alameda County will “limit development to very low densities in areas where... response times will average more than 15 minutes.”³⁴ As MEP is located in an area of very low density and will not increase population densities in that area, there is no inconsistency with this policy.

F. The definitions of “public facility” set forth in the Coastal Zone Management Act and the United States Code are irrelevant to this proceeding.

Mr. Sarvey also asserts that the PMPD incorrectly concludes that MEP is a public facility.³⁵ As support, Mr. Sarvey cites to the Coastal Zone Management Act (“CZMA”) and the “Disaster Relief” Chapter of Title 42 of the U.S. Code relating to Public Health and Welfare (“U.S.C.”) definitions of “public facility.”³⁶ However, Mr. Sarvey fails to recognize that the definitions of “public facility” under the CZMA and U.S.C. is irrelevant to how the term “public facility” is defined in the ECAP.

The ECAP has defined “public facility” as including “limited infrastructure, hospitals, research facilities, landfill sites, jails, etc.”³⁷ This definition does not have limitation on whether there must be government ownership of those facilities to constitute a public facility for the purposes of ECAP. Thus, whether or not MEP meets the definition of a public facility under the CZMA or U.S.C. is not relevant to this proceeding; the key issue is whether it meets the ECAP’s definition of a public facility, which it does.

Furthermore, MEP is not in the Coastal Zone, as defined by the CZMA. Thus the CZMA is wholly inapplicable to MEP. Similarly, provisions of law related to federal disaster relief are

³³ Alameda County Ordinance, Title 15, Chapter 15.48, Section 15.48.020. While this definition of “industrial” is not contained within the ECAP, this language provides guidance as to how to interpret the ECAP, as the Zoning Ordinance implements the General Plan. Alameda County Zoning Code § 17.02.020.

³⁴ ECAP 246.

³⁵ Sarvey PMPD Comments, pp. 6-7.

³⁶ Sarvey PMPD Comments, pp. 6-7.

³⁷ ECAP Policy 54.

equally inapplicable in a powerplant siting case before the Commission. Therefore, the PMPD did not err in concluding that MEP constitutes a public facility as defined by the ECAP.

G. There is substantial evidence in the record that MEP meets a public need.

Mr. Sarvey argues that “The PMPD fails to address the key finding for a conditional use permit is that the MEP must be a public need...Unchallenged testimony in the record demonstrates that the MEP is not needed for the public.”³⁸ Mr. Sarvey’s assertion that testimony “demonstrate[ing] that the MEP is not needed for the public” was “unchallenged” is incorrect. Applicant has put forth substantial evidence that MEP is needed, as Eastern Alameda County has insufficient local generation to meet load demands,³⁹ and that MEP is necessary to support the integration of renewable resources to the grid, and provide support for intermittent resources to ensure that load needs are met, especially during critical times such as when the intermittent resource is not generating or during peak load conditions.⁴⁰ Moreover, the CPUC’s decision approving the MEP power purchase agreement with Pacific Gas and Electric is prima facie evidence that MEP is required for the public need.⁴¹

H. MEP will not cause significant impacts to aviation safety.

Mr. Sarvey claims that if a NOTAM as required by TRANS-8 is not issued, there will be significant impacts to aviation.⁴² However, as set forth in TRANS-8, the NOTAM is not the sole “mitigation” provided. Even if a NOTAM is not required by the jurisdictional agency – the FAA -- there will not be significant impacts to aviation safety. It is important to note that the FAA has determined that MEP will pose “no hazard” to aviation and recommended, but did not require, that the Byron Airport authority provide the MEP location and avoidance information in the listing for Byron Airport contained in the Airport/Facility Directory.⁴³ Thus, Mr. Sarvey is

³⁸ Sarvey PMPD Comments, pp. 7-9.

³⁹ Ex. 1, Appendix 5.6A, p. 1.

⁴⁰ Ex. 1, Appendix 5.6A, p. 9; Ex. 301, p. 4.1-72, 77, 82.

⁴¹ See CPUC Decision 09-10-17 (issued Oct. 16, 2009), Finding of Fact 5 (The 184 MWs represented by the Mariposa PPA reasonably contributes toward the range of need previously authorized in D.07-12-052) and Conclusion of Law 11 (Approval of the PPA is consistent with the Commission’s goals in terms of PG&E’s supply portfolio and assisting PG&E in dispatchability and management of its renewable resources).

⁴² Sarvey PMPD Comments, p. 9.

⁴³ Ex. 7, Attachment DR51-1; Ex. 73.

incorrect in stating that there will be a significant impact to aviation safety if a NOTAM is not issued.

Dated: May 5, 2011

ELLISON, SCHNEIDER & HARRIS L.L.P.

By _____

Greggory L. Wheatland

Jeffery D. Harris

Samantha G. Pottenger

2600 Capitol Avenue, Suite 400

Sacramento, California 95816

Telephone: (916) 447-2166

Facsimile: (916) 447-3512

Attorneys for Mariposa Energy Project

STATE OF CALIFORNIA
Energy Resources Conservation
and Development Commission

Application for Certification for the)
Mariposa Energy Project) Docket No. 09-AFC-03
)
)
_____)

PROOF OF SERVICE

I, Karen A. Mitchell, declare that on May 5, 2011, I served the attached
Applicant's Response to Comments Submitted on the Presiding Member's Proposed
Decision via electronic mail and U.S. Mail to all parties on the attached service list.

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

Karen A. Mitchell

SERVICE LIST

09-AFC-3

APPLICANT

Bo Buchynsky
Diamond Generating Corporation
333 South Grand Avenue, #1570
Los Angeles, California 90071
b.buchynsky@dgc-us.com

APPLICANT'S CONSULTANTS

Doug Urry
2485 Natomas Park Dr #600
Sacramento, CA 95833-2975
Doug.Urry@CH2M.com

COUNSEL FOR APPLICANT

Gregg Wheatland
Ellison, Schneider, and Harris
2600 Capitol Ave., Suite 400
Sacramento, CA 95816-5905
glw@eslawfirm.com

INTERESTED AGENCIES

California ISO
E-mail Service Preferred
e-recipient@caiso.com

INTERVENORS

Mr. Robert Sarvey
501 W. Grantline Road
Tracy, California 95376
Sarveybob@aol.com

Edward A. Mainland
Sierra Club California
1017 Bel Marin Keys Blvd.
Novato, CA 94949
emainland@comcast.net

Rob Simpson
27126 Grandview Avenue
Hayward CA. 94542
Rob@redwoodrob.com

California Pilots Association
c/o Andy Wilson
31438 Greenbrier Lane
Hayward, CA 94544
andy_psi@sbcglobal.net

Rajesh Dighe
395 W. Conejo Avenue
Mountain House, California 95391
dighe.rajesh@gmail.com

Morgan K. Groover
Development Director
Mountain House Community
Services District
230 S. Sterling Drive, Suite 100
Mountain House, CA 95391
mgroover@sjgov.org

Mr. Jass Singh
291 N. Altadena Street
Mountain House, California 95391
jass.singh2000@gmail.com

ENERGY COMMISSION

Karen Douglas
Commissioner and Presiding Member
KLDougla@energy.state.ca.us

Kenneth Celli
Hearing Officer
kcelli@energy.state.ca.us

Galen Lemei
Advisor to Commissioner Douglas
E-Mail Service Preferred
glemei@energy.state.ca.us

Craig Hoffman
Siting Project Manager
choffman@energy.state.ca.us

Kerry Willis
Staff Counsel
kwillis@energy.state.ca.us

Jennifer Jennings
Public Adviser
E-mail Service Preferred
publicadviser@energy.state.ca.us