State of California
California Energy Commission

In the Matter of:	I	Docket No. 09-AFC-03
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Application for Certification For the Mariposa Energy Project	I	**Rob Simpson, Intervenor Opening Brief**
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TO THE COMMISSION, COMMISSIONER BYRON, HEARING OFFICER CELLI, INTERVENORS, AND THE PARTIES OF THE RECORD:

Intervenor Rob Simpson ("Intevenor") hereby submits his opening brief in the matter of the Mariposa Energy Project ("MEP"). The Commission's Staff Assessment fails to properly analyze the possibility of disproportionate impacts of the proposed plant on the "environmental justice" community surrounding the MEP, particularly the Mountain House Community located 2.5 miles east of the proposed plant. As such, the Commission should deny the certification of the MEP.

MEMORANDUM OF POINTS AND AUTHORITIES

I. 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 heath 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. However, the Commission has failed to properly analyze the environmental justice issues presented by the proposed site, particularly in regards to the Mountain House community, which will be disproportionately impacted by the plant.

The Commission's failure to follow the environmental justice guidelines under Federal and state law, and take into consideration all relevant data about the Mountain House community will potentially lead to significant health impacts on the community. For example, the Staff Assessment's reliance on the 2000 Census data in determining the demographics of the Mountain House community demonstrates the commission's failure to properly analyze all current and relevant data, as required. Moreover, 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." Such a conclusion fails to take into the consideration the potential and unique impacts on the Mountain View community by placing them in the same category as the general population, even though that are located within two and half miles of the

proposed facility. Without a robust analysis of the potential environmental justice impacts the Mountain House community will never know whether they are susceptible to increases in asthma, hearth disease, and other health impacts. Thus, I respectfully request the Commission deny certification of the Mariposa Energy Project.

II. LEGAL ARGUMENT

A. FEDERAL AND STATE LAW REQUIRES THAT THE STAFF DO AN ENVIRONMENTAL JUSTICE ANALYSIS.

On February 11, 1994, then President Clinton signed Executive Order ("EO") 12898 regarding "Federal Actions to Address EJ in Minority Populations and Low-Income Populations."[1] This EO was in response to a 1992 U.S Environmental Protection Agency ("EPA") report finding that "communities of color and low-income populations experience higher than average exposures to selected air pollutants, hazardous waste facilities, and other forms of environmental pollution."[2] The EPA has defined Environmental Justice as "the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies."[3] Moreover, under EPA regulations "fair treatment means that no group of people, including racial, ethnic, or socioeconomic group should bear a disproportionate share of the negative environmental consequences resulting from industrial, municipal, and commercial operations or the execution of federal, state, local, and tribal programs and policies."[4]

Following the identification of such issues at the national level, many states, with

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1 *See* http://www.opr.ca.gov/planning/publications/OPR_EJ_Report_Oct2003.pdf.
2 Id.
3 http://www.energy.ca.gov/public_adviser/environmental_justice_faq.html
4 Id.

California being the first, adopted similar laws to address the disproportionate environmental impacts on minority communities and low-income communities. In California, such concerns were put into law with the stated purpose being to ensure the "fair treatment of people of all races, cultures, and incomes with respect to the development, adoption, implementation, and enforcement of environmental laws, regulations, and policies." (Gov. Code, § 65040.12, subd. (e).) As the Staff Assessment acknowledges this process involves (1) public outreach and involvement; (2) demographics, a screening-level analysis to determine the existence of a minority or low-income population; and (3) if warranted, a detailed examination of the distribution of impacts on segments of the population.[5] However, the Staff's assessment, as discussed below, failed to follow its own process and relied on flawed and outdated data to reach its conclusion.

