

DOCKET

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STATE OF CALIFORNIA
ENERGY RESOURCES CONSERVATION
AND DEVELOPMENT COMMISSION

In the Matter of:) Docket No. 09-AFC-03
Application For Certification)
For the Mariposa Energy Project) **STAFF'S OPENING BRIEF**
_____)

I. INTRODUCTION

On February 7, 2011, the Mariposa Energy Project (MEP) Application for Certification Committee (Committee) held a Prehearing Conference to assess the parties' readiness for an evidentiary hearing, identify areas of agreement or dispute, and discuss the remaining schedule and procedures necessary to conclude the certification process. At that time, Energy Commission Staff (Staff) indicated that all topics were ready for hearings and that the Applicant and Staff had no remaining issues in dispute.

On February 24-25, 2011, at the Byron Bethany Irrigation District Headquarters located near the proposed project site, the Committee held approximately 20 hours of evidentiary hearings on the topics of Land Use, Air Quality/Public Health, and Aviation, including several hours of public comment each day. In addition to the Applicant, Staff, and seven Intervenors, representatives from Alameda County and the Bay Area Air Quality Management District testified on Land Use and Air Quality respectively. Because the evidentiary hearings were not completed, a third hearing day was added on March 7, 2011 in Sacramento. The additional hearing day lasted over 13 hours and covered the topics of Socioeconomics, Alternatives, Biological Resources, Hazardous Materials and Soil and Water Resources. A Visual Resources Condition of Certification (Vis-6) was introduced and agreed upon by all of the parties. Furthermore, a Condition of Certification in which the Applicant agrees to provide additional funding to the Tracy Rural Fire Department was presented.

At the conclusion of the evidentiary hearings, Hearing Officer Ken Celli asked all participants to brief the issues still in dispute. The Applicant and Staff had no remaining issues in dispute. At this time, Staff does not believe there are any issues that need to be addressed since the Intervenors failed to offer substantial evidence to support their contentions.

II. ANALYSIS

A. Staff Provided Substantial Evidence in the Record to Support Its Recommendation of Project Approval.

Staff provided substantial evidence in its written testimony to support its recommendation that Mariposa Energy Project, with Staff's recommended Conditions of Certification, should be approved. Those documents include: the Staff Assessment (Ex. 300); Supplemental Staff Assessment (Ex. 301); and the Bay Area Air Quality Management District's Final Determination of Compliance (Ex. 302). Furthermore, the extensive cross-examination during the evidentiary hearings did not diminish the weight or the credibility of Staff's evidence. In addition, the Applicant also provided substantial evidence orally and in writing that basically supported all of Staff's testimony and independently met the Applicant's burden of proof pursuant to Title 20, California Code of Regulations, section 1748(d).

In *Topanga Assoc. For A Scenic Community v. County of Los Angeles*, the California Supreme Court held that a reviewing court "must scrutinize the record and determine whether substantial evidence supports the administrative agency's findings..." (*Topanga Assoc. For A Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 514.) "Substantial evidence" has more recently been defined by the courts as "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' (citation omitted)." (*Center for Biological Diversity v. County of San Bernardino* (2010) 185 Cal.App.4th 866, 881.)

In the California Environmental Quality Act (CEQA) Guidelines, section 15384 "substantial evidence" is defined as follows:

(a) "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.

(b) Substantial evidence shall include facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts. (Cal. Code Regs., tit. 14, § 15384.)

Based upon those definitions, Staff has provided substantial evidence supporting its conclusions.

B. Staff's Testimony Determined that With the Proposed Conditions of Certification, the Mariposa Energy Project Would Not Cause Significant Adverse Impacts to the Environment.

Title 20, California Code of Regulations, section 1742, requires the Applicant to include in its application for a proposed power plant information on the environmental effects of the proposed project, and in turn requires the Staff and all concerned environmental agencies to review the application and assess whether the application's "list of environmental impacts is complete and accurate, whether the mitigation plan is complete and effective, and whether additional or more effective mitigation measures are reasonably necessary, feasible, and available." (Cal. Code Reg., tit. 20, §1742(b).)

Furthermore, Title 20, California Code of Regulations, section 1742.5 outlines Staff's responsibilities in conducting its environmental assessment including, reviewing information from the Applicant and other sources, and assessing the potential environmental effects of the proposed project, the completeness of the proposed mitigation and the need for, and feasibility of, further or alternative mitigation. Staff is required to present its assessment in a report to be offered at the evidentiary hearing.

Portions of the Staff Assessment (SA; Ex. 300) and the entire Supplemental Staff Assessment (SSA; Ex. 301) comprised Staff's written testimony in accordance with sections 1742 and 1742.5. In each section of the SA and SSA, Staff assessed the project's potential to cause direct, indirect, or cumulative impacts, and concluded that the project, with mitigation, either proposed by the Applicant and/or in the form of Conditions for Certification, would not cause a significant impact on the environment. (Ex. 300; pp. 4.3-1, 4.13-1, 5.2-1; Ex. 301, pp. 1-8, 4.1-1, 4.2-1, 4.4-1, 4.12-1, 4.6-1, 4.8-1, 4.12-1, 4.10-14.12-1, Appendix A.)

