

Decision 10-12-025 December 16, 2010

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

Application of Wild Goose Storage, LLC to  
Amend its Certificate of Public Convenience  
and Necessity to Expand and Construct  
Facilities for Gas Storage Operations (U911G).

Application 09-04-021  
(Filed April 24, 2009)

**DECISION AMENDING CERTIFICATE OF PUBLIC CONVENIENCE  
AND NECESSITY FOR WILD GOOSE STORAGE, LLC AND  
AUTHORIZING PHASE 3 GAS STORAGE FACILITIES**

**1. Summary**

We grant the request of Wild Goose Storage, LLC (Wild Goose) for an amendment of its certificate of public convenience and necessity (CPCN) to expand gas storage facilities in Butte County by 21 billion cubic feet and to connect the expanded facilities to a major, intrastate transmission pipeline, Line 400/401, near the Delevan Compressor Station in Colusa County. Wild Goose may offer this additional storage capacity and related services at market-based rates.

Today's decision also certifies the Supplemental Environmental Impact Report (SEIR) for the Wild Goose expansion project and further conditions the CPCN on mitigations set forth in the SEIR. As mitigated, all environmental impacts are less than significant.

**2. Background**

Wild Goose Storage, LLC (Wild Goose), a subsidiary of Niska Gas Storage, is an independent natural gas storage owner and operator of storage facilities in

Butte County, approximately 50 miles north of Sacramento, California. The Wild Goose facilities are located on the site of a depleted gas field consisting of 12 reservoirs located at depths from 2,550 to 3,450 feet and separated by impervious rock formations. In 1997, Decision (D.) 97-06-091 granted Wild Goose its initial certificate of public convenience and necessity (CPCN), and in 2002, D.02-07-036 amended that CPCN to authorize Wild Goose to expand its facilities. Under its current authority, Wild Goose has no captive ratepayers, it provides storage services under market-based rates, and its shareholders are at risk for the costs of construction and operation.

### **3. Procedural History**

Pacific Gas and Electric Company (PG&E) filed a timely response and limited protest to the application on June 4, 2009. PG&E's concerns were addressed in the course of discussion among the parties at the June 23, 2009, prehearing conference (PHC). Thereafter, the Assigned Commissioner's September 3, 2009 scoping memo determined that given the lack of dispute about the substance of the application and the relief requested, neither hearings nor briefs would be necessary and preparation of a Supplemental Environmental Impact Report (SEIR), which Commission staff had informally recommended, would control the schedule. The scoping memo was amended twice (on January 1, 2010 and on September 21, 2010) to update the schedule due to delays, beyond the control of the Commission, in the preparation of the SEIR. (We review the environmental review process and the content of the SEIR in Section 5.)

On February 10, 2010, the Administrative Law Judge (ALJ) granted a motion for party status filed by Wild Goose Gun Club, Inc. (WGC), which owns the 8.5 acre well pad site that is part of Wild Goose's natural gas storage

facilities, and directed WGC to familiarize itself with the scoping memo, as then amended. Thereafter, by informal motion for an extension of time under Rule 11.6 of the Commission's Rules of Practice and Procedure (Rules), WGC requested leave to file a late response and limited protest to the application to raise a single legal issue. Wild Goose opposed the motion, WGC filed a reply, and on June 22, 2010, the ALJ ruled that the late reply and protest should be filed, that Wild Goose might reply to the protest within 30 days, and that WGC "must pursue its environmental concerns, if any, through the public processes associated with review of the Draft [SEIR], as authorized by the California Environmental Quality Act."<sup>1</sup>

#### **4. Relief Requested by Wild Goose**

Wild Goose seeks Commission authority to increase the storage, injection and withdrawal capabilities of its natural gas storage facilities in Butte County and refers to this undertaking as the Phase 3 expansion. The chart below shows Wild Goose's current storage capacity and its injection and withdrawal capabilities, as well as the respective increases sought.

	<b>Storage</b>	<b>Injection</b>	<b>Withdrawal</b>
<b>Current</b>	29 Bcf <sup>2</sup>	450 MMcf/d <sup>3</sup>	700 MMcf/d
<b>Requested</b>	50 Bcf (+21 Bcf)	650 MMcf/d (+200 MMcf/d)	1,200 MMcf/d (+500 MMcf/d)

The proposed expansion will increase the physical footprint and current operations. The expansion will increase utilization of four storage reservoirs (the

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<sup>1</sup> *Administrative Law Judge's ruling Granting, In Part, Motion of Wild Goose Club, Inc. to File a Response and Limited Protest Out of Time*, June 22, 2010, at 6.

