



Meredith Allen
Senior Director
Regulatory Relations

P.O. Box 77000
San Francisco, CA 94177-0001
Mail Code B23A
(415) 973-2868
Cell: (415) 828-5765
Meredith.Allen@pge.com

September 8, 2021

BY OEIS E-FILING

Office of Energy Infrastructure Safety
300 Capitol Mall, Suite 500
Sacramento, CA 95814
info@energysafety.ca.gov

Office of Administrative Law
300 Capitol Mall, Suite 1250
Sacramento, CA 95814
staff@oal.ca.gov

Re: **Office of Energy Infrastructure Safety Adoption of Emergency Rulemaking Action Process and Procedure Regulations: Notice of Proposed Emergency Action 2021 Emergency Rulemaking Docket 2021-RM**

Dear Office of Administrative Law:

Pacific Gas and Electric Company (“PG&E”) submits the following comments in response to the second set of proposed Rules of Practice and Procedure from the Office of Energy Infrastructure Safety (“OEIS”), which were submitted to the Office of Administrative Law (“OAL”) on September 3, 2021 under the emergency rulemaking protocol. These comments are being submitted to both the OEIS and the OAL in accordance with Government Code Section 11349.6 and 1 California Code of Regulation (“CCR”) § 55. Pursuant to 1 CCR § 55(b)(4), PG&E is electronically submitting these comments to the OEIS in the manner instructed by the OEIS in its Notice of Proposed Emergency Action.

INTRODUCTION

Governor Gavin Newsom signed Assembly Bill 111 and established the OEIS within the Natural Resources Agency on July 12, 2019. AB 111 provided that, on July 1, 2021, the OEIS would become the successor to, and be vested with, all of the duties, powers, and responsibilities of the Wildfire Safety Division (“WSD”), a division of the California Public Utilities Commission (“CPUC”).¹ Prior to July 1, 2021, the WSD has been charged with reviewing, approving, or denying the wildfire mitigation plans (“WMPs”) submitted by electrical corporations as part of a coordinated effort to reduce the risk of ignition of wildfires from utility infrastructure.² Pursuant

¹ See also Govt. Code § 15475.

² See Pub. Util. Code §326; see also Govt. Code § 8386.1.

to Energy and Infrastructure Safety Act Section 15475.6, the OEIS was instructed to use the CPUC’s Rules of Practice and Procedure until the new agency adopted its own set of rules, so as to provide the OEIS with a smooth transition and functioning rules in this interim period.

On July 6, 2021, the OEIS provided notice that it intended to submit proposed emergency regulations on July 13, 2021, in accordance with Government Code Section 11346.1. These proposed regulations were eventually submitted to the OAL on July 26, 2021 and PG&E, Southern California Edison Company, and San Diego Gas & Electric Company each provided comments on this first set of emergency regulations. However, the OEIS