

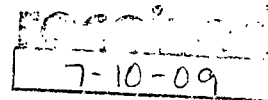


## DEPARTMENT OF CONSERVATION

## DIVISION OF LAND RESOURCE PROTECTION

801 K STREET • MS 18-01 • SACRAMENTO, CALIFORNIA 95814

PHONE 916 / 324-0850 • FAX 916 / 327-3430 • TDD 916 / 324-2555 • WEBSITE conservation.ca.gov



July 6, 2009

Mr. Bohdan Buchynsky  
 Executive Director  
 Mariposa Energy, LLC  
 333 S. Grand Avenue, Suite 1570  
 Los Angeles, CA 90071

Dear Mr. Buchynsky:

Re: Alameda County: Mariposa Energy Project Proposed Electric Facility as  
 "Compatible Use"

Given the stated facts in your letter dated June 2, 2009, the Mariposa Energy Project appears to be a compatible use with the on-going agricultural activities occurring on the 158-acre parcel. While the final decision is in the hands of the County of Alameda, the Department of Conservation could certainly concur with that conclusion should Alameda County arrive at it.

Because the contracted land in question will continue to have an agricultural use (grazing), the conclusion that the proposed use is compatible is based on the provisions contained in Government Code §51238.1, which reads as follows:

**§51238.1. (a) Uses approved on contracted lands shall be consistent with all of the following principles of compatibility:**

**(1) The use will not significantly compromise the long-term productive agricultural capability of the subject contracted parcel or parcels or on other contracted lands in agricultural preserves.**

**(2) The use will not significantly displace or impair current or reasonably foreseeable agricultural operations on the subject contracted parcel or parcels or on other contracted lands in agricultural preserves. Uses that significantly displace agricultural operations on the subject contracted parcel or parcels may be deemed compatible if they relate directly to the production of commercial agricultural products on the subject contracted parcel or parcels or neighboring lands, including activities such as harvesting, processing, or shipping.**

**(3) The use will not result in the significant removal of adjacent contracted land from agricultural or open-space use.**

**In evaluating compatibility a board or council shall consider the impacts on noncontracted lands in the agricultural preserve or preserves.**

**DOCKET****09-AFC-3**

DATE \_\_\_\_\_

RECD. July 15 2009

Y9903

**(b) A board or council may include in its compatible use rules or ordinance conditional uses which, without conditions or mitigations, would not be in compliance with this section. These conditional uses shall conform to the principles of compatibility set forth in subdivision (a) or, for nonprime lands only, satisfy the requirements of subdivision (c).**

**(c) In applying the criteria pursuant to subdivision (a), the board or council may approve a use on nonprime land which, because of onsite or offsite impacts, would not be in compliance with paragraphs (1) and (2) of subdivision (a), provided the use is approved pursuant to a conditional use permit that shall set forth findings, based on substantial evidence in the record, demonstrating the following:**

**(1) Conditions have been required for, or incorporated into, the use that mitigate or avoid those onsite and offsite impacts so as to make the use consistent with the principles set forth in paragraphs (1) and (2) of subdivision (a) to the greatest extent possible while maintaining the purpose of the use.**

**(2) The productive capability of the subject land has been considered as well as the extent to which the use may displace or impair agricultural operations.**

**(3) The use is consistent with the purposes of this chapter to preserve agricultural and open-space land or supports the continuation of agricultural uses, as defined in Section 51205, or the use or conservation of natural resources, on the subject parcel or on other parcels in the agricultural preserve. The use of mineral resources shall comply with Section 51238.2.**

**(4) The use does not include a residential subdivision.**

**For the purposes of this section, a board or council may define nonprime land as land not defined as "prime agricultural land" pursuant to subdivision (c) of Section 51201 or as land not classified as "agricultural land" pursuant to subdivision (a) of Section 21060.1 of the Public Resources Code.**

**Nothing in this section shall be construed to overrule, rescind, or modify the requirements contained in Sections 51230 and 51238 related to noncontracted lands within agricultural preserves.**