<sup>2</sup> Bcf means billion cubic feet.

<sup>3</sup> MMcf/d means million cubic feet per day.

L-1 and L-4 reservoirs, which already are in use, and the U-1/U-2 reservoirs, which have not been developed, though Wild Goose has authority to do so pursuant to D.02-07-036). The 8.5 acre facility known as the Well Pad Site provides access to these reservoirs, which are located in wetlands. As part of the Phase 3 expansion, Wild Goose will need to drill up to 11 additional wells (which D.02-07-036 also authorized). Likewise, Wild Goose will need to expand the above-ground process facility site, known as the Remote Facility Site, located outside the wetlands on 12.2 acres of agricultural land. The expansion will include installation of additional compression and dehydration and related equipment.

The Remote Facility Site interconnects with PG&E's Line 400/401, the major intrastate natural gas transmission pipelines known as the PG&E backbone, through two PG&E metering facilities – the Line 167 Meter Station and the Delevan Meter Station. The Phase 3 expansion must interconnect with, and requires modifications or upgrades to, the PG&E backbone and the Delevan Meter Station. PG&E will need to install up to four new hot tapped pipeline connections between the Wild Goose facilities and Line 400/401 (a hot tap process is a means of safely cutting/tying into a pressurized system while under full operating conditions). PG&E also will need to reconductor up to 6.1 miles of electrical line.

As clarified at the PHC, Wild Goose asks the Commission to issue an order that:

1. Pursuant to Pub. Util. Code § 1001,<sup>4</sup> amends the existing CPCN to authorize Wild Goose to construct and operate the Phase 3 expansion facilities.
2. Authorizes Wild Goose to use the Phase 3 expansion facilities to provide baseload and short-term storage services at market-based rates.
3. Requires PG&E to interconnect the Phase 3 Wild Goose expansion with the backbone and with the Delevan Meter Station.
4. Pursuant to the California Environmental Quality Act (CEQA) and § 15163 of the CEQA Guidelines, approves a supplement to the EIR certified by D.02-07-036.

No party has contested Items 1 and 2. Item 3 is now uncontested as well, since PG&E's concerns were resolved by Wild Goose's clarification at the PHC that Wild Goose merely seeks to ensure "equal and nondiscriminatory access to the system according to the rules of PG&E's tariff."<sup>5</sup>

We discuss, below, the affirmative showing in Wild Goose's application on all issues except Item 4 (preparation and content of the SEIR), which we review separately in Section 5.

#### **4.1. Discussion**

A request for an amendment of an existing CPCN triggers the same kind of review as the request for the original CPCN. Before granting a CPCN to construct the project at issue, pursuant to § 1001, the Commission must consider need and, pursuant to § 1002(a), four other factors: community values, recreation and park areas; historical and aesthetic values, and the influence of the

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<sup>4</sup> Unless otherwise indicated, all subsequent references to a code section or sections are to the Public Utilities Code.

proposed project on the environment. The Commission's obligation to consider community values and the three additional § 1002(a) factors is independent of its obligation to conduct a review under CEQA.<sup>6</sup> However, since the review process established by CEQA is the primary vehicle for review of all § 1002(a) issues except community values, we defer discussion of the three other § 1002(a) issues to Section 5.

#### **4.1.1. Issues Under § 1001**

Consistent with Commission decisions on Wild Goose's initial CPCN and the previous amendment to its CPCN (D.97-06-091 and D.02-07-036, respectively) and with decisions on the CPCN for another independent gas storage owner/operator in California, Lodi Gas Storage, LLC (Lodi), the Wild Goose application includes a presumptive showing of need<sup>7</sup> and then consistent with the Lodi CPCN decision, expands upon that to underscore the benefits of gas storage identified in the Lodi decision. Those benefits continue to be

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<sup>5</sup> PHC Tr. at 815-18.

<sup>6</sup> See *Re Southern California Edison Company*, D.90-09-059, 37 CPUC2d 413, 453.

<sup>7</sup> In granting the Wild Goose and Lodi CPCNs, the Commission interpreted project need under § 1001 in light of its *Gas Storage Decision*, which determined that a "let the market decide" policy should apply to competitive gas storage providers and therefore, need for new gas storage would not require a resource planning showing but instead would rely on a presumptive showing of need, established by the builders and users of the new project accepting all of the risk of the unused, new capacity. See generally, *Gas Storage Decision*, (1993) 48 CPUC2d 107.

