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STATE OF CALIFORNIA

Energy Resources Conservation
and Development Commission

Application for Certification for the)
MARIPOSA ENERGY PROJECT)
_____)

Docket No. 09-AFC-03

**OPPOSITION TO
THE PETITIONS FOR RECONSIDERATION
By
INTERVENOR ROB SIMPSON
And
INTERVENOR ROBERT SARVEY**

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INTRODUCTION

Pursuant to the Commission's June 24, 2011 *Notice and Order Re: Petitions for Reconsideration*, Mariposa Energy Project, LLC ("Applicant"), the owner of the Mariposa Energy Project ("MEP"), hereby files this *Opposition to the Petitions for Reconsideration by Intervenor Rob Simpson and Intervenor Robert Sarvey* (this "Opposition").

Section 1720(a) of the Commission's Rules of Practice and Procedure (the "Commission's Rules")¹ requires that a petition for reconsideration 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 fact or error of law in the final decision by the Commission. In addition, a petition for reconsideration "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."² The petitions for reconsideration filed by Intervenor Rob Simpson and Robert Sarvey fail to make the required showing. For this reason, the Commission should deny the petitions for reconsideration filed by Mr. Simpson and Mr. Sarvey.

DISCUSSION

I. The Commission should deny the petition for reconsideration submitted by Rob Simpson as he has failed to set forth any new evidence or error in fact or of law requiring reconsideration of the Final Decision.

A. The Commission properly denied Mr. Simpson's petition for reconsideration of the Committee's ruling denying Mr. Simpson's motion to subpoena PG&E.

On March 7, 2011, during the final evening of evidentiary hearings for MEP, Mr. Simpson made an oral motion requesting that the Committee issue a subpoena requiring a PG&E representative to testify

¹ 20 C.C.R. § 1716.5. The Commission's Rules of Practice and Procedure Relating to Power Plant Site Certification are set forth in Title 20, Division 2 of the California Code of Regulations.

² Section 1720(a) reads, in part: "Within 30 days after a decision or order is final, the Commission may on its own motion order, or any party may petition for, reconsideration thereof. 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 fact or change or error of 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...."

regarding the condition of Line-002, a portion of the PG&E intrastate pipeline system that extends downstream from the interconnection to the MEP.³ The Committee did not grant the motion at the evidentiary hearing, and took the matter under submission.⁴ On March 28, 2011, Commissioner Douglas issued a written order (“Committee Order”) setting forth the ruling of the Committee denying Mr. Simpson’s motion to subpoena PG&E.⁵ Eleven days later, on April 8, 2011, Mr. Simpson submitted a petition to the Commission requesting reconsideration of the Committee Order (“April 8th Petition”).⁶ In his petition, Mr. Simpson alleged that Hearing Officer Celli had engaged in a prohibited ex parte communication at the March 7, 2011 evidentiary hearing, and requested reconsideration of the Committee Order denying Mr. Simpson’s motion to subpoena PG&E.⁷ The Commission chose to deny the petition by expiration of time, and Mr. Simpson’s April 8th Petition was deemed denied on May 9, 2011.⁸

On May 18, 2011, the Application for Certification for MEP was approved by the Commission.⁹ On June 17, 2011, Mr. Simpson filed a petition for reconsideration (“June 17th Petition”) of the Commission’s final decision approving MEP (“Final Decision”) asserting that the Commission had failed to act on his April 8th Petition, requesting that the Commission subpoena PG&E, and alleging that both

³ 3/7 RT 337. As described in MEP’s *Opposition to the Petition for Reconsideration by Intervenor Rob Simpson*, Mr. Simpson did not submit any testimony or sponsor any witnesses on this subject, and did not identify PG&E as a potential witness at any other point in this proceeding. *Applicant’s Opposition to the Petition for Reconsideration by Intervenor Rob Simpson*, 09-AFC-3, pp. 2-3 (April 15, 2011)(hereinafter “Opposition”), available at http://www.energy.ca.gov/sitingcases/mariposa/documents/applicant/2011-04-15_Applicant_Opposition_to_Petition_for_Reconsideration_by_Intervenor_Rob_Simpson_TN-60270.pdf.

