STATE OF CALIFORNIA

Energy Resources Conservation
and Development Commission

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

# REPLY BRIEF OF MARIPOSA ENERGY PROJECT

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, LLC

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## INTRODUCTION

Pursuant to the Committee's Briefing Order, Mariposa Energy Project, LLC ("Applicant"), the owner of the Mariposa Energy Project ("MEP"), hereby files the following Reply Brief.

The findings and conclusions required for certification decisions by the California Energy Commission ("CEC") must be supported by substantial evidence. The California Environmental Quality Act ("CEQA") Guidelines define "substantial evidence" as follows:

> 'Substantial evidence' as used in these guidelines means enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, *even though other conclusions might also be reached*. Whether a fair argument can be made that the project may have a significant effect on the environment is to be determined by examining the whole record before the lead agency. *Argument, speculation, unsubstantiated opinion or narrative, evidence which is clearly erroneous or inaccurate,* or evidence of social or economic impacts which do not contribute to or are not caused by physical impacts on the environment does not constitute substantial evidence.[1]

Significantly, a decision to certify MEP is supported by substantial evidence if the record contains enough relevant information to support the decision, even if there is conflicting evidence in the record: "Determinations in an EIR must be upheld if they are supported by substantial evidence; *the mere presence of conflicting evidence in the administrative record does not invalidate them*."[2]

Clearly, MEP has met its burden of proof. This proceeding has spanned almost two years since the Application was deemed data adequate. The record contains more than 7,525 pages of exhibits and 1,688 pages of transcripts. It is particularly noteworthy that MEP and CEC Staff are in complete agreement with regard to all conditions of certification, which reflects the extraordinary steps the Applicant has taken to satisfy all reasonable concerns. In addition, the MEP is supported by findings or concurrence of the Bay Area Air Quality Management District ("BAAQMD"), San Joaquin Valley Air Pollution Control District ("SJVAPCD"), Alameda County, Contra Costa County, the Federal Aviation Administration ("FAA") and even the Tracy Fire Department, that MEP satisfies all applicable laws and ordinances within their respective jurisdictions and that MEP (with the conditions of certification proposed by Staff) will not result in any significant adverse environmental impacts.

There is neither time nor space to enumerate and respond to all of the factual inaccuracies in the Opening Briefs submitted by Intervenors. Therefore, we will address only the most egregious errors and misstatements in the Intervenors' Opening Briefs.

## I. AIR QUALITY

Four parties raise concerns about air quality impacts of MEP. None of these parties are experts in air quality analysis. Sarvey and Simpson simply restate arguments that were raised with BAAQMD regarding the PDOC, and to which BAAQMD has fully responded.[3]

Despite the comments raised by the Intervenors, the irrefutable fact is that four independent and exhaustive expert air quality analyses of MEP were conducted by BAAQMD[4], SJVAPCDC[5], CEC Staff[6]

[1] 14 C.C.R. § 15384(a); emphasis added.
[2] *Barthelemy v. Chino Basin Municipal Water District* 38 Cal.App.4th 1609, 1619; emphasis added.
[3] 2/24 RT 424 ; Ex. 302.

and Applicant.[7] Each analysis concluded that with the implementation of the conditions in the Final Determination of Compliance ("FDOC"), the SSA and the SJVAPCD Agreement, MEP will fully comply with all applicable air quality LORS, and will not result in any significant air quality impacts to either air district, local communities, or upon the Mountain House Community Services District ("MHCSD").[8] No Intervenor has cited evidence to the contrary.

### A. BAAQMD has the exclusive authority to issue the FDOC for MEP.

Intervenors Dighe and Singh incorrectly assert, without any citation to authority, that the wrong air district issued the "Permit" for this project, based on the premise that air districts are defined by non-attainment areas, rather than by political boundaries.[9] By law, jurisdictional boundaries are established by the California Air Resources Board ("CARB").[10] CARB established the jurisdictional boundary for the BAAQMD to include all of Alameda County; therefore, MEP is located within and subject to BAAQMD's jurisdiction.[11]

Dighe and Singh also claim that the air quality modeling is inadequate because CEC staff "did not checked [sic] the equipments [sic] calibration certification of ARB which gathered the data."[12] The meteorological data used by MEP and Staff in the air dispersion modeling analysis were collected by the SJVAPCD specifically for use in air dispersion modeling.[13] During the preparation of the AFC, the meteorological data were reviewed by BAAQMD and CEC experts, who determined that these data were appropriate for use in MEP's air dispersion modeling.[14] Intervenors do not cite any rule that requires CEC Staff to meteorological monitoring system calibration prior to accepting the meteorological data for use in air dispersion modeling.

### B. CEC Staff appropriately determined MEP's foreseeable annual capacity factor.

Intervenors Dighe, Singh and Sarvey complain that MEP will be licensed to operate up to 4,000 hours per year, whereas the mitigation provided to SJVAPCD was for 1,400 hours.[15] This issue was addressed in the SSA.[16] The approach used by Staff in addressing MEP's impacts is not new and has been used on other simple cycle projects such as the Orange Grove Energy Project, 08-AFC-04.[17] Staff examined the operating history of roughly 100 similar existing peaking power plant units in California between 2001 and 2008 to find that MEP's reasonably foreseeable annual capacity factor would be less than 16 percent, or 1,400 hours annually.[18] Staff determined that annually these units operated approximately 300 hours per year and that 98 percent of the units operated fewer than 1400 hours per year.[19] Thus, Sarvey's assertion that 1,400 hours of operation is "pure speculation"[20] is clearly incorrect.

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[4] Ex. 302.
[5] Ex. 9, Attachment RSDR1-1.
[6] Ex. 301, pages 4.1-44 and 4.1-45.
[7] Ex. 4, pp. 14-15.
[8] Ex. 301, p.4.1-45.
[9] Dighe Opening Brief, p. 39; Singh Opening Brief, p. 24.
[10] Cal. Health & Safety Code § 39606.
[11] Ex. 302, Appendix C, p. 41.
[12] 2/24 RT 415
[13] Ex. 301, p. 4.1-22.
[14] Ex. 301, p. 4.1-40.
[15] Ex. 301, page 4.1-43.
[16] Ex. 301, page 4.1-43.
[17] Orange Grove Energy 08-AFC-04
[18] Ex. 301, page 4.1-21.
[19] Ex. 301, page 4.1-21.

### C. Use of a more conservative methodology to analyze $NO_2$ impacts is appropriate to determine compliance with the federal one hour $NO_2$ standard.

Intervenor Sarvey complains that Staff did not "use EPA or SJVAPCD approved methods to determine if in fact the MEP would violate the new federal 1 hour $NO_2$ standard."[21] Staff did not employ the exact methodology recommended by the EPA or SJVAPCD; however, this is because Staff used an even more conservative analysis (i.e., assumptions that would over-predict potential impacts). If Staff had employed the exact methodology recommended by EPA or SJVAPCD, the resulting $NO_2$ impacts would be *lower* than those used to determine MEP's compliance with the 1-hour Federal $NO_2$ standard.[22]

Sarvey also asserts that Staff and Applicant's $NO_2$ analysis fails to satisfy the USEPA's requirements for the placement of $NO_2$ monitors.[23] However, the placement of ambient $NO_2$ monitors is the responsibility of CARB or local air districts, not Staff or MEP.

### D. AQ-SC7 ensures that local emission reductions will be achieved in SJVAPCD.

Sarvey also complains that the agreement with SJVAPCD to mitigate MEP's air quality impacts on the San Joaquin Valley Air Basin provides no "mechanism to compute the success of these emission reduction programs."[24] Sarvey's criticism ignores the fact that Staff considered the potential of a shortfall in emission reductions from the MEP/SJVAPCD mitigation agreement, and incorporated provisions in Condition AQ-SC7 to expand the scope of the agreement to cover any shortfall, and to require a showing that local emission reductions have been achieved prior to initiating operation of the facility.[25]

### E. Arguments regarding the inadequacy of the GHG analysis for MEP are unfounded.

Sarvey's arguments regarding the GHG Analysis for MEP are badly misinformed. For example, Sarvey argues that CEC Staff's GHG analysis is inadequate because the net worst-case heat rate of MEP, which is approximately 10,187 Btu/kWh, "is higher than the average system- wide heat rate for California which in 2002 was about 9,750 BTU/kWh."[26] Comparing MEP's net worst-case heat rate to the 2002 average system-wide heat rate is a false "apples to oranges" comparison. Such a comparison also ignores the project- specific GHG analysis which shows the heat rate, 2009 electrical production, and GHG performance for power plants within the Greater Bay Area load pocket as compared to the MEP.[27] Instead of focusing on projects located throughout the California electrical system, Staff's analysis focused on existing power plants that could actually be displaced by MEP and concluded that MEP's net worst-case heat rate of 10,187 Btu/kWh was more efficient than all but three of the 14 plants identified, and MEP would likely be higher in the Greater Bay Area loading order than the most of these plants.

