State of California

California Energy Commission

In the Matter of:	)	Docket No. 09-AFC-03
	)	
Application For Certification For the	)	**Jass Singh, Intervener Opening Brief**
Mariposa Energy Project	)	
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TO THE COMMISSION, COMMISSION COMMITTEE OFFICER CELLI, INTERVENORS, AND THE PARTIES OF THE RECORD:

INTRODUCTION

On June 15, 2009, Mariposa Energy, LLC ("Applicant"), owned by Diamond Generating Corporation ("DGE"), a wholly owned subsidiary of Mitsubishi Corporation, filed an Application for Certification ("AFC") with the California Energy Commission ("CEC"). The AFC was an application to construct and operate a natural gas-fired, simple cycle peaking facility with a generating capacity of 200 megawatt (MW). The CEC is tasked with the exclusive authority to certify the construction and operation thermal electric power plants 50 megawatts (MW) or larger. As such, the CEC is required to review the applicants AFC in order to determine potential environmental and

public health and safety impacts, environmental justice issues, and any measures to mitigate such impacts (Public Resources Code, § 25519), as well as compliance with other applicable laws and standards (Public Resources Code, § 25523 (d)).

The MEP is proposed to be located in Alameda County, in an area that is designated for Agriculture by the East County Area Plan. The proposed site is located in close proximity to many communities and potentially presents significant public health and safety impacts and environmental justice issues for these communities. Specifically, the proposed site is located roughly seven miles northwest of Tracy, seven miles east of Livermore, six miles south of Byron, and two and half miles west of the community of Mountain House.

Argument

(I) ENVIRONMENTAL JUSTICE

(1) Position Statement

Presently, it is impossible for the Commission to properly analyze the environmental justice issues or environmental impacts presented by the proposed site, because the applicant has failed to meet its burden. The absence of an environmental justice analysis is perhaps best illustrated by the issues surrounding the Mountain House community, which will be disproportionately impacted by the plant, as it is the nearest community, and its existence has yet to be fully acknowledged or analyzed by either the CEC Staff or Applicant's environmental studies.

(2) Legal Statement

Under Federal and State law, the commission and applicant must take into consideration all relevant data about the Mountain House community that will potentially lead to significant various impacts on the community.

California Code Section 65040.12 codifies and establishes the requirement of Environmental Justice analysis in the State of California. In addition, "federal guidelines encourage governmental agencies to incorporate environmental justice principles and the environmental review of this project." Transcript of the March 7 Evidentiary Hearing, p. 6. According to this Commission, "Minority populations exist for purposes of an environmental justice analysis where either: One, the minority population of the affected area is greater than 50 percent of the affected areas general population or; two, the minority population percentage of the area is meaningfully greater than the minority population percentage in the general population while other appropriate unit of geographic analysis or one or more U.S. Census blocks in the affected area show a minority population greater than 50 percent." Transcript of the March 7 Evidentiary Hearing, p. 6-7.

Both the Commission and the Applicant, via stipulation, agree that the applicant has the burden of proof in demonstrating compliance with the requirement to perform an environmental justice analysis. Transcript of the March 7 Evidentiary Hearing, p. 124-125. To adequate conduct an environmental analysis under the California Environmental Quality Act (CEQA), the analysis must consider specific impacts rather

than just lay out a mitigation strategy for a broader community. *See* **Association of Irritated Residents et al v. California Air Resources Board et al**, Superior Court of California (San Francisco County), No. CPF-09-509562 (January 21, 2011). (California AB 32 implementation stopped because of failure to consider all impacts of permit approval process. The Petitioner, Association of Irritated Residents, argued that environmental justice communities could be disproportionately impacted because air emission mitigation strategies involved payments to offsets over large areas, rather than at the directly impacted community. Similarly, the MEP applicants present mitigation strategy involves payments to counties, in lieu of a mitigation plan that would prevent the direct impacts to the nearest impacted community, e.g. Mountain House.)

(3) Failure to Conduct an Environmental Justice Analysis

(A) The Basic Review of Whether the Community was Minority Majority Never Occurred.

Both the CEC and the Applicant's reliance on the 2000 Census data in determining the demographics of the Mountain House community was fundamentally flawed. Specifically, the Mountain House community in San Joaquin County came into existence after 2000. Accordingly, by relying on that data, it is impossible to analysis what type of community Mountain House is, or what impacts the construction of a power plant approximately 2 miles from an urban area might have. See Wikipedia Definition of Urban Area, http://en.wikipedia.org/wiki/Urban_area (Urban Areas and Urban Clusters are communities with about 10,000 people. Mountain House, San Joaquin County has about 10,000 residents.)

Based on the data from the 2000 U.S. Census, the Staff analysis determined that the "total population within the six-mile radius of the proposed site is 2,164 persons, with a minority population of 706 persons, or about 33% of the total Exhibit 300 p 1-5 [Staff Executive Summary-Determining Minority Population]

Because Mountain House, San Joaquin County was not in existence during the 2000 census, this analysis must have been for Mountain House, Alameda County.