Subsequently, the Lodi CPCN decision explained that a presumptive showing of need may not suffice for all purposes and that "a fuller showing of need may be necessary to the extent required by law", for example, to establish conformance with community values and the other criteria listed in § 1002, to show grounds for a finding of overriding consideration with respect to an EIR, or in connection with eminent domain under § 625. See *Lodi CPCN Decision*, D.00-05-048, 2000 Cal. PUC LEXIS 394 at \*37.

necessary today: “(a) increased reliability; (b) increased availability of storage in California; (c) the potential for reduced energy price volatility; and (d) the potential for reduced need for new gas transmission facilities.”<sup>8</sup> Wild Goose points to several developments in the energy markets that indicate the need for additional natural gas capacity, and therefore, support construction of the Phase 3 expansion. These include:

- The 1-day in 10-year planning standard for PG&E, pursuant to D.06-07-010, and the potential use of independent natural gas storage to support that incremental demand, pursuant to D.04-09-022.
- Increases in gas fired electric generation in California between 2004 and 2008 by more than 4800 megawatts (MW), according to data from the California Energy Commission, and estimates of a further increase in 2009 of 3200 MW or more.
- Potential construction of various proposed interstate pipeline projects, including El Paso Corporation’s Ruby Pipeline, LLC Project (1.5 Bcf/d to Malin, Oregon), Spectra Energy’s Bronco Pipeline (1.0 Bcf/d to Malin, Oregon), and Williams and TransCanada Corporation’s Sunstone Pipeline (1.2 Bcf/d to Stanfield, Oregon).
- Construction and/or development of other natural gas storage projects in Northern California, such as Lodi’s Kirby Hills Project and Expansion, Sacramento Natural Gas Storage, and Central Valley Gas.
- Use of natural gas supplies to fill in the gaps between the availability of intermittent wind or solar power supplies in electric utilities’ Renewable Portfolio Standards.

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<sup>8</sup> *Lodi CPCN Decision*, 2000 Cal. PUC LEXIS 394 at \*41.

Wild Goose has made its showing under § 1001 in compliance with the dictates of both the *Gas Storage Decision* and the *Lodi CPCN Decision*. No party, including storage competitors and customers, contests any part of Wild Goose's showing, nor have we reason to do so.

#### **4.1.2. Community Values Under § 1002(a)**

In assessing community values, the Commission considers the views of the local community, including the positions of the elected representatives of the area who address a matter on behalf of their constituents.<sup>9</sup> As the Wild Goose application suggests, the concept of community values is somewhat fluid. The issues that need to be considered can vary greatly depending upon the nature of a project and where its proponents wish to build it.

Other than WGC, whose narrow, legal concern we discuss in Section 6, no local person or entity has registered opposition to the Phase 3 expansion. As evidence of overall community support, the Wild Goose application includes, as Appendix F, letters from two elected officials: Assemblyman Dan Logue from the Third Assembly District; and Senator Sam Aanestad from the Fourth Senatorial District. Both letters commend Wild Goose's existing relationship with the City of Gridley and with Butte and Colusa counties. The letters also note that construction of the Phase 3 expansion will create about 75 local construction jobs and about \$750,000 in spending for food and lodging for non-resident personnel during construction; in addition, the Phase 3 expansion will yield additional property tax revenues for the counties of about \$600,000 per year.

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<sup>9</sup> *Lodi CPCN Decision*, 2000 Cal. PUC LEXIS 394 at \*41, as modified by D.00-08-024, 2000 Cal. PUC LEXIS 546 at \* 26-27.



The Wild Goose application also points to Wild Goose's positive safety record and states: "Since commencing business in April 1999, neither Wild Goose nor PG&E has experienced any operational problems as a result of the management of the Wild Goose Facility."<sup>10</sup> Among other things, the application describes Wild Goose's "operational and maintenance procedures," its commitment to ensuring "safe, efficient, and economical operation," the installation of "safety systems and equipment consistent with all federal, state, and local codes and requirements," and its development of "a detailed emergency response plan . . . that is consistent with DOT regulations."<sup>11</sup>

The uncontested evidence indicates community support for the Phase 3 expansion.

