

September 12, 2018

Mr. Stanley Young
California Air Resources Board
1001 I Street
Sacramento, CA 95814

**Re: Maas Energy Works, Inc.'s Comments on Aliso Canyon Natural Gas Leak
Mitigation Agreement**

Dear Mr. Young,

Maas Energy Works, Inc. (“Maas Energy”) would like to thank the California Air Resources Board (“CARB”) for the opportunity to comment on the proposed Aliso Canyon Natural Gas Leak Mitigation Agreement developed by CARB, the Southern California Gas Company (“SoCalGas”) and the Attorney General of the State of California (“Attorney General”) (together, “Parties”).

Maas Energy is California’s largest dairy digester developer and operator. Maas Energy has developed 15 dairy digesters including five in the Pacific Northwest and ten in California, giving it an approximately 67% share of the California dairy digester market since 2014. Maas Energy has also retrofitted a variety of existing or decommissioned digesters, and expanded or enhanced other digesters built by others. Maas Energy developed the digester on California’s largest dairy, and has also built California’s only operational pipeline cluster, which is already delivering pipeline gas conditioned to make low carbon vehicle fuel.

Maas Energy is in broad agreement with CARB, SoCalGas, and other parties to the Consent Decree resolving legal claims against SoCalGas in connection with the natural gas leak from SoCalGas’ Aliso Canyon Natural Gas Storage Facility in October 2015 (“Settlement Agreement”) regarding the selection of dairy digesters as a method for mitigating methane leaks. Dairy digesters not only provide the most efficient means of methane mitigation, but they also provide numerous other benefits in air quality, water quality, transportation fuels, and economic development. Maas Energy applauds the parties’ efforts to encourage more dairy digester development as part of the Settlement Agreement.

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Maas Energy's single area of concern is with respect to the Project Selection Mechanism and resulting procedural deficiencies, which resulted in Maas Energy and other dairy digester developers being precluded from the opportunity to participate in the public bidding process. CARB's March 31, 2016 Aliso Canyon Methane Leak Climate Impacts Mitigation Program ("Mitigation Program") stated that mitigation projects would be selected by "[s]creening responses to requests for project proposals" and that "projects will be solicited through a public process"¹ Maas Energy, and likely anyone else reading the document, anticipated the public process would occur soon after the mitigation plan was approved. However, instead of engaging in a public process as contemplated by the Public Contract Code and anticipated by Governor Brown's January 2016 proclamation² paving the way for the Mitigation Program, SoCalGas proposed and CARB approved 17 dairy digester projects designed to satisfy the entire Mitigation Program using a single company – California Bioenergy. Behind closed doors, SoCal Gas conducted and concluded negotiations with California Bioenergy unknown to even those intimately familiar with this very small industry.

CARB's blessing of SoCalGas' sole engagement with California Bioenergy violates the competitive bidding laws designed to protect against this very situation. CARB has a duty to ensure that SoCalGas publicly bid and notice certain contracts aimed at utilizing public monies.³ The importance of competitive bidding stems from the California Constitution and more than 140 years of California Supreme Court precedent precluding all payments on contracts violating the competitive bidding laws. The purpose of requiring governmental entities to engage in public bidding is to eliminate favoritism, fraud and corruption, avoid misuse of public funds, and stimulate advantageous market place competition.⁴

¹ California Air Resources Board, *Aliso Canyon Methane Impacts Climate Mitigation Program* at 19 (March 31, 2016).

² The Mitigation Program was implemented as a result of a directive from Governor Brown's proclamation on January 6, 2016, in which it directed CARB to prepare a program to be funded by SoCalGas to fully mitigate the leak's emissions of methane. The proclamation itself stated: "The California Air Resources Board, in consultation with appropriate state agencies, shall develop a program to fully mitigate the leak's emissions of methane by March 31, 2016. This mitigation program shall be funded by the Southern California Gas Company, be limited to projects in California, and prioritize projects that reduce short-lived climate pollutants." Thus, the proclamation directs CARB to ensure that a range of projects is considered.