⁴ 3/7 RT 340:15-19.

⁵ *Committee Ruling on Motion to Subpoena PG&E*, 09-AFC-03 (March 28, 2011), available at http://www.energy.ca.gov/sitingcases/mariposa/notices/2011-03-29_Ruling_on_Motion_to_Subpoena_PGE.pdf.

⁶ *Petition for Reconsideration of Energy Commission’s Committee Order*, 09-AFC-3 (filed and served on April 8, 2011). It should be noted that Mr. Simpson’s Petition and Proof of Service incorrectly identify April 7, 2011 as the date of service. Additionally, because this petition is unpaginated, all citations to this document refers to the pdf page number (hereinafter “Simpson April 8th Petition”).

⁷ Simpson April 8th Petition, pp. 1-9, passim.

⁸ 5/18 RT 167:2-8; also see 20 C.C.R. §1215(c) (Providing that unless the Commission acts upon a petition to review an order of the committee within thirty days after the filing of the petition, the petition is deemed denied).

⁹ Commission Decision Approving the Application for Certification of the Mariposa Energy Project, CEC 800-2011-001-CMF, 09-AFC-3 (May 2011) (hereinafter “MEP Final Decision”); Commission Adoption Order, Order No. 11-0518-16, 09-AFC-3 (May 18, 2011). These document are available online at <http://www.energy.ca.gov/2011publications/CEC-800-2011-001/CEC-800-2011-001-CMF.pdf>.

Hearing Officer Celli and Commissioner Douglas had engaged in an improper ex parte communication at the evidentiary hearing on March 7, 2011.¹⁰

1. The Commission was not required to formally deny Mr. Simpson's April 8th Petition.

In his June 17th Petition, Mr. Simpson alleges that his petition for reconsideration of the Committee's written order denying Mr. Simpson's motion to subpoena PG&E "has yet to be addressed by the Commission or its staff in any manner" and that the Commission "has no right to simply ignore motions it doesn't feel like dealing with."¹¹ Mr. Simpson's assertion that his petition has been "ignored" is mistaken. Interlocutory appeal of a Committee order made during a proceeding is governed by Section 1215 of the Commission's Rules of Practice and Procedure.¹² Subsection 1215(c) provides:

Unless the commission acts upon questions referred by the presiding member to the commission or upon a petition to review an order of the presiding member or committee within thirty (30) days after the referral or filing of the petition, whichever is later, such referrals or petitions are deemed to have been denied. The commission may act by formally denying the petition or by vacating or amending the committee order.

Therefore, the Commission was not required to formally deny Mr. Simpson's April 8th Petition for review of the Committee's written order; instead, the petition was deemed denied after the expiration of 30 days pursuant to Section 1215. The Commission's choice not to formally deny the petition is in no sense a "failure" on the part on the Commission. Mr. Simpson's allegations that the Commission "has violated the Warren Alquist Act and Public Resources Code" and "impermissibility [sic] ruled on the PMPD" by "failing to respond to prior motions by Mr. Simpsons [sic]"¹³ are baseless. As Mr. Simpson has failed to show an error in law, his June 17th Petition should be denied.

¹⁰ The first instance in which Mr. Simpson alleged that Commissioner Douglas engaged in an improper ex parte communication was during a brief public comment made by his attorney at the Commission's Business Meeting on May 18, 2011. 5/18 RT 148:11-19. *Rob Simpson's Petition for Reconsideration of the Commission's May 18, 2011 Written Order*, 09-AFC-3 (June 17, 2011) (hereinafter "Simpson June 17th Petition").

¹¹ Simpson June 17th Petition, pp. 3-4.

¹² 20 C.C.R. § 1215.

¹³ Simpson June 17th Petition, p. 2.