#### **4.1.3. Market-Based Rate Authority**

Wild Goose seeks authority to charge market-based rates for the Phase 3 expansion's storage services. In support, Wild Goose points to the increased competitiveness of natural gas storage in California, attributable both to additional storage provided by new competitors as well as expansions by existing storage operators, and to continued development of additional pipeline capacity. The application includes the following assessment, which no party contests:

The result is significant competition among the providers and service types (e.g. excess pipeline capacity, pipeline or utility balancing services, and price arbitrage provided by natural gas futures markets) with which Wild Goose competes. The presence of these alternatives forces storage providers, such as Wild Goose, to

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<sup>10</sup> Application at 29.

<sup>11</sup> Application at 29-30.

make their services available on competitive terms. In other words, the available alternatives have precluded, and will continue to preclude, Wild Goose from increasing its prices above competitive levels.<sup>12</sup>

We agree that market-based rate authority should be extended to the Phase 3 expansion.

#### **4.1.4. Interconnection with PG&E**

Wild Goose seeks to interconnect with PG&E's gas transportation system pursuant to PG&E's tariff rules and Commission policy, which all require equal and nondiscriminatory access. The Wild Goose application confirms that Wild Goose intends to pay for all necessary modifications/upgrades required to accomplish the interconnection. In a status report made after the PHC, PG&E reported that it has completed the engineering studies required to assess the changes needed. No issues remain for the Commission to resolve.

### **5. SEIR**

Pub. Resources Code §§ 21000 et seq. codify CEQA and govern environmental review by this Commission and other state agencies. Where the Commission is the lead agency for a project, as in this proceeding, it must prepare an environmental document that assesses the project's potential impacts on the environment.<sup>13</sup> Under § 15162 of the CEQA Guidelines, an SEIR is appropriate, generally, when only minor additions or changes are necessary for a previously prepared EIR to adequately address the new project's potential environmental impacts.

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<sup>12</sup> Application at 33.

<sup>13</sup> See generally *Re Southern California Edison Company*, D.90-09-059, 37 CPUC2d 413, 421.

### **5.1. Procedural History: Environmental Review**

Commission staff, together with the Commission's environmental consultant, Ecology and Environment, determined that an SEIR should serve as the vehicle for environmental review of the Phase 3 expansion by updating the 2002 EIR certified by D.02-07-036. The formal environmental review process commenced on October 7, 2009, when the Commission issued a Notice of Preparation (NOP) of an SEIR, which initiated the 30-day public scoping process. The NOP was published on the Commission's website and was sent by direct mail to federal, state, regional, and local agencies, to elected officials, and to public stakeholders including property owners within 300 feet of the Phase 3 expansion-site. The Commission received one comment letter during the public scoping, from the California Regional Water Quality Control Board, Central Valley Region.

On June 7, 2010, the Commission issued the Draft SEIR and Notice of Availability, which initiated a 45-day public review period (until July 21, 2010). Both documents were mailed to public agencies and interested parties, as was information on the public meeting set for June 29, 2010, in the City of Gridley Council Chambers. Information about the Draft SEIR and the public meeting also were published in three local newspapers. Twelve members of the public and representatives from interested organizations and governmental agencies attended the public meeting; all verbal comments are summarized in Appendix E of the Final SEIR. Copies of all written comments received during the public review period (eight letters with a total of 64 comments) are included in Chapter 4 of the Final SEIR, along with detailed responses to each comment. The following entities submitted written comments: California Regional Water Quality Control Board, Central Valley Region; California Division of Oil, Gas,

and Geothermal Resources; Butte County Department of Public Works; Butte County Air Quality Management District; WGC; Niska Gas Storage; and PG&E.

The Final SEIR issued in September 2010. It consists of two volumes, Volume I (the Draft EIR) and Volume II (the Final SEIR), which contains all changes to the Draft SEIR, together with the comments and responses previously described. We mark these documents, respectively, as Reference Exhibit A and Reference Exhibit B, and as so marked, file both of them in the record for this proceeding. Today's decision refers to them individually where necessary and otherwise refers to them collectively as the SEIR.

## **5.2. Content of SEIR**

The Draft and Final SIER are based upon the EIR certified for the Wild Goose expansion in 2002 by D.02-07-036. The SEIR finds new, potentially significant environmental impacts in only two resource areas: Air Quality and Greenhouse Gas Emissions; and Biological Resources. All impacts can be mitigated to a level of less than significant level, pursuant to the Draft Mitigation, Monitoring, and Reporting Program set out in Chapter 5 of the Final SEIR.