Sarvey also inappropriately compares MEP's net worst-case heat rate to the gross heat rates (without considering plant parasitic loads) for the three versions of the LM-6000 turbine analyzed by the BAAQMD in the FDOC.[28] Table 1 of the FDOC shows that the difference in heat rates between the three

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[20] Sarvey Opening Brief, p. 8.
[21] Sarvey Opening Brief, p. 8.
[22] According to BAAQMD, "…this staff assessment shows conservatively higher concentrations because pairing each hour of $NO_2$ impact concentrations with hourly concurrent background values would result in totals less than those shown in this assessment." Ex. 301, page 4.1-23.
[23] Sarvey Opening Brief, p. 8.
[24] Sarvey Opening Brief, p. 9.
[25] Exhibit 301, page 4.1-50, COC AQ-SC7.
[26] Sarvey Opening Testimony, p. 10.
[27] Ex. 301, Greenhouse Gas Table 4, page 4.1-82.
[28] Ex. 302, Table 1, page 8.

versions of the LM-6000 turbines is between 3 and 4 percent. However, this improvement in gross heat rate comes with a penalty in the form of a reduction in gross electrical output of approximately 4 to 6 percent.[29] BAAQMD concluded in the FDOC that the difference in efficiency and heat rate was not sufficient to reject the version of the LM-6000 turbine proposed by MEP and noted that the other LM-6000 versions analyzed by BAAQMD did not meet project objectives.[30]

### F. Intervenors' conclusions regarding potential impacts from ammonia emissions have no basis in the evidentiary record.

Sarvey complains that BAAQMD did not quantify the secondary particulate formation.[31] However, as explained in BAAQMD's response to Sarvey's comments on the PDOC, there is not an agency-approved method for quantifying project-specific secondary particulate matter formation. Staff concluded that "$PM_{10}/PM_{2.5}$ precursors would be mitigated with BAAQMD offsets and local SJVAPCD emission reductions in a sufficient quantity and timeline as specified by staff to ensure the worst-case expected annual emissions are offset by at least one-to-one (Air Quality Table 14)".[32]

Without specific citation to the record, Sarvey asserts that "The evidence in the record is that ammonia is the most significant precursor emission for the formation secondary PM-10/2.5..."[33] In fact, the evidence in the record shows "[BAAQMD] modeling efforts have shown that allowing 5 ppm ammonia slip under worse-case [sic] meteorological conditions would not contribute to significant $PM_{2.5}$ buildup within the Bay Area or Central Valley"[34], "Based on the analysis in SJVAPCD 2008 $PM_{2.5}$ plan, additional ammonia emissions should not significantly influence $PM_{2.5}$ levels in the San Joaquin Valley"[35], and "With sulfuric and nitric acid availability being a key component of particulate matter formation, minimizing and offsetting $SO_x$ and $NO_x$ emissions would avoid $PM_{10}/PM_{2.5}$ impacts and reduce secondary pollutant impacts to a less than significant level".[36] Therefore, MEP's ammonia emissions are not expected to significantly contribute to secondary particulate matter formation. Mitigation of MEP's oxides of sulfur and nitrogen emissions will reduce any potential impacts to less than significant levels.

### G. BAAQMD has determined a particulate matter BACT for MEP.

Sarvey complains that BAAQMD and CEC Staff have not provided an hourly emission limit for particulate matter.[37] BAAQMD conducted a comprehensive BACT analysis and determined that particulate matter BACT for MEP is the use of inlet air filtration, low sulfur natural gas, combined with good combustion practice, therefore a numeric hourly limitation was neither warranted nor required by applicable regulatory guidance.[38] Furthermore, BAAQMD included a permit condition to monitor daily particulate matter emissions, which is included in the Supplemental Staff Assessment ("SSA") as Condition AQ-23.[39] As noted by BAAQMD, the particulate matter emissions are affected by equipment design (inlet filtration and good combustion practices) and fuel selection (low sulfur fuel), which do not change hourly or daily. Therefore, an hourly or daily emission limitation is not warranted to comply with the 24-hour national $PM_{2.5}$ ambient air quality standards. This is confirmed by Staff's analysis, which

[29] Ex. 302, Appendix C, p. 23.
[30] Ex. 302, Appendix C, pp. 23-24.
[31] Sarvey Opening Brief, p. 12.
[32] Ex. 301, pp. 4.1-28 and 4.1-34.
[33] Sarvey Opening Brief, p. 12.
[34] Exhibit 302, Appendix C, page 27.
[35] Exhibit 302, Appendix C, page 12.
[36] Exhibit 301, p. 4.1-28.
[37] Sarvey Opening Brief, p. 12.
[38] Exhibit 302, p. 56.
[39] Exhibit 301, p. 4.1-60.

used a more conservative 24-hour $PM_{2.5}$ background concentration of 81.2 micrograms per cubic meters to assess MEP's ambient air quality impacts[40] and determined that "the local emission reductions resulting from the SJVAPCD Air Quality Mitigation Settlement would mitigate the foreseeable PM10/PM2.5 impacts to a less than significant level.[41]

Sarvey also complains that no health risk assessment for particulate matter has been performed, but cites no law or regulation that requires such an assessment. As BAAQMD discussed in its response to comments on the PDOC and at the evidentiary hearings, an agency-approved methodology does not exist to conduct the source-specific particulate matter health risk assessment being requested.[42] Sarvey's conjecture is not supported by any applicable LORS.

### H. MEP does not meet the Clean Air Act's definition of a major source.

Intervenor Simpson claims that MEP is a major source as defined under the Clean Air Act.[43] Simpson is simply wrong. BAAQMD has concluded that MEP is not a major source under the PSD programs, and is therefore not subject to PSD review.[44] CEC Staff concurs with this determination.[45]

### I. MEP and the Byron Cogen are not "under common control."

Simpson also argues that MEP and the Byron Cogen are a "single source" because they are "under common control."[46] Without citation to authority, Simpson claims that Byron Cogen and MEP are "under common control" because both are dispatched by PG&E, and provides a definition of common control that has no basis in either the Clean Air Act or its implementing regulations.[47]

Based on twenty years of USEPA guidance on the issue, it is clear that the Byron Cogen and MEP are not under common control. Whether there is common control is a fact-specific determination based on questions of who owns or operates the facilities, not on the basis of who dispatches the plants.[48] Byron Cogen and MEP are not affiliates; Byron Cogen is owned by Ridgewood Electric Power Trust III, and MEP is owned by Diamond Generating Corporation, a wholly owned subsidiary of Mitsubishi Corporation.[49] The facilities will not share common workforces, plant managers, corporate officers, or board executives. The facilities will not share equipment. Neither Byron Cogen nor Diamond Generating Corporation can make decisions affecting control technologies for the other entity. The operational state of either facility has no bearing on the operations of the other. Therefore, MEP and the Bryon Cogen are not under common control, and are not together considered a single major source under the Clean Air Act.

## II. ALTERNATIVES

### A. The CPUC has determined that MEP is consistent with the preferred loading order.

Intervenor Sierra Club California ("SCC") contends that the Alternatives Analysis should have "mentioned" the loading order in relation to the MEP. This contention reflects SCC's fundamental misunderstanding of the loading order and how it was implemented in relation to MEP.

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[40] Exhibit 301, p. 4.1-27.
[41] Exhibit 301, p. 4.1-45.
[42] Exhibit 302, Appendix C, p. 15.
[43] Simpson Opening Brief, word doc. p. 11.
[44] Exhibit 302, p. 77 and Appendix C, p. 11.
[45] Ex. 301, p. 4.1-3.
[46] Simpson Opening Brief, word doc. p. 13.
[47] Simpson Opening Brief, word doc. p. 13.
[48] http://www.epa.gov/region07/air/title5/t5memos/control.pdf.
[49] Exhibit 301, p. 3-1.

