

COMMITTEE CONFERENCE
BEFORE THE
CALIFORNIA ENERGY RESOURCES CONSERVATION
AND DEVELOPMENT COMMISSION

In the Matter of:)
)
Application for Certification for the) Docket No.
Oakley Generating Station Project) 09-AFC-4
_____)

CALIFORNIA ENERGY COMMISSION
HEARING ROOM A
1516 NINTH STREET
SACRAMENTO, CALIFORNIA

TUESDAY, MAY 3, 2011

1:00 p.m.

Reported by:
Peter Petty

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Radback Energy

INTERVENOR

Robert Sarvey

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1 MR. LAMBERG: Greg Lamberg, Senior Vice
2 President, Radback Energy.

3 MR. BELL: Kevin W. Bell, Senior Staff Counsel
4 representing staff. With me here is Pierre Martinez. We
5 also have at the committee's disposal numerous staff members
6 that may be available to answer questions that you may have.

7 HEARING OFFICER VACCARO: Thank you. I notice
8 that Lynn Sadler, our Assistant Public Advisor, has now
9 entered the room. Those of you in the room, I think,
10 already know who she is but we always like to ensure that
11 people know that the public advisor is here and available if
12 anyone needs assistance.

13 Let's turn to the folks on the phone. I asked for
14 appearances just a few moments ago. Mr. McLucas with
15 Radback identified himself. Is there anyone else on the
16 telephone who would like to identify themselves?

17 (No audible response.)

18 HEARING OFFICER VACCARO: I don't -- I don't hear
19 anyone. Mr. Sarvey, are you on the line at all?

20 (No audible response.)

21 HEARING OFFICER VACCARO: Okay. And, Ms. Sadler,
22 do you have any indication that we're having difficulty
23 with -- Okay, and my question is, are we having, do we have
24 any indication that we're having difficulty with WebEx?

25 (No audible response.)

1 HEARING OFFICER VACCARO: Okay, okay. So I think
2 when Mr. Sarvey is able to appear by telephone I'm sure
3 he'll let us know. It's unfortunate to get started without
4 him, yet everyone's here on time, everyone's ready to
5 proceed, and that's exactly what we're going to do.

6 I think those of you who participated in
7 conferences with me before, I think one of the things that
8 you will note is this admonition that I always give. The
9 committee has read your submissions. Everyone gave timely,
10 complete, thorough, and easily understood submissions. The
11 committee has read them, the committee understands the
12 points of view, understands the recommended changes so you
13 don't need to tell us what you've already told us. What
14 we'd like you to do today is tell us what you think is
15 important for us to know and also to respond to whatever
16 comments were made by the other parties that you think is
17 important for the committee to know as well.

18 So what we'll do is we'll start with the
19 Applicant. Mr. Galati, if there's something you need to
20 underscore, a point that you think the committee needs to
21 have made very clear, we'd like you to start there please.

22 MR. GALATI: Yes. Staff previously filed an
23 errata, which is also part of their comments. We commented
24 on that errata in our comments on the PMPD. In summary, we
25 agree with all the changes except for, I believe it's AQ-17,

1 which had to do with seven days or 24 days for a -- 24 hours
2 for a --

3 HEARING OFFICER VACCARO: Notice with respect to
4 combustor tuning. And, in fact, it's the verification to
5 condition of certification, Air Quality 17.

6 MR. GALATI: Correct. Staff pointed out to me
7 today that one of our comments, which is comment on biology,
8 condition of certification, Biology 21, we asked for a
9 slight modification to the verification timeline for this
10 condition so that the payment to east county -- East Contra
11 Costa County Habitat Conservancy could be made when we close
12 financing and not 30 days prior. Staff pointed out to me
13 that they've used language that says "within 30 days prior,"
14 so our understanding is that if we were to close financing
15 some days before we wanted to start construction if we
16 showed proof of payment and got the buyout from staff that
17 we have in fact paid, we would not necessarily need to meet
18 30 days prior to construction, that their inclusion of the
19 word "within" would allow us to not have that be interpreted
20 as a strict timeline. So we could, in fact, pay after we
21 closed on our financing.