The use of ten acres on a 158-acre parcel does not appear to significantly compromise the long-term productive agricultural capability of the subject contracted parcel, especially when the party has agreed to make improvements to the remaining rangeland that will make up for any loss of the current carrying capacity of the parcel due to the land requirements of the proposed project. Because the area in question has a long history of acting as a major energy and other infrastructure corridor of the State, an additional small facility will not create additional stress on neighboring agricultural operations. For these reasons, and the fact that grazing is about the only likely agricultural activity that can occur on non-irrigated land of this low quality, there is no reason to believe that the proposed project will significantly displace or impair current or reasonably foreseeable agricultural operations. Nor is it likely that the proposed project will result in the significant removal of adjacent contracted land from agricultural or open-space use.

Mr. Bohdan Buchynsky  
July 6, 2009  
Page 3 of 3

The fact that the parcel is non-prime land allows Alameda County to also consider the provisions contained in §51238.1(c), which gives the County more leeway to make compatible use findings. As the application of the more stringent provisions of §51238.1(a) already appear to lead to the conclusion that the proposed project is a compatible use, if the County were to use the less stringent test contained in §51238.1(c), it would most likely find the proposed project compatible.

For these reasons, it appears that should Alameda County find the proposed Mariposa Energy Project (as described in your letter of June 2, 2009) to be a compatible use under the Williamson Act, the Department of Conservation would concur with and respect that decision.

If you require any future assistance or have any additional questions, please contact me at (916) 324-0850.

Sincerely,

A handwritten signature in black ink, appearing to read "B. Leahy for".

Brian R. Leahy  
Assistant Director

cc: William Geyer  
David Blackwell

Alameda County Community Development Agency  
Planning Department  
224 W. Winton, Room 111  
Hayward, CA 94544

Mariposa Energy **COPY**  
333 S. Grand Ave., Suite 1570, Los Angeles, CA 90071  
Tel: (213) 473-0080 Fax: (213) 620-1170

**Via Overnight Service**

June 2, 2009

Mr. Brian R. Leahy  
Assistant Director  
Division of Land Resource Protection  
California Department of Conservation  
801 K Street, MS 18-01  
Sacramento, California 95814

*Re: Alameda County: Mariposa Energy Project  
Proposed Electric Facility as "Compatible Use"*

Dear Mr. Leahy:

Per Government Code section 51206, and on behalf of Mariposa Energy, LLC, we are submitting this letter requesting your informal opinion about the application of the "compatible use" provisions of the Williamson Act to our proposed electric facility in unincorporated Alameda County.

It is our belief that the electric facility, known as the Mariposa Energy Project, is by definition a statutory compatible use per Government Code section 51238 for the reasons we have discussed and have memorialized in prior correspondence and memoranda to you. We recognize, however, that the Department is currently formulating a policy regarding the statutory compatibility of energy uses on lands under Williamson Act contracts, per the request of the Governor's Office, and that it could be premature for you to issue an opinion regarding the application of Section 51238 until that policy is adopted.

Thus, although we request that you provide an informal opinion regarding the applicability of Section 51238 to the Mariposa Energy Project, we understand if you would prefer to limit your opinion to the application of Section 51238.1, which relates to non-statutory compatible uses and the three "principles of compatibility." As background, we provide below a description of the Mariposa Energy Project and the application of Section 51238.1 to the Project.

**I. Property Background**

The Mariposa Energy Project will occupy ten acres on a 158-acre parcel owned by Mr. Steven Shin-Der Lee located in Alameda County, APN 99B-7050-001-10. A five-acre construction

# Mariposa Energy, LLC

laydown and worker parking area for the Project is located adjacent to and southeast of the proposed Project site. An additional laydown area (one acre) for the water supply pipeline will be located at the Byron Bethany Irrigation District (BBID) headquarters, approximately 1.3 miles north of the project site. A 0.6-acre laydown area for transmission line construction will be located along the transmission line route adjacent to PG&E Kelso Substation. The Project site is located directly south of the existing 6.5-megawatt Byron Power Company cogeneration plant, which occupies two acres in the middle portion of the parcel.