The loading order was initially conceived in California's 2003 Energy Action Plan ("EAP I"), and jointly adopted by the CEC, CPUC and the California Power and Conservation Financing Authority. As stated in EAP I, "The Action Plan envisions a 'loading order' of energy resources that will guide decisions made by the agencies jointly and singly. First, the agencies want to optimize all strategies for increasing conservation and energy efficiency to minimize increases in electricity and natural gas demand. Second, recognizing that new generation is both necessary and desirable, the agencies would like to see these needs met first by renewable energy resources and distributed generation. Third, because the preferred resources require both sufficient investment and adequate time to "get to scale," *the agencies also will support additional clean, fossil fuel, central-station generation.* Simultaneously, the agencies intend to improve the bulk electricity transmission grid and distribution facility infrastructure to support growing demand centers and the interconnection of new generation."[50] Energy Action Plan II ("EAP II," issued October 2005)[51] similarly endorsed the loading order, and acknowledged that "to the extent efficiency, demand response, renewable resources and distributed generation are unable to satisfy increasing energy and capacity needs, *we support clean and efficient fossil-fired generation*."[52]

In Decision 09-10-017, the CPUC expressly took the loading order into consideration when it approved MEP's Power Purchase Agreement ("PPA") with PG&E. The CPUC specifically held that MEP was consistent with the loading order: "In determining the need for new resources in D.07-12-052, we considered forecasts of energy and peak demand, and compared these with available resources consistent with the preferred loading order...The proposed [MEP] PPA is consistent with the requirements of D.07-12-052, including the preferred loading order, and the need for dispatchable ramping resources to firm the intermittent types of renewable resources."[53] Therefore, it is not at all surprising that CEC Staff's Alternatives analysis does not revisit the question of MEP in relation to the loading order. This issue has already been resolved, as a matter of fact and a matter of law, by the CPUC in D.09-10-017, and is consistent with both EAP I and EAP II.

Intervenors now argue that the CPUC or CEC should revisit the CPUC's findings in D.09-10-017. However, the CPUC has rebuffed the efforts of these parties to continuously second-guess approved procurement decisions. As the CPUC stated in D.06-11-048: "Our long term procurement proceedings are intended to monitor changes in forecasts. In order to permit timely action in response to Commission determinations of need for new generation resources, it is crucial that we not be sidetracked by second-guessing recent determinations absent evidence of significant errors."[54] Intervenors do not allege "significant errors" in D.09-10-017; they merely allege that changes in forecasts have occurred since the MEP PPA was approved. SCC wants to "update" these forecasts.[55] Under the rules established by the CPUC, these parties should not be permitted to side-track or second guess the CPUC's determination that MEP is needed and is consistent with the loading order. There will always be changes in forecasts and these changes should affect future procurement decisions. However, the CEC must not allow collateral second-guessing of CPUC determinations between the time that the CPUC approves a PPA and the time the CEC issues the AFC license.[56]

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[50] EPA I (http://www.energy.ca.gov/energy_action_plan/2003-05-08_ACTION_PLAN.DOC) at 3; emphasis added.
[51] http://www.energy.ca.gov/energy_action_plan/2005-09-21_EAP2_FINAL.DOC.
[52] EAP II at 2; emphasis added.
[53] D.09-10-017, pp. 8-9, Conclusion of Law #3. D. 09-10-017 further states "The Mariposa PPA is consistent with the requirements of D.07-12-052, including the preferred loading order, and the need for disptachable ramping resources."
[54] D.06-11-048, p. 10.
[55] SCC Opening Brief, p. 15.
[56] As we noted in our Opening Brief, Sarvey as a member of CARE, entered into a Settlement Agreement in A.09-04-001 whereby he agreed that the MEP PPA "is just, fair and reasonable, and in the public interest."

In summary, Intervenors are free to disagree on the rate of growth of electricity demand in California. However, parties are not free to litigate this issue in this proceeding because (1) the CPUC has ruled on this issue in D.09-10-017, and (2) the Legislature has expressly determined that a CEC siting case is not the proper forum for questions of need.

### B. Solar PV and energy storage do not meet project objectives.

SCC complains that the Alternatives Analysis did not assess solar PV and energy storage as alternatives to MEP. As we explain in our Opening Brief, these technologies were considered but rejected as alternatives to MEP because these technologies do not meet MEP's basic project objectives.[57] SCC also complains that the Alternatives Analysis failed to assess the costs to ratepayers.[58] As we explain in our Opening Brief, the Alternatives Analysis under CEQA is charged with analyzing alternatives that can avoid or mitigate significant environmental impacts, not economic costs.[59]

SCC argues that the Alternatives Analysis did not "correctly" assess the impact of MEP on the retirement of older plants.[60] This argument is predicated upon the inaccurate qualifying phrase "in fact".[61] However, none of the "facts" alleged by SCC are in the record of this proceeding, and thus these unsubstantiated allegations cannot form the basis for any finding by the CEC.

Finally, SCC claims the Alternatives Analysis fails to conform with PG&E's Environmental Leadership Protocol.[62] This argument is nonsensical. A PG&E protocol is (1) not an applicable LORS, (2) not in the record of this proceeding and (3) has nothing to do with an Alternatives analysis.

## III. BIOLOGICAL RESOURCES

### A. MEP Will Not Result in Significant Adverse Impacts on Biological Resources.

None of the Intervenors filed testimony on the subject of Biological Resources. Nevertheless, several Intervenors raised new, unsubstantiated allegations in their Opening Briefs. These allegations are not supported by the record in this proceeding.

First, Sarvey speculates that MEP is not compatible with the standards for development review in East County Area Plan ("ECAP") Table 5 because MEP could "interfere with the ability of any identified species of concern to use the site as habitat or as a corridor linking identified habitat areas."[63] There is no evidence in this record that MEP will divide a corridor linking identified habitat areas. No special-status terrestrial species are known to occur onsite, or are known to use the project site as a dispersal and movement corridor.[64] Wildlife will be able to freely move up to and around the site to adjacent contiguous habitats during the operational life of the project.[65] California Department of Fish and Game and U.S. Fish and Wildlife Service have specifically considered potential habitat fragmentation when

[57] Applicant's Opening Brief, p. 4; Ex. 301, p. 6-1.
[58] SCC Opening Brief, p. 20.
[59] Applicant's Opening Brief, pp. 3-4.
[60] SCC Opening Brief, pp. 20-21.
[61] SCC Opening Brief, p. 20.
[62] SCC Opening Brief, p. 21.
[63] Sarvey Opening Brief, p. 7.
[64] Ex. 36, Attachment F.
[65] Ex. 36, Attachment F.

providing input to Staff and MEP regarding proposed mitigation ratios.[66] The proposed offsite compensatory habitat mitigation will be part of a larger framework of other barrier-free conservation properties located nearby. Staff found that with the implementation of the compensatory mitigation outlined in Condition of Certification BIO-16, impacts to biological resources would be minimized and below a level of significance.[67]

Second, Simpson argues that Staff failed to properly analyze the impact of nitrogen and ammonia deposition on the surrounding areas.[68] Although he offered no testimony on this matter, Simpson speculates that "there is a lake located near the site and the increase in pollutant, including Nitrogen deposition and shoreline fumigation will adversely impacts this body of water... An increase in Nitrogen deposition will likely lead to shoreline fumigation and an increase in invasive species in the area."[69] These allegations without citation to the record should be given no weight.

In marked contrast, Staff and Applicant have properly studied and identified the potential impacts of nitrogen deposition on the area immediately surrounding the site.[70] The project site and vicinity under current conditions are characterized as a nitrogen-rich environment.[71] Pre-existing agricultural practices in the vicinity include row crop and livestock production (including cattle grazing), causing significant nitrogen inputs into the environment.[72] Regionally, additional nitrogen inputs are caused by industrial activities and transportation (motor vehicle use).[73] The waters being diverted into the Clifton Court Forebay and Byron Bethany Reservoir are from natural waterbodies that are dominated by agricultural drainage waters; therefore, they are also nitrogen-rich for the reasons described above. There are no nitrogen-deficient habitats immediately surrounding the MEP site. The surrounding natural landscape is characterized as non-native annual grassland interspersed with seasonal wetlands including vernal pools. Cattle grazing has been and will continue to be the primary land activity within the undeveloped areas of the project parcel.[74] Therefore, MEP and Staff properly concluded that nitrogen deposition will not cause a significant adverse impact on the surrounding area.

