

# DOCKET

09-AFC-3

DATE	MAR 30 2011
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STATE OF CALIFORNIA  
State Energy Resources  
Conservation and Development Commission

In the Matter of: )  
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Mariposa Energy Project )  
 )  
\_\_\_\_\_ )

DOCKET NUMBER: 09-AFC-3

## Opening Evidentiary Brief by CALPILOTS

### Introduction

California Pilots Association ("CALPILOTS") submits this brief.

Although the Committee heard testimony and considered documentary evidence during its three days of evidentiary hearings on a variety of contested topics, CALPILOTS has confined its' topics to Traffic and Transportation – Aviation and Land Use areas in which it presented evidence and conducted cross examination.:

### Traffic & Transportation – Aviation and Land Use

With respect to these topic areas, the applicant MEP, ("the applicant") has failed to meet its burden of proof that the facility will not cause significant adverse environmental effects under CEQA, and that the facility will comply with all applicable federal, state and local laws ordinances, regulations and standards ("LORS"). (20.C.C.R§§ 1748-1752.5)

Specifically, the applicant has failed to prove that the so-called "thermal plumes" emitted by MEP are not a serious threat to aviation safety for pilots operation in and out of the nearby Byron Airport. Moreover, the applicant has not presented any evidence indicating that the threat to aviation safety can be mitigated. The aviation hazard posed by MEP in turn makes it incompatible with the Contra Cost County land use restrictions and the Contra Cost County Land Use Commissions ("ALUC") land use regulations. In addition, the MEP facility threatens the safe and orderly growth and expansion of the Byron Airport.

Most of these significant adverse effect and LORS incompatibilities were identified in the Traffic & Transportation and Land Use sections for the Energy Commission Staff's ("the staff") Supplemental Staff Assessment ("SSA"). (See Ex 301.) As the applicant failed to present evidence that rebuts the Aeronautical Information Manual (AIM); the committee must uphold the AIM and evidence and testimony and deny the MEP AFC.

### Traffic & Transportation – Aviation

The Energy Commission has only recently been faced with the question whether and to what extent industrial thermal plumes pose a threat to aviation safety. (RT 1/14/08 195:6-12) Answering this question has proven difficult because of the lack of state and federal guidelines, uncertainty in the theoretical modeling, and the absence of rigorous-in-flight testing. Although the parties have made some progress to address these shortcomings, the answer to the safety question remains unknown. Without sufficient information to rule out the Staff's conclusion that there exists a strong possibility the thermal plumes could endanger aircraft in flight, the Committee must find that the Applicant has failed to meet its burden to demonstrate that MEP will not pose a threat to aviation safety.

### **The FAA Safety Analysis Does not serve as the a "Federal Guidelines"**

The Applicant has argued that federal guidelines exist in the form of FAA Safety Risk Analysis of Aircraft Overflight of Industrial Exhaust Plumes ("FAA Safety Analysis" Ex. 301 Reference FAA 2006) The Applicant points out that the FAA Safety analysis concludes that thermal plumes pose an "acceptable risk" (Id., quoting FAA Safety Analysis at 15.)

While the FAA Safety Analysis is based upon 30 years of incident data, the FAA has determined invisible thermal plume being emitted from the relatively short stacks at facilities such as Mariposa Energy Project (MEP) Instead, that the data reflects pilot interactions with facilities that have tall stacks that emit invisible plumes, and that cannot be built near airports.

### **Thermal Plumes Pose an Actual Threat as Aircraft Currently Fly Over the MEP Site**

The dispute over the impact of thermal plumes on safe air navigation takes on particular significance in the MEP AFC because the evidence demonstrates that aircraft presently can and do fly over the MEP AFC because the evidence demonstrates that aircraft presently can and do fly over the MEP site. Flight track data presented by the Staff Clearly demonstrates that aircraft fly over the MEP site.

### **Mariposa Energy Aviation Safety Hazards cannot be Mitigated**

The Committee does not have to resolve the degree of threat thermal plumes pose to safe air navigation because the evidentiary record clearly demonstrates that an attempt at applying the mitigation used for the MEP would be impractical or impossible.

Moreover FAA could not issue a Notice to Airmen ("NOTAM") warning pilots of the tow power plant thermal plumes because the Airmen's Information Manual section 5-1-3 restricts NOTAMs to use Temporary not permanent, hazards. (RT 12/18/07 168:25-169:4.)

### **The Committee Should Defer to the Judgment of the Federal, State and Local Aviation Regulatory Agencies.**

Finally, the Committee should be persuaded that MEP poses a risk to aviation that cannot be mitigated based on the identical conclusions of every federal, state and local aviation regulatory agency. The construction of a thermal power plant given the close proximity of the Byron Airport should not be allowed. The Applicant has not presented any evidence that would support Committee findings overruling the opinions and expertise of the entire regulatory system. Moreover, doing so would be a terrible price of the entire aviation regulatory system. Moreover, doing so would come at a terrible price for the Byron e Airport.

