STATE OF CALIFORNIA

Energy Resources Conservation
and Development Commission

Application for Certification for the MARIPOSA ENERGY PROJECT (MEP)	))))	Docket No. 09-AFC-3

APPLICANT'S BRIEF
ON
NATURAL GAS PIPELINE JURISDICTION

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At the Prehearing Conference on February 7, 2011, Commissioner Douglas asked the parties to Brief the following question:

> "Whether the CEC should analyze potential impacts of a project on the gas system to which it interconnects, specifically beyond the first point of interconnection?"

The answer to this question as a matter of well-settled law is "No."

The California Energy Commission ("Commission" or "CEC") need not and should not analyze the potential impacts of the Mariposa Energy Project ("MEP" or "Project") on the Pacific Gas &Electric ("PG&E") natural gas pipeline beyond the first point of interconnection.

Over the past 35 years of licensing gas-fired powerplants in California, the Commission has analyzed projects' impacts up to the first point of interconnection and has not analyzed the potential impacts of a proposed project on the gas pipeline system to which it interconnects beyond the first point of interconnection. There are two reasons why the Commission has not undertaken an analysis of natural gas pipelines beyond the first point of interconnection. First, as a matter of law, the Commission does not have jurisdiction over the construction or operation of

natural gas pipelines beyond the first point of interconnection.[1] Second, in the context of the California Environmental Quality Act ("CEQA"), there are no direct or indirect environmental impacts of the Mariposa Energy Project on the natural gas pipeline system beyond the first point of interconnection.

We discuss both of these reasons below.

I. The California Energy Commission Does Not Have Jurisdiction Over The Natural Gas Pipelines To Which The MEP Will Be Connected.

Natural gas pipelines in California are regulated by two entities: (1) the Federal government, through its legal authorities and (2) the California Public Utilities Commission ("CPUC"), through the legal authorities delegated to it from the Federal government. As such, the CEC has no regulatory authority over natural gas pipelines to which the Project will interconnect.

A brief summary of the Federal regulation of natural gas pipelines will be helpful.

A. The Federal Government Is The Primary Regulator Of Natural Gas Pipelines.

The United States Department of Transportation ("DOT") is the primary regulator of the operation of natural gas pipelines pursuant to the Natural Gas Pipeline Safety Act of 1978 (codified at Title 49 of the United States Code, Chapter 601). Within the DOT, the Pipeline and Hazardous Materials Safety Administration ("PHMSA"), through the Office of Pipeline Safety ("OPS"), is responsible for establishing and enforcing proper design, construction, operation,

[1] California Public Resources Code § 25110; 20 C.C.R. § 1702(n).

maintenance, testing and inspection standards for natural gas pipelines. These regulations are published in Title 49 of the Code of Federal Regulations, Parts 190-199.[2]

In addition to DOT/PHMSA's regulation of gas pipeline safety, the Federal Energy Regulatory Commission ("FERC") regulates pipelines. FERC is responsible for rate setting for interstate natural gas pipelines; intrastate rates are regulated by state public utility commissions. The Natural Gas Act of 1938 conferred the authority on FERC's predecessor agency (the Federal Power Commission) to review and grant certificates for the construction and operation of interstate natural gas pipelines and interstate natural gas facilities. Prior to receipt of a "certificate of public convenience and necessity" pursuant to Section 7 of the Natural Gas Act, gas pipelines typically undergo an extensive pre-filing and filing process with FERC that includes the review and approval of the siting of new lines, including compliance with the National Environmental Policy Act ("NEPA").

B. The CPUC Has Been Designated By The Federal Government To Assume Responsibility For The Oversight Of Intrastate Pipelines Within California.

The Federal government has exclusive responsibility for the pipeline safety regulations for interstate (pipelines that cross state boundaries) and primary responsibility for intrastate pipelines (pipelines that are contained within the borders of a state). Although OPS can designate a state to act as its agent in the inspection of interstate lines, OPS remains solely responsible for enforcement. Most states, including California, work with OPS in the oversight of the pipelines. Federal law allows states to assume responsibility for enforcing the regulations of intrastate pipelines through an annual certification. To do so, states are required to adopt the federal regulations. States must adopt the minimum Federal regulations and may adopt more stringent

[2] Federal Pipeline Safety Regulations, Title 49 of the Code of Federal Regulations; See also Pipeline Safety Improvement Act of 2002, Public Law 107-355

regulations for intrastate pipelines as long as the state's regulations are not incompatible with Federal regulations.