22 So, with that understanding we would remove our
23 request that it be modified to five days.

24 HEARING OFFICER VACCARO: Okay. So you've raised
25 two issues. I think I understand, certainly, the second

1 point with respect to the condition of certification,
2 Bio-21. But if we can move backwards to the verification on
3 AQ-17, it was originally --

4 MR. GALATI: Sorry.

5 HEARING OFFICER VACCARO: You have a concern with
6 staff's making a change and I think the committee's not
7 clear on what your concern is or why it is that you oppose
8 staff's requested change. I think that might be helpful.

9 MR. GALATI: AQ-17 already has in the condition
10 itself when notice has to be provided for combustion tuning.
11 First we have to provide notice within seven days before we
12 do combustion tuning unless there's an emergency and, in
13 those cases, we only have to provide notice 24 hours. The
14 way staff changed the verification, it's always 24 hours
15 prior and it doesn't read consistent with what the condition
16 requires. And while we like the idea of notifying, you
17 know, 24 hours in advance I didn't want an operator at a
18 later date to misinterpret the condition and miss the seven-
19 day notice unless it was an emergency. So I wanted the
20 verification to either be the -- just said seven days or we
21 can just use what the condition says.

22 So I thought it was inconsistent in -- could see
23 somebody misinterpreting it.

24 HEARING OFFICER VACCARO: Okay, thank you.

25 I guess we do have a point of clarification with

1 respect to condition of certification, Bio-21. It looked as
2 though there were two possible recommended changes, one
3 having to do with from 30 days to five days, and then the
4 other was changing from -- you specifically wanted to say
5 preconstruction site mobilization. So I think there were
6 two changes that you were suggesting with respect to that,
7 but really you only addressed one.

8 So you're just withdrawing the entire suggested
9 change to the PMPD or you want to keep part of it and not
10 the other part?

11 MR. GALATI: No, it is fine the way staff has done
12 it in their errata.

13 HEARING OFFICER VACCARO: Okay.

14 MR. GALATI: I just wanted to make sure that we
15 had a record clear because we don't intend to provide that
16 payment, proof of payment 30 days prior to mobilizing to the
17 site. We're going to do it when we get sign-off on the PSE
18 agreement, when we can from a fiscal standpoint, and I
19 understand that staff included the word "within" so that we
20 could capture that. And so I think we're okay with that as
21 written in staff's errata, both changes.

22 HEARING OFFICER VACCARO: Okay. So anything else
23 with respect to the comments that Applicant submitted that
24 you want us to know at this point? I want to hear from
25 staff, just staff's response to what you've stated, but I

1 want to make sure that only with respect to your comments.
2 We'll talk about comments received from others in a few
3 moments, but is there anything else that the committee needs
4 to know?

5 MR. GALATI: No. It's in our -- it's in our
6 written filing. No, thank you.

7 HEARING OFFICER VACCARO: Okay, thank you.

8 Mr. Bell, any response to -- it seems like the
9 only thing you do need to respond to is the comment with
10 respect to Air Quality language that Mr. Galati just raised.
11 Staff holds one view, Applicant holds another.

12 MR. BELL: No, actually that may have been the
13 case at one point. I think staff's intent in these changes
14 that we've talked about right here, which Bio-21 and also
15 AQ-17, was to allow for a certain level of realistic
16 flexibility for the Applicant in areas where we may not need
17 verification in a strict timeline.

18 It does appear that there could be an
19 inconsistency between the text of the condition itself in
20 AQ-17 on the verification. I think that recommended change
21 from our Air Quality staff was, again, to provide a little
22 bit more flexibility for the Applicant to provide
23 information that we may not actually need a certain period
24 of time before. However, staff is perfectly fine with the
25 Applicant's suggesting of seven days prior rather than 24

1 hours as staff had recommended both in our errata and also
2 in the PMPD comments.

