

DOCKET	
09-AFC-4	
DATE	<u>JUN 20 2011</u>
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June 20, 2011

California Energy Commission
Docket Unit
1516 Ninth Street
Sacramento, CA 95814-5512

Subject: **CCGS, LLC'S OPPOSITION TO INTERVENOR SARVEY'S PETITION
FOR RECONSIDERATION
OAKLEY GENERATING STATION
DOCKET NO. (09-AFC-4)**

Enclosed for filing with the California Energy Commission is the original of **CCGS,
LLC'S OPPOSITION TO INTERVENOR SARVEY'S PETITION FOR
RECONSIDERATION**, for the Oakley Generating Station (09-AFC-4).

Sincerely,



Marie Mills

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STATE OF CALIFORNIA

Energy Resources
Conservation and Development Commission

In the Matter of:

Application for Certification for the
OAKLEY GENERATING STATION

DOCKET NO: 09-AFC-4

**CCGS, LLC'S OPPOSITION TO
INTERVENOR SARVEY'S PETITION
FOR RECONSIDERATION**

INTRODUCTION

Contra Costa Generating Station LLC (CCGS LLC), a wholly owned subsidiary of Radback Energy Inc., hereby files its Opposition to the Petition For Reconsideration (Petition) filed by Intervenor Robert Sarvey (Sarvey) on June 17, 2011 for the Oakley Generating Station (OGS). The Commission should deny Sarvey's Petition for the following reasons:

- The Petition fails to meet the minimum requirements of Title 20, Section 1720; and
- The Petition alleges facts that are inaccurate or irrelevant to the Commission Decision

PETITION FAILS TO MEET MINIMUM THRESHOLDS

Section 1720 of the Commission Regulations¹ states:

A petition for reconsideration must specifically set forth either: 1) new evidence that despite the diligence of the moving party could not have been produced during evidentiary hearings on the case; or 2) an error in

¹ "Commission Regulations" means Title 20 of the California Code of Regulations

fact or change in law. The petition must fully explain why the matters set forth could not have been considered during the evidentiary hearings; and their effects upon a substantive element of the decision.

The Petition fails to present new evidence, any error in fact, or any change or error of law. Further, the Petition fails to explain why the matters alleged could not have been considered during evidentiary hearings. In fact, not only did Sarvey have every opportunity to raise the precise issues contained in the Petition during evidentiary hearings and briefing, he actually did so. Once again, Sarvey's Petition alleges not that he was not given a full and fair opportunity to be heard, but that he disagrees with the Commission's factually based Decision disagreeing with his contentions. Disagreement is not a basis for such a Petition and the Commission should summarily dismiss it.

Nitrogen Deposition

The Petition claims that a letter from the California Department of Fish and Game's (CDFG) letter of February 11, 2011 raises new issues that were not adjudicated. Sarvey claims that the fact that the letter was posted to the CEC website after evidentiary hearings somehow prevented him from presenting evidence that the OGS affected the Lange's metalmark butterfly. Contrary to this assertion, Sarvey did present evidence in the form of expert testimony about the impacts to the Lange's metalmark butterfly. Sarvey's witness Dr. Stuart Weiss written testimony was accepted into the evidentiary record.² Sarvey contends, however, that Dr. Weiss was denied an opportunity to provide testimony because the CDFG letter was not available until after the close of evidentiary hearings and that specifically, the CDFG letter addresses private lands other than the Antioch Dunes National Wildlife Refuge (ADWR). The Petition fails to demonstrate, that if in fact private lands are affected as the Petition alleges, why Dr. Weiss failed to address those impacts in his testimony. According to his testimony, Dr. Weiss has been working on nitrogen deposition impacts to federally listed endangered butterflies since 1999. Dr. Weiss's testimony addresses only the ADWR and he and Sarvey were given a full and fair opportunity during the two years of processing the OGS AFC to raise the issue of impacts to private lands. They failed to do so.

Even if private lands did contain the Lange's metalmark butterfly (and there is no evidence that they do) the mitigation would be the same as the impacts identified are to the ADWR due to its close proximity to site and the fact that it is a conservation area. Even the United States Fish and Wildlife Service (USFWS) focused its comments and arguments solely to impacts to the ADWR. Lastly, the Decision addresses the exact argument concerning private lands raised by Sarvey in his comments on the Presiding Member's Proposed Decision (PMPD) and again in this Petition. Specifically, Page 22 of the Biological Resources Section of the Decision states:

² Exhibit 402

Finally, CDFG contends that the proposed mitigation “does not take into account loss or degradation of habitat on private lands” attributable to nitrogen deposition, which might affect “local species.” However, the evidence of record identifies only three species, all of which are located at the Antioch Dunes NWR that might be affected by project-related nitrogen deposition. We are satisfied that the evidence contains a thorough analysis of project related nitrogen deposition impacts.