In five other resource areas, the SEIR revises mitigation measures required by the 2002 EIR or adds new mitigation measures to address changes “to the resource area setting and any changes to applicable plans, policies, and regulations of agencies with jurisdiction over” the proposed Phase 3 expansion.<sup>14</sup> These mitigations affect the following areas: Agriculture and Forestry Areas; Cultural Resources; Hazards and Hazardous Materials; Hydrology; and Noise.

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<sup>14</sup> Draft SEIR at A-1.

Consistent with the previous EIR, there are no potential, significant environmental impacts in the remaining resource areas: Aesthetics; Geology, Soils, and Mineral Resources; Land Use and Planning; Population and Housing; Public Services and Socioeconomics; Recreation; Transportation and Traffic; Utilities and Services Systems.

Below we briefly summarize (1) the two new, potential environmental impacts and corresponding mitigations, and (2) the new and/or revised mitigations in the other five resource areas. The Mitigation, Monitoring and Reporting Program, attached to today's decision as Appendix A, lists all mitigations and describes them in greater detail.

### **5.3. New Potential Impacts and Corresponding Mitigations**

#### **5.3.1. Air Quality and Greenhouse Gas Emissions**

To mitigate conflict with or obstruction of the air quality plan that applies in the Phase 3 expansion project area and to mitigate the potential generation of greenhouse gas emissions, several measures must be implemented. These include mitigation measures to: control emissions from construction equipment; prevent and control dust; require development of a construction emissions reduction plan for NO<sub>x</sub> and the purchase of NO<sub>x</sub> emissions offsets; require participation in PG&E's Climate Smart™ Program to increase the quantity of electricity from renewable sources used at the Remote Facility Site; and require development of a greenhouse gas reduction plan, as specified.

With these mitigations, the potential environmental impacts identified can be reduced to a less than significant level.

#### **5.3.2. Biological Resources**

The Phase 3 expansion project must mitigate impacts to: sensitive wildlife species identified for protection under state and federal laws (including but not limited to Swainson's Hawk, California Burrowing Owl, and the giant garter snake); federally protected wetlands; and native and migratory fish. Required mitigations include preconstruction surveys, specific conditions on construction activities within identified habitats (particularly where sensitive plants occur) and during identified time periods, ongoing coordination and consultation with the California Department of Fish and Game, the United States Fish and Wildlife Service, and other named organizations, as well as on-site monitoring.

With these mitigations, the potential environmental impacts identified can be reduced to a less than significant level.

#### **5.4. New/Revised Mitigations in Other Areas**

##### **5.4.1. Agriculture and Forestry Resources**

To continue to mitigate conversion of various categories of farmland to non-agricultural use, Wild Goose must purchase or obtain compensatory mitigation, which can take several forms: mitigation credits from a Butte County agricultural mitigation bank; placement of an easement or other restrictions on non-agricultural uses on existing agricultural land in Butte County; mitigation credits from a wetlands and/or endangered species habitat bank.

##### **5.4.2. Cultural Resources**

To continue to avoid damage or destruction to historical and/or archaeological resources, PG&E or its contractor must retain a qualified archaeologist to survey the area, as specified, prior to reconductoring, to mark any findings and establish a buffer area around them, and to monitor construction.

#### **5.4.3. Hazards and Hazardous Material**

To continue to avoid injury to the public or the environment through the release of hazardous materials, Wild Goose and PG&E must each undertake specified mitigations. These include ongoing monitoring for surface gas releases, and adherence to local, state, and federal regulations governing pipeline construction and maintenance.

#### **5.4.4. Hydrology**

To continue to avoid flood-related impacts, the Phase 3 expansion must avoid the following: placement within a 100-year flood plane of structures that might impede or redirect flood flows; and the potential to expose people or structures to injury, death or loss as a consequence of flooding, including flooding attributable to the failure of a levee or dam. As continued mitigation, the SEIR requires compliance with designated engineering specifications and standards.

#### **5.4.5. Noise**

Several mitigations are revised and added to ensure mitigation of noise to levels that comply with applicable standards, including the local general plan or noise ordinance. Many of the identified mitigations address construction practices and equipment (engine idling and backup alarm restrictions, required use of noise reduction barriers, etc.). In response to comments on the Draft SEIR from WGC, the Final SEIR requires Wild Goose to monitor noise levels at full build out (or when fewer than 20 wells are operating) and to undertake

appropriate mitigation measures to prevent noise levels from exceeding 55 dBA  $L_{\max}$  at a distance of 100 yards from the Well Pad Site berm.<sup>15</sup>

### **5.5. Certification**

CEQA requires the lead agency to certify that an SEIR was completed in compliance with CEQA, that the agency has reviewed and considered it prior to approving the project, and that the SEIR reflects the agency's independent judgment. This SEIR was completed after proper issuance of a NOP, notice and conduct of public scoping; issuance of the Draft SEIR; notice and conduct of a public meeting on the Draft EIR; and the issuance of the Final SEIR responding to all written and oral comments that were received during the 45-day public comment period.