Third, Dighe and Singh speculate that MEP could impact burrowing owl habitat, which in turn, could increase rodent infestation in the MHCSD.[75] They also speculate that burrowing owls will be affected by thermal plumes from MEP.[76] Burrowing owls in the vicinity of the MEP site do not provide pest control for the MHCSD. Burrowing owls occupy a relatively small home range from about 0.2 square miles to up to approximately 1 square mile from their burrow. The home range of the owls near MEP is likely much less than the upper 1 square mile range due to the abundance of prey found in the project vicinity. MHCSD is located approximately 2.5 miles from the Project site, well outside of the general home range for burrowing owls in the vicinity of MEP. Burrowing owls are low-flying predators which spend most of their time close to the ground near their burrow entrance. They hunt for insects and

[66] Ex. 301, Section 4.2.
[67] Ex. 301, Section 4.2.
[68] Simpson Opening Brief, word doc. p. 9.
[69] Simpson Opening Brief, word doc. p. 9.
[70] Ex. 301, p. 4.2-43; Ex. 36, Attachment F, pp. 2-11 – 2-13.
[71] Ex. 301 Page 4.1-28.
[72] Ex. 36, Attachment F, p. 2-13.
[73] *Impacts of Nitrogen Deposition on California Ecosystems and Biodiversity* (CEC-500-2005-165). www.energy.ca.gov/2005publications/CEC-500-2005-165/CEC-500-2005-165.PDF.
[74] Ex.1, Section 5.6.
[75] Singh Opening Brief, p. 22.
[76] Singh Opening Brief, p. 23.

other prey items by hopping, walking, and/or running along the ground, or by taking short flights from a nearby perch such as fence post and are not expected to be at heights above 80 foot stacks.[77]

## IV. LAND USE

### A. MEP is consistent with the ECAP.

Intervenors continue to raise the same arguments regarding Measure D and the ECAP that were addressed and dismissed by the CEC in both the East Altamont Energy Center ("EAEC") and the Tesla Power Plant proceedings.[78] In both those proceeding, the CEC confirmed that power plants constitute infrastructure and are consistent with the ECAP.[79]

#### 1. MEP constitutes infrastructure permissible under Policy 13.

ECAP Policy 13 defines infrastructure as including "public facilities, community facilities, and all structures and development necessary to the provision of public services and utilities." As explained in its Opening Brief, MEP qualifies as infrastructure in two ways: (1) as a public facility, and (2) as a structure or development necessary to the provision of public services and utilities.[80] While several Intervenors argue at length that MEP does not constitute a public facility under Policy 13 (an argument MEP continues to dispute), it remains undisputed that MEP, as a generator of electricity, is a "structure and development necessary to the provision of public services and utilities."[81] Electrical service is a utility service provided to the public. Electricity cannot be provided without generation.[82] Thus, MEP is clearly infrastructure under Policy 13.

Sarvey asserts without citation to authority that the "legal definition of public facilities and public services is 'facilities or services which are financed, in whole or in part, by any state or political subdivision thereof.'"[83] Sarvey concludes, based on his definition, that MEP is not a public facility because it is "not financed by any state [or] political subdivision."[84] While Sarvey does not provide a source for this "legal definition," it is clear that this definition is not found in either the ECAP or in the Alameda County Zoning Ordinance. Policy 54 of the ECAP specifically provides that public facilities include "limited infrastructure."[85] There is no requirement that such infrastructure be specifically financed by "any state or political subdivision thereof."

Intervenors also argue that there is no evidence in the record that MEP is "needed for permissible development" and that "absent such an analysis, the CEC cannot conclude that MEP is not excessive as required by ECAP Policy 13."[86] These arguments are baseless. MEP specifically commissioned an analysis of the load and resource balance to determine the existing electrical energy needs and available generation for Alameda County, and specifically Eastern Alameda County.[87] This analysis found that facilities such as MEP are needed to balance load needs, and help meet electrical energy needs by

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[77] Ex. 301, p. 4.2-23.
[78] Ex. 67, pp. 4-5.
[79] East Altamont Energy Center, Final Commission Decision, 01-AFC-4, p. 369 (August 2003); Tesla Power Project, Final Commission Decision, 01-AFC-21, p. 388, Findings of Fact 6, 11, and 12 (June 2004); also see Ex. 67, pp. 4-5.
[80] MEP Opening Brief, pp. 9-10.
[81] Ex. 41; Ex. 67, p. 2; *also see* 2/24 RT 129-130.
[82] 2/24 RT 134.
[83] Sarvey Opening Brief, p. 2.
[84] Sarvey Opening Brief, p. 2.
[85] ECAP Policy 54.
[86] SCC Opening Brief, p. 9. *Also see* Singh Opening Brief, p. 15 and Dighe Opening Brief, p. 35.
[87] Ex. 1, Appendix 5.6A.

providing additional local dispatchable generation, decreasing the amount of imported energy, and providing system/grid support at critical times in Eastern Alameda County and Alameda County.[88] No evidence was presented to the contrary. MEP is clearly consistent with Policy 13 of the ECAP.

**2. MEP is consistent with Policy 54 of the ECAP.**

Policy 54 of the ECAP provides that, "The County shall approve only open space, park, recreational, agricultural, limited infrastructure, public facilities (e.g., limited infrastructure, hospitals, research facilities, landfill sites, jails, etc.) and other similar and compatible uses outside the Urban Growth Boundary." SCC claims that MEP is inconsistent with Policy 54 because MEP is "not a public facility", and speculates that MEP is not "minimal" enough to constitute "limited infrastructure."[89] However, Policy 54 must be read in conjunction with the entirety of the ECAP. Policy 13 already provides a limitation of what infrastructure should be permitted within the ECAP, specifically provides that infrastructure uses that are permitted within the ECAP, and includes some limitations on those uses. Thus it is evident from the language of the ECAP that infrastructure, as allowed by Policy 13, is permitted outside the Urban Growth Boundary, consistent with Policy 54.

**3. MEP does not constitute an industrial use under the ECAP.**

Certain Intervenors postulate that MEP constitutes an industrial use under the ECAP.[90] For example, Dighe claims that "Mr. Martinelli has admitted that MEP is a [sic] 'industrial infrastructure'."[91] Dighe misrepresents Mr. Martinelli's testimony. Nowhere does Mr. Martinelli state that MEP is "industrial infrastructure"; in fact, Mr. Martinelli makes very clear that MEP is not an industrial use as defined by the ECAP.[92] Similar to Dighe, SCC argues that "MEP is a private industrial use."[93] However, SCC provides no support or explanation, beyond SCC's opinion, as to how MEP is an "industrial use." In fact, 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 processes, and the wholesaling of merchandise."[94] 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 included within this definition. As discussed above, MEP is infrastructure as defined by the ECAP, and Intervenors unsubstantiated opinions to the contrary are unpersuasive.

**4. MEP is a permitted use of lands with the Large Parcel Agriculture designation.**

SCC argues that MEP is not a permitted use of lands designated as Large Parcel Agriculture ("LPA") based largely on Mr. Schneider's testimony regarding what "drafters of Measure D meant to exclude."[95] This argument fails for several reasons. First, Mr. Schneider's testimony that "the drafters of Measure D meant to exclude" industrial uses from lands designated as LPA is irrelevant.[96] As explained by the California Supreme Court, "the opinion of drafters…who sponsor an initiative is not relevant since

[88] Ex. 1, Appendix 5.6A, p. 9.
[89] SCC Opening Brief, p. 8.
[90] Singh, Dighe, SCC,
[91] Dighe Opening Brief, p. 34.
[92] 2/24 RT 127, 136.
[93] SCC Opening Brief, p. 7.
[94] 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.
[95] SCC Opening Brief, p. 7.
[96] Ex. 402; SCC Opening Brief, p. 7; 2/24 RT 330.

such opinion does not represent the intent of the electorate."[97] The policy supporting this conclusion is that it cannot be said certain that voters were aware or informed of the drafters' intent, for example by way of a voter's pamphlet.[98] Therefore, regardless of what the drafters of Measure D meant to exclude, where, as here, there is no evidence in the record that materials expressly explaining such intent were provided to the electorate, Mr. Schneider's testimony of his intent is irrelevant as to how the ECAP should be interpreted.