3 And did you need a response for Bio-21? Because
4 otherwise it is as Mr. Galati has represented.

5 HEARING OFFICER VACCARO: Okay, thank you. No,
6 that's fine.

7 Mr. Sarvey, have you joined us on the line?

8 MR. SARVEY: Yes, I'm here.

9 HEARING OFFICER VACCARO: Okay, great. Thank you.

10 I think what we'll do next is we'll hear from
11 staff again with the caveat you've already told us so you
12 don't have to tell us what you've told us, but certainly
13 underscore what you think is important in the comments that
14 staff submitted on the PMPD.

15 MR. BELL: Whenever I have an open mic in front of
16 me and a captive audience, it's very hard to -- for me to
17 pass up the opportunity to get on a soapbox and talk. But I
18 will say that the staff has read and considered the PMPD and
19 we are standing by our comments. We have nothing further at
20 this time other than what Mr. Galati has already raised.

21 HEARING OFFICER VACCARO: Okay, thank you.
22 Mr. Sarvey, your timing, I think, is perfect because now
23 it's your turn. And the part that you might have missed is
24 my admonition to all parties, and I'll summarize it again,
25 is that the committee has read all of the submissions, is

1 well aware of what your written comments are so you don't
2 need to tell the committee what you've already told it. But
3 we would invite you to underscore briefly particular points
4 or matters that are pertinent, that you think the committee
5 needs to be made aware of based on solely your comments, not
6 responsive to comments made by others.

7 MR. SARVEY: Well, I was pretty clear in my
8 comments. Of course, if the committee is not going to
9 listen to the Department of Fish and Game and U.S. Fish and
10 Wildlife, they're certainly not going to listen to me so I'm
11 not going to go any further.

12 I believe that you really have to provide adequate
13 demographic data in this project, otherwise you haven't met
14 your burden of proof for your environmental (indiscernible).
15 Other than that, that's about all I have to say.

16 HEARING OFFICER VACCARO: Okay, thank you. And
17 when you do speak again, if you could speak just a little
18 bit, with a little more volume, I think it would be easier
19 for us to hear you. But I do think your comments were
20 captured pretty well.

21 So, Mr. Sarvey, I think what you did is you segued
22 into what the next topic is, which is to hear whatever the
23 parties might have to say in response to comments that were
24 received from California Department of Fish and Game.

25 It appears that there was a letter dated February

1 2011 that didn't get docketed until April 2011, so there
2 were comments on the PSA but, indeed, they were docketed in
3 the context of the PMPD. So we want to ensure that all of
4 the parties have an opportunity to briefly respond to those
5 comments.

6 In addition, just today I received an e-mail with
7 a letter that had apparently been received by the agency a
8 week or so ago. This came from U.S. Fish and Wildlife
9 Service. I e-mailed it to Mr. Galati and to Mr. Sarvey
10 because I had received it earlier today from Mr. Martinez
11 and I'd like the parties to have an opportunity to respond
12 to that letter as well.

13 So I'll start with the Applicant, we'll move to
14 staff, and then, Mr. Sarvey, we certainly would like to hear
15 from you on those points as well.

16 MR. GALATI: We have reviewed both of those
17 letters. We don't believe that they raise any new issues
18 that both the staff didn't address in the final staff
19 assessment nor that we didn't address in our testimony and
20 that weren't thoroughly briefed and considered by the
21 committee at evidentiary hearing. I would like to put it in
22 perspective so that we understand what we're actually
23 talking about here.

24 And what we're talking about is a potential take
25 due to nitrogen deposition, which would be about equivalent

1 of taking four or five pallets of Scott's Turf Builder,
2 Winter Guard Fertilizer, and spreading it in this room.
3 That's really what we're talking about, extremely, extremely
4 small amounts that were over-calculated based on extremely
5 conservative assumptions.

6 The Applicant has agreed to mitigate for those,
7 assuming that they are impacts. The idea that that rises to
8 a level requiring a take permit is inconsistent with the
9 Marsh Landing decision. It is inconsistent with general
10 practice, inconsistent with the law. And while we
11 understand that Fish and Game and U.S. Fish and Wildlife
12 Service may disagree with what the committee found here
13 under CEQA, they have no jurisdiction in that area and no
14 take permit is required.

15 We made comments in our, in our PMPD comments that
16 we think the PMPD should be revised accordingly, making it
17 very clear that no take permit is required, as opposed to
18 condition Bio-23.