The property has historically been used for non-irrigated grazing on nonprime agricultural land. On February 4, 1971, the County adopted a resolution establishing Agricultural Preserve No. 1971-34 and entered into Land Conservation Agreement No. 5635 with Mr. Lee's predecessor in interest. After Mr. Lee purchased a 158-acre portion of that property, he asked the County to enter into a new Land Conservation Agreement to reflect the change of ownership and to modify the list of approved compatible uses to allow the designation of an additional compatible use: the operation of a co-generation/wastewater distillation facility as defined by a County-approved conditional use permit CUP - 5653. On December 12, 1989, the County Board of Supervisors adopted Resolution No. 89-947, which approved the change of ownership and added the Byron Power Company co-generation/wastewater distillation facility as a second compatible use (in addition to the grazing, breeding or training of horses or cattle).<sup>1</sup> On that same day, Mr. Lee and the County entered into Land Conservation Agreement No. C-89-1195.

Diamond Generating Corporation, as the parent entity of Mariposa energy, LLC, now leases the 158-acre parcel from Mr. Lee. We have been working with Mrs. Jess, who grazes cattle on the Lee property to coordinate the proposed mitigation for utilizing ten acres of non-irrigated grazing land as the location for the Mariposa Energy Project. One of the limiting factors to grazing on the property is the lack of water year-round, since the current water source is a vernal pool. By adding cattle water troughs on the east and west sides of the Project, the useful grazing period on the property can be extended. In addition, when the five acre temporary construction laydown and parking area is re-seeded, the recommended seed mixture will increase the grazing capacity of the five acres to more than compensate for the loss of ten acres of non-irrigated grazing land.

## **II. Application of Section 51238.1 to the Mariposa Energy Project**

As we have previously discussed, we believe that the Mariposa Energy Project is consistent with the three principles of compatibility set forth in Section 51238.1(a).

---

<sup>1</sup> Section 51238.1 did not exist in 1989, when the County Board determined that the cogeneration facility was a compatible use under the Williamson Act contract. We believe that the Board's action underscores the County's recognition that determining a use to be a compatible use is preferable to requiring partial contract cancellation, and that retaining the entire parcel under Williamson Act control is important.

# Mariposa Energy, LLC

First, the Project will not significantly compromise the long-term productive agricultural capability of the subject contracted parcel or parcels or on other contracted lands in agricultural preserves. To the contrary, the Project will enhance agricultural production. The subject parcel is a non-irrigated, non-prime, 158-acre parcel used for grazing cattle. Removing ten acres for the Mariposa Energy Project would have no adverse effect on long-term agricultural capability in the area, even if the Project did not offer the mitigation described herein. By providing an enhanced watering system for the cattle and re-seeding the five-acre laydown area with more productive grasses, the remainder of the parcel will continue to support the cattle that are currently grazing on the parcel. Therefore, no significant compromise of the long-term productive agricultural capability of the subjected contracted parcel will occur.

Second, the Project will not significantly displace or impair current or reasonably foreseeable agricultural operations. Again, the Mariposa Energy Project will be fully-contained within a ten-acre site in the middle of the 158-acre parcel, and will not significantly displace or impair current or reasonably foreseeable agricultural operations on the parcel since the only reasonably foreseeable agricultural operations are non-irrigated grazing. The parcel's topography, soil, and vernal pools make the production of other agricultural commodities highly unlikely. Therefore, the use of ten acres for an electric facility will not significantly displace agricultural operations.

Third, the Project will not result in the significant removal of adjacent contracted land from agricultural or open-space use. The Project will have no effect on adjacent properties' agricultural production. Grazing on adjacent contracted land will continue as it has previously because the Project is located on ten acres in the middle of the 158-acre parcel, and will have no impacts on the other properties' operations.