³ Public Contract Code §100 contains an express declaration of legislative intent, stating that the purpose of the code is to: (a) To clarify the law with respect to competitive bidding requirements. (b) To ensure full compliance with competitive bidding statutes as a means of protecting the public from misuse of public funds. (c) To provide all qualified bidders with a fair opportunity to enter the bidding process, thereby stimulating competition in a manner conducive to sound fiscal practices. (d) To eliminate favoritism, fraud, and corruption in the awarding of public contracts.

⁴ *Konica Business Machines U.S.A., Inc. v. Regents of Univ. of Cal.*, 206 Cal. App. 3d 449 (1988).

The proposed Settlement Agreement did not use a public, competitive, or transparent selection process to determine which dairy digester clusters to support with the public monies that SoCalGas agreed to provide. Nor did the Settlement Agreement publish or announce a public solicitation or develop a list of potential dairy digester developers who could be used. Instead, the Settlement Agreement dictates a list of projects already confidentially selected by SoCalGas, under undisclosed terms, with a single company providing 100% of the mitigation projects. The process that led to including these digester clusters in the Settlement Agreement was inappropriate, collusive and not conducted in good faith for the Settlement Agreement to be presumptively valid.⁵

The Mitigation Plan involves public impact funds, regardless of whether they are spent by a private company. CARB appropriately designed in its 2016 Mitigation Program in accordance with the Governor's Proclamation that a transparent, competitive process should ensure that the funds result in the best outcome for the citizens of California. CARB must maintain California's policy goals and requirements for competitive bidding⁶ by revising the Settlement Agreement to eliminate the inappropriate, exclusive, and uncompetitive pre-selection made by SoCalGas of the California Bioenergy dairy digester clusters. By failing to do so, the Settlement Agreement suffers from the following issues:

1. ***Lack of Diversity of Input.*** The Settlement Agreement was not prepared based on input from multiple stakeholders or industry participants, as would be standard when designing a public impact program. In fact, no other developers were even consulted during its preparation. Maas Energy Works, Inc. made multiple attempts to contact SoCalGas to discuss mitigation project selection. SoCalGas, for its own undisclosed reasons, pursued private negotiations with a single company. Even the existence of these negotiations was not disclosed, while the rest of the industry awaited a public solicitation process to emerge from the Settlement as described by CARB in its Mitigation Program. SoCalGas could not consider other projects, approaches, or offers because no information or competitive proposals were solicited from anywhere else in the industry.
2. ***Inappropriate Sole-Source Approach.*** The Settlement Agreement is for all intents and purposes a sole-source Agreement. The language describes a public solicitation process,

⁵ Courts evaluate procedural fairness by “look[ing] to the negotiation process and attempt[ing] to gauge its candor, openness, and bargaining balance.” *United States v. Cannons Eng’g Corp.*, 899 F.2d 79, 86 (1st Cir. 1990).

⁶ *Domar Elec., Inc. v. City of Los Angeles*, 9 Cal. 4th 161, 175-76 (1994) (“bidding requirements must be strictly adhered to in order to avoid the potential for abuse in the competitive bidding process”).

but as drafted, two full lists of pre-selected projects will receive funding before any public solicitation. These lists, titled “First Project” and backup “Pre-Approved Projects,” supply approximately 150% of the necessary mitigation, so that no other developers will likely ever be solicited. Not only does this sole-source approach deny the rest of the industry its right to participate, but it also places the entire mitigation effort in the hands of one company – California Bioenergy – that has never completed a single vehicle fuel dairy digester project nor a single dairy pipeline cluster as far as is publicly announced. The 17 pre-approved projects equal 340% of that company’s currently installed capacity of just five projects (down from six after one was recently abandoned).⁷ California Bioenergy has yet to demonstrate it can deliver digesters at the rate contemplated by the Settlement Agreement. SoCalGas will have no recourse if its single contractor cannot deliver, nor is there is any competitive force keeping costs under control or ensuring accountability for performance.