MR. SIMPSON: Would the outreach have been
17 different if there was an environmental justice community?
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MR. HOFFMAN: Hypothetically, I think I probably
10 would have worked closer with a public adviser to identify
11 those sectors that needed maybe some additional outreach.
12 And we do have public adviser and Jennifer is here who's
13 active in every project. And we do the best we can to
14 provide the outreach to the communities that every project
15 (inaudible)
140

1. The Staff Failed to Used Proper Data in its Demographics Analysis

As stated above, the 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

[5] Executive Summary of Staff Assessment (1-4), http://www.energy.ca.gov/2010publications/CEC-700-2010-017/Executive_Summary.pdf

"environmental justice screening process relies on the 2000 U.S. Census data to determine the presence of minority and below-poverty level population." [6] 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."[7] 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 60%.[8] That would mean that there is an 8,000 person discrepancy between the 2000 U.S. Census and the 2009 report published by Mountain House Community Services District. Moreover, the current data shoes that the minority population has doubled over the past decade. Nevertheless, Staff 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. In light of this new data the Staff should be required to do a full environmental justice analysis on the Mountain House community.

2. Staff Ignored the Unique Circumstances Of, And Cumulative Impacts on, the Mountain House Community

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[6] Executive Summary of Staff Assessment (1-5), http://www.energy.ca.gov/2010publications/CEC-700-2010-017/Executive_Summary.pdf

[7] Id.

[8] 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

Staff's assessment fails 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."[9] 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 erred by creating a threshold inquiry whether there was a significant environmental impact upon the entire populations. In other words, because the Staff found no significant impact on the general population with respect to public health, socioeconomics, and air quality, Staff stopped its analysis. Never reaching the question of whether there would be a disproportionate impact on the environmental justice community in Mountain House. Such analysis is flawed because it goes against the intention of environmental justice laws, which require Staff to separate and independently analyze populations like Mountain House that will disproportionately be impacted by the project. Thus, Staff needs to do proper demographics analysis of Mountain House and independently analyze the community within the proper environmental justice framework.

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

B. **STAFF'S ANALYSIS OF THE GREENHOUSE GAS EMISSIONS FAILS TO MEET CEQA REQUIREMENTS.**

Staff's analysis fails to abide by the requirements of the CEQA, because the analysis fails to find that MEP's emissions of hundreds of tons of greenhouse gases is a significant impact. As stated in the *San Joaquin Raptor Rescue Center v. County of Merced*, the Staff's analysis must "adequately identify and analyze the significant environmental effects of the proposed project." 149 Cal.App.4th 645, 660. Thus, Staff's analysis must properly measure and determine the significance of the greenhouse gas (GHG) emission. However, for the MEP the Staff's analysis quantified and analyzed some of the GHG emissions but then improperly stopped it's CEQA analysis. Instead the analysis stated that the MEP would lead to a "net reduction" in GHG emission, and thus, would not result in impacts that are cumulatively significant. (See AIR QUALITY APPENDIX AIR-1). Staff's "net reduction" theory is based on the flawed logic that the MEP facility is going to replace more polluting plants. Such an assumption, however, does not relieve them of the burden imposed under CEQA to properly quantify and analyze the GHG emission from the MEP plant. Moreover, in addition to the analysis the Staff should able to show the public that the MEP will not add to GHG emissions and global warming as whole. For further information the Commission should look to Center for Biological Diversity's Opening Brief in the Carlsbad Energy Center Project.[10]

C. Staff Fails to Properly Analyze the Impact of Nitrogen and other pollutant Deposition on the Surrounding Areas

Nitrogen deposition is the input of nitrogen oxide (NOx) and ammonia (NH3) derived pollutants from the atmosphere to the biosphere. The MEP, if built, will emit NOx and NH3 that