B. Mr. Simpson’s June 17th Petition is an untimely attempt to seek reconsideration of the Commission’s denial of his April 8th Petition, and should be denied.

Section 1720 of the Commission’s Rules provides that within 30 days after a decision or order of the Commission is final, “any party may petition for, reconsideration thereof.”¹⁴ As stated above, Mr. Simpson’s April 8th Petition requesting Commission review of the Committee’s Order denying Mr. Simpson’s motion to subpoena PG&E was deemed denied on May 9, 2011. Mr. Simpson had 30 days from this date, until June 8, 2011, to appeal to the Commission for reconsideration of the denial that occurred by operation of law. Mr. Simpson failed to act pursuant to the requirements of Section 1720, and his untimely attempt to revisit issues raised in his April 8th Petition, including his request to subpoena PG&E, is improper at this late stage. Mr. Simpson’s June 17th Petition should be denied.

C. The Commission’s Final Decision is supported by substantial evidence in the record establishing that no significant adverse impacts will result from the MEP interconnection with the natural gas pipeline system.

1. Mr. Simpson has failed to set forth grounds for reconsideration of the Commission’s Final Decision relating to pipeline safety and reliability.

Mr. Simpson’s June 17th Petition does not set forth any new evidence regarding Line 002, or allege any error in fact regarding Line 002 in the Final Decision. Mr. Simpson merely asserts that the Final Decision “fails to address pipeline safety and reliability.”¹⁵ Mr. Simpson’s assertion is patently incorrect. Pipeline safety and reliability is discussed extensively in the Hazardous Materials Management section of the Final Decision.¹⁶ Furthermore, in accordance with Public Resources Code section 25523, this section contains “specific provisions relating to the manner” in which MEP is “designed, sited, and operated to protect environmental quality and assure public health and safety.”¹⁷ For example, the Final Decision describes how MEP will be designed to use both double-block and bleed valves for gas shut-off and automated combustion controls in accordance with federal law, and outlines the numerous existing

¹⁴ 20 C.C.R. § 1720(a).

¹⁵ Simpson June 17th Petition, p. 1.

¹⁶ MEP Final Decision, Hazardous Materials Management, pp. 1-9, 17-18.

¹⁷ MEP Final Decision, Hazardous Materials Management, pp. 1-9, 17-18.

codes that MEP will comply with to ensure public health and safety. As the Final Decision was prepared in conformance with the requirements of the Warren Alquist Act, including Public Resources Code section 25523, there is no error of law as alleged by Mr. Simpson. Therefore, Mr. Simpson's June 17th Petition should be denied.

2. Disagreement with the Commission's conclusions regarding the proper weight to afford evidence in the record regarding pipeline safety is insufficient grounds to support a petition for reconsideration.

Mr. Simpson's June 17th Petition also alleges that the Final Decision "does not include sufficient bases for the conclusion that there are no issues of pipeline safety or reliability of Line 002 and the planned interconnection,"¹⁸ and repeats, cut and paste from his April 8th Petition and comments on the Presiding Member's Proposed Decision ("PMPD"), his opinion that the "witnesses that testified regarding pipeline safety demonstrated their ignorance of basic facts regarding Line 002."¹⁹ These statements do not allege new evidence, or an error in fact or of law as required by Section 1720. Instead, Mr. Simpson merely opines regarding the probative value that should be afforded the testimony given by Applicant's and Staff's expert witnesses on the issue of pipeline safety and reliability. Mr. Simpson's opinions as to the probative value of the witnesses presented on the issues have no merit, especially where, as here, Mr. Simpson did not object to the qualification of Applicant's and Staff's witnesses as expert. As Mr. Simpson has failed to meet his burden under Section 1720, the Commission need go no farther to deny Mr. Simpson's June 17th Petition on this basis.

3. Substantial evidence in the evidentiary record establishes that MEP will not significantly impact pipeline safety and reliability.

Even though Mr. Simpson's June 17th Petition has failed to meet the standard for consideration

¹⁸ Simpson June 17th Petition, pp. 5, 7.