Second, the issue of whether or not industrial uses are permitted outside the Urban Growth Boundary is irrelevant to this proceeding. Mr. Schneider's conclusion that MEP is not a permitted use of lands designated as LPA is erroneously based on the premise that MEP constitutes an industrial use.[99] As discussed above and as clearly established in the evidentiary record, MEP constitutes a public or quasi-public use, both of which are expressly allowed in the LPA designation, and is not an industrial use.[100] Furthermore, the plain text of the LPA designation in the ECAP, even as amended by Measure D, clearly permits infrastructure in lands with this designation, and similar uses compatible with agriculture.[101] For example, the ECAP discusses the building location requirements that apply to developments within LPA designated lands, and specifically excludes infrastructure under Policy 13 from such requirements.[102] As described above, MEP satisfies the definition of infrastructure, and as explained in detail below the California Department of Conservation and Alameda County have determined that MEP is a use compatible with agriculture and the Williamson Act.[103] Thus, any argument that Measure D somehow bars MEP based on the assumption that MEP is an industrial use is without merit. MEP is a permitted use of lands designated as LPA.

**5. MEP is consistent with the floor area ratio ("FAR") requirements of Large Parcel Agriculture designation.**

Intervenors incorrectly assert that MEP violates the FAR requirements of the Large Parcel Agriculture designation in the ECAP.[104] As set forth in Exhibit 43, MEP is consistent with Large Parcel Agriculture FAR requirements because the two non-residential buildings proposed for the project cover less than 20,000 square feet.[105] Therefore, there is no "violation" of the ECAP's FAR requirements.

**6. MEP aids in the achievement of the policies and objectives identified in the ECAP.**

Sarvey argues incorrectly that MEP "accomplishes none of [the] objectives" identified in Measure D, and in particular, that MEP "does not preserve agricultural land."[106] As discussed in its Opening Brief, MEP will preserve and enhance agriculture and agricultural lands consistent with Measure D and the ECAP in two fundamental ways. First, MEP will ensure that the current agricultural productivity of the land is not only preserved, but enhanced through the use of a higher productivity seed mix and year-round water supply for cattle to increase the holding capacity on the parcel and allow for more flexible rangeland management.[107] Second, by utilizing only a fraction of the parcel for a use compatible with agriculture, MEP ensures that the Williamson Act contract on the parcel does not have to be cancelled and

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[97] *Taxpayers to Limit Campaign Spending v. Fair Pol. Practices Com*, 51 Cal. 3d 744, 764, fn 10 (1990).
[98] *Taxpayers to Limit Campaign Spending*, 51 Cal. 3d 744, 764, fn 10; *People v. Castro*, 38 Cal. 3d 301, 312 (1985).
[99] SCC Opening Brief, p. 7.
[100] ECAP, p. 47; Ex. 41; Ex. 67, p. 2; *also see* 2/24 RT 30, 37, 114, 129-130, 135.
[101] ECAP, p. 47.
[102] ECAP, p. 47.
[103] ECAP, p. 47.
[104] Dighe Opening Brief, p. 36.
[105] Ex. 41.
[106] Sarvey Opening Brief, p. 1.
[107] Ex. 13, p. 5.

that the entire property remains subject to the protections afforded by the Williamson Act. Both the California Department of Conservation and Alameda County have determined that MEP will not compromise or impair the long-term productive agricultural capability of the parcel.[108] MEP is consistent with the ECAP's goals of preserving and enhancing agriculture.

#### 7. MEP worked closely with Alameda County and surrounding counties.

Dighe alleges that MEP "has clearly violated Policy 76" by failing to work with San Joaquin County and San Joaquin Valley Air Pollution Control District ("SJVAPCD").[109] This allegation is wrong. San Joaquin County was fully informed of the project by CEC Staff, given several opportunities to provide comments, and in fact, did so.[110] In addition, MEP worked at length with the SJVAPCD to ensure that air quality concerns were addressed, has committed to provide funding for local air quality benefit programs, and has included within the mitigation agreement with SJVAPCD a provision that preference be given for programs in or near the MHCSD.[111] Furthermore, a representative of the SJVAPCD was present at the evidentiary hearings on February 24 to answer questions.[112] Intervenors chose not to ask him any questions.[113] As evident from the record, Policy 76 has not been "violated."

### B. MEP is a compatible use under the Williamson Act.

Sarvey states "Applicant has expressed a unique legal opinion that electrical generating facilities are compatible with Williamson Act Property and that the MEP is a compatible use."[114] However, as explained below, the opinion that MEP is a compatible use under the Williamson Act is neither unique, nor is it exclusively MEP's opinion.[115] The Williamson Act clearly provides that "electric. . . facilities are hereby determined to be compatible uses within any agricultural preserve", unless the local government has provided otherwise.[116] The California Department of Conservation, Alameda County, and CEC Staff have all independently concluded that MEP is a compatible use.[117]

#### 1. MEP is a compatible use under the Williamson Act's principles of compatibility.

Sarvey asserts, without any citation or evidentiary support, that the term "electrical facilities…has always been associated with gas, electrical, and water linear conveyance systems not electrical production facilities."[118] There is no such provision in the Williamson Act, nor has one existed. To the contrary, the legislative history of the Williamson Act reveals that in 1991 and 1992, there were attempts to amend Section 51238 to limit its application to transmission facilities, but these attempts were withdrawn.[119] In fact, Section 51238's reference to electric facilities as compatible uses has not been limited during the 46-year history of the Williamson Act. Sarvey's assertion is also contrary to the evidentiary record, which demonstrates that the term "electrical facilities" under the Williamson Act includes electrical generating facilities such as MEP.[120]

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[108] Ex. 20; Ex. 41.
[109] Dighe Opening Brief, p. 27;
[110] Ex. 301, pp. 1-3 through 1-4.
[111] Ex. 301, p. 4.1-32; Ex. 7, Attachment DR11-1; Ex. 14, pp. 8-14.
[112] 2/24 RT 367, 439.
[113] 2/24 RT 439.
[114] Sarvey Opening Brief, p. 5.
[115] Ex. 20; Ex. 41.
[116] Cal. Govt. Code § 51238.
[117] Ex. 20; Ex. 41; Ex/ 301, p. 4.12-1, 13, 36, 41, 45.
[118] Sarvey Opening Brief, p. 5.
[119] AB 1770, AB 3406 [1991-1992 Regular Session].
[120] 2/24 RT 153

Not only is Sarvey's attempt to rewrite the express language of Section 51238 unavailing, MEP would also separately qualify as a compatible use under the three principles of compatibility set forth in Government Code section 51238.1 that the local government must use to establish a use as a compatible use beyond those identified in Section 51238. Sarvey ignores the fact that not only did Alameda County determine that MEP satisfied the principles set forth in Section 51238.1, so did the California Department of Conservation, which is the State body in charge of administering and interpreting the Act.[121]

Even if the term "electrical facilities" could somehow be read to exclude MEP as a compatible use under Government Code section 51238, the evidence shows that MEP meets the three principles of compatibility set forth in the Williamson Act, and is a compatible use under the Williamson Act.[122]

**2. MEP is consistent with the Williamson Act contract on the property.**

Some Intervenors claim that MEP is not consistent with the Williamson Act contract on the parcel.[123] To support this claim, certain Intervenors read Exhibit B of the Williamson Act contract as providing for only two types of compatible uses: (1) grazing, breeding, or training of horses and cattle and (2) co-generation/waste-water distillation facility.[124] However, as explained by Alameda County, "no augmentation to the Exhibit B compatible use list is necessary" because electrical facilities are "explicitly called out" in the Williamson Act as a compatible use, unlike the two compatible uses identified in Exhibit B.[125] Thus, Alameda County's prior decision to identify two compatible uses in the contract for the property does not negate the statutorily-recognized compatible uses identified in Section 51238. In addition, a Williamson Act contract 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.[126] Thus, there is no conflict with the Williamson Act contract on the parcel.

**C. The Alameda County CUP process does not apply in the CEC proceeding.**

Sarvey argues that various aspects of the Alameda County conditional use permit ("CUP") process apply to the CEC certification process.[127] Simpson similarly asserts that CEC Staff "failed to meet its mandate" to provide notice by "fail[ing] to post a notice on the actual site,"[128] but Simpson fails to identify any particular law or regulation that requires the CEC to provide notice in this manner. These arguments ignore the preemptive permitting authority of the CEC. The Warren-Alquist Act specifically provides that certification by the CEC "shall be in lieu of any permit, certificate, or similar document required by any state, local, or regional agency" and "shall supersede any applicable statute, ordinance, or regulation of any state, local, or regional agency, or federal agency to the extent permitted by federal law.[129] Thus, the Alameda County process for noticing or issuing a CUP is completely irrelevant to the CEC certification process. The noticing provisions of the CEC's certified regulatory program, which have been scrupulously followed, control.