To clarify, there are actually three unincorporated communities in California that have taken the name Mountain House at some point in time. See Wikipedia Mountain House, California, http://en.wikipedia.org/wiki/Mountain_House,_California (1. Mountain House, San Joaquin County, 2. Mountain House, Alameda County, and 3. Brush Creek, Butte County, California – formerly known as Mountain House)

Such data is flawed and does not represent the current demographics of the area and the Mountain House community. Moreover, reliance on this data eliminated the ability of the CEC staff or the applicant to conduct the required environmental justice analysis. Specifically, by analyzing an entirely different town in an entirely different community, there was no possibility that the analysis could have been performed. Until the analysis is completed, approval cannot be granted pursuant to California Code Section 65040.12 et al. Moreover, the relevant data for the 2010 census is already available for the State of California. See 2010 Census Homepage, www.census.gov/2010census.

(B) The CEC Staff and Applicant Relied upon Conclusory Statements rather than Facts or Analysis in Determining Mountain House, San Joaquin County was not an Environmental Justice Community.

Reliance on irrelevant data demonstrates the Applicant and CEC staff's failure to properly conduct an environmental justice analysis. Unfortunately, a significant portion of the environmental impact analysis were built upon this initial conclusion. See entire record (a few key examples are illustrated below). As a result, the CEC Staff Assessment reached the conclusion that since the "potential impacts would be insignificant levels in all the areas around the project (including the Mountain House community of specific concern), there would be no environmental justice Exhibit 301 p 4.7-13 [Staff Assessment Supplemental]

However, without a robust analysis of the potential environmental justice impacts the Mountain House community specifically could face, it is impossible to reach this conclusion under the legal requirements of California Code Section 65040.12 et al.

(a) The Staff and Applicant have failed to Use Proper Data in its Demographics Analysis.

As per Federal and state laws, guidelines and policies as mentioned above, the CEC Staff analysis was required to properly analyze the demographics to determine whether a minority or low-income population exists in the community. However, the Staff failed to do so in its assessment of the MEP. The Staff's analysis states that the "environmental justice screening process relies on the 2000 U.S. Census data to determine the presence of minority and below-poverty level population".

Based on the data from the 2000 U.S. Census, the Staff analysis determined that the "total population within the six-mile radius of the proposed site is 2,164 persons, with a minority population of 706 persons, or about 33% of the total population". Such data is

flawed and does not represent the current demographics of the area and the Mountain House community.

The Mountain House community is less than two and half miles from the MEP site. First, it must be noted that Mountain House is a community that came into existence in 2003. Thus, any census data from 2000 does not reflect the actual demographics in 2011. Second, in May 2009 the Mountain House Community Services District published the *2009 Mountain House Community Survey*, which found that the current population was approximately 9,930 and the minority population was closer to 53%. (2009 Mountain House Community Survey, http://www.ci.mountainhouse.ca.us/admin/upload/2009%20Mountain%20House%20Community%20Survey%20Initial%20Summary%20Results%20%282%29.pdf).

The CEC Staff and Applicant were both aware that there is around 8,000 person discrepancy between the 2000 U.S. Census and the 2009 report published by Mountain House Community Services District.

Therefore, both the CEC Staff and Applicant knew the 2000 Census data was an erroneous metric to use for conducting an environmental justice analysis. Nevertheless, both CEC Staff and the Applicant relied on the outdated and inaccurate data to form it conclusion that no environmental justice analysis was required because minorities did not make up 50% of the population in 2000 Exhibit 301 p 4.7-13 [Staff Assessment Supplemental].

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Moreover, both the CEC Staff and Applicant know that the 2010 census data is readily becoming available in April 2011 [Transcript March 7 p 96 L 7] (incorrect)

Whereas 2010 census data came on around March 8, 2010 which clearly mentions that Mountain House a minority population of around 64%. See 2010 Census Website, http://2010.census.gov/2010census/. However, rather than use appropriate metrics to conduct the required analysis or momentarily delay completion of the analysis until the already collected US Census Data became available, both the CEC Staff and Applicant rushed through environmental justice reports that relied upon flawed data. By doing so, the conclusions were based upon flawed data, the necessary due diligence was not conducted, and the Applicant has failed to meet its burden to conduct an environmental justice assessment. As we say in Silicon Valley, garbage in, garbage out. Therefore, the Applicants petition for approval must be denied until a relevant environmental justice analysis is conducted.

(b) Staff and Applicant Ignored the Unique Circumstances of, And Cumulative Impacts on the Mountain House Community

CEC Staff and Applicant's assessments fail to consider the unique circumstances, and the potential for harmful cumulative impacts on the Mountain House community. Specifically, the Staff Assessment incorrectly concludes that since the "potential impacts would be insignificant levels in all the areas around the project (including the Mountain House community of specific concern), there would be no

environmental justice concerns."[1] Such a conclusion is flawed because it fails to properly distinguish the Mountain House community from the rest of the areas around the project, particularly due to it close proximity to the project compared to others.