¹⁹ Simpson June 17th Petition, pp. 5, 7. Additionally, as Applicant stated previously in its Opposition to Mr. Simpson's April 8th Petition, Mr. Simpson's allegations that "the witnesses that testified regarding pipeline safety demonstrated their ignorance of basic facts regarding Line 002" is simply incorrect. Specifically, Cesar de Leon, an undisputed expert in natural gas pipeline construction and operations, testified to many "basic facts" regarding Line 002, including: the length of Line 002, when the pipeline was first constructed, the materials used to construct the pipeline, the maximum allowable operating pressure, that he had reviewed the pigging results for Line 002, that he was aware of when the last pigging of Line 002 had occurred, and that in his opinion, "Line 2 is in very good condition." Mr. de Leon also testified that the power plant cycling of natural gas would have no effect on Line 002, regardless of the condition of the pipeline.

established by the Commission's Rules, it is important to note that the Final Decision properly relied on the probative value of the testimony and evidence presented by Applicant's and Staff's witnesses. For example, Mr. Cesar de Leon, an undisputed expert in pipeline safety who served as the Director of the Office of Pipeline Safety for the U.S. Department of Transportation, confirmed that power plant cycling of natural gas would have no effect on Line 002, regardless of the condition of the pipeline, and that in his expert opinion, MEP could be safely interconnected to Line 002.²⁰ Furthermore, the probative value of Mr. de Leon's testimony is not diminished by a "lack" of personal knowledge of Line 002²¹ as asserted by Mr. Simpson. California law provides that an expert witness is entitled to testify based on his own special knowledge, experience, and education on matters either personally known to the witness or made known to the witness.²² In this case, Mr. de Leon provided expert testimony based on his extensive 40 year career in pipeline safety engineering, and review of the pigging results from Line 002, studies on pressure cycles on gas pipelines, and industry standards and practices.²³ The Commission has properly relied on testimony from an expert witness and has afforded the testimony the appropriate weight. Therefore, Mr. Simpson's June 17th Petition should be denied.

D. No prohibited ex parte communication occurred.

With his June 17th Petition, Mr. Simpson continues his baseless accusation that Hearing Officer Celli and Presiding Member Douglas engaged in a prohibited ex parte communication at the March 7, 2011 evidentiary hearing for MEP.²⁴ As previously discussed in Applicant's *Opposition to the Petition for Reconsideration of Rob Simpson*, Mr. Simpson has not met his burden to establish that the ex parte provisions of the Government Code apply, or that an ex parte communication occurred, let alone a "prohibited" ex parte communication.²⁵ In fact, as set forth in Applicant's *Opposition*, it is clear from the

²⁰ Ex. 68; 2/25/11 RT 277:19-280:7.

²¹ Simpson June 17th Petition, p. 6.

²² Cal. Evidence Code § 801.

²³ Ex. 68; 2/25/11 RT 244-280:7, passim.

²⁴ Simpson June 17th Petition, pp. 7- 10.

²⁵ *Opposition*, pp. 5-9.

March 7, 2011 evidentiary hearing transcripts that a “prohibited ex parte communication” did not occur.

Government Code section 11430.20 specifically permits communications concerning “a matter of procedure or practice.”²⁶ The communication at issue concerned whether Mr. Galati intended to testify at the evidentiary hearing.²⁷ This is a procedural matter, and does not go to the merits of the MEP application, or to any of the disputed issues previously identified by the parties. Such communication is permissible under Government Code section 11430.20 because the communication concerned a “matter of procedure or practice,” and not the merits of any substantive issue in the proceeding.²⁸

