

**MORRISON | FOERSTER**

425 MARKET STREET  
SAN FRANCISCO  
CALIFORNIA 94105-2482  
  
TELEPHONE: 415.268.7000  
FACSIMILE: 415.268.7522  
  
WWW.MOFO.COM

MORRISON & FOERSTER LLP  
NEW YORK, SAN FRANCISCO,  
LOS ANGELES, PALO ALTO,  
SAN DIEGO, WASHINGTON, D.C.,  
DENVER, NORTHERN VIRGINIA,  
ORANGE COUNTY, SACRAMENTO,  
WALNUT CREEK, CENTURY CITY  
  
TOKYO, LONDON, BEIJING,  
SHANGHAI, HONG KONG,  
SINGAPORE, BRUSSELS

October 3, 2005

Writer's Direct Contact  
415/268-6718  
MZischke@mfofo.com

Peter Brundage  
Sacramento Local Agency Formation Commission  
11121 I Street, Suite 100  
Sacramento, CA 95814

Re: Comments on the Scope of the Program Environmental Impact Report for the Requested SMUD Annexation

Dear Mr. Brundage:

Pacific Gas and Electric Company ("PG&E") has reviewed the September 1, 2005 Notice of Preparation for the Program Environmental Impact Report ("Program EIR") to be prepared for the annexation of certain Yolo County areas by the Sacramento Municipal Utility District ("SMUD") and amendment of the Sphere of Influence for SMUD. On behalf of PG&E, we appreciate the opportunity to submit comments on the scope and content of the Program EIR for this project. PG&E looks forward to working with Sacramento LAFCo, interested parties, governmental agencies and members of the public in ensuring that all significant environmental impacts of the project are fully analyzed.

PG&E has two significant concerns with the Program EIR as proposed in the Notice of Preparation:

- **The proposed project and project description are incomplete and ill-defined, and therefore the annexation application and Notice of Preparation are premature and invalid.** The EIR is premature because the annexation application is invalid due to significant continuing changes in the annexation proposal and the map of the annexation area submitted with the application. Before an EIR may be conducted, SMUD must submit a new and final application that reflects the complete project that is proposed to be approved by LAFCo, including a comprehensive description of the complete area to be annexed and all existing and new facilities reasonably foreseeable to be part of the project. Given SMUD's disclosure that it intends to continue to modify the map of the area to be annexed and the facilities to be acquired or constructed as part of the annexation, the EIR should not be conducted until SMUD submits an annexation application and project description which is complete and final.

**MORRISON | FOERSTER**

Peter Brundage  
October 3, 2005  
Page Two

- The "study area" approach for required new facilities such as the Elverta-Woodland Transmission Line and Willow Slough Substation violates CEQA. The Notice of Preparation proposes to analyze the new Elverta-Transmission Line and Willow Slough Substation without examining transmission line routing alternatives or substation siting alternatives. Notice of Preparation, p. 12. Adequate environmental review as required by CEQA is only possible by analyzing specific alternative routes for the transmission line and substation locations, as is always done prior to the construction of any transmission line and/or substation. These facilities are necessary for the annexation and the analysis of their impacts and alternative routes and sites may not be deferred to a later EIR.

In addition to these concerns, PG&E has identified several potentially significant environmental impacts which should be included in the EIR analysis. Each of these concerns and impacts is discussed below.

**I. The Annexation Application and Project Description Are Incomplete and Therefore Premature and Invalid under CEQA**

The project description must be stable and consistent so that the EIR can adequately evaluate project impacts. Without a stable project description, there cannot be intelligent public participation in the decision-making process. *County of Inyo v. City of Los Angeles*, 71 Cal.App.3d 185, 197-98 (1977). The SMUD annexation project is currently a moving target rather than the fixed and stable project description required by CEQA.

The map attached to the SMUD board resolution, the adoption of which formally started the annexation process, differs markedly from the map submitted with the annexation application and the map contained in the Notice of Preparation. The central component to an annexation is precisely what territory will actually be annexed. Before an EIR may be conducted, SMUD must submit a new and final application that reflects the complete project that is proposed to be approved by LAFCo. Additionally, at the September 13, 2005 SMUD Board Policy Committee meeting, SMUD indicated that it intends to continue to modify the area to be annexed as well as the facilities to be acquired and that the final boundary will not be known until the end of the LAFCo process. Continued changes such as these violate CEQA's requirement that the project description remain stable and consistent.