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[10] Carlsbad Power Plant Project, Docket Number 07-AFC-06, http://www.energy.ca.gov/dockets/docket_redesign.php?docketNo=07-AFC-06.html

will lead to increased deposition in the surrounding areas. As Staff admits in the Supplemental Staff Assessment, Nitrogen Deposition "can lead to impacts to sensitive species from direct toxicity, changes in species composition among native plants, and enhancement of invasive species." [11] However, Staff concludes that since the "nearest occurrence of nitrogen limited habitat in the region" is located twenty miles from the proposed site there will be no Nitrogen deposition impacts. This conclusion, however, fails to take into consideration all the immediate surrounding areas. For example, there is a lake located near the site and the increase in pollutant, including Nitrogen deposition and shoreline fumigation will adversely impacts this body of water. Similarly, in Applicants biological assessment they stated that the area currently has a significant number of non-native species, and thus, an increase in Nitrogen deposition will not negatively impacts the area. Both of these conclusions fail to take into consideration the actual or potential impacts of Nitrogen deposition on the area. An increase in Nitrogen deposition will likely lead to shoreline fumigation and an increase in invasive species in the area. Thus, Staff needs to properly study the potential impacts of Nitrogen deposition on the areas immediately surrounding the site.

D. Staff Failed to Conduct A Proper Public Outreach as Required

California law states that the "advisor *shall* require that adequate notice is given to the public and that the procedures specified by this division are complied with." (Pub. Resources Code § 25519, subd. (i)). Moreover, under Alameda county regulations the planning department "shall give notice for all conditional use permits." In the instant case, Staff failed to meet this mandate under California law and the county regulations. Specifically, the advisor failed to post a notice on the actual site informing the general public the project or its air quality effects,

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[11] Supplemental Staff Assessment (4.2-4.3), http://www.energy.ca.gov/2010publications/CEC-700-2010-017/CEC-700-2010-017-SUP.PDF

NAAQS, as well as other impacts on public health. The Commission should either override the county regulations or abide by them. These regulations were developed pursuant Due Process to inform the public of the actual and potential impacts that plants like the MEP will have on the public. However, the Staff current procedures send the public on a fishing expedition in order to determine what the impact on their health will be. Such a system needs to change and be made more transparent so that the public is aware of the impacts on their community and health.

HEARING OFFICER CELLI: Can I just say as a
3 matter of relevance, the PMPD is not going to look at all
4 at whether there was adequate notice or anything like that
5 between whatever the air quality management district did
2011-02-24_Corrected_Transcript.pdf 425

The manipulation of the term site and parcel has served to mask the true scope of this facility.

The CEC should have considered the cumulative effect of both facilities as one source.

The reliance on the term site, verses parcel, would appear to circumvent the Subdivision Map Act, County ordinances and Clean Air Act. It undermines an alternative analysis that should have considered the on site alternatives like Solar energy. It has undermined the public participation opportunity by defining the 1000 foot public notice scope to be from the site and not the parcel. CEC staff disclosed not thresholds for significance when determining that 10 acres removed from agricultural use would be insignificant. They appear to wish to toggle between the term site and parcel to justify the siting. If the site is 10 acres than 100% of it it removed from agricultural use.

22 MR. SIMPSON: I've got a couple of questions
23 starting with the air district. There is another source
24 on this parcel. Does that make this a modification of the
25 facility?
MS. CABRAL: I don't know of anything about the
2 other source

MR. SIMPSON: So is it within 1,000 feet of the
24 parcel or the site?
25 MR. HOFFMAN: In this case, looking at the AFC,
1 it was where the project is within the project boundaries.
2 MR. SIMPSON: The site?
3 MR. HOFFMAN: Yes.
4 MR. SIMPSON: So within 1,000 feet of the site.
5 MR. HOFFMAN: Yes.

MEP is a Major Source as defined under the CAA and CEC's Analysis Otherwise is Flawed

The CEC has failed to properly analyze whether or not the proposed facility will be regulated as a major source. CEC staff concluded "A PSD permit would not be required for the proposed MEP project because it would be neither a new major source nor a major modification to an existing major source." CEC Staff Report page 4.1-3 MEP should be regulated as a major source and staff's analysis of the project is flawed based on their incorrect assumption that it is not a major source. MEP emission must be looked at in the aggregate with the existing CoGen facility on the same parcel and CEC staff has failed to do so.