California's Gas Safety Program requirements are codified in California Public Utilities Code Sections 315, 768, 4351-4361 and 4451-4465. The CPUC's regulations are set forth in CPUC General Order 112-E.

C. The CEC's State Law Jurisdiction Does Not extend to Federal Law.

The CEC has plenary jurisdiction over all state law issues pursuant to Public Resources Code 25500. Significantly, however, the CEC's jurisdiction does not extend to federal law matters:

> In accordance with the provisions of this division, the commission shall have the exclusive power to certify all sites *and related facilities* in the state, whether a new site and related facility or a change or addition to an existing facility. The issuance of a certificate by the commission shall be in lieu of any permit, certificate, or similar document required by any state, local or regional agency, or federal agency *to the extent permitted by federal law*, for such use of the site and related facilities, 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*.[3]

Federal law related to pipeline safety issues does not permit the CEC to stand in the shoes of the federal authorities; CEC regulation of interstate or intrastate pipelines is not "permitted by federal law." Instead, as discussed in subsection B above, to the extent those federal legal powers are capable of extension, the CPUC has the delegated authority. Nothing in that delegation provides the CEC with jurisdiction over these federal law matters.

[3]Public Resources Code 25500; emphasis added.

D. The Warren-Alquist Act Makes Clear that the CEC Has No Jurisdiction Over Natural Gas Pipelines Beyond The First Point Of Interconnection.

In addition to recognizing federal preemption, the Warren Alquist Act, the Commission's enabling legislation, recognizes that the Commission's jurisdiction is limited to the first point of interconnection.

Warren-Alquist gives the Commission jurisdiction over certain "sites and related facilities."[4] "Facility" means any electric transmission line or thermal powerplant, or both electric transmission line and thermal power plant, regulated according to the provisions of this division.[5] A "thermal power plant" is defined as "a stationary or floating electrical generating facility using any source of thermal energy, with a generating capacity of 50 megawatts or more, and any facilities appurtenant thereto."[6] An "electric transmission line" is defined as "any electric powerline carrying electric power from a thermal powerplant located within the state to a point of junction with any interconnected transmission system."[7]

Natural gas lines are "related facilities" for the purposes of the CEC's regulations. Specifically, the Commission's regulations define the term "related facilities" to include the thermal powerplant and other accessories including "transmission and fuel lines up to the first point of interconnection".[8]

And so it has been for 35 years that the permit jurisdiction of the Energy Commission over natural gas lines extends only up to the first point of interconnection with the natural gas

[4]California Public Resources Code § 25550.

[5] California Public Resources Code § 25110.

[6] California Public Resources Code § 25120.

[7] California Public Resources Code § 25107.

[8] California Code of Regulations, tit. 20, § 1702(n).

system. Beyond this first point of interconnection, the primary jurisdiction has rested with the Department of Transportation and the California Public Utilities Commission.

II. There Are No Direct Or Indirect Environmental Impacts From The Mariposa Energy Project On The Pipeline System Beyond The First Point Of Interconnection.

Under CEQA, the environmental review of a proposed project must describe any *environmental* consequences imposed by the project, including significant direct effects and significant indirect effects that are reasonably foreseeable.[9] In examining the question of what effects are "reasonably foreseeable" for the purposes of analyzing environmental impacts, courts have held that an impact is reasonably foreseeable if it is "sufficiently likely to occur" such that "a person of ordinary prudence would take [it] into account in reaching a decision."[10]

An indirect physical change in the environment is a physical change in the environment which is not immediately related to the project, but which is caused indirectly by the project. In this case, Mr. Sarvey speculates that there is a risk of unspecified "failures" in the PG&E gas transmission system.[11] These potential "failures", Mr. Sarvey speculates, could be caused indirectly by "stress" to the pipelines from the "cycling" of the Project. [12]