In addition, the discrepancy between the maps invalidates the annexation application and thus an EIR is premature. A local agency may begin the annexation process by adopting a resolution proposing the annexation, and the resolution must contain a map setting forth the boundaries of the affected territory. Govt. Code §56654(c). Based on the resolution, the local agency then submits an application to LAFCo requesting the annexation and this application must also contain a map and description of the boundaries of the subject territory.

MORRISON | FOERSTER

Peter Brundage  
October 3, 2005  
Page Three

Govt. Code §56652(c). The two maps must be identical, because otherwise the resolution map would be meaningless. Because the map which SMUD submitted with the application differs substantially from that in the resolution, the application appears to be invalid.

Finally, the map attached to the Notice of Preparation which describes the proposed annexation territory and sphere of influence change (Attachment A) incorrectly describes West Sacramento's sphere of influence ("SOI"). West Sacramento's SOI is coterminous with its city limits and, according to Yolo LAFCo, West Sacramento has not requested an update to its SOI and thus the map must be further revised - more proof that the project description is not stable and that it is not ready for meaningful public participation. These uncertainties over the annexation area and project description must be resolved prior to proceeding with the CEQA review, and a new notice of preparation should be issued once the project description and proposed annexation area are final and complete.

## II. The "Study Area" Approach Defers Analysis That Must Be Conducted Now

The SMUD annexation will require the construction of a transmission line stretching approximately 15 to 18 miles between the Elverta and Woodland Substations and a new substation located between the cities of Woodland and Davis near the Willow Slough. Despite the fact that the end points of the transmission line are currently known, preferred and alternative transmission line routes have not been identified. Instead, the annexation application and Notice of Preparation propose that the Program EIR will analyze potentially significant environmental impacts in the transmission line "study area" and that SMUD will analyze the impacts of proposed routes during a later project EIR. Application for Annexation, SMUD, July 29, 2005, p. 57; Notice of Preparation, p. 12. The same "study area" approach is proposed for the Willow Slough Substation, even though its location is currently known to within one square mile. CEQA does not allow this staged approach because these impacts are "reasonably foreseeable," an alternative routes analysis conducted at this point would not be speculative, and CEQA requires full environmental analysis at the earliest possible point.

The "study area" approach violates the basic axiom of CEQA that the EIR must "inform the public and responsible officials of the environmental consequences of their decisions *before* they are made." *Citizens of Goleta Valley v. Board of Supervisors*, 52 Cal.3d 553, 564 (1990) (emphasis in original). As currently envisioned, LAFCo and the residents who will vote on the annexation must decide whether the annexation should proceed without knowing where the transmission line will be routed. To a voter living in the Transmission Line Study Area, the precise route may be the most significant issue for deciding whether to approve the annexation. In fact, within days of SMUD's Board Resolution to move forward with the annexation, some property owners within the Transmission Line Study Area wrote to SMUD stating that, while they supported the annexation generally, they strongly objected to routing the transmission line along Elverta

## MORRISON | FOERSTER

Peter Brundage  
October 3, 2005  
Page Four

Road within the Study Area. Letter from Karen L. Diepenbrock, counsel to the Brookfield Land Company, to John DiStasio and Paul Lau, SMUD, May 24, 2005. The public and the decision makers deserve to know the potential alternate locations where the transmission line will be constructed, and whether it will be built overhead or underground. It undermines CEQA's basic purpose of ensuring that governmental decisions are made only after full disclosure and analysis of all environmental impacts to defer routing analysis until after the decision to construct the line and substation have been made. As one court stated in an analogous case when the lead agency sought to defer analysis of the issues, this would "be putting the cart before the horse." *Stanislaus Natural Heritage Project v. County of Stanislaus*, 48 Cal.App.4th 182, 200 (1996). Deferring the siting analysis until after the LAFCO decision and the November 2006 annexation election denies relevant information to both the LAFCO decisionmakers and the voters.