Moreover, it fails to consider the unique circumstances of the environmental justice community of Mountain House. Nothing under Federal or state law permits Staff to assume that a finding of no significant impact on the general population precludes a disproportionate impact on the environmental justice population. Indeed, making such a conclusion inevitably masks precisely the sort of unique vulnerabilities environmental justice analysis is intended to indentify.

Thus, the Staff and Applicant erred by creating a threshold inquiry whether there was a significant environmental impact upon the entire populations. Essentially, because neither the CEC Staff nor the Applicant found significant impact on the general population with respect to public health, socioeconomics, and air quality, the analysis was stopped. Accordingly, the fundamental question regarding whether there would be a disproportionate impact on an environmental justice community, for instance Mountain House, San Joaquin County, was never considered.

Such analysis is flawed because it goes against the intention of environmental justice laws, which require the CEC Staff and the Applicant to separate and independently analyze populations, like Mountain House, San Joaquin County, that maybe disproportionately impacted by the project.

Supplemental Staff Assessment, http://www.energy.ca.gov/2010publications/CEC-700-2010-017/CEC-700-2010-017-SUP.PDF

Until such an environmental justice analysis is conducted using the appropriate standard of review, the Applicants petition for approval must be denied.

(c) The Staff and Applicant have Routinely Relied on Errors of Fact and Law when Conducting their Analysis.

Here are a few of the more egregious errors.

i) Under section - Direct/Indirect impacts and mitigations [Exhibit 300 p 4.8-4 of Staff Assessment] mentions

> **"**the cities closest to the project are Pleasanton, Livermore, and Tracy, which are in San Joaquin County." (Wrong Analysis)

Pleasanton and Livermore are part of Alameda County and not of San Joaquin County. Notably, there again is no mention of either of the three closest communities, Mountain House, San Joaquin County; Mountain House, Alameda County; or Byron, Contra Costa County.

ii) **Under section - Result in Substantial Physical Impacts to Government Facilities [Exhibit 301 p 4.8-6 of Supplemental Staff Assessment]**

> "the MEP would not cause significant impacts to service ratios, response times, or other performance objectives relating to emergency medical services, law enforcement, or schools. Fire protection, including the applicant proposed onsite Fire Protection and Prevention Plan is analyzed in the Worker Safety and Fire Protection section of this document." (Inaccurate)

The Mountain House, San Joaquin County Fire Station and Police Station are over 10 miles closer than the facilities cited in the Fire Protection and Prevention Plan. Specifically, it is within 3 miles of MEP. Both Mountain House Fire and Police have significantly faster response times than the institutions relied upon in Alameda because of the location being closer to any other cities.

This will inevitably impact the community in the future. For instance, Mountain House Fire may well have to respond to incidents, e.g. brush fires in the grassland surrounding the proposed site, accidents caused during the construction of the MEP facility, traffic instances off of a main commuter corridor – Altamont Pass/Grant Line Road, or injuries to workers at the proposed MEP site).

Moreover, emergency vehicles traveling to MEP from the Dublin, Alameda County areas would have to transverse Interstate 580 and could encounter significant traffic during rush hour. This would prevent timely response, draw valuable resources from communities like Livermore or Pleasanton for inordinate amounts of time, and likely force the closest first responders, Mountain House Fire and Police, to respond.

iii) **Emergency Medical Services [Exhibit 301 p 4.8-7 of Supplemental Staff Assessment]**

As stated in the AFC and verified by staff (www.co.alameda.ca.us/fire), Alameda County Fire Department (ACFD) firefighters would be the first responders to any hazmat emergencies. Alameda County has three hazardous materials response teams based at Stations 4, 12, and 20. The closest responding team to MEP would be Station 20, located at 7000 East Avenue in Livermore, 16 miles from MEP. This team consists of nine personnel—two trained to a specialist level, six technicians, and a battalion chief. All equipment and personal are trained at a Level A/Type I level …. (Inaccurate)

The closest response time of 8 minutes would be from the Mountain House Fire Station, located at the intersection of Tradition and Mascot Blvd. in Mountain House, CA 95391

iv) **Law Enforcement [Exhibit 301 p 4.8-7 of Supplemental Staff Assessment]**

The MEP proposed project site is located within the jurisdiction of the Alameda County Sheriff's Office (ACS (http://www.alamedacountysheriff.org). The primary responding station to the site is the Tri-Valley Station located at 100 Civic Plaza in Dublin, approximately 26 miles from MEP. The Tri-Valley Station has 17 full time uniformed officers. Average response time to the site is between ten and fifteen minutes. The ACSO has mutual aid agreements with law enforcement agencies within the surrounding counties (MEP 2009a, p. 5.10-11). (Wrong Analysis).