## **Land Use**

The Applicant's Evidence of Land Use Conformity is Contingent Upon the Commission Finding MEP Does Not Pose Any Aviation Risks.

As a threshold matter, the Committee must first resolve whether MEP poses an aviation safety hazard, and whether the hazard can be mitigated. Most of the LORS noncompliance concerns the hazard posed by thermal plumes to aircraft operating in and out of the Byron Airport and thus to the safe and continued operation of the airport.

The Applicant has conceded that its argument is contingent upon a finding that thermal plumes pose no risk to safe air navigation, or that the risk can be mitigated. Moreover, the conclusions in the Applicant's land use testimony rely exclusively on the iconolast opinions of its own witnesses that MEP poses no aviation safety hazard.

The County has already demonstrated, *supra* that the Applicant has failed to meet its burden of proof that MEP will not pose a safety hazard. Therefore, to the extent the Committee includes MEP thermal plumes will pose and risk – and thus any degree of hazard – the Committee must find that MEP does not comply with the local LORS and deny the MEP AFC.

### **The MEP Facility Is Incompatible with the Byron Airport Compatible Land use Policy Plans**

The State legislation established county airport land use to “protect public health, safety and welfare by ensuing the orderly expansion of airports and the adoption of land use measures that maintain the public's exposure to excessive noise and safety hazards within area around public airports...” (Public utility Code § 21670(a)(2). Among their statutory duties, airport land use commissions must “coordinate planning at the state, regional, and local levels s as to provide for the orderly development of air transportation, while at the same time protecting the public health, safety, and welfare.” (Id. at § 21674(b).) To further these goals, airport land use must “prepared and adopt an airport land use compatibility plan...” (Id. At 21674(c).)

The ALUC serves as the airport land use commission for the airports in Alameda County, including the Byron Airport land use compatibility plan. The ALUC's jurisdiction extends to the boundary for the airport influence area, an irregularly boundary that includes the MEP site. The Airport Influence Area Includes within it several “safety zones” in the immediate vicinity of the airport where the ALUC has imposed greater restrictions on the compatible land use

Within the boundaries of the Airport Influence area, the ALUC reviews for consistency and makes recommendations on proposed projects under consideration by local public agencies. When the ALUC finds a proposed project would be incompatible with land use restrictions within the CLUP, the referring public agency must amend the project proposal to cure the defects, or override the ALUC's incompatibility finding by a two-thirds vote.

## **The MEP Facility is Inconsistent With the Safety Provisions of the Contra Costs County CLUP**

The CCC ALUC has reviewed the MEP AFC and based upon its finding that thermal plumes pose a threat to safe air navigation into and out of the MEP, recommends the Energy Commission find an alternative site outside of the Airport Influence Area.

The Applicant has not presented any evidence to rebut the ALUC's findings and resolution. The ALUC's resolution was based upon the research of its staff working in conjunction with the Energy Commission staff, and review at a public meeting by members of the ALUC who are public officials and experts in the field of aviation. (Code § 21670(b) Identifying qualifications for commissioners).

The CCC ALUC rendered its MEP Inconsistent based upon its statutory duty to review safety concerns for the nearby Byron Airport. (See Public Utilities Code § 21674.) That resolution, however, is not the same as a formal consistency determination because the Contra Costa County LUP does not include any specific restrictions on the construction of power plant or facilities emitting thermal plumes. In addition, the MEP site is located only slightly outside the nearest Safety Zone where the land use restrictions are more stringent.

Nevertheless, the Committee must show deference to the ALUC's judgment. To rebut the ALUC resolution would require the Committee to substitute the Applicant's judgment for the unique aviation safety related land use expertise of the ALUC, whose commissioners have been tasked by the State legislature to ensure safe and compatible land use near airports. By failing to provide evidence to attempt to rebut the ALUC's resolution, the applicant has failed to meet its burden of proof that the MEP is a compatible land use that will not pose a hazard to safe and continued operation of the Byron Airport.

CALPILOTS incorporated by reference its Aeronautical Information Manual (AIM) The MEP Facility is a safety hazard to aircraft and passengers, violates FAA Part 77.15, the Contra Costa County Land Use Plan (Ex. 301, Reference CCCALUC 2000, BA 2005). In addition MEP exceeds all height restrictions of Hazards in Zone D of the Contra County Airport Land Use Plan and (Ex. FAA Part 77.25 on drawing 5 of 11) of the CCC ALUC Byron Airport Master Plan (Ex. 301BA 2005, page 5 of 11) and violates. (FAA Part 77Scope 77.15.)