[121] Ex. 20; Ex. 41.
[122] Ex. 1, p. 5.6-18; Ex. 4; Ex. 20, Ex. 41; Ex. 301, pp. 4.12-11 through 13.
[123] Dighe Opening Brief, p. 22; Sarvey Opening Brief, pp. 5-6; SCC Opening Brief, pp. 10-11; Singh Opening Brief, p. 17.
[124] Opening Brief, pp. 5-6; SCC Opening Brief, pp. 10-11.
[125] Ex. 42.
[126] *County of Humboldt v. McKee* ( 2008) 165 Cal.App.4th 1476, 1496-1500.
[127] Sarvey Opening Brief, p. 5; Simpson Opening Brief, word doc. p. 9.
[128] Simpson Opening Brief, word doc. p. 9.
[129] Cal. Pub. Resources Code § 25500.

### D. The Contra Costa Airport Land Use Compatibility Plan ("CCALUCP") is not an applicable LORS.

CalPilots requests that the CEC find that the CCALUCP is an applicable "local law, ordinance regulation or standard", and that as "a result of its location [MEP] is bound by the terms of the [CCALUCP]." CalPilot's request is based on the erroneous assumption that the CCALUCP applies to projects outside the borders of Contra Costa County.

By its express terms, the CCALUCP "does not extend to [the] jurisdictions" of Alameda and San Joaquin County, and is "binding only within Contra Costa County."[130] As the Mariposa power plant will be located in Alameda County, the CCALUCP is not an applicable local LORS and MEP cannot be "bound by the terms" of a document that has no relevance in Alameda County. Moreover, even assuming for the sake of argument that the CCALUCP were applicable, MEP is a compatible land use. As CalPilots concedes, the "[CCALUCP] does not include any specific restrictions on the construction of power plants or facilities emitting thermal plumes."[131] Therefore, there is no basis to make the findings requested by CalPilots.

## V. SOCIOECONOMICS

### A. Because MEP will not result in any significant adverse impacts on any populations, MEP complies with applicable environmental justice requirements.[132]

Several parties have expressed concerns regarding environmental justice ("EJ"). These parties have a fundamental misunderstanding of what "environmental justice" means. Environmental justice is defined by the USEPA as "The fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies. Fair treatment means that no group of people, including racial, ethnic, or socioeconomic group should bear a disproportionate share of the negative environmental consequences resulting from industrial, municipal, and commercial operations or the execution of federal, state, local, and tribal programs and policies."[133]

To begin, no party argued that MHCSD is a "low income" population as that term of art is defined in applicable guidance. Instead, certain Intervenors complain that the MHCSD community is more numerous and ethnically diverse than is represented in the 2000 census data.[134] No one disputes that the 2010 Census will likely confirm that the population of the MHCSD has grown more numerous and ethically diverse. However, based on the USEPA's definition of EJ concerns, the dispositive inquiry is whether any "disproportionately high and adverse impacts" (or "significant environmental impacts" in CEQA terms) fall disproportionately on minority and/or low-income members of the community. If there are no such impacts, then the project is consistent with EJ requirements, regardless of how ethnically diverse the surrounding population may be. On the other hand, if there are significant adverse impacts, then the CEC considers whether these impacts fall disproportionately on a minority or low income group.

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[130] Contra Costa County Airport Land Use Commission, *Contra Costa County Airport Land Use Compatibility Plan*, p. 1-1 and Section 1.3(c) (Dec. 2000) http://www.co.contra-costa.ca.us/DocumentView.aspx?DID=851.
[131] CalPilots Opening Brief, word doc. p. 4.
[132] Marsh Landing Generating Station, 08-AFC-03, Commission Decision, pp. 55, 69, 100, 104TID Almond 2 Power Plant, 09-AFC-2, Commission Decision, Waste Management, p. 8, Traffic & Transportation, p. 15, Socioeconomics, p. 8.
[133] http://www.epa.gov/region7/ej/definitions.htm
[134] Dighe Opening Brief, pp. 7-8; Simpson Opening Brief, word doc. pp. 5-6; Singh Opening Brief, pp. 5-8.

In this proceeding, Intervenors dwell exclusively on the question of the demographics of the MHCSD rather than on MEP's potential impacts. The undisputed evidence is that MEP will not have any significant adverse environmental impact on any population;[135] therefore, without any significant adverse impacts, MEP cannot have a disproportionate high and adverse impact on the MHCSD. Singh alleges that Staff and MEP failed to consider impacts on MHCSD.[136] This is incorrect. Staff and MEP examined both the environmental impacts of MEP on the general population and the impacts on MHCSD in particular, and concluded that there are no significant adverse environmental impacts.[137]

### B. The CEC's public outreach has been exemplary.

As explained in Applicant's Opening Brief, the intent of the CEC's environmental justice policy "is to ensure that the public, including minority and low-income populations, are informed of opportunities to participate."[138] This intent has been met, and indeed surpassed, in this proceeding through the efforts of the CEC, CEC Staff, and the Public Advisor.[139]

Several Intervenors allege that the CEC's public outreach efforts to the MHCSD have been inadequate. Three different parties purport to represent the MHCSD community in this proceeding: (1) the District itself, (2) Singh, a recently elected member of the MHCSD Board, and (3) Dighe, an unsuccessful candidate for the MHCSD Board in the last election.[140] Each of these parties joined this proceeding as a result of the CEC's outreach. Their very participation belies the argument that the CEC has not reached out to the MHCSD.

The CEC has undertaken an extraordinary public outreach effort to all surrounding communities, including MHCSD. This effort, which far exceeds the notice requirements of CEQA, and which is more extensive than the outreach of any other California agency, is detailed in the Public Advisor's presentation at the first informational hearing.[141] In addition, MEP has done substantial outreach in MHCSD as well. MEP sought input from the MHCSD well in advance of the filing of the AFC.[142] Presentations were provided to both MHCSD Staff and the MHCSD Board of Directors.[143] Representatives of MEP attended almost every MHCSD Board meeting from July 2009 through March 2010, and have had numerous other meetings with MHCSD Board Members, Staff, and members of the MHCSD community since the filing of the AFC in June 2009 to answer questions regarding MEP.[144] Statements by Intervenors that neither MEP nor the CEC have done any outreach to MHCSD are clearly unfounded.[145]

Dighe claims that "English was the only language used for outreach."[146] This is incorrect. As the Public Adviser explained at the first Informational Hearing, outreach was provided in both English and Spanish. [147] While it is true that outreach was not conducted in other languages, such as Punjabi or

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[135] 3/7 RT, p. 33; Ex. 1, Ex. 4; Ex. 301.
[136] Singh Opening Brief, p. 9.
[137] 3/7 RT, p. 33; Ex. 1, Ex. 4; Ex. 301, pp. 4.1-37, 41; 4.7-7, 10, 12, 13; 4.8-2, 8, 9, 11, 12, 13; 4.10-10, 12-15, 29-31, 50; 4.12-6, 15-17, 23.
[138] Applicant's Opening Brief, pp. 15-16.
[139] For example, *see* Ex. 301, pp. 1-4 through 11.
[140] For example, *see* 2/24 RT 2, 3, 5, 82, 101.
[141] http://www.energy.ca.gov/2009publications/CEC-130-2009-006/CEC-130-2009-006.PDF.
[142] Ex. 13.
[143] Ex. 13. Presentations were held on Aril 9, 2009 for MHCSD Staff, and on July 8, 2009 for the MHCSD Board of Directors.
[144] Ex. 13; Ex. 137.
[145] Dighe Opening Brief, pp. 9-10; Singh Opening Brief, p. 14.
[146] Dighe Opening Brief, p.9.
[147] http://www.energy.ca.gov/2009publications/CEC-130-2009-006/CEC-130-2009-006.PDF. *Also see* the Public Advisor's Office Notice of the Proposed Project in Spanish at http://www.energy.ca.gov/2009publications/CEC-130-2009-006/CEC-130-

Korean, no party has demonstrated a need for other specific languages. MHCSD itself is a public agency. If, as some Intervenors allege, environmental justice demands notices and translation to MHCSD on the basis that MHCSD is an environmental justice community, why is the business of the MHCSD conducted only in English?