MHCSD has assigned deputy available 24 hours a day. Mountain Houses' response time is within 4 miles. The mutual aid agreement's referenced evidence the necessary reliance on San Joaquin County, e.g. Mountain House and Tracy.

v) **Education [Exhibit 301 p 4.8-8 of Supplemental Staff Assessment]**

"Mountain House ESD for the 2008-2009 school year had a total enrollment of 42". (Wrong Analysis, as cited as evidence of due diligence in Mountain House, San Joaquin County)

Noted: Mountain House ESD referred here is in Contra Costa County and not in San Joaquin County. The Mountain House schools falls under Lammersville School District, see http://www.lammersvilleschooldistrict.net, which consist of:

- Wicklund Elementary School with enrollment of approx 650 students http://www.axiomadvisors.net/livesarc/SARCIndexPDFs/39685510106484_08-09_1.pdf

- Bethany Elementary School with enrollment of approx 808 students http://www.axiomadvisors.net/livesarc/SARCIndexPDFs/39685510114645_08-09_1.pdf

- Questa Elementary School with enrollment of less than 500
- Lammersville Elementary School

These elementary schools are the closes schools, yet no analysis was done related to the environmental impacts on these sites. This is particularly disturbing, as an assessment was done on the much smaller school located in a different city, Byron, and cited as evidence that there would be no impact on the Mountain House communities' children.

Conclusion

These representative flaws are representative of the rushed, insufficient analysis that was conducted and relied upon in making a determination that there would be no impact on the community of Mountain House. Until a analysis is performed, which relies upon accurate data, the Applicant's petition must be denied.

(d) The MEP site poses an impact to the Mountain House Community that warrants denial of the Applicants Request for Permission Outright.

The vital reasons that AFC for Eastshore Energy Center and Russell City energy center (city of Hayward, Alameda County) were denied was based on the location in an urban setting.
[http://www.energy.ca.gov/sitingcases/eastshore/documents/intervenors/2008-02-11_COUNTY_OF_ALAMEDA_OPENING_BRIEF_TN-45306.PDF]

Similarly in the MEP project, the proposed development is located in an urban setting. (e.g. Mountain House currently has over 10,000 full time residents and is projected to have between 40,000-50,000 residents once development is complete. Neither the Applicant nor the CEC Staff have evaluated the impacts on the urban setting of the Mountain House Community because Mountain House Community did not exist in US census bureau 2000.

Had the Applicant analyzed the Mountain House, San Joaquin County, area appropriately, as an urban/residential area, it would have concluded the MEP was not appropriate for the location. In fact, the Applicant's expert specifically stated that the MEP was not compatible with an Urban Community [Transcript March 7 p 37 Line 19].

Moreover, Alameda County would oppose the MEP as it did in the Russell City proceeding, the Alameda County Health Department came out against an almost identical project due to its particulate matter impacts on its residence. Now, in typical NIMBY fashion, Alameda County Health Department is ok provided they are only polluting and imposing negative health impacts on the citizens of San Joaquin County, particularly the Mountain House Community.

Without even a cursory analysis of the impacts on the Mountain House, San Joaquin County community, (notably not the Contra Costs Mountain House Elementary School or the Mountain House, Alameda County community), the Applicant has failed to meet its burden of proof and approval of the project should be denied.

Moreover, the CEC Commission should rely on its own precedent and not approve the MEP facility directly adjacent to an urban community.

(e) There are no mitigating factors or benefits for San Joaquin County or Mountain House. See Section 4.8-10 Direct and Indirect induced benefits [Exhibit 300 p 4.8-10 Table 6 Staff Assessment]

Mountain House community will not get any direct or direct benefits from MEP and the benefits will go to Alameda County and all the resources related to jobs, buying material, taxes will likely go to Alameda County.

There are no local communities in San Joaquin County that require power from the MEP site. In fact, there is a very similar peaker plant located in Tracy that has never been used to capacity and seldom runs.

Outreach to Mountain House

During the socioeconomic hearing on March 7th, 2011, in Sacramento and was not considered in Mountain House and there was no provision for Mountain House public to provide the comments. According to the CEC Environmental Justice was not at the highest priority of CEC. It was clearly an eye wash for Mountain House public.

US census bureau 2010 came on March 8, 2011, CEC rushed to finish MEP hearing by avoiding recent US census bureau 2010 demographic and population data.

i) Outreach to Mountain House Community as a minority community was not done as per Environmental Justice Framework.
ii) Rajesh's request dated December 13, 2010 for 2nd public workshop in Mountain House was not considered.
iii) Translation of documents related to MEP was not done in minority native language.
iv) All the workshops were held at BBID which is in Contra Costa County. BBID location is remote and is not served by bus service.
v) Only Jennifer Jennings, Public Advisor visited once in MHCSD to explain the application process. None of the CEC staff members ever visited as a part of work shop.
vi) CEC always accommodated applicant as compared to Mountain House public. They squashed the motion for translating the documents in native language. They pushed the hearing on March 7, despite interveners request for another date.
vii) Public comment section was not put on March 7th hearing schedule

(II) LAND USE

The Land use section of this brief will refer to pages in Transcript of MEP Feb 24, 2011 hearing.