Because the Mariposa Energy Project is located on non-prime land, even if it were determined that the principles of compatibility set forth in Section 51238.1(a) were not met, *and* that the Project could not be subject to conditions imposed pursuant to Section 51238.1(b) so that the principles could be met, then a determination that the Project is compatible under each of the four more relaxed standards of Section 51238.1(c) could be made. First, by implementing the conditions referenced above, the Project will enhance agricultural productivity on the remainder of the 158-acre parcel, thus any adverse onsite impacts will be mitigated. Second, the parcel is non-irrigated grazing land that is not considered as Prime Farmland, Farmland of Statewide Importance, Farmland of Local Importance, or Unique Farmland by the Farmland Mapping and Monitoring Program. The use of ten acres out of 158 acres of grazing land would theoretically displace one or two cow/calf pairs out of the typical ninety-three pairs seasonally grazing on the site. With the addition of cattle water troughs and the reseeded construction laydown area with more productive grasses, however, the one or two cow/calf pairs no longer able to graze on the Project's ten acres will be able to exist on the balance of the 146 acres of the parcel. Third, the Project will support the continuation of agricultural uses on the property by enhancing water availability with cattle troughs and improved feed from the reseeded construction laydown area. In addition, the additional revenue from the long-term lease on the ten-acre site provides the land

# Mariposa Energy, LLC

owner of the 158-acre parcel with a financial incentive to maintain the agricultural and open-space nature of the balance of the parcel. Fourth, the Project does not involve a residential subdivision, and may actually discourage new residential development in the immediate area.

If you have any questions or comments, please give me a call. Thank you.

Very truly yours,



Bohdan Buchynsky  
Executive Director

Cc: William Geyer  
David Blackwell

Files – MEP – Chron.  
MEP – DOC  
DGC – Chron.



# Mariposa Energy, LLC

333 S. Grand Ave., Suite 1570, Los Angeles, CA 90071  
Tel: (213) 473-0080 Fax: (213) 620-1170

## VIA OVERNIGHT SERVICE

Mr. Robert Worl  
Project Manager  
Energy Facilities Siting Division  
California Energy Commission  
1516 Ninth Street, MS 15  
Sacramento, California 95814-5512

July 13, 2009  
DGC-457

Re: Department of Conservation Determination of Compatible Use under Section 51238.1 (a) of the Williamson Act

Dear Mr. Worl:

During our pre-filing meeting on April 14, 2009, some members of the California Energy Commission Staff requested that we obtain a letter from the Division of Land Resource Protection of the Department of Conservation confirming their concurrence that the Mariposa Energy Project would be considered as a compatible use under the Williamson Act. After several informal discussions and a site visit by Mr. Brian Leahy, Assistant Director of the Division of Land Resource Conservation, we requested an informal opinion under Government Code Section 51206. A copy of our letter requesting informal consultation is enclosed for your information.

Enclosed please find a copy of a letter dated July 6, 2009, from Mr. Brian Leahy indicating that his review of compatible use under Section 51283.1 (a) of the Williamson Act finds that the Mariposa Energy Project would be considered as a compatible use based on the information presented in our letter of June 2, 2009. Should Alameda County find the proposed Mariposa Energy Project to be a compatible use under the Williamson Act, the Department of Conservation would concur with and respect that decision.

We hope that this letter meets the requirements that the California Energy Commission Staff had for a concurrence by the Division of Land Resource Protection of the Department of Conservation as to a compatible use determination under the Williamson Act for the Mariposa Energy Project. Please let us know if additional documentation on this point is required.

Best regards,

Bo Buchynsky  
Executive Director

FILES: Mr. Alan Solomon – CEC - Project Manager  
Mr. Bruce Jensen – Alameda County Planning Department.  
Mr. Doug Urry – CH2M Hill  
Greg Wheatland, Esq. – Ellison, Schneider & Hart, LLP  
MEP – Chron, - CEC, - DOC

DGC-457