Height of the plumes hazard was confirmed in testimony by CEC expert witness Mr. William Walters (RT 3/7/11 288:14 -294: 17.).

This would require an Override by the Commission.

## **The FAA Part 77 Structures Does Not Account for Impact of the Thermal Plumes.**

The Applicant and Staff relies upon the FAA review of MEP pursuant to 14 CFR § 77 and issuance of Determination of No hazard to Air Navigation ("Part 77 Determination") to suggest that the FAA considers MEP a compatible land use. Therefore, the part 77 determination should have little bearing on the Committees decision as it does not reflect the FAA's opinion on the threat posed by thermal plumes as site in the Aeronautical Information Manual (AIM).

### **Aeronautical Information Manual**

Avoid Flight in the Vicinity of Thermal Plumes (Smoke Stacks and Cooling Towers)

The FAA Aeronautical Information Manual (AIM) clearly states (FAA AIM, Ex. 700 pg. 4)

CALPILOTS questioned the Applicants expert witness panel in as to whether they knew of any pilots who had been held liable for not following the Aeronautical Information Manual (AIM) (Ex.700, pg. 4)

“MR. MOSS: Furthermore, the Aeronautical Information Manual is a not a statutory requirement for guidance, it is just an information manual. And yes, we're not disclaiming the validity of the plume, the plumes do exist from power plants, but the applicability of the Airman's Information Manual doesn't extend to the point of actually restricting operations.” (RT 2/2511 25:15-22.)

“MR. MOSS: The Aeronautical Information Manual is published by the -- I'm sorry, Douglas Moss. The Aeronautical Information Manual is a document published by the Federal Aviation Administration, and it provides general guidance primarily in air traffic control communications navigation to the pilots, but it is not a document that is enforceable, if you will; there's no provisions in there for mandatory compliance, but it's general guidance and principles.” (RT 2/25/11 30 21-35; 31: 1-4.)

So the first question, all hands, in the aviation industry, have any of you used the AIM, the Aeronautical Information Manual, in your professional careers as a reference at any time?.....

MR. WILSON: All right. So we'll do it again. The people that have made reference to the AIM in their professional careers. Okay. So we have Olson, Moss, Lichman, Yurtis. Is it Solberg? No, Solberg is not raising his hand, but it's Wardall. Okay. Hands down. The two people that have never used the AIM in their professional careers as a reference, we have Shiu, we have Hess, and we have Solberg. ( RT 2/25/11 33 6-15.)

### **FAA Determines Plumes Not A Hazard**

In the Applicants opening Brief includes plumes are not a hazard to aviation. “The FAA has determined that the structures and plumes will not pose a hazard to aviation.” (Ex. 4 at 84.)

The applicants own an expert witness rebuts their own brief by testifying:

“MR. MOSS:‘ I said that I would not fly through a plume unless I had justification to do so.”(RT 2/25/11 36:22-23.)

CALPILOTS requests notice by the Committee of the following court cases holding the pilot responsible for not following the AIM and FAA Circulars as well. The following cases indicate that violating the AIM is sufficient to establish that the pilot breached his duty of reasonable care, and thus operated his airplane negligently:

“The Airman's Information Manual (AIM) is an FAA publication whose purpose is to instruct pilots about basic flight information, air traffic control procedures, and general instructional information. Pilots must study and know the appropriate provisions of the AIM and FAA Advisory Circulars (ACs) pertaining to their flying activities. These documents are evidence of the standard of care among all pilots.”

*Management Activities v. U.S.*, 21 F.Supp.2d 1157 (1998)

[http://scholar.google.com/scholar\\_case?case=9352546813886783604&hl=en&as\\_sdt=2&as\\_vis=1&oi=scholar](http://scholar.google.com/scholar_case?case=9352546813886783604&hl=en&as_sdt=2&as_vis=1&oi=scholar)

"In addition to these general safety regulations, the FAA publishes information regarding wake turbulence in its Airman's Information Manual and in the FAA advisory circulars. Pilots are bound by 14 C.F.R. Sec. 61.105(a) to be familiar with the information contained in these publications and in the Federal Aviation Regulations. These rules, information manuals and circulars constitute evidence of the standard of care among all pilots. Muncie Aviation, 519 F.2d at 1180-81; N-500L Cases, 517 F.Supp. at 833".

*Gladys Dyer v. USA*, 832 F. 2d 1062 (1987) See:

<http://ftp.resource.org/courts.gov/c/F2/832/832.F2d.1062.85-4369.html>

The Airman's Information Manual ("AIM"), a quarterly FAA publication containing basic flight and air traffic procedural information, including explanations of and procedures for avoiding wake turbulence, and FAA Advisory Circular 90-23D ("AC 90-23D"), concerning wake turbulence and avoidance procedures, both constitute evidence of the standard of care for all certified pilots in the aviation community.