(a) Measure D- Intention to Keep Space Open and Limit New Industrial Development is Inconsistent with MEP Proposed Development.

On Page 28, Mr. Lopez – Alameda County Representative admits to the fact that Measure D was passed ostensibly to curb growth and to limit ability for new residential, new commercial and new industrial development to occur in unincorporated non-urban growth boundary areas of Alameda county and desire to keep space open. Mr. Lopez has also admitted that the MEP site is located on the land covered by Measure D. Accordingly, development of the MEP facility on the proposed site is directly against voter approved public policy and California law and should not be granted approval by the MEP [Transcript Feb 24 p 28].

(b) The MEP facility is not Public Infrastructure and is Incompatible with the Proposed Development at the Proposed Site.

On Page 29, line 17-20, Mr. Lopez for the record mentions that MEP will be public infrastructure and agrees Measure D has put restrictions on land use and development intensity. This is inaccurate, particularly because the only criteria for development that has been submitted is the agreement that a private company, PG&E, will purchase power from the proposed development [2008 PG&E Long Term Power Purchase Agreement]. Until the MEP private developers can present evidence of some public needs, the facility should not be classified as a public or quasi-public development. Without a record evidencing a public need, the Applicant/private

developer has failed to meet its burden to demonstrate the facility is a public/quasi-public facility and the proposed development is incompatible with the law, Measure D. Accordingly, the application for approval must be denied.

(c) There is no Public Need for the Proposed MEP Facility from the Surrounding Community.

[Transcript Feb 24 p 29] Mr. Lopez is suggesting MEP is a public infrastructure since it provides key needs of public which is “electricity”. However, as was the standard of review, the CEC is only to consider the area of 6 miles surrounding the proposed development [Exhibit 300, 301]. However, there was no assessment in the 6 mile radius related to a need for the proposed development. Had there been even a cursory assessment, the Applicant would have discovered non operating Cogen facility near the proposed development that not being used. Cogen facility cannot be operated because the price of electricity too low for it to generate power. As such, there is no factual basis that there is any public need for the proposed development and a conclusion stating as much cannot be reached by the CEC. Accordingly, the proposed development must be denied, as it is contrary to the legal requirements of Measure D and incompatible with the land use of the proposed development. Simply stated, there is no evidence on the record which proves MEP is current regional need, thus no grounds to designate the development a public use.

(d) The Site and Surrounding Area have been Consistently Misclassified by the Applicant.

(e) The new Peaker Plant is a New development?

[Transcript February 24, Page 28], Mr. Lopez clearly puts on the record new development will violate Measure D. So now how would Applicant and Alameda County make MEP be consistent with ECAP? Alameda County accomplished this by stating:

"Peaker Plant is not a new development" [Transcript February 24, Page 28]

MEP is not an existing facility. The MEP facility is a proposed new development, Peaker Plant on the proposed site which involves construction of new industrial facility. Since MEP involves new industrial development it clearly violates Measure D per Mr. Lopez's definition [Transcript February 24, Page 28]. As such, the Applicant's proposal should be denied.

Applicant has not met his burden of proof in analyzing Measure D initiative properly.

(f) The MEP Violates the Williamson Act Public Contract.

[Transcript February 24, Page 32] Line 10, Mr. Lopez admits that parcel falls under Williamson contract. The justification give to make the land compatible with Williamson Contract is highly superficial and based upon conclusory analysis, rather than factual data. Applicant via Alameda County has not met his burden of proof. Specifically, the Applicant suggests that the 146 acre land of "low quality grazing property" is adjacent to industrial facilities. Moreover, the Applicant attempts to state that the property is consistent with Measure D, because it will be watered to have same number of cattle grazing as before is not a convincing statement, not is it accurate.

It is unequivocally clear that allowing industrial development on private open grazing land that receives public benefits, e.g. lower taxes, due to a public covenant under a Williamson Act Contract is an inconsistent land use. Specifically:

> *The California Land Conservation Act of 1965--commonly referred to as the Williamson Act--enables local governments to enter into contracts with* ***private landowners*** *for the purpose of* ***restricting specific parcels of land to agricultural or related open space use.*** *In return, landowners receive property tax assessments which are much lower than normal because they are based upon farming and open space uses as opposed to full market value. Local governments receive an annual subvention of forgone property tax revenues from the state via the Open Space Subvention Act of 1971.*

In effect, the Applicant is attempting to make a private industrial facility compatible with the Williamson Act by laying some grass seed and providing a *de minimis* water resources on the parcel that is already readily available. This is not only taking advantage of firm, well precedence California law, at the expense of tax payers; and against public policy; it also makes absolutely no logical sense.