19 That's all we have to say. We think it's been
20 thoroughly addressed.

21 HEARING OFFICER VACCARO: Thank you. Mr. Bell?

22 MR. BELL: Just echoing a few matters that
23 Mr. Galati just said. This already has been thoroughly
24 vetted through our process, through the evidentiary
25 hearings.

1 The latest letter that U.S. Fish and Wildlife
2 Service has provided is -- echoes all of the same issues
3 that were raised by Fish and Game during our proceedings.
4 There's simply nothing here that would change the
5 committee's determination that it's already made in PMPD,
6 nothing new, and staff has no further comment on that.

7 HEARING OFFICER VACCARO: Thank you. Mr. Sarvey?

8 MR. SARVEY: I think that the Department of Fish
9 and Game's letter raises a couple of issues that weren't
10 covered by staff. One Department of Fish and Game letter
11 talks about other private lands outside of the preserve
12 there that needs consideration, some mitigation. And they
13 also say that unless the Energy Commission here or someone,
14 Applicant, somebody can provide assurances that the -- this
15 isn't going to be the extinction of the species, then they
16 can't issue a permit.

17 So I think those are the two things that weren't
18 considered and, you know, the Department of Fish and Game
19 and the state agency here, they're supporting U.S. Fish and
20 Wildlife, so I don't see how they can be ignored. But
21 (indiscernible) surprised before, so that's all I have to
22 say.

23 HEARING OFFICER VACCARO: Okay, thank you.

24 Applicant or staff, would you like to respond to
25 those two points because I think in addition to the nitrogen

1 deposition issues Fish and Game did raise a few other
2 concerns about clarity and consistency, I think, in the
3 biological resources section. Perhaps you can address that
4 and, if not, the committee certainly can because the
5 committee has carefully reviewed both letters and looked
6 back at the FSA as well as the PMPD to determine whether or
7 not those concerns have been addressed. But we'd like to
8 hear from the parties.

9 MR. BELL: Yeah. The only real new issue that was
10 raised as staff sees in the U.S. Fish and Wildlife Service
11 is the issue of private lands. However, this is a non-issue
12 and I can explain why.

13 One of the contentions of both Fish and Game and
14 U.S. Fish and Wildlife Service is that the Antioch Dunes are
15 unique, that the Antioch Dunes are the only place where this
16 butterfly can propagate. The idea that there are private
17 lands somewhere, anywhere near the Antioch Dunes is actually
18 inconsistent with the justification used by Fish and Game
19 and U.S. Fish and Wildlife Service. If indeed there are
20 other lands that share that same, the same qualities as the
21 Antioch Dunes, if we even knew where those lands were, then
22 the Antioch Dunes are not quite so unique to support the
23 Lange's Metalmark butterfly.

24 So while they've raised this minor issue, they've
25 sort of thrown that out there without providing the

1 committee or staff or the Applicant or anybody else any
2 other supporting information to support that position. And
3 I think the reason why they did that is because it is
4 contrary to the position they've taken with the unique
5 nature of the Antioch Dunes.

6 HEARING OFFICER VACCARO: Thank you. Mr. Galati?

7 MR. GALATI: The only thing I would add is ask the
8 committee to read that portion of my brief again. There is
9 a difference between causation under the California
10 Environmental Quality Act and causation under both the
11 federal Endangered Species Act, and I would augment and echo
12 that that same law and causation applies to the California
13 Endangered Species Act as well. They are very, very, very
14 different and the law does not support a minor impact such
15 as this to establish a take.

16 And so no take is required and again what we would
17 like is the committee to be stronger in its opinion that no
18 take permit is required under both of these laws, as it did
19 in the Marsh Landing project.

20 HEARING OFFICER VACCARO: Mr. Bell, you're
21 ready --

22 MR. GALATI: I'm sorry, one last thing that I did
23 not mention. That is staff's previous arguments regarding
24 proportionality would apply to the U.S. Fish and Wildlife
25 Service as well. I understand that the U.S. Fish and

1 Wildlife Service and Fish and Game have just a difference of
2 opinion as to what type of mitigation, extended mitigation
3 that would be required regarding the impacts to the Antioch
4 Dunes.