We certify that the SEIR was completed in compliance with CEQA, that we have reviewed and considered the information contained in it, and that it reflects our independent judgment.

## **6. Relief Requested by WGC**

WGC's protest asks the Commission to take judicial notice of a complaint that WGC has filed against Wild Goose in the superior court for Butte County (Case Number 149934, filed April 2, 2010) and more particularly, to "order as an express condition of any amendment to WGS's [Wild Goose's] certificate of public convenience and necessity that WGS's [sic] must conduct its gas storage operations in accordance with the final judgment, if any is rendered, in the Wild

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<sup>15</sup> dBA refers to decibels, measured on an A-weighting scale that includes sound levels outside frequencies audible to the human ear.  $L_{\max}$  refers to the highest A-weighted sound level that occurs during a noise event.



Goose Lawsuit.”<sup>16</sup> Both the protest and Wild Goose’s subsequent reply describe the subject of the complaint as a contractual dispute between the two that concerns land use and noise. The Commission lacks jurisdiction to adjudicate a private contract of this kind, as both agree; accordingly, the merits of the complaint are not before the Commission.

As support for the relief it seeks, WGC relies upon “the comity that *should* exist between the Commission and the courts of this state, in order to avoid potentially inconsistent decisions, and in order to avoid confusion on the part of the WGS and WGC regarding their respective rights and duties . . . ”<sup>17</sup> WGC cites no authority. Wild Goose opposes WGC’s request and interprets legal authority to establish that the Commission neither can, nor should, grant the relief WGC seeks.

Indeed, as Wild Goose argues, it is well established that this Commission has very broad regulatory powers, with origins in both the California Constitution and in statute. The California Supreme Court (Supreme Court) has recognized the Commission’s authority repeatedly.<sup>18</sup> Moreover, § 1759, in relevant part, expressly limits review of Commission decisions to the courts of appeal and the Supreme Court, and also prohibits superior courts from enjoining the Commission’s lawful review of matters before it.<sup>19</sup>

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<sup>16</sup> WGC Protest at 6. The complaint is part of Exhibit A to the protest.

<sup>17</sup> *Id.*, emphasis in original.

<sup>18</sup> See for example, *Hartwell Corp v The Superior Court of Ventura County* {Hartwell}, (2002) 27 Cal. 4<sup>th</sup> 256, 265 (2002), citing *San Diego Gas & Electric Co. v. Superior Court, Martin Covalt et al., real parties in interest* [Covalt] (1996) 13 Cal. 4<sup>th</sup> 893, 914-915.

<sup>19</sup> Section 1759(a) provides:

While § 2106, in relevant part,<sup>20</sup> provides a private right of action against a public utility in the superior courts for damages, the Supreme Court has explained that such actions must be “limited to those situation in which an award of damages would not hinder or frustrate the commission’s declared supervisory and regulatory policies.”<sup>21</sup>

Further, the Supreme Court has explained:

. . . an action for damages is barred by section 1759 not only when an award of damages would directly contravene a specific order or decision of the commission, i.e. when it would ‘reverse, correct, or annul’ that order or decision, but also when an award of damages would simply have the effect of undermining a general supervisory or regulatory policy of the

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No court of this state, except the Supreme Court and the court of appeal, to the extent specified in this article, shall have jurisdiction to review, reverse, correct, or annul any order or decision of the commission or to suspend or delay the execution or operation thereof, or to enjoin, restrain, or interfere with the commission in the performance of its official duties, as provided by law and the rules of court.

<sup>20</sup> Section 2106 provides:

Any public utility which does, causes to be done, or permits any act, matter, or thing prohibited or declared unlawful, or which omits to do any act, matter, or thing required to be done, either by the Constitution, any law of this State, or any order or decision of the commission, shall be liable to the persons or corporations affected thereby for all loss, damages, or injury caused thereby or resulting therefrom. If the court finds that the act or omission was wilful, it may, in addition to the actual damages, award exemplary damages. An action to recover for such loss, damage, or injury may be brought in any court of competent jurisdiction by any corporation or person.