Clearly, the Williamson Act shows the proposed parcel is **"restricted land to agricultural or related open space use"** by law. Hence as explained above, MEP will be violating Williamson Act and California law. Therefore, the proposed development must be denied.

(g) The MEP Violates Policy 13.

On Page 34, line 23 Mr. Lopez defines Infrastructure as per ECAP and adds words not in the ECAP specifically see in italics font – as a provider of energy power.

See Mr. Lopez's infrastructure definition:

23 MR. LOPEZ: Sure. That definition is here.

24 Infrastructure shall include public facilities, community

25 facilities and all structures and development necessary to

1 the provision of public services and utilities ***as a***

2 provider of energy power. I think it's very clear this is

3 a public service.

However if excerpt from ECAP specifically states:

Policy 13: The County shall not provide nor authorize public facilities or other infrastructure in excess of that needed for permissible development consistent with the Initiative. This policy shall not bar 1) new, expanded or replacement infrastructure necessary to create adequate service for the East County, 2) maintenance, repair or improvements of public facilities which do not increase capacity, and 3) infrastructure such as pipelines, canals, and power transmission lines which have no excessive growth-inducing effect on the East County area and have permit conditions to ensure that no service can be provided beyond that consistent with development allowed by the Initiative. "Infrastructure" shall include public facilities, community facilities, and all structures and development necessary to the provision of public services and utilities.

http://www.acgov.org/cda/planning/generalplans/documents/EastCountyAreaPlancombined.pdf

NOTE: ECAP has no specific mention **of provider of energy power as a public use.**

Alameda County representative are misguiding the committee. Moreover, Applicant has not met his burden in evaluating statements of Alameda County for accuracy and hence not met his burden of proof. Therefore, the proposed development should be denied.

Notably, the, ECAP has special policies for Wind Farms. See ECAP excerpt: Policies like 168 clearly indicate ECAP authors and Measure D.

Wind Farms

Goal: To maximize the production of wind generated energy.

Policies

Policy 168: The County shall recognize the importance of **wind power** as a clean, renewable source of energy.

Policy 169: The County shall allow for continued operation, new development, redevelopment, and expansion of existing and planned **wind farm facilities** within the limits of environmental constraints.

Policy 170: The County shall protect **nearby existing uses** from potential traffic, noise, dust, visual, and other impacts generated by the construction and operation of wind farm facilities.

Policy 171: The County shall work with the wind energy industry, public utilities, other agencies, and energy experts to monitor **trends in wind energy** developments, technology, and environmental safeguards.

Policy 172: The County shall establish a **mitigation program** to minimize the impacts of wind turbine operations on bird populations.

Wind farms as clean energy and allowed these clean infrastructures after putting below policies. There is no mention in ECAP around natural gas fired power plants and there are no policies in ECAP around natural gas power plant. It is very clear ECAP never wanted non-renewable, e.g. clean tech, power generation to spread around ECAP governed agriculture lands.

The proposed development is incompatible with the nearby existing uses and the mitigation program does nothing to mitigate the impact on the surrounding community. In fact, even the Applicant's expert states that the facility would be incompatible with an urban area, e.g. Mountain House, San Joaquin County. According, the Applicants proposal for development is inconsistent with the existing and surrounding community land use and must be denied.

(h) The MEP Violates ECAP Policy 54.

[Transcript February 24 p 37 line 19], Mr. Lopez categorizes MEP as a public infrastructure outside the urban growth boundary. Hence does not violate ECAP policy 54. Of course, Mr. Lopez ignores, the current 10,000+ residents who live in the Mountain House, San Joaquin County community, which is within 2.5 miles of the proposed development. He also fails to consider the additional 30,000 to 40,000 residents whom will be even closer to the proposed MEP site once the full, existing land use plan of the Mountain House community is finalized. See, Definition or Urban Population as per Wikipedia: http://en.wikipedia.org/wiki/Urban_area.

Because the proposed MEP facility is inconsistent with policy 54 and the surrounding/adjacent development, the Applicants proposed development must be denied.

(III) BIOLOGY – FEDERALLY LISTED AND ENDANGERED SPECIES

During the March 7, 2011, evidentiary hearing, Mr. Rob Simpson asked How far is the project from the nearest endangered species [Transcript March 7 p 437 L 21]. The Staff Wild Life Biologist, Ms. Keeler laughed and responded that “these are mobile species” [Transcript March 7 p 438 L 2]. Unfortunately, this cavalier and unconcerned approach to protecting sensitive species has been consistent during the MEP analysis. Moreover, the statement was actually inaccurate. (The life cycle of a Tiger Salamander is such that it lives in a borough for most of its life and move 10 to 100m [**Accounts and Measures for Managing Identified Wildlife – Accounts V. 2004, page 3]**. A

reasonably competent Biologist should know this or at least have been prepared to respond to such queries when serving as an expert for the Applicant.)