SMUD and LAFCo cannot escape the need to conduct this review now by calling the current EIR a "program" EIR. CEQA Guidelines §15152. A program EIR and tiering may not be used to defer an analysis of "reasonably foreseeable significant environmental impacts" to a later stage of review in order to avoid addressing them in the first tier, program EIR. *Id.* An environmental impact should be reviewed in the first tier EIR when it is a "reasonably foreseeable consequence of the approval" and there are "sufficient reliable data to permit preparation of a meaningful and accurate report on the impact." *Los Angeles Unified Sch. Dist. v. City of Los Angeles*, 58 Cal.App.4th 1019, 1028 (1997). Failure to analyze such foreseeable impacts during the initial stage of review renders the EIR inadequate. *Id.* According to the annexation application, the annexation "requires" the transmission line and substation, and thus the transmission line and substation are "reasonably foreseeable" impacts. Annexation Application, at p. 35. Moreover, the starting and ending points and general route are known. Thus, there are sufficient data to conduct more detailed review and there is no reason to believe the siting analysis will differ after the election.

Additionally, many of the possible significant environmental impacts that could result from the transmission line and substation are location specific. As such, without knowing the precise location of the facilities, it is not possible to conduct adequate environmental review. The fact that future environmental review will be conducted does not cure this default. *Stanislaus Natural Heritage Project*, 48 Cal.App.4th at 202-03.

### III. Potentially Significant Environmental Impacts from the Elverta-Woodland Transmission Line Which Must Be Considered In The EIR

The Elverta-Woodland transmission line will result in several potentially significant environmental impacts which must be analyzed. The following briefly summarizes impacts that PG&E has identified that should be included within the scope of the EIR.

MORRISON | FOERSTER

Peter Brundage  
October 3, 2005  
Page Five

**Natomas Basin Habitat Conservation Plan.** The Natomas Basin Habitat Conservation Plan ("NBHCP") is a conservation program that encompasses over 53,000 acres in northwestern Sacramento County and southern Sutter County aimed at protecting 22 species. It seeks to promote a balance between biological conservation and economic development by requiring that land developed in the Natomas Basin is mitigated by setting aside land into conservation preserves at a ratio of 0.5 acres of habitat mitigation land for each 1.0 gross acre of development that occurs in the Basin. The NBHCP has been under constant legal challenge since its initial adoption in 1997, including a recent upholding of an incidental take permit issued under the NBHCP. *National Wildlife Federation v. Norton*, 2005 WL 2175874 (E.D.Cal. 2005).

The portion of the Transmission Line Study Area east of the Sacramento River is almost entirely within the area covered by the NBHCP and it contains nine NBHCP mitigation properties as well as three properties which border the study area. Mitigation properties in Sutter County extend north-south from the northern boundary of the Study Area south to the Sacramento County line, forming essentially a broad swath across the Study Area.<sup>1</sup> Properties in Sacramento County form a similar swath.<sup>2</sup> In addition, all land within one mile of the Sacramento River is designated the "Swainson's Hawk Zone" and special provisions for it must be made. The EIR must evaluate whether the transmission line is compatible with the NBHCP generally and whether it will have any impacts on the mitigation properties specifically.

The NBHCP is an example of why the study area approach is inappropriate. Whether the transmission line is consistent with the NBHCP and whether it will have significant environmental impacts on the protected species will depend in large part, if not entirely, on the routing of the line. A route that goes through a mitigation property may require much different analysis than a route that avoids all such properties.

**Yolo County Habitat Conservation Plan.** Although Yolo County has not yet adopted a Habitat Conservation Plan, it has started this process and has developed a Preliminary Draft Habitat Conservation Plan. The proposed area of the Yolo HCP covers the entire Study Area in Yolo County. Although this HCP has not been adopted, the EIR must carefully evaluate potential impacts to the sensitive biological resources identified in the Preliminary Draft and LAFCo must work with the relevant agencies to ensure that the transmission line and substation are consistent with the Yolo HCP.

**Expansion of the Sacramento International Airport.** The Sacramento International Airport Master Plan calls for expanding the current airfield in order to

<sup>1</sup> These mitigation properties are: Bennett South, Lucich South, Huffman East, Huffman West, Atkinson, and Ruby Ranch.

<sup>2</sup> See the Tufts and Sills mitigation properties.