E. The Commission’s Final Decision correctly concludes that MEP is consistent with the Williamson Act.

Mr. Simpson’s June 17th Petition continues to raise the same legal arguments related to the Williamson Act that have previously been evaluated and rejected by the Commission in this proceeding. For example, Mr. Simpson claims that the MEP will be in violation of the Williamson Act contract, and that Alameda County has not “look[ed] to the terms of the contracts” when concluding that MEP is a permitted use of the land.²⁹ This claim is incorrect, and not supported by the evidentiary record. As discussed in MEP’s Opening and Reply Briefs, MEP is consistent with the Williamson Act contract on the parcel.³⁰ Contrary to Mr. Simpson’s assertions, the Williamson Act contract does not restrict use of the parcel solely to the “two uses” identified in Exhibit B of the contract because the contract does not negate the statutorily-recognized compatible uses identified in Section 51238 of the Government Code. As explained by Alameda County, “no augmentation to the Exhibit B compatible use list is necessary”

²⁶ Cal. Govt. Code § 11430.20(b).

²⁷ 3/7 RT 403.

²⁸ As explained in MEP’s Opposition, Government Code subsection 11430.10(a) prohibits communications “*to* the presiding officer *from* an employee or representative of an agency that is *a party* or *from* an interested person outside the agency.”²⁸ The use of the words “to” and “from” are significant. As explained in the comments from the Law Revision Commission, “[w]hile this section precludes an adversary from communicating with the presiding officer, it does not preclude the presiding officer from communicating with an adversary.”²⁸ As described in the March 7, 2011 evidentiary hearing transcripts, the communications from Hearing Officer to Mr. Galati fall within the scope of this Law Revision Commission comment, and no violation of the ex parte rules occurred.

²⁹ Simpson June 17th Petition, p. 11.

³⁰ *Opening Brief of Mariposa Energy Project*, 09-AFC-3, p. 11 (March 30, 2011); *Reply Brief of Mariposa Energy Project*, 09-AFC-3, pp. 12-13 (April 6, 2011).

because electrical facilities are “explicitly called out” in the Williamson Act as a compatible use, unlike the two compatible uses identified in Exhibit B.³¹ A Williamson Act contract specifically incorporates the laws in existence each year upon the contract's annual renewal, thus the contract at issue by law incorporates the compatible uses set forth in Sections 51238 and 51238.1.³² Thus, there is no conflict with the Williamson Act contract on the parcel. As Mr. Simpson has failed to set forth an error of law in the final decision relating to the Williamson Act, his petition for reconsideration should be denied.

F. As Simpson’s June 17th Petition fails to set forth with specificity any errors in the Final Decision relating to CEQA, his petition must be denied.

Although Mr. Simpson’s June 17th Petition alleges that “the proposed project has not complied with CEQA in countless aspects”, Mr. Simpson fails to set forth any of these “countless aspects” of noncompliance, apart from repeating an argument relating to the Williamson Act already raised in his petition.³³ As Mr. Simpson has failed to “specifically set forth” any new evidence, error in fact or error of law relating to CEQA, he has failed to meet the standard for reconsideration established by Section 1720 of the Commission’s Rules. Therefore, Mr. Simpson’s June 17th Petition must be denied.

II. The Commission should deny the Petition for Reconsideration submitted by Robert Sarvey as he has failed to meet the standard for reconsideration set forth in Section 1720 of the Commission’s Rules.

A. The potential impact of MEP on local roads has been fully addressed in the Commission’s Final Decision approving MEP.

In his petition, Mr. Sarvey requests reconsideration of the Final Decision as the “condition of Bruns Road has deteriorated due to the construction of the Greenvolts Solar Project,” and alleging that “MEP will continue the degradation of that road...a significant impact which must be addressed.”³⁴ Contrary to Mr. Sarvey’s allegation, the potential impact of MEP on local roads, including Bruns Road, has already been fully addressed in the Final Decision. For example, the Final Decision recognized that

³¹ Ex. 42.

³² *County of Humboldt v. McKee*, 165 Cal.App.4th 1476, 1496-1500 (2008).

³³ Simpson June 17 Petition, p. 12.

³⁴ Sarvey Petition, pp. 1-2.