(a) The Applicant's witnesses were clearly inadequate.

As another example, Mr. Morgan Groover asked the wildlife biologist if she knew if adding electro-conductivity, mercury or Tri-hallow methane to the water was harmful to the aquatic wild life and the biologist stated she did not know although all of those substances are regulated by the State because they are harmful to aquatic wild life [Transcript March 7 p 430 L 7]

"Electro-conductivity" is a means to measure salt. If the Applicant's relied upon expert biologist would make such erroneous statements in an open forum, how can the opinions of the Applicant's biology experts serve any value.

Clearly, the Applicant relied upon and provided experts who did not understand a reference to which any reasonable biologist adequate for the task should have understood. Accordingly, her subsequently conclusions that using reclaimed water has a beneficial effect on the Delta water system because one is not discharging things like mercury into it can at best be deemed suspect.

Moreover, Applicant's relied upon conclusions that the MEP site would not impact the numerous identified endangered species which inhabit the site, can also only be deemed highly suspect. For reference, here is the list of endangered species identified as having habitat on the property:

- Burrowing Owl – Burrows actually found on the subject site.

Letter from Department of Army dated April 20, 2010 [Exhibit 29] did mention that

> - There is a potential for take of listed *fairy* shrimp, frog and salamander during construction and operation due to sediment or other material being released via storm water into nearby wetlands; potential for take of frog, salamander and kit fox during construction and operation, caused by vehicles and other equipment. Cumulative impacts may occur as a result of new developments and operation and maintenance of existing facilities in the action area.
> - Based on the available information, we have determined the action may affect the Federally-listed California red-legged frog *(Rana aurora draytonii),* San Joaquin kit fox *(Vulpes macrotis mutica),* California tiger salamander *(Ambystoma californiense),* vernal pool fairy shrimp *(Branchinecta longiantenna),* longhorn fairy shrimp *(Branchinecta longiantenna)* and/or their critical habitat.

Without reliable competent experts thoroughly investigating the potential impacts of the MEP development on vital habitat for federally listed species, the Applicant has failed to meet its burden and the proposed development must be denied.

(b) The Applicant and the CEC Staff's analysis were clearly inadequate.

California Code of Regulations, Title 14, Chapter 3, Guidelines for California Environmental Quality Act. Section 15151 states:

> An EIR should be prepared with a sufficient degree of analysis to provide decision makers with information which enables them to make a decision which intelligently takes account of the environmental consequences. An evaluation of the environmental effects of a proposed project need not be exhaustive, but the sufficiency of an EIR is to be reviewed in the light of what is reasonably feasible.

Disagreement among experts does not make an EIR inadequate, but the EIR should summarize main points among the experts. The courts have looked not for perfection but for adequacy, completeness and good faith effort at full disclosure. However, when none of the wildlife biologists on the project knows that dumping salt, mercury or THM's into the delta is harmful to aquatic wildlife, then the EIR is not adequate.

(c) The Removal of these Species will have a Profound Impact on the Local Communities.

Not only are these species, particularly the Burrowing Owl endanger, but they are also critical to pest control for the community of Mountain House. For example, the Burrowing Owl is the dominant predator for nocturnal rodent pest species. Had an appropriate analysis being done it would have revealed the burden on Mountain House Community. However, again, the needs of Mountain House Community were never considered.

Due to the power plant existence and plume the bird will stay away from power plant and will tend to take flight higher, this will make birds fly higher and close to Byron Airport and also direct them toward the well known hazard of the Altamont Wind Farm. This will further endanger the federally listed species and will create a new flight hazards and more flight hazards to planes which are non instrumental like gliders. This analysis was not done thoroughly by CEC staff or applicant. [Transcript March 7, p 432]

It is the Applicant's burden to consider and account for the very real impacts the development will have on wildlife and the local community. The Applicant has failed to meet this burden. Therefore, the application for the MEP development must be denied.

(IV) AIR QUALITY

(a) Inappropriate Air Quality District for Air Quality Permit.

In pursuance of compliance with Federal and State air quality standards, the applicant pursued air quality from the Bay Area Air Quality Management District. However, this was the inappropriate region for the proposed MEP site.

Pragmatically, the Applicant has failed to get certification/permit from San Joaquin Valley Air Pollution Control District. However, the wind pattern from the bay area will cause the San Joaquin Valley Air Pollution Control District to be the area affected by the MEP's air pollution, particularly the Mountain House, San Joaquin community.

Air quality districts are not the defined exclusively by county lines. Rather, they are mapped and defined by non-attainment areas. The San Joaquin Valley Air Pollution Control District is in violation of the air quality standards for many more emission criteria than the Bay Area Air Quality Management District. Therefore, the standards are far stricter for obtaining air quality permits. This likely explains why the Applicant sought an air quality permit from the Bay Area Air Quality Management District rather than the more appropriate San Joaquin Valley Air Pollution Control District.