For the purposes of CEQA analysis, an "indirect physical change is to be considered only if that change is a reasonably foreseeable impact which may be caused by the project. A change which is speculative or unlikely to occur is not reasonably foreseeable."[13] Impacts which are too broad, vague, or attenuated are properly excluded from consideration under both NEPA and

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[9] 14 C.C.R. §§ 15060, 15064

[10] *Sierra Club v. Marsh*, 976 F.2d 763, 767 (1st Cir. Me. 1992). Federal decisions interpreting NEPA are considered persuasive authority by California courts for the purposes of interpreting CEQA. (For example, see *No Oil, Inc. v. City of Los Angeles*, 13 Cal. 3d 68,86 (1974)).

[11] Proposed Exhibit 405, p. 2.

[12] Proposed Exhibit 405, pp. 2,4.

[13] 14 C.C.R. § 15064(d)(3).

CEQA.

For example, the United States Supreme Court held that the indirect psychological problems potentially brought about by nuclear power, such as anxiety and fear, were "too remote from the physical environment" to justify its inclusion within an environmental impact analysis.[14] The Court noted specifically that "some effects that are 'caused by' a change in the physical environment in the sense of" 'but for' causation, will nonetheless not fall within section 102 because the causal chain is too attenuated. Specifically, the relationship between the environmental effect and the proposed action must have "a reasonably close causal relationship between a change in the physical environment and the effect at issue."[15]

The crux of Mr. Sarvey's arguments are (1) "Pipeline pressure fluctuations from the cycling of these projects will cause additional stress to Line 002", and (2) these additional stresses could cause the risk of a pipeline failure.

There are three problems with Mr. Sarvey's arguments.

First, Mr. Sarvey's testimony offers absolutely no authority or references to support this speculation. He offers unsubstantiated speculation only. Further, Mr. Sarvey has provided no academic or professional experience that would qualify him to opine on this matter.

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[14] *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 774 (1983).

[15] *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 774 (1983).

"NEPA addresses environmental effects of federal actions. The gravity of harm does not change its character. If a harm does not have a sufficiently close connection to the physical environment, NEPA does not apply.

"...[T]he Court of Appeals noted that PANE's claim was made "in the wake of a unique and traumatic nuclear accident." We do not understand how the accident at TMI-2 transforms PANE's contentions into "environmental effects." The Court of Appeals "cannot believe that the psychological aftermath of the March, 1979, accident falls outside" NEPA. On the contrary, NEPA is not directed at the effects of past accidents, and does not create a remedial scheme for past federal actions. It was enacted to require agencies to assess the future effects of future actions. There is nothing in the language or the history of NEPA to suggest that its scope should be expanded "in the wake of " any kind of accident." (460 US 479-480, citations omitted)

Second, not only is the assertion unsupported, it is untrue. As set forth in the rebuttal testimony of Cesar de Leon, P.E.:

> "The effects of pressure cycles on gas pipelines were studied by John Kiefner and Michael Rosenfeld on a contract for the Gas Research Institute ("Effects of Pressure Cycles on Gas Pipelines"; GRI Project, GRI-04-0178, contract no.:8749, submitted on September 17, 2004). The objective of the study was to establish whether or not gas pipelines have a significant degree of exposure to failure from seam defects that could be enlarged by pressure-cycle-induced fatigue. That study concluded gas pipelines are not at significant risk of failure from the pressure-cycle induced growth of seam defects that may exist after a hydrostatic test. The times to failure for this mode of crack growth are much longer than the expected useful life of a typical gas pipeline. The predicted time to failure was from 170 years to more than 400 years, indicating that, in most circumstances gas pipelines are not at risk of failure from the pressure-cycle-induced growth of seam defects that may exist after a hydrostatic test.
> The conclusion of the Kiefner and Rosenfeld report was further endorsed serving as the basis for the conclusions in a letter from the Pipeline and Hazardous Material Safety Administration (PHMSA) to the National Transportation Safety Board, dated August 10, 2009. The PHMSA letter referenced the Kiefner and Rosenfeld report, and stated, in pertinent part, that:
>
> - Typically, gas pipelines are not at significant risk of failure from the pressure-cycle-induced growth of original manufacturing-related or transportation-related defects.
>
> - PHMSA records do not contain any known incidents involving failure of steel natural gas transmission pipe from the pressure-cycle-induced growth of original manufacturing-related or transportation-related defects.
>
> - Test pressure levels of at least 1.25 times the Maximum Allowable Operating Pressure (MAOP) tend to eliminate the risk of failure from pressure-cycle-induced fatigue crack growth of defects, or other failure modes, for steel pipe in natural gas service.
>
> . . . The PG&E pipeline has been pressure tested to establish the MAOP, so there is no basis to conclude that these additional stresses from the cycling of these projects will cause the PG&E line to fail.[16]