“heavy trucks can damage roadways,” and instituted Condition of Certification TRANS-2 to ensure that the project would “not cause any degradation or significant impacts” to traffic and transportation.³⁵ Specifically, Condition of Certification TRANS-2 requires MEP to “restore all public roads, easements, and rights-of-way that have been damaged due to project-related construction activities.”³⁶ Therefore, as this issue has already been addressed and determined in the Commission’s Final Decision, and Mr. Sarvey has failed to set forth any error of law or fact in the Commission’s analysis, Mr. Sarvey’s Petition for Reconsideration should be denied.

B. Replacing the estimation of the school impact fee with the exact fee amount will have no effect upon a substantive element of the Final Decision, and does not warrant reconsideration.

Section 1720(a) requires that when a petition for reconsideration alleges an error of fact that the petition must also explain the “effects” of these matters “upon a substantive element of the decision.” The MEP Final Decision contained an estimate of the school impact fee. While Mr. Sarvey asserts that the evidentiary record “needs to be reopened to reflect” the exact amount that MEP paid in school impact fees to the Mountain House Elementary School District, he fails to explain the effect that updating the school impact fee would have upon a substantive element of the Final Decision.³⁷ In fact, replacing the estimation of the school impact fee in the Final Decision with the actual amount paid by MEP will have no effect upon a substantive element of the Final Decision. The school impact fee is imposed by the school district pursuant to Section 17620 of the Education Code,³⁸ and whether the Final Decision states the estimated fee or the precise amount paid will have no substantive effect on the Commission’s findings and conclusions regarding the MEP. Therefore, as Mr. Sarvey has failed to meet the standard for reconsideration, his petition should be denied.

³⁵ MEP Final Decision, Traffic and Transportation p. 5; Appendix A-41.

³⁶ MEP Final Decision, Traffic and Transportation p. 22.

³⁷ Sarvey Petition, p. 3.

³⁸ Final Decision, Socioeconomics p. 4.

C. The Final Decision accurately states the average and maximum operating hours of MEP.

Mr. Sarvey asserts that the “evidence in the record is that Mariposa Project can operate up to 4,200 hours per year”, and faults Finding of Fact 8 in the Project Description section of the Final Decision for stating “The project will operate on average, 600 hours per year, but if licensed, could run up to 4,000 hours.”³⁹ However, Mr. Sarvey is incorrect in alleging that Finding of Fact 8 is inconsistent with the evidentiary record. For example, Finding of Fact 8 is consistent with Exhibit 4, which states, “The project is expected to operate 600 hours per year on average, but will be permitted to run up to a maximum of 4,000 hours per year” and that “In the event of maximum permitted annual operation MEP will utilize 187 acre-feet of water for 4,000 hours of operation and 300 starts/stops.”⁴⁰ Additionally, it is unclear why Mr. Sarvey asserts an error of fact in the Final Decision, given that his own petition for reconsideration acknowledges that evidence in the record provides:

The MEP facility would be permitted to operate up to 4,000 hours per year plus 300 startup and shutdown cycles.⁴¹

Both Exhibit 4 and Exhibit 301 support the conclusion in Finding of Fact 8 that MEP will “run up to 4,000 hours.” As Mr. Sarvey has failed to set forth an error of fact, his petition for reconsideration must be denied.

D. Air Quality

Mr. Sarvey faults Finding of Fact Number 6 in the Final Decision for stating that “the [Bay Area Air Quality Management District (“BAAQMD”)] is classified as non-attainment for the state 1-hour and federal 8-hour ozone standards...and the state and federal PM2.5 standards.”⁴² However, this language is consistent with Mr. Sarvey’s statement that the BAAQMD is “not classified non-attainment for the Federal Annual PM 2.5 standard only the Federal 24 Hour PM 2.5 Standard.”⁴³ While the Final Decision may not contain the precise level of specificity desired by Mr. Sarvey, CEQA does not require technical

³⁹ Sarvey Petition, p. 3.

⁴⁰ Ex. 4, p. 2.