The Applicant's request for approval for the MEP project should be declined until a permit has been issued from the San Joaquin Valley Air Pollution Control District.

(b) The Air Quality Modeling and Monitoring Data was Inadequate.

As mentioned by Ms. Qian that EPA Air Quality Modeling was based on metreological data provided and certified by ARB, but staff did not checked the equipments calibration certification of ARB which gathered the data [Transcript February 24 p 415]. As a result, the data can only be deemed inadequate correct.

Until the applicant can obtain and provide better air data, the burden of proof has not been meet and the request for approval must be denied.

(c) The Proposed MEP Facility is not Vital Infrastructure and is Against Public Policy.

California AB 32 and the proposed energy mandates for 33% renewable energy sources will continue to reduce the need for fossil fuel based energy sources. Moreover, voter approval of these mandates firmly express a public policy against developments of fossil fuel based power generation facilities, such as the MEP project. According, the CEC should consider rejecting the application for the MEP facility, as its development is against public policy and unnecessary given the trends in development.

(d) There is no Need for Additional Energy Generation Capacity.

In Tracy power plants is running under capacity and its capacity is not fully utilized [Transcript February 24 p 387-388]. There are power plants in Alameda, San Joaquin and Contra Costa County which are not utilized to its full capacity [Exhibit 300, 301]. The analysis of each power plant current production vs its full capacity has not been analyzed. The new proposed power plants will impact tax payers and rate payers, because infrastructure costs are passed onto consumers. The only justification for developing this plant that has currently been given is that PG&E has agreed to buy power from MEP.

If this is the only standard, no power plant with a purchase agreement from a private company would ever be denied. This cannot be the standard as the CEC must at some level take into account need and public good, as the CEC is in effect an entity of government, rather than one that serves at the will of private companies.

Moreover, MEP has not mitigated appropriately based upon its proposed capacity. Specifically, the plant will be permitted to operate 4,225 hours and licensed to operate up to 4,000 hours per year where as the mitigation provided to San Joaquin was only for 1,400 hours [Transcript February 24].

The absence of adequate mitigation for the capacity of the plant and the lack of firm justification for a 250 MW plant should be taken into consideration and warrant the non-approval of the proposed MEP development.

(V) Safety

(a) PG&E Pipeline Safety

In the hearing it was mentioned by Mr. de Leon that they did not check the maintenance record of PG&E pipeline 002 [Transcript February 25 p 265 L 17] and also did not do risk analysis of line 002. There was no physical check procedure on Line 002 [Transcript February 25 p 272 L 21]. As is evidenced by the current safety cases involving PG&E, e.g. San Bruno Explosions, the absence of pipeline safety data is a critical safety concern. Specifically:

- Mr. Tyler accepted in the hearing that no pressure fluctuation analysis done for Line 002 [Transcript March 7 p 353 L 20] .
- Additionally, no analysis was done for hazard situation with active oil pipelines passing by line 002 gas line. See Chevron letter dated February 16, 2010 by Mr. Lee Higgins to Mr. Craig Hoffman of CEC.
- Mr. Tyler mentioned that there was no cyclic pressure analysis or modeling done which can show the impact on the safety of the line 002. Cyclic pressure analysis is important for peaker plant because peaker plant is supposed turn on and off several times a day.

Without checking the maintenance record, doing risk analysis and physically checking line 002, there is a significant hazard and risk to the population around MEP, the most at risk community being Mountain House, San Joaquin. Until this critical safety assessment is conducted, the Applicant has failed to meet its burden of proof and the permit must be declined.

STATE OF CALIFORNIA

State Energy Resources

Conservation and Development Commission

In the Matter of: [DOCKET NUMBER 09-AFC-3]

[MARIPOSA ENERGY PROJECT] **DECLARATION OF SERVICE**

_____

I, Jass Singh declare that on March-30-2011, I served and filed copies of this document dated March-30-2011. The original document, filed with the Docket Unit, is accompanied by a copy of the most recent *Proof of Service* list (most recent version is located on the proceeding's web page 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:

For service to the applicant and all other parties:

__X___ sent electronically to all email addresses on the Proof of Service list;

_____ by personal delivery or by depositing in the United States mail at Sacramento, California with first-class postage thereon fully prepaid and addressed as provided on the *Proof of Service* list above to those addresses **NOT** marked "email preferred."

AND

For filing with the Energy Commission:

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

OR

_____ depositing in the mail an original and 12 paper copies, as follows:

CALIFORNIA ENERGY COMMISSION

Attn: Docket No. [09-AFC-03]

1516 Ninth Street, MS-4

Sacramento, CA 95814-5512

docket@energy.state.ca.us

I declare under penalty of perjury that the foregoing is true and correct to best of my knowledge.