Third, for purposes of CEQA and NEPA, "a risk of an accident is not an effect on the physical environment."[17] Therefore, even if Mr. Sarvey's allegations regarding the risk of

[16] Applicant's Rebuttal Testimony, Hazardous Materials Handling and Pipeline Safety, 09-AFC-3 (filed on Feb. 14, 2011).

[17] Regardless of the gravity of the harm alleged, if a harm does not have a sufficiently close connection to the

pipeline failure were true, which they are not, the proper forum for evaluating these issues is DOT and the CPUC, not a CEQA analysis.

Mr. Sarvey's unsupported and unqualified assertion that operation of the MEP will cause PG&E pipelines to fail is pure speculation and is not reasonably foreseeable. Not only is the causal chain too attenuated, it is completely unsupported by any credible evidence. Under CEQA, for the Commission to even entertain consideration of public safety issues on the PG&E pipeline system beyond the first point of interconnection with the MEP, there must be evidence of "a reasonably close causal relationship between a change in the physical environment and the effect at issue."[18] The fact that no causal relationship exists explains why the Commission has properly not examined the impacts of a project on intrastate and interstate natural gas pipelines in any previous AFC proceeding over the past 35 years.

III. Conclusion

Citing the recent San Bruno accident, Mr. Sarvey asserts that "We certainly cannot rely on PG&E's incomplete and inaccurate records and inadequate safety practices." Mr. Sarvey's assertions ignore one very simple fact in this case: all that the MEP requires is a 580-foot service line to interconnection the existing PG&E system.

Rather than focusing this 580-foot service drop as a "related facility," Mr. Sarvey tries to change the subject. Mr. Sarvey instead suggests that the CEC investigate the integrity of the entire PG&E interstate and intrastate pipeline system. This Application is not about the existing PG&E natural gas system. It is not about Line 002. The question for this Commission is whether this 580-foot service interconnection can be built in a safe and reliable manner. Notwithstanding

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physical environment, NEPA does not apply. See *Metropolitan Edison Co. v. People Against Nuclear Energy,* 460 U. S. 778 (1983).

[18] *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 774 (1983).

that Mr. Sarvey has selected the wrong forum, in addressing Mr. Sarvey's concerns, the Commission can and should take notice of the expertise and authority of the Department of Transportation, FERC and the CPUC as the California federal delegate to oversee the construction and operation of intrastate and interstate pipelines. Mr. Sarvey's unsubstantiated speculation should be given no weight, and the Commission should clearly reject Mr. Sarvey's invitation for the Commission undertake an analysis of pipelines that will not be impacted by the Mariposa Energy Project.

The Applicant recommends that the Commission rule the Rebuttal Testimony of Mr. Sarvey inadmissible on the grounds that it is both irrelevant and not qualified to be expert testimony. In the alternative, should Mr. Sarvey's testimony be received into evidence, the Commission should also receive the surrebuttal testimony of Mr. de Leon.

Dated: February 18, 2011

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PROOF OF SERVICE

I, Karen A. Mitchell, declare that on February 18, 2011, I served the attached *Applicant's Brief on Natural Gas Pipeline Jurisdiction* via electronic and U.S. mail to all parties on the attached service list.

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

Karen A. Mitchell

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