The Petition also inaccurately claims that the Commission “unlawfully substituted its judgment for that of the USFWS”. The Commission has made its findings that disagree with certain individuals at the USFWS regarding whether the nitrogen emissions from the OGS would result in a “take” of the species. USFWS contentions were considered fully by the Commission.³ The issues were thoroughly briefed and the Commission’s findings are correct. However, no finding by the Commission precludes the USFWS from acting under its federal authority as claimed by Sarvey. In fact, the Commission included Condition of Certification **BIO-23** to ensure that if the a USFWS permit was issued for the OGS, the permit conditions shall be incorporated into the Commission’s Biological Resources Mitigation Implementation and Monitoring Plan (BRMIMP) pursuant to Condition of Certification **BIO-6**.⁴ Again, Sarvey provides nothing new in this regard and instead reiterates his earlier arguments in his Petition.

Simply put, Sarvey’s Petition does not add any new fact that was not or could not be raised during the proceedings to support any of his claims. He does not cite any change in law. He simply does not like the Commission’s consideration and subsequent rejection of his arguments.

Environmental Justice

Sarvey’s Petition raises no new facts or change in law. The environmental justice arguments contained in his Petition are exactly the same as those contained in his testimony and briefs. The Commission considered the arguments and correctly rejected them.

Intervenor Sarvey’s testimony and post-hearing brief essentially argue that Staff’s environmental justice analysis is deficient because it does not rely on the recently released (March 2010) 2010 U.S. Census data and instead relies on the US Census data available when the AFC was filed and the evaluation was performed. Sarvey submitted no evidence or legal authority establishing that the 2000 census data is unreliable or that the minority population with the six-mile radius now exceeds 50 percent. Nor does Sarvey present any persuasive evidence regarding whether the project might result in a significant adverse impact on a low-income or minority population. ***As discussed throughout this Decision and as***

³ Page 19, Biological Resources Section of the Final Decision

⁴ Page 50, Biological Resources Section of the Final Decision

supported by the evidence of record, we conclude that the OGS Project will not cause a significant impact on anyone, including an environmental justice population. (See also Ex. 401). ***(Emphasis added)***

Sarvey's contentions relating to environmental justice were thoroughly considered and because they were meritless, were rejected. The Commission should deny the Petition.

CONCLUSION

CCGS LLC respectfully requests that the Commission affirmatively deny Sarvey's Petition on its Business Meeting on June 30, 2011 on the grounds that it does not meet the minimum standards under Title 20, Section 1720. It is unfortunate and a waste of the Commission's time and resources that an Intervenor is allowed to "take another bite at the apple" contrary to the express requirements for filing a Petition. We support the Commission's swift denial and urge the Commission to include in the record a warning that frivolous Petitions in the future may be rewarded with sanctions.

Dated: June 20, 2011

Respectfully Submitted,



Scott A. Galati
Counsel to Contra Costa Generation Station LLC



**BEFORE THE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT
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**APPLICATION FOR CERTIFICATION
FOR THE *OAKLEY GENERATING STATION***

**Docket No. 09-AFC-4
PROOF OF SERVICE**

(Revised 4/5/2011)

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*indicates change

DECLARATION OF SERVICE

I, Marie Mills, declare that on June 20, 2011, I served and filed copies of the attached **CCGS, LLC'S OPPOSITION TO INTERVENOR SARVEY'S PETITION FOR RECONSIDERATION**, dated June 20, 2011. 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:

[\[http://www.energy.ca.gov/sitingcases/contracosta/index.html\]](http://www.energy.ca.gov/sitingcases/contracosta/index.html). The documents have been sent to both 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;
- by delivering on this date, for mailing with the United States Postal Service with first-class postage thereon fully prepaid, to the name and address of the person served, for mailing that same day in the ordinary course of business; that the envelope was sealed and placed for collection and mailing on that date 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
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I declare under penalty of perjury that the foregoing is true and correct, that I am employed in the county where this mailing occurred, and that I am over the age of 18 years and not a party to the proceeding.



Marie Mills