CEC staff used a less stringent and less accurate modeling for NOx emissions than the standard recommended by the EPA based on their determination that MEP would not be a major source. This [NOx emissions] impact assessment has a purpose that is similar to but not identical to that required for compliance of a major source with the federal Prevention of Significant Deterioration (PSD) program; because the MEP would be a minor source under PSD, this impact assessment is not subject to U.S. EPA review . . . Energy Commission staff and MEP modeling differs from these draft guidelines and regulatory recommendations for major sources because MEP uses three years of locally-available meteorological data where major source modeling requires five years (nearest station: Stockton) and because MEP uses the 3-year average of the eighth highest concentration rather than the form of the standard which is the 98th percentile of the annual distribution of daily highest 1-hour concentrations. Energy Commission staff may revise this assessment if U.S. EPA releases a prevailing recommendation, suitable for federal non-major sources, as part the Guideline on Air Quality Models in Appendix W of Title 40,

Code of Federal Regulations (CFR) Part 51." Staff Report page 4.1-23

In making "stationary source" determinations, air quality districts look to the definitions of "stationary source" outlined in the federal PSD 40 C.F.R. 51.166(b) and Title V 40 C.F.R. § 70.2 requirements. See MacClarence v. United States EPA, 596 F.3d 1123, 1126-1127 (9th Cir. 2010). "In some cases, several discrete stationary sources may be required to be aggregated into one single stationary source for purposes of compliance with these provisions. For example, as noted above, Title V requires every "major source" of air pollution to obtain a permit. 42 U.S.C. § 7661a(a). The Title V regulations, in turn, define "major source" as a "stationary source (or any group of stationary sources that are located on one or more contiguous or adjacent properties, and are under common control of the same person (or persons under common control)) belonging to a single major industrial grouping . . . ." 40 C.F.R. § 70.2." Id.

42 U.S.C. § 7412 defines a major source as "any stationary source or group of stationary sources located within a contiguous area and under common control that emits or has the potential to emit considering controls, in the aggregate, 10 tons per year or more of any hazardous air pollutant or 25 tons per year or more of any combination of hazardous air pollutants. The Administrator may establish a lesser quantity, or in the case of radionuclides different criteria, for a major source than that specified in the previous sentence, on the basis of the potency of the air pollutant, persistence, potential for bioaccumulation, other characteristics of the air pollutant, or other relevant factors." 42 U.S.C. § 7412(a)(1)

42 U.S.C. § 7602 defines a major source as "Except as otherwise expressly provided, the terms

“major stationary source” and “major emitting facility” mean any stationary facility or source of air pollutants which directly emits, or has the potential to emit, one hundred tons per year or more of any air pollutant (including any major emitting facility or source of fugitive emissions of any such pollutant, as determined by rule by the Administrator).”

Through regulation, guidance, and individual determinations, the EPA has established several mechanisms for use by sources and permitting authorities in determining common control as used in the definition of “major source” under Title I and Title V of the Clean Air Act.1 First, common control can be established through ownership (i.e., same parent company or a subsidiary of the parent company). Second, common control can be established if an entity such as a corporation has decision-making authority over the operations of a second entity through a contractual agreement or a voting interest. If common control is not established by the first two mechanisms, then one should next look at whether there is a contract for service relationship between the two companies or if a support/dependency relationship exists between the two companies in order to determine whether a common control relationship exists.

The proposed facility is located within a contiguous area, actually on the same parcel, as the CoGen generating facility and belongs to the same industrial grouping. PG&E has common control over the existing CoGen facility and the proposed facility whereby PG&E has decision-making authority over the operations of a both entities through a contractual agreement, there exists a contract for service relationship between PG&E and the two companies, and there exists a support/dependency relationship exists between the two companies.

Rob Simpson