## MORRISON | FOERSTER

Peter Brundage  
October 3, 2005  
Page Six

accommodate an expected increase in airport demand. All alternative airport expansion plans involve extending the current eastern runway 2,400 feet to the north, bringing it within close proximity to Elverta Road and the southern boundary of the Transmission Line Study Area. Sacramento International Airport Master Plan, Exhibit 5.1-1 (February 17, 2005). The EIR must analyze whether the transmission line is consistent with the SIA Master Plan and with federal regulations limiting the construction of structures which might affect navigable space. *See* 14 CFR 77 *et seq.*

**Natomas Joint Vision Area.** The City and County of Sacramento signed a Memorandum of Understanding in 2002 to develop a vision for growth in the Natomas area, an area which overlaps with much of the Transmission Line Study Area east of the Sacramento River. The City and County are both currently moving forward with implementing the MOU by adopting General Plan amendments and the City is currently preparing an EIR for its amendment. The General Plan amendment contemplates future urban development in the section of the Transmission Line Study Area north of Elverta Road and east of Lone Tree Road. The annexation EIR must examine whether the Elverta-Woodland transmission line is compatible with this potential urban growth.

**SACOG Blueprint.** The EIR should consider whether the transmission line is consistent with the SACOG Blueprint. The SACOG Blueprint proposes some significant residential development in the Transmission Line Study Area, particularly along Elverta Road in Sacramento County and along Riego Road, east of Highway 99 in southern Sutter County. It also envisions significant industrial and retail/office development in southern Sutter County near the intersection of Highway 99 and Riego Road. The EIR must analyze the extent to which a transmission line would interfere with any of these uses.

**General Plans.** Depending on routing of the transmission line, it may pass through land governed by a variety of general plans, including the Sacramento County General Plan, Sutter County General Plan, Yolo County General Plan, and the City of Woodland General Plan. The NOP states that it is "anticipated" that any general plan implicated "will accommodate the construction of public facilities." NOP, at p. 19. It is unclear why this is "anticipated," especially given that the transmission line route has yet to be determined and that all the General Plans have elements which may limit the transmission line, including elements regarding conservation of agricultural lands. Each of these General Plans must be carefully reviewed to evaluate both plan consistency and potentially significant environmental impacts. After all, the line and substation are not necessary to provide electric service to Yolo inhabitants - they are only necessary to permit one specific provider to provide that service.

We note a number of aspects of the various General Plans which should be taken into account in the EIR:

MORRISON | FOERSTER

Peter Brundage  
October 3, 2005  
Page Seven

- City of Woodland General Plan. The Woodland General Plan requires that public utility facilities are sited to minimize health hazards and states that overhead lines can be unsightly. Woodland General Plan, Public Facilities and Services, 4-16.
- Sacramento County General Plan. The Sacramento County General Plan Public Facilities Element has an extensive discussion on energy facilities, including a number of policies directed at the siting and design of transmission lines. Sacramento County General Plan, Public Facilities Element, pp. 43-44. For example, transmission lines should not split parcels, they should avoid biological resources, cultural resources, and prime or statewide importance farmland, and they should be routed to minimize aesthetic impacts on scenic highways, recreation areas and other similar scenic resources. Depending on the routing, the Elverta-Woodland Transmission Line may implicate all of these policies.
- Yolo County General Plan. The Yolo County General Plan contains a policy of keeping transmission lines outside scenic corridors. Yolo County General Plan, Scenic Highway Policies, SH 8. It also states that the County shall consider designating "river roads" as scenic highways, which might include County Road 117. It appears that any transmission line route within the Study Area must either cross County Road 117 or to be within close proximity. In addition, the Yolo County General Plan prohibits nonagricultural land use activities on agriculturally designated land areas. *Id.* Land Use Policies, LU 7; *see also* Yolo County LAFCo Agricultural Conservation Policy. Most of the land in the Transmission Line Study Area is agricultural and a route through this land is potentially in conflict with this policy. The General Plan also requires "floodproofing" of any development within areas at risk of flooding. Large areas in Yolo County close to the Sacramento River are subject to flooding and to the extent that the transmission line must pass through these, the structures must meet this policy.
- Sutter County General Plan. The Sutter County General Plan notes that there are no designated transmission line corridors in Sutter County and that any development will be regulated by the Public Utilities Commission. Sutter County General Plan, Chapter 11.5. The General Plan notes that although there are no state designated scenic highways, there are scenic roads in various parts of the County, including along the Sacramento River. *Id.* at Chapter 7.8.