<sup>21</sup> *Waters v. Pac. Tel Co. [Waters]*, (1974) 12 Cal. 3d 1, 4.

commission, i.e., when it would ‘hinder’ or ‘frustrate’ or ‘interfere with’ or ‘obstruct’ that policy.<sup>22</sup>

The Supreme Court’s guidance in harmonizing § 1759 and § 2106 has resulted in a three-part test that asks: (1) whether the Commission has regulatory authority to act; (2) whether the Commission has exercised that authority; and (3) whether the superior court’s judgment would hinder or interfere with the Commission’s exercise of its regulatory authority.<sup>23</sup>

Wild Goose argues that the first two parts of this test clearly have been met, since the Commission is poised to issue a decision on the Phase 3 expansion application over which it has undisputed regulatory authority and, that it is premature to assess the third since the superior court has yet to issue a decision on the WGC complaint. Thus, Wild Goose contends:

In the absence of any certainty regarding what this future Superior Court order may contain, it is both impossible and unreasonable to ask the commission to prospectively subordinate its own broad authority and jurisdiction to an unspecified future judgment of a Superior Court.<sup>24</sup>

We have no need, here, to opine upon what circumstances, if any, might persuade us to condition a decision upon compliance with a superior court decision. Given the procedural status of the WGC complaint, and the nature of the matter properly before us, we agree with Wild Goose that today’s decision should not be conditioned in the manner that WGC requests.

## **7. Comments on Proposed Decision**

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<sup>22</sup> *Covalt, supra*, at 918.

<sup>23</sup> *Hartwell, supra*, at 266, citing *Covalt* and *Waters*.

<sup>24</sup> Wild Goose Reply to Protest at 5.

The proposed decision of the ALJ in this matter was mailed to the parties in accordance with Section 311 of the Public Utilities Code and comments were allowed under Rule 14.3 of the Commission's Rules of Practice and Procedure. Wild Goose filed timely comments on November 22, 2010, and reply comments on November 27, 2010. WGC timely served its comments but tendered them for filing late (after 5:00 p.m.); no harm appearing, the assigned ALJ directed that the comments be filed. Late on November 23, 2010, WGC served "revised" comments. By email ruling the same day, the assigned ALJ directed WGC to file, no later than 1 p.m. on November 24, 2010, a motion explaining why the revised (i.e. amended) comments should be filed and attaching a "redlined" version to show the difference between its initial and revised comments. WGC complied, explaining that its initial comments contained several inadvertent errors and contending that its prompt effort to correct those errors should not be deemed prejudicial. By email ruling on November 24, 2010, the assigned ALJ directed that the amended comments be filed.

Wild Goose supports the proposed decision. Its comments identify two typographical errors and we have corrected both, along with several others we detected. WGC focuses on the noise level analysis in the Final SEIR, contends that analysis is erroneous, and urges us to make changes. Wild Goose challenges the WGC comments on procedural and substantive grounds.

As already noted in Section 5.4.5 above, the Final SEIR requires Wild Goose to monitor noise levels at full build out (or when fewer than 20 wells are operating) and to undertake appropriate mitigation measures to prevent noise levels from exceeding 55 dBA  $L_{\max}$  at a distance of 100 yards from the well pad site berm.

Procedurally, Wild Goose is correct that the WGC amended comments include new, extra-record information in the form of an October 27, 2010 study on noise levels by WGC's consultant, Brown Buntin Associates (BBA). Rule 14.3(c) of the Commission's Rules requires that comments "focus on factual, legal or technical errors . . . and in citing such errors . . . make specific reference to the record or applicable law . . . or be accorded no weight." WGC's amended comments purport to provide *additional* support for a more stringent significance threshold of 48 dBA to protect waterfowl, based on the BBA study. Further, WGC's amended comments attempt a procedural end run around the requirement to submit timely comments on the substance of the Draft SEIR. If WGC had desired to submit the analysis of an acoustic engineering consultant for use in preparation of the Final SEIR, WGC could have done so -- that opportunity was provided during the comment period on the Draft SEIR. WGC did not play by those rules, though it was fully aware of them at the time -- or should have been.

Substantively (were we to excuse the significant procedural defects), nothing in WGC's November 24 motion, amended comments, or in the BBA report provide substantial evidence to support WGC's contention that 48 dBA should be the appropriate significance threshold in this case, and we accordingly decline to adopt WGC's recommendation.