The testimony of the Applicant's witnesses fully supported Staff's conclusions. The other parties introduced argument, speculation, and unsubstantiated opinion, but none of the parties offered substantial evidence into the record that would support a contention that the project, with Staff's recommended mitigation, would cause a significant adverse impact on the environment.

C. Staff's Testimony Determined that the Mariposa Energy Project Would Be Reliable and Not Create a Significant Impact to Public Health And Safety.

California Code of Regulations, section 1743 requires Staff and interested agencies to assess the completeness and adequacy of the measures proposed by the Applicant in terms of applicable health and safety standards and other reasonable requirements. (Cal. Code Reg., tit. 20, §1743(b).)

Staff reviewed reliability, public health and safety in the following topic areas of the SA and SSA: Facility Design, Reliability, Efficiency, Public Health, Transmission Line Safety and Nuisance, Worker Safety, and Hazardous Materials. In each section, Staff concluded that the MEP would be reliable and not adversely impact public health and safety. (Ex. 300; pp. 5.1-1, 5.3-1, 5.4-1: Ex. 301, pp. 4.1-1, 4.4-1.4.7-1, 4.11-1, 4.14-1.)

Once again, the Applicant's testimony fully supported Staff's conclusions. No other substantial evidence was offered into the record to refute Staff's analyses or conclusions.

1. PG&E's Natural Gas Pipeline Past the First Point of Interconnect Is Not Under the Energy Commission's Jurisdiction.

Following the Prehearing Conference, the Committee ordered the parties to brief the issue of the jurisdiction and safety of the PG&E natural gas pipeline, Line 002. The Energy Commission does not have, and cannot assume jurisdiction over the gas pipeline, Line 002, since it was permitted by the California Public Utilities Commission. Scott Galati, attorney for PG&E, voluntarily appeared at the evidentiary hearing to inform the Committee and participants that PG&E would not be present at the Mariposa hearing because PG&E was involved in three new proceedings before the California Public Utilities Commission: a rate case in which a safety measures phase was added, an order instituting rulemaking to determine if the regulations need to be modified in light of the San Bruno incident, and an order instituting investigation, specifically focusing on the San Bruno incident and PG&E operations. In addition, the National Transportation Safety Board is conducting its own investigation. (RT 3/7/11, pp. 344-345.)

2. The Applicant and Staff Testified to the Safety of the Gas Pipeline.

The proposed Mariposa project would require the construction of a new 580-foot, 8-inch diameter natural gas transmission line to the point of interconnection with the

existing PG&E natural gas transmission system. The new pipeline, up to the new on-site metering station, would be designed, constructed, operated, maintained, and managed by PG&E in accordance with Title 49, Code of Federal Regulation (CFR), Part 192 and California Public Utilities Commission (CPUC) General Order No. 112. The regulations constitute an extensive regulatory program that Staff believes is sufficient to ensure the pipeline would be built and operated in compliance with all laws, ordinances, regulations and standards (LORS), and without significant risk to public safety. (Ex. 301, p. 4.4-7.)

The existing PG&E gas pipeline, Line 002, was built by PG&E in 1972 and represents modern state of the art codes. (RT 3/7/11, p. 348.) Staff reviewed the design of the proposed new pipeline to evaluate the risk to public safety. Although Staff's analysis was limited to the new pipeline up to the point of interconnection and recent pipeline incidents notwithstanding, Staff contends that the current existing regulatory programs applicable to natural gas transmission lines protect the public from significant risk from the new pipeline and from the existing pipeline. Staff testified that the existing regulatory program addresses the issue of pressure cycling. In the absence of evidence that such a program is insufficient to protect the public, CEQA allows a lead agency to rely on such programs. (RT 3/7/11, pp. 313-314, 371.)

Cesar de Leon, P.E., a pipeline safety engineering consultant, testified that "the PG&E pipeline has been pressure tested to establish the MAOP [Maximum Allowable Operating Pressure], 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." (Ex. 68, p. 6.) Although the power plant might have a small effect on the pipeline at the point of interconnection, the cycling of the power plant, even a peaker plant, would not have an impact on the PG&E gas pipeline 002 because the gas is compressible, and the effect would be the same regardless of the condition of the pipeline. (RT 2/25/11, pp. 277-278.) He concluded, in part, that the combined pressure cycles from MEP and the Tracy Peaker Project will not affect the pipeline, the pipeline is not prone to corrosion,

and the remedial action in 2001 was in conformance with the Federal regulations and industry practice and does not indicate any problems. (Ex. 68, p. 9.)

The proposed pipeline, the interconnection to the PG&E pipeline, and the existing pipeline in the immediate vicinity of the interconnection would be located in an area that is unpopulated, with the nearest residences about 3,000 feet from the new line. Significant impacts to public safety would not be expected to occur in this setting even in the event of a complete loss of containment of the new pipeline. (RT 3/7/11, pp. 313-314, 348, 357.)