5 And I think really the reason why they're doing
6 that -- we didn't point this out in our briefs -- is that I
7 believe that those two entities have, are looking at this
8 from a different viewpoint. They're looking at the Dunes as
9 the project itself. The Dunes aren't the project. The
10 Oakley Generating Station is the project. And under
11 proportionality the -- or the concept of proportionality,
12 the project can only be held responsible for that proportion
13 of the impacts or potential impacts they might on a
14 resource. We cannot expect the project to pay all
15 mitigation for all potential impacts from all other sources.
16 They're responsible for their piece of the pie. And, you
17 know, the letters from both Fish and Game and U.S. Fish and
18 Wildlife Service disregard the concept of proportionality.

19 HEARING OFFICER VACCARO: Okay. I think basically
20 we've covered the comments then that have been received to
21 date. I think all of you are aware that the comment period
22 has not yet expired. May 12th is the close of the 30-day
23 comment period on the presiding members' proposed decision.

24 The goal today was to give the parties an early
25 opportunity to hear from one another, find out if there were

1 any significant issues that needed to be addressed, also to
2 hear from interested agencies.

3 We'll do another pass through on the phone lines.
4 Do we have any representatives from California Department of
5 Fish and Game or U.S. Fish and Wildlife Service on the
6 telephone who would like to identify themselves?

7 (No audible response.)

8 HEARING OFFICER VACCARO: No. And I take it,
9 staff, you have no indication that they were intending to
10 participate in today's proceeding, is that correct?

11 MR. BELL: None. I can check with Madam Public
12 Advisor. Indicating none.

13 HEARING OFFICER VACCARO: Any further questions or
14 comments from the committee? What we'll do is we'll turn to
15 public comment, though again I haven't -- I know there are
16 no members of the public in the room and nobody's been
17 willing to identify themselves on the phone. But I think
18 we'll do a callout for public comments. So, again, those of
19 you on the telephone who are being very silent, this is your
20 opportunity -- not your only opportunity but your
21 opportunity today to give oral comments on the presiding
22 members' proposed decision. Is there anyone who would like
23 to make a public comment?

24 (No audible response.)

25 HEARING OFFICER VACCARO: Hearing none, what we'll

1 do -- I'll do basically a final call to find out from the
2 parties are there any final or closing comments that you'd
3 like to make today before Commissioner Peterman adjourns
4 today's committee conference? Starting with you,
5 Mr. Galati.

6 MR. GALATI: Yes, two things. I just wanted to
7 make sure -- I can't remember if I said it. We agree with
8 the rest of staff's changes on the PMPD. I said we agreed
9 with the errata; we also agree with the comments on the PMPD
10 in staff's document.

11 And also I just wanted to thank the committee for
12 listening to our concerns and putting out a PMPD that would
13 support a May 18th commission decision, and at least getting
14 the PMPD out in a way in which we can circulate it. I
15 thought it was well written. I think you can tell by the
16 lack of voluminous comments that you received; on other
17 PMPDs comments are generally far greater. So I think the
18 committee did a great job and we are very thankful.

19 HEARING OFFICER VACCARO: Mr. Bell?

20 MR. BELL: The staff would like to thank the
21 committee and Ms. Vaccaro for moving this project along,
22 especially towards the closing stages. As you know, this
23 project is almost two years old. I've had this project from
24 the beginning and, of course, I wish we could've gotten here
25 much sooner than we did right now. But I know there's been

1 some concern that there was a rush towards the end and I
2 have to say in all fairness that two years is an awful long
3 time. Usually these are 12-month projects. However, I know
4 that the committee worked very hard to go through the
5 evidence and to compose a PMPD that captured all of the
6 important aspects of this projects and also reflected the
7 amount of work that staff put into analyzing that, which was
8 put in front of us from the Applicant. We believe this is a
9 good project and we support the PMPD.