However, independently of WGC's November 24 motion and amended comments, and based on updated information provided by our environmental consultant, Ecology and Environment, we have determined that in the interests of clarity, it would be prudent to revise Measure NOI-2 in the Mitigation, Monitoring and Reporting Program to provide more detailed guidance on the specific noise monitoring activities that Wild Goose will be required to carry out

during the first year after full build-out of the Phase 3 expansion. Revised Measure NOI-2 is shown in Appendix A-1 to today's decision, entitled Revisions to the Final SEIR, which includes the revised Mitigation, Monitoring and Reporting Program and all supporting discussion of revised Measure NOI-2 in the SEIR (i.e., pages 2-1 through 2-23, 5-1 through 5-21, and Appendix A, page A.8-13).

The ALJ's proposed decision first appeared on the agenda for the Commission's December 2, 2010 public meeting. We held the matter for further review and subsequently, on December 7, 2010, WGC filed a motion for leave to file (late) a reply to Wild Goose's timely comments on the proposed decision. The lengthy reply comments that WGC proposes to file include several attachments that concern the pending complaint in the superior court of Butte County, a matter that is beyond our jurisdiction. Rule 14.3 does not contemplate extended rounds of reply comments and we deny WGC's motion. We several times already have liberally construed our rules to ensure WGC's participation; WGC has had a lawful opportunity to weigh in on the SEIR.

## **8. Assignment of Proceeding**

Michael R. Peevey is the assigned Commissioner and Jean Vieth is the assigned ALJ in this proceeding.

### **Findings of Fact**

1. No party disputes Wild Goose's showing under §§ 1001 and 1002.
2. The proposed project has potentially significant environmental impacts on (1) air quality and greenhouse gases and (2) biological resources but these impacts can be mitigated to a level of insignificance.
3. The SEIR was completed in compliance with CEQA.

4. The Commission has reviewed and considered the information contained in the SEIR.

5. The SEIR reflects the Commission's independent judgment.

### **Conclusions of Law**

1. Wild Goose has provided the showing required by §§ 1001 and 1002.

2. Wild Goose's CPCN should be amended to permit construction and operation of the Phase 3 expansion, subject to the Mitigation, Monitoring and Reporting Program attached as Appendix A, and to offer that additional storage capacity and related services at market-based rates.

3. The SEIR has been completed in compliance with CEQA and should be certified.

4. The Draft SEIR and the Final SEIR should be marked for identification and filed in the record for this proceeding.

5. The Commission should not condition this decision upon a future decision of the superior court on the private contract that is the subject of the complaint filed against Wild Goose by WGC in Butte County.

6. WGC's December 7, 2010 motion for leave to file (late) a reply to Wild Goose's timely comments on the proposed decision should be denied, since the proposed reply is untimely and fails to otherwise comply with Rule 14.3.

7. This proceeding should be closed.

8. This order should be effective immediately to provide business certainty to affected individuals and entities.

**O R D E R**

**IT IS ORDERED** that:

1. Wild Goose Storage, LLC is granted an amendment to its certificate of public convenience and necessity to authorize it to develop, construct, and operate the Phase 3 expansion of its existing natural gas storage facilities, in conformance with the Mitigation, Monitoring and Reporting Program, attached to this opinion as Appendix A and further revised in Appendix A-1 hereto, and to offer that additional storage capacity and related services at market-based rates.
2. The Supplemental Environmental Impact Report (SEIR), which consists of two separate documents, the Draft SEIR and the Final SEIR (as further revised by Appendix A-1 hereto), is adopted pursuant to the requirements of the California Environmental Quality Act. The Draft SEIR is marked for identification as Reference Exhibit A, the Final SEIR is marked for identification as Reference Exhibit B, and as so marked, both documents are filed in the record for this proceeding.
3. *Wild Goose Club's Motion for Leave to File a Reply to Wild Goose's Comments*, filed December 7, 2010, is denied.
4. Application 09-04-021 is closed.

This order is effective today.

Dated December 16, 2010, at San Francisco, California.

MICHAEL R. PEEVEY  
President  
DIAN M. GRUENEICH  
JOHN A. BOHN



A.09-04-021 ALJ/XJV/jyc

TIMOTHY ALAN SIMON  
NANCY E. RYAN  
Commissioners

[D1012025 Appendix A for Vieth Final Dec](#)  
[D1012025 Appendix A-1 for Vieth Final Dec](#)