D. Staff, Along With the Bay Area Quality Management District, Determined That the Mariposa Energy Project Would Not Create a Significant Adverse Impact to Air Quality.

California Code of Regulations, section 1744.5 requires the local air pollution control officer, in this case the Bay Area Air Quality Management District (BAAQMD), to conduct “a determination of compliance review of the application in order to determine whether the proposed facility meets the requirements of the applicable new source review rule and all other applicable district regulations. If the proposed facility complies, the determination shall specify the conditions, including BACT and other mitigation measures, that are necessary for compliance...” (Cal. Code Reg., tit. 20, §1744.5(a).) BAAQMD completed their Final Determination of Compliance (FDOC) on November 24, 2010, and determined that the proposed Mariposa Energy Project complies with all applicable District, state and federal air quality rules and regulations subject to the permit conditions, BACT and offset requirements discussed in the FDOC. (Ex. 302, *Bay Area Quality Management District Final Determination of Compliance*, p. 100.) Furthermore, in the SSA, Staff testified that the project would not result in significant air-related impacts. (Ex. 301, p. 4.1-1.)

Section 1744.5(c) requires BAAQMD to provide a witness at the evidentiary hearings to explain the determination of compliance. At the MEP evidentiary hearings

on February 24, 2011, Staff presented an air quality public health panel, which included Staff witnesses and Brenda Cabral, Supervising Air Quality Engineer from BAAQMD. The panel was cross-examined by all Intervenors. None of the Intervenors offered substantial evidence that the proposed project would not be in compliance with all LORS or would result in significant air-related impacts.

E. Staff Concluded That the Mariposa Energy Project Would be in Compliance With All Laws, Ordinances, Regulations and Standards.

California Code of Regulations, section 1744 requires that information on the compliance measures planned by the applicant comply with all applicable federal, state, regional, and local laws, regulations, standards (LORS), and that each agency responsible for enforcing the applicable LORS assess the adequacy of the Applicant's proposed compliance measures to determine whether the facility will comply with the applicable LORS. The Staff is required to assist and coordinate the assessment of the Conditions of Certification to ensure that all aspects of the facility's compliance with applicable laws are considered. Furthermore, section 1744 (e) states that "comments and recommendations by an interested agency on matters within that agency's jurisdiction shall be given due deference by Commission staff." (Cal. Code Reg., tit. 20, §1744 (e).)

In both the SA and SSA, Staff testified that it reviewed all applicable LORS for the proposed project and consulted with the appropriate federal, state, regional, and local jurisdictions. Staff concluded that the MEP, with the recommended Conditions of Certification, in some cases including mitigation measures, would be in compliance with all applicable LORS. (Ex. 300, pp.4.3-24, 4.13-1, 5.1-1,5.2-1, 5.4-1; Ex. 301, pp. 4.1-1, 4.2-1, 4.4-1, 4.12-1, 4.6-1, 4.7-12, 4.8-14, 4.12-1, 4.10-1, 4.11-1, 4.12-4-9, 4.14-1, 5.5-1.) During the evidentiary hearings, representatives from the County of Alameda testified that the proposed project is in compliance with Land Use LORS, and were cross-examined by all parties (RT 2/24/11, pp. 25-99), and, as mentioned above, Brenda Cabral with BAAQMD, testified that the proposed project would be in compliance with all air quality LORS. (RT 2/24/11, pp. 375-432.) Furthermore, the

Applicant's testimony supported the conclusion that the project would be in compliance with all LORS.

III. CONCLUSION

By law, the Commission is required to make its findings and conclusions on whether the proposed MEP will cause a significant adverse impact on the environment or public health and safety based on substantial evidence offered into the hearing record by the parties. Staff and the Applicant offered substantial evidence in their written testimonies and orally during the evidentiary hearings clearly demonstrating that the proposed project, with the recommended mitigation, would not cause a significant adverse impact on the environment, public health, or safety, and the project would be in compliance with all LORS. All other parties were given an abundance of time and opportunity to cross-examine the Applicant and Staff's witnesses. Yet, the Intervenor offered only argument, speculation, unsubstantiated opinion, narrative, and evidence of social or economic impacts which do not contribute to or are not caused by physical impacts on the environment. The Intervenor has not provided substantial evidence to support their claims that the MEP should not be permitted. Therefore, Staff continues to recommend that the Commission approve the MEP Application of Certification.

Dated: March 30, 2011

Respectfully submitted,

/s/ Kerry Willis

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**APPLICATION FOR CERTIFICATION
FOR THE *MARIPOSA ENERGY PROJECT*
(MEP)**

Docket No. 09-AFC-3

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(Revised 3/18/2011)

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DECLARATION OF SERVICE

I, Janet Preis, declare that on March 30, 2011, I served and filed copies of the attached Staff's Opening Brief dated March 30, 2011. The original document, filed with the Docket Unit, are accompanied by a copy of the most recent Proof of Service list, located on the web page for this project at:

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I declare under penalty of perjury that the foregoing is true and correct, that I am employed in the county where this mailing occurred, and that I am over the age of 18 years and not a party to the proceeding.

/s/ Janet Preis