10 HEARING OFFICER VACCARO: Thank you. Mr. Sarvey,
11 any closing comments?

12 MR. SARVEY: I just wanted to address a couple of
13 things that was said earlier about the Fish and Game letter.

14 First of all, this is the first input I saw from
15 the Department of Fish and Game and maybe Mr. Bell knows of
16 some other input, but he's trying to make an assumption here
17 that somehow that goes against the position that U.S. Fish
18 and Wildlife Service had. U.S. Fish and Wildlife Service
19 hasn't appointed any (indiscernible) Department of Fish and
20 Game, just doing this and I hadn't seen U.S. Fish and
21 Wildlife being inconsistent in any way in that record.

22 HEARING OFFICER VACCARO: Before you go further,
23 could you please speak up. We're really straining to hear
24 you right now.

25 MR. SARVEY: Okay. And did you want me to repeat

1 what I just said or did you --

2 HEARING OFFICER VACCARO: No, I think we heard
3 that, but going forward if you could just project a bit more
4 that would be very helpful.

5 MR. SARVEY: Okay. And, you know, I'm real
6 uncomfortable with overriding the, you know, staff not
7 deferring to U.S. Fish and Wildlife, Department of Fish and
8 Game. I think it's really an abuse of discretion, whether
9 they're not the ones that are responsible for abuse of
10 discretion. But I think they really have not met the
11 requirements of the Warren Alquist Act in terms of deferring
12 to responsible agencies. And we're pretty united on this
13 issue and, you know, staff's basically relying on a couple
14 of folks that have nowhere near the experience of the people
15 at U.S. Fish and Wildlife Service, Department of Fish and
16 Game, Dr. Stuart Weiss, a preeminent biologist in this
17 field.

18 So I really think you ought to relook at this and
19 provide appropriate mitigation for the butterfly issues.
20 And, once again, you guys need to put proper demographics in
21 this particular decision. It's not that hard to do. All
22 you've got to do is get a hold of the state finance,
23 Department of Demographics over there. They'll give you the
24 proper numbers that you could at least have the proper
25 numbers as a factual basis for this decision.

1 That's all I have to say. Thank you.

2 HEARING OFFICER VACCARO: Thank you. I think
3 before I pass the microphone over to Commissioner Peterman,
4 I do think it's important for everyone, those listening,
5 those in the room, to maybe recall some important features
6 of this process.

7 We had an evidentiary hearing. We had a process
8 in which everyone was invited to intervene should they
9 choose to, to submit testimony, to submit oral and
10 documentary evidence to support whatever positions they
11 might have. In looking at the record of these proceedings,
12 and that's what the findings and conclusions of the PMPD are
13 based on, it is the evidence in the record that was
14 submitted in oral and documentary form that forms the basis.
15 We've received a number of arguments, opinion, comment, all
16 of which has been considered, all of which has been
17 addressed in some fashion, perhaps not to the satisfaction
18 of those who made the comments. But, again, it's important
19 to realize that the evidence in the record is the basis, the
20 primary basis for the findings and conclusions in this PMPD.

21 I think with that I'm going to turn this matter
22 over to Commissioner Peterman to adjourn the proceeding.

23 COMMISSIONER PETERMAN: Thank you, Ms. Vaccaro.

24 I want to thank you again for your excellent work
25 on this proceeding. Thank you also to my advisor, Jim

1 Bartridge, and to Commissioner Boyd's advisor, Sarah
2 Michael, for their work on this. I appreciate all your
3 comments today. We will consider them as we finalize the
4 draft.

5 And with that we're adjourned.

6 (Whereupon, at 1:33 p.m. the
7 Committee Conference was adjourned.)

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CERTIFICATE OF REPORTER

I, PETER PETTY, an Electronic Reporter, do hereby certify that I am a disinterested person herein; that I recorded the foregoing California Energy Commission Committee Conference; that it was thereafter transcribed into typewriting.

I further certify that I am not of counsel or attorney for any of the parties to said hearing or in any way interested in the outcome of said hearing.

IN WITNESS WHEREOF, I have hereunto set my hand this 5th day of May, 2011.

PETER PETTY

CERTIFICATE OF TRANSCRIBER

I certify that the foregoing is a correct transcript, to the best of my ability, from the electronic sound recording of the proceedings in the above-entitled matter.

CAROL EDWARDS

May 5, 2011