3. ***Preclusion of Competition.*** The undisclosed procurement procedures SoCalGas deployed and which it now seeks to have affirmed in the Settlement Agreement deprived Maas Energy, and likely other dairy digester developers, of the opportunity to compete for publicly available funds. Most importantly, California was deprived of the opportunity to compare the privately procured projects with other projects and benefit from the best available projects. For example, Maas Energy has numerous pipeline cluster projects able to supply compressed natural gas (“CNG”) vehicle fuels into the pipeline, very likely faster and less expensively than the selected projects, which SoCalGas (and CARB) would have learned if Maas Energy had the opportunity to participate.
4. ***Preferential Treatment.*** SoCalGas is responsible for treating all customers equally. In many cases, multiple customers are applying to deliver dairy biogas into the same pipeline system, where capacity is limited. Through the Settlement Agreement, SoCalGas is allowed to not only pay its mitigation debt to society by selecting its own favorite or preferred projects, but SoCalGas will be in a position where it could give its favorite and preferred projects preferential access to the SoCalGas pipeline system. Indeed, such preferential access might even be necessary if SoCalGas is to achieve its mitigation burden and is forced to rely upon one company to do so. The entire process of project selection not only calls SoCalGas’ actions into question and eliminates basic transparency requirements, it also creates a cascade of favoritism pressures that ultimately harms Californians.

⁷ See https://docs.wixstatic.com/ugd/e8c369_017ce8ee68d6490ebbebd6f241d66f92.pdf.

5. ***Lack of Diversity of Suppliers.*** SoCalGas has contracted with one company, California Bioenergy, to deliver 100% of its mitigation statewide. California Bioenergy has five active projects but SoCalGas has approved funding for 17 more, all to be performed by this one relatively small company that has never completed a pipeline vehicle fuel project. For this reason, CARB and other state agencies routinely require that utilities solicit a diversity of suppliers, especially when public mitigation is concerned. Instead, SoCalGas has chosen, and CARB has inappropriately allowed, an award of sole-source, no-bid, non-recourse funds to a single company. A diversity of suppliers would better serve the public interest.
6. ***Perpetuates the Public Funding Myth.*** The Mitigation Agreement continues to perpetuate a self-interested and false narrative from the project proponents that more public funds are necessary to prime the pump for future private lending. Maas Energy has three pipeline injection CNG projects thus far that are already fully funded with majority private funds (including loans from agricultural banks, developer funds, owner equity, farmer equity, and private equity). They will be online and injecting gas into the SoCalGas system sooner than any of the mitigation projects chosen by SoCalGas. Mitigation funding can be very helpful in enabling new projects *when the incentives are structured right*. Without a competitive process, a sole-source contractor will inevitably want to “stack” mitigation funds on top of other public funds to maximize profits by minimizing private contributions, rather than maximizing the number of mitigation projects. A competitive open process, as proposed originally by CARB, would give developers an incentive to propose the most possible mitigation.
7. ***Fails to Create Additional Mitigation Projects.*** The projects pre-selected are all, or nearly all, funded by state grants that are already designed to incentivize voluntary greenhouse gas reductions—in some cases with grants from two separate grant programs from two separate agencies (California Energy Commission (“CEC”) and California Department of Food and Agriculture (“CDFA”), for example) for the same projects. Adding a second (or third) source of public benefit funds to the same pre-planned projects does little to create mitigation over and above the mitigation already promised to the other grant funding agencies. Maas Energy, and likely other companies, have projects ready to fund that are not already paid for with other state funds.

All of these concerns, and many others expressed by the public, legislators and others, can be easily resolved by removing the pre-selected list of projects in Appendix A of the Mitigation Agreement. Instead, all mitigation projects should be selected through the public solicitation process originally laid out by CARB and also described in the Settlement Agreement. By doing so, SoCalGas will have access to a much larger and more robust project delivery

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capability, faster execution, more cost containment, a larger and more diverse set of projects, and all of the other benefits of transparency and open competition. The Mitigation Agreement could remain in place to prioritize short-lived climate pollutants, to advance dairy digester clusters, and to use the same methods of CARB analysis that rightly prioritized vehicle fuel benefits.

Maas Energy respectfully urges CARB to consider its request for the process for selecting the dairy digester projects to be public, competitive and transparent, as it was contemplated to be by the Mitigation Program and the law.

Thank you for your consideration. Please let us know if you have any questions regarding our comments. We look forward to working with CARB and the State moving forward.

Sincerely,



Vidhya Prabhakaran
Davis Wright Tremaine LLP
Attorneys for Maas Energy Works, Inc.

cc: Daryl Maas, Chief Executive Officer, Maas Energy Works, Inc.