Finally, the Intervenors also complain that hearings and workshops were held at a "remote" location.[148] The BBID offices are approximately 4 miles by car from the center of the MHCSD. If the BBID offices are remote, then MEP, which is approximately the same distance from MHCSD as the BBID office, and which cannot be seen or heard from within MHCSD, is similarly remote.

The CEC, CEC Staff and the Public Adviser should be commended, not criticized, for their extraordinary outreach efforts to all surrounding communities, including MHCSD. The MHCSD community has been saturated with information regarding MEP, through the local press, in the meetings of the MHCSD Board, and in the local electoral campaign. Given that over two years of outreach has yielded only a scattering of a few voices in opposition to MEP, the most logical conclusion to draw is that the vast majority of the 10,000 MHCSD residents do not share the alarmist views of the Intervenors. Therefore, with respect to MEP, the Commission should conclude as it has in every previous siting case, that because MEP will not result in any significant adverse impacts, it does not present environmental justice concerns.

### C. MHCSD had full notice and opportunity to participate in this proceeding.

MHCSD, a party to this proceeding, asserts for the first time in its Opening Brief that it did not receive reasonable notice of this proceeding and that the CEC "made no effort to solicit comments from it."[149] These assertions are both untimely and untruthful.

First, MHCSD incorrectly asserts that it is a "responsible agency." Under CEQA, a responsible agency is "a public agency which proposes to carry out or approve a project, for which a Lead Agency is preparing or has prepared an EIR or Negative Declaration. The term 'Responsible Agency' includes all public agencies other than the Lead Agency which have discretionary approval power over the project."[150] Because of CEC's exclusive state law authority preempts all other state and local entities, there are no local or state agencies with discretionary permit authority over MEP. Further, even in the absence of CEC jurisdiction, MHCSD would have no discretionary permit authority over MEP. Therefore, MHCSD is not a responsible agency under CEQA.

MHCSD also asserts that the CEC failed to "consult" with MHCSD under Public Resources Code section 21104(a). However, MHCSD meets none of the criteria for consultation under Section 21104(a). MHCSD is not a responsible agency or a public agency that has jurisdiction over the project. MHCSD is also not a city or county, nor does it border on or contain the project site. Therefore, the CEC is not required to consult with MHCSD.

Even though MHCSD is not a responsible agency, MHCSD did receive actual and timely notice of this proceeding, did receive requests for comments from the Commission and did have every possible opportunity to participate actively and fully in the proceeding. Mr. Lamb and Mr. Sensibaugh (a Director and General Manager of MHCSD, respectively) participated in the very first Informational Hearing and

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2009-006.PDF.

[148] Singh Opening Brief, p. 14; *also see* 3/7 RT 306 (MR SARVEY: *** BBID is in a remote area).

[149] MHCSD Opening Brief, p. 5 (The pages in this Brief are not numbered)

[150] 14 C.C.R. § 15381.

Site Visit on October 1, 2009.[151] Their participation in this hearing confirms that MHCSD received timely notice of the proceeding. At the hearing, Mr. Lamb addressed the Committee. The Presiding Member invited MHCSD to contact the Staff. Mr. Lamb agreed to do so.[152]

MHCSD's statement that "no communications from MHCSD were responded to by the CEC' is simply not true. In November 2009, MHCSD filed a Petition to Intervene that was promptly granted. At that point, MHCSD acquired the rights of a full party, with rights of participation that far exceed the role of a responsible agency under CEQA. Thereafter, on April 8, 2010, the MHCSD submitted a Resolution in Opposition to MEP.[153] MHCSD alleges that all but one of the issues raised in the MHCSD Resolution stand unaddressed. This too is false. Each of the issues raised in the Resolution were addressed, point by point, by MEP and CEC Staff. MEP promptly provided a detailed response to the Resolution.[154] The Staff responded to issues raised in the Resolution (air quality, public health, visual resources, and fire services) in the Staff Assessment ("SA") and SSA.[155] The SA was accompanied by a notice that requested comments from all interested parties, including MHCSD.[156] MHCSD filed no comments on the SA during the comment period.[157]

If MHCSD thought an issue was unaddressed, it had every opportunity to raise this issue. Yet, it did not do so. Despite being a party to this proceeding for more than 15 months, MHCSD has issued no data requests, provided no comments on the SA during the comment period, raised no issues in its PHC Statement and filed no testimony.[158] To raise these issues in its Opening Brief at this late juncture, given the MHCSD's documented lack of participation, is quite inappropriate. Where MHCSD has chosen to remain mute in this case for 15 months, it cannot credibly claim now that its voice has not been heard.

## VI. SOIL AND WATER RESOURCES

No Intervenor introduced testimony on the subject of water resources. However, Sarvey raises several new contentions in his Opening Brief. None of these contentions have any merit.

First, Sarvey incorrectly asserts that MEP has not supplied a water supply assessment to determine whether BBID can supply MEP.[159] In fact, MEP has testified that BBID's current demands (within the area served by its pre-1914 water rights) range from 27,621 to 30,659 acre-feet per year in average and dry years, respectively.[160] With an existing available supply of 50,000 acre-feet per year, BBID can clearly meet the project demand of a maximum of 187 acre-feet per year. MEP further demonstrated that

[151] 10/01/09 RT 97, 102.
[152] 10/01/09 RT 101-102.
[153] http://www.energy.ca.gov/sitingcases/mariposa/documents/others/2010-04-07_Mountain_House_Resolution_in_Opposition_TN-56174.pdf
[154] Ex. 37.
[155] For example, *see* Ex. 301, pp. 4.1-37, 41; 4.7-7, 10, 12-13; 4.8-2, 8, 9, 11-13; 4.10-10, 12-15, 29-31, 50; 4.12-6, 15-17, 23.
[156] http://www.energy.ca.gov/sitingcases/mariposa/notices/2010-11-24_NOA_Executive_Summary_SA_TN-59058.pdf; http://www.energy.ca.gov/sitingcases/mariposa/notices/2010-12-18_NOA_Supplemental_Staff_Assessment_TN-59269.pdf.
[157] Instead, MHCSD waited over a month after the close of the comment period, before filing a brief statement to "confirm" that Alameda County Fire Department and Tracy Fire Department have a mutual aid agreement, and to note that any response from Tracy Fire under the mutual aid agreement would be from the Mountain House Fire Station. http://www.energy.ca.gov/sitingcases/mariposa/documents/others/2010-01-7_Mountain_House_Comments_TN-59437.pdf
[158] http://www.energy.ca.gov/sitingcases/mariposa/documents/others/2011-01-25_Mountain_House_Community_Services_District_Pre-Hearing_Conference_Statement_TN-59576.pdf
[159] Sarvey Opening Brief, p. 18.
[160] Exhibit 14.

by 2030, BBID supplies would increase to 55,930 acre-feet per year, and demands would increase to a range of 47,877 to 51,244 acre-feet per year.[161]

Although Sarvey offered no testimony on this topic, he speculates that BBID has "overcommitted" its water supplies. Sarvey's speculation is based on two fundamental errors. First, he assumes that BBID currently delivers 40,000 to 45,000 acre feet per year. Sarvey deliberately chose not to rely on testimony from a witness who knew the correct number of 27,621-30,650 acre feet per year, and based his assumption on testimony from a witness who admitted to not knowing exactly what the number was.[162] Second, Sarvey incorrectly assumes that BBID will serve the East Altamont Energy Center ("EAEC") and the Tracy Hills project, as well as the increased demands projected from build-out of the Mountain House community.[163] The Project Owner of the EAEC has asked to cancel the license, and future growth of these other developments is entirely speculative.[164] In summary, the only credible evidence of record is that BBID can clearly meet MEP demand, now and in the future, as originally indicated in the AFC.[165]

Sarvey also argues that MEP will not comply with the 2003 Integrated Energy Policy Report ("IEPR") and State Water Resources Control Board ("SWRCB") Resolution 75-58. Sarvey argues that water use could be further reduced by using low-NOx combustors for NOx control.[166] As set forth in Applicant's Opening Brief, these policies are not applicable to MEP because this project is air-cooled and does not use fresh water for cooling.[167] However, in the spirit of promoting the use of recycled water where feasible, MEP and CEC Staff evaluated the possibility of offsetting the use of raw water (for non-cooling purposes) by bringing recycled water to the site. As demonstrated in AFC Section 6.5.3, response to Data Request 16 (Exhibit 7), and Supplemental Staff Assessment Chapter 6, both MEP and CEC Staff concluded that a recycled water source was economically unsound and environmentally undesirable.