**IV. Impacts Resulting From The Willow Slough Substation**

The Preliminary Draft of the Yolo County Habitat Conservation Plan has identified the Willow Slough as a key riparian corridor in Yolo County and states that it provides

**MORRISON | FOERSTER**

Peter Brundage  
October 3, 2005  
Page Eight

important habitat for some of the Yolo HCP's covered species. Yolo County Habitat Conservation Plan, Preliminary Draft, p. 5-5 (January 2001). The Willow Slough Substation Study Area includes part of the Willow Slough and the EIR must address potential impacts on the Willow Slough from this proposed substation. This is another instance when the Study Area approach is inappropriate because the impacts analysis cannot be adequately conducted without knowing where the substation will be located.

**V. Air and Water Quality Impacts**

**A. Increased Powerplant Emissions.** The annexation will result in increased output from existing and/or new natural-gas fired powerplants within the annexation area, such as from the under-construction Cosumnes plant owned by SMUD. This increased output will result in increased emissions of pollutants and air and water quality impacts. The scope of the EIR must model and estimate this increased powerplant output and analyze the resulting air and water quality impacts and emissions.

**B. Increased Diesel Truck and Other Vehicle Emissions.** The annexation will result in increased diesel truck and other vehicle emissions because SMUD will not be acquiring service centers within the annexed territory, and has not planned (nor forecast costs) to construct such centers. Thus, its service vehicles will need to travel greater distances to serve Yolo customers. PG&E currently operates service centers in Woodland and Davis, both within the annexation area. In contrast, all SMUD service centers are located outside the annexation area east of the Sacramento River. As a result, SMUD's diesel service trucks and other vehicles will need to travel a much greater distance to conduct the same service activities PG&E now does, resulting in a significant increase in diesel emissions and air quality impacts. The scope of the EIR must analyze this significant environmental impact.

**VI. Energy Conservation Impacts**

Consistent with Appendix F of the CEQA Guidelines, the EIR should evaluate the potential energy impacts of the annexation. PG&E's analysis indicates that its renewable energy and energy conservation programs surpass those of SMUD and that the annexation thus may result in a decrease in energy conservation and a decrease in energy conservation options available to consumers within the affected territory.

**VII. New PG&E Facilities Required as a Result of Reconfiguration of SMUD's Transmission System and PG&E's Transmission and Distribution Systems**

PG&E owns transmission and distribution facilities in the annexation area that would be used, in part, to wheel power to SMUD, and it estimates that these facilities would need to be reinforced. If the approximately 350 MW of Yolo load, plus additional 50 to 80 MW of



MORRISON | FOERSTER

Peter Brundage  
October 3, 2005  
Page Nine

UC Davis load is added to the SMUD transmission system, the power to serve this load will flow over a different path than is currently the case. As a result, PG&E facilities south of the Rio Oso Substation would become overloaded and would need to be upgraded. The impacts of and alternatives to these upgrades must be analyzed in the EIR.

**VIII. Socioeconomic and "Environmental Justice" Impacts Due to Higher Electric Rates Resulting from the Project**

SMUD claims the annexation will result in lower rates to customers within the annexed area, and therefore the only impact to be analyzed is the potential for growth inducement. However, PG&E disagrees with SMUD's assumption that the annexation will reduce electric rates, and believes in fact it will significantly increase electric rates, particularly to low and middle income residential customers within the annexed area (given the loss of AB IX rate protection) as well as existing SMUD customers. Therefore, the EIR must analyze the socioeconomic impacts of such higher electric rates, including the "environmental justice" issues associated with those higher rates.

PG&E appreciates the opportunity to comment on the Notice of Preparation. Having conducted environmental review for numerous transmission lines and substations in the past, we are familiar with the process and understand the amount of effort needed to put together a thorough and complete document. Thank you for taking the time to consider our concerns.

Very truly yours,

  
Michael H. Zischke