*First of America Bank-Central v. U.S.*, 639 F. Supp. 446 (1986).

[http://scholar.google.com/scholar\\_case?case=13078984220579619005&hl=en&as\\_sdt=2&as\\_vis=1&oi=scholar](http://scholar.google.com/scholar_case?case=13078984220579619005&hl=en&as_sdt=2&as_vis=1&oi=scholar)

"2. A pilot must have studied and must know the provisions of the Airmen's Information Manual (AIM) and FAA Advisory Circulars pertaining to his flying activities."

"Furthermore, the pilot is charged with that knowledge of those facts which were then material to the safe operation of his flight."

*Associated Aviation Underwriters v. U.S.*, 462 F.Supp. 674 (1978)

[http://scholar.google.com/scholar\\_case?case=11844989866138486905&hl=en&as\\_sdt=2&as\\_vis=1&oi=scholar](http://scholar.google.com/scholar_case?case=11844989866138486905&hl=en&as_sdt=2&as_vis=1&oi=scholar)

The commission by approving the MEP AFC would limit pilots and aircraft of the use of airspace for both IFR and VFR flight operations over and near the MEP site. This would exceed the authority of the Commission would be in violation of FAA limiting of a use of airspace. The only authority who can limit the use of airspace is the FAA. (Ex. 4. Pg. 82 – 84.)

Under Federal law, once an aircraft's wheels leave the ground, the Federal Aviation Administration ("FAA") has exclusive jurisdiction and regulatory control over all matters Relating to the safety of the aircraft. "The U.S. government has exclusive sovereignty of the Airspace of the United States."<sup>1</sup> (Ex. 4 pg 82-84.)

The evidentiary hearings in this AFC proceeding strongly demonstrate the Applicant's complete failure to meet the burden of proof to demonstrate the Mariposa Energy Project will comply with the applicable state and local LORS, and will no cause significant adverse aviation.

The applicants' reliance on flawed studies and disregard of the great weight of evidence against it requires the committee to deny the Mariposa Energy Project AFC. A denial from the committee would be supported by every federal, state and local agency that participated in these AFC proceeding including the FAA CALTRANS Contra Cost County Airport land Use Commission CALPILOTS. The committee must act to protect health welfare and safety of the people of Byron, Mountain House the surrounding community by denying the Mariposa Energy Project.

### **Proposed Findings**

CALPLOTS respectively requests the Committee to adopt the proposed findings with respect to the CCC CLUP.

1. The Byron Airport compatible Land Use Plant (the CLUP) is local law, ordinance regulation or standard
2. The Mariposa Energy Project site is located within the Airport influence area as that term is defined by the CLUP and a as a result of its location is bound by the terms of the CLUP
3. The CLUP provides the power plants are incompatible uses within ZONE D
4. The mariposa Energy Plant will emit thermal plumes that will create turbulence within the flight path of the Byron Airport.
5. The Commission by approving the MEP AFC would violate Federal in restricting Airspace in and around the Byron Airport.

DECLARATION OF SERVICE

I, Andy Wilson, declare that on March 30, 2011, I served and filed copies of the attached CALPILOTS First Testimony. The original documents, filed with the Docket Unit, is accompanied by a copy of the most recent Proof of Service list, located on the web page for this project at:

[<http://www.energy.ca.gov/sitingcases/mariposa/index.html>].

The document has been sent to both the other parties in this proceeding (as shown on the Proof of Service list) and to the Commission's Docket Unit, in the following manner:

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AND

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sending an original paper copy and one electronic copy, mailed and emailed respectively, to the address below (*preferred method*);

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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.



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Andy Wilson  
CALPILOTS





BEFORE THE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT  
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**APPLICATION FOR CERTIFICATION  
FOR THE *MARIPOSA ENERGY PROJECT*  
(MEP)**

***Docket No. 09-AFC-3***

***PROOF OF SERVICE***  
(Revised 3/18/2011)

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DECLARATION OF SERVICE

I, \_\_\_\_\_, declare that on \_\_\_\_\_, I served and filed copies of the attached \_\_\_\_\_ dated \_\_\_\_\_. 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: [\[http://www.energy.ca.gov/sitingcases/mariposa/index.html\]](http://www.energy.ca.gov/sitingcases/mariposa/index.html). The document has been sent to both the other parties in this proceeding (as shown on the Proof of Service list) and to the Commission's Docket Unit, in the following manner:

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**OR**

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Sacramento, CA 95814-5512  
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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.

\_\_\_\_\_