Finally, Sarvey argues that the water conservation mitigation measure is speculative.[168] MEP's voluntary water conservation program will offset 100% of the raw water used by MEP (for non-cooling purposes), either by funding a one-time capital investment or paying into BBID's water conservation fund. The option of a one-time capital investment will result in the ongoing annual conservation equal to or in excess of MEP water usage. The option of paying to the water conservation fund ($1,000 per acre-foot consumed) is based on empirical evidence that this amount has been more than adequate for recent, nearby conservation programs.[169] Success of these options must be to the CEC's satisfaction as part of the compliance process (see Condition of Approval Soil&Water-4). For these reasons, achievement of 100-percent offset of raw water usage via water conservation is not speculative.

## VII. TRAFFIC AND TRANSPORTATION

### A. MEP will pose no hazard to air navigation

#### 1. The FAA has determined that MEP will pose no hazard to air navigation.

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[161] Ex. 14.
[162] Sarvey Opening Brief, p. 18, citing to 3/7 RT 451.
[163] Sarvey Opening Brief, p. 18.
[164] http://www.energy.ca.gov/sitingcases/mariposa/documents/others/2011-03-23_Calpine_Corporation_Letter_to_Terminate_Certification_TN_60156.pdf .
[165] Ex. 1, Appendix 2D.
[166] Sarvey Opening Brief, p. 19.
[167] See AFC Figures 2.3-5a and 2.3-5b.
[168] Sarvey Opening Brief, p. 19.
[169] Ex. 55; Ex. 63; Ex. 64; Ex. 301, p. 4.12-18.

CalPilots alleges that MEP has not met its burden of proof that MEP will not pose a threat to aviation.[170] This allegation is without merit. As matters of fact and law, the Federal Aviation Administration ("FAA") has determined that the MEP will pose "No Hazard to Air Navigation."[171] These determinations regarding both the MEP project features and the MEP thermal plume (collectively the FAA's "Determinations of No Hazard") alone fully satisfies MEP's burden of proof and establishes a prima facie case that MEP poses no hazard to aviation. As CalPilots concede, the Commission "Should Defer to the Judgment of the Federal....Aviation Regulatory Agencies."[172] Applicant agrees.

CalPilots asserts that the FAA Determinations of No Hazard to Air Navigation should "have little bearing on the Committees [sic] decision as it does not reflect the FAA's opinion on the threat posed by thermal plumes..." [173] This argument is just plain wrong. The FAA's determination expressly takes into account the presence of thermal plumes and recommends specific measures to ensure aviation safety.[174]

CalPilots also argues that the Commission should not provide the MEP location and avoidance information in the Airport Facility Directory because "the only authority that can limit the use of airspace is the FAA."[175] In fact, however, it is the FAA itself – the only authority over airspace – that recommended providing this notice of location and avoidance information.[176] This recommendation in the FAA's Determination of No Hazard for MEP is entirely consistent with the FAA's Aeronautical Information Manual ("AIM") which states "pilots are encouraged to exercise caution when flying in the vicinity of thermal plumes. Pilots are encouraged to reference the Airport/Facility Directory where amplifying notes may caution pilots and identify the location of structure(s) emitting thermal plumes."[177]

**2. The Aeronautical Information Manual ("AIM") is not a regulatory document.**

CalPilots claims that Mariposa has "failed to present evidence that rebuts the [AIM]," therefore, "the Committee must uphold the AIM and evidence and testimony and deny the MEP AFC."[178]

MEP is not required to "rebut the AIM." The cases relied upon by CalPilots for that proposition define the AIM as "an FAA publication whose purpose is to instruct pilots about basic flight information, air traffic control procedures, and general instructional information."[179] Moreover, those cases and the AIM itself clearly differentiate the instructional role of the AIM from that of "the Federal Aviation Regulations ('FARs') published in Title 14 of the Code of Federal Regulations [which] have the force and effect of law."[180] The AIM flight information publication policy states: "This publication, while not regulatory, provides information which reflects examples of operating techniques and procedures which may be requirements in other federal publications or regulations."[181] This paragraph clearly indicates that the AIM is an informational and not a regulatory document. In addition, those cases confirm MEP's position that: (1) there are no regulatory constraints imposed by the FAA on the location of MEP, as the

[170] CalPilots Opening Brief, word doc. p. 1 (note that the pages of the brief are not numbered).
[171] Ex. 7, Attachment DR51-1. The MEP was granted extensions for the Determinations of No Hazard to Air Navigation on March 4, 2011. The extensions are a part of the evidentiary record as Exhibit 73.
[172] CalPilots Opening Brief, word doc. p. 2.
[173] CalPilots Opening Brief, word doc. p. 4.
[174] Ex. 7, Attachment DR51-1.
[175] CalPilots Opening Brief, word doc. p. 6.
[176] Ex. 7, Attachment DR51-1.
[177] 2/24 RT 22-24, 31-37. The AIM can be found at: http://www.faa.gov/air_traffic/publications/atpubs/aim/, Section 7-5-15.
[178] CalPilots Opening Brief, word doc. p. 1.
[179] *Management Activities, Inc. v. United States of America*, 21 F.Supp.2d 1157, 1175 (1998).
[180] *First of America Bank – Central v. United States*, 639 F.Supp. 446, 453 (1986).
[181] AIM, Flight Information Publication Policy, paragraph d.

FAA has issued No Hazard Determinations for all stacks and power poles, pursuant to 14 C.F.R. Part 77; and therefore, (2) the primary responsibility rests with the pilot to "see and be seen" or "see and avoid."[182]

### 3. A substantial volume of expert testimony supports the FAA determination.

MEP did not rest its case only on the FAA's Determination of No Hazard. MEP offered a substantial volume of unrefuted expert testimony, including both exhaustive expert analysis and actual flights through a power plant's thermal plumes, demonstrating conclusively that MEP will not pose any hazard to aviation.[183]

CalPilots argues that MEP's evidence is "flawed" and claims that "there is the great weight of evidence against it."[184] However, CalPilots Opening Brief fails to cite a single alleged flaw in MEP's expert testimony and fails to cite any evidence, much less the "great weight" of evidence, that contradicts MEP's testimony. Mr. Wilson's lay opinions on questions of aviation safety do not constitute credible evidence.[185]

CalPilots suggests that MEP's witness Moss contradicts the fact that thermal plumes are not a hazard to aviation.[186] Mr. Moss testified that as a pilot he would not fly through a plume unless he had justification to do it.[187] However, CalPilots omits Mr. Moss's explanation that he would avoid flying through a thermal plume because it would be "uncomfortable to do, not because it would be unsafe. [188]

In summary, the FAA's Determinations of No Hazard, the FAA's AIM, the CEC Staff's independent analysis and MEP's expert testimony all concur that with implementation of the measures recommended by the FAA, MEP poses no hazard to air navigation.

Dated: April 6, 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, LLC

[182] *Dyer v. United States*, 832 F.2d 1062, 1069-70 (1987).
[183] See Applicant's Opening Brief, pp. 18-19 and Exhibits 1, 4, 5, 6, 7, 11 and 15.
[184] CalPilots Opening Brief, word doc. p. 7.
[185] 2/24 RT 364.
[186] CalPilots Opening Brief, p. 5.
[187] 2/25 RT 36.
[188] RT 2/25/11, p. 67, lines 10-22. Mr. Moss testified: "There may seem to be an inconsistency, but there really is not. The AIM suggests and it recommends pilots avoid overflying a plume below a thousand feet. And that's not from necessarily a safety perspective. And for a piloting perspective, unless there's a good reason to fly directly over a plume, I as a pilot would naturally avoid it because it's uncomfortable. It's -- it's a sudden but small increase in G load, and it's not something that you really want to do. And so it's a good idea to avoid it if all other things being considered equal. But given the fact that if you do have to fly over it, it will not create a hazard to the airplane. It's mostly a comfort factor."

STATE OF CALIFORNIA

Energy Resources Conservation
and Development Commission

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

**PROOF OF SERVICE**

I, Karen A. Mitchell, declare that on April 6, 2011, I served the attached *Reply Brief of Mariposa Energy Project* 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