⁴¹ Sarvey Petition, p. 3, FN 5, citing to Ex. 301, p. 4.1-16.

⁴² Sarvey Petition, p. 3.

⁴³ Sarvey Petition, p. 3.

perfection, but “adequacy, completeness, and a good faith effort at full disclosure.”⁴⁴ Here, Finding of Fact Number 6 adequately describes whether the BAAQMD is classified as attainment or non-attainment, and for what pollutants. Failing to use the precise language identified by Mr. Sarvey does not constitute an error of fact or of law in the Final Decision. As Mr. Sarvey has failed to meet the standard for reconsideration, his petition should be denied.

E. The Commission’s Final Decision correctly concludes that MEP is consistent with the Williamson Act.

Similar to Mr. Simpson, Mr. Sarvey continues to raise the same legal arguments related to the Williamson Act that have previously been evaluated and rejected by the Commission in this proceeding. Mr. Sarvey continues to assert his opinion that Alameda County’s Agricultural Preserves Objectives, Uniform Rules, and Procedures only permit electrical facilities “accessory to other permitted uses”⁴⁵ as a compatible use. However, as previously established in this proceeding, Government Code section 51201(e) provides that compatible uses are defined in either local rules or by the Williamson Act itself. 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, as expressly recognized by Alameda County itself.⁴⁶ Additionally, Alameda County’s Uniform Rules expressly recognize that compatible uses are defined by both the Williamson Act and the Alameda County Rules itself.⁴⁷ Mr. Sarvey’s allegations that MEP is not a permitted use under the Williamson Act are unavailing, and should be disregarded by the Commission. As Mr. Sarvey has failed to set forth an error of law in the Final Decision, his petition should be denied.

F. The Commission should reject Mr. Sarvey’s arguments relating to “demographics” as Mr. Sarvey fails to allege any error of fact or law or any new evidence that would affect a substantive element of the decision.

Mr. Sarvey’s arguments relating to “demographics” fail to meet the standard for reconsideration

⁴⁴ 14 C.C.R. § 15151.

⁴⁵ Sarvey Petition, p. 4; also see Sarvey PMPD Comments, p. 4.

⁴⁶ Gov. Code § 51238; 2/24 RT 151.

⁴⁷ 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

under Section 1720. Although Mr. Sarvey references a passage in the Final Decision discussing the environmental justice analysis by the Commission, Mr. Sarvey does not allege any error of law or fact in the Final Decision relating to the EJ analysis.⁴⁸ It appears that Mr. Sarvey is attempting to introduce new information regarding the demographics in the six mile radius around the MEP site, but he fails to meet his burden under Section 1720 (1) to specifically set forth what the evidence is, (2) explain why that evidence could not have been produced during evidentiary hearings, and (3) explain the effect that the evidence would have upon a substantive element of the decision.⁴⁹

If the proffered evidence is that there is a minority population in certain census blocks within a six mile radius of the project, that evidence would not substantively affect any element of the decision. The Final Decision assumed the presence of a minority population within a 6 mile radius, and analyzed the potential impacts to minority populations accordingly. The Final Decision concluded that as there are no significant adverse impacts from MEP, the project will not have a disproportionate impact on any minority population. Therefore, the information put forward by Mr. Sarvey would have no effect upon a substantive element of the Final Decision. Mr. Sarvey's Petition should be denied.

CONCLUSION

The Petitions of Robert Sarvey and Rob Simpson are without merit and should be denied.

Dated: July 6, 2011

ELLISON, SCHNEIDER & HARRIS L.L.P.

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⁴⁸ Sarvey Petition, p. 5.

⁴⁹ Sarvey Petition p. 5.

STATE OF CALIFORNIA

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PROOF OF SERVICE

I, Karen A. Mitchell, declare that on July 6, 2011, I served the attached *Opposition to the Petitions for Reconsideration of Intervenor Rob Simpson and Intervenor Robert Sarvey* 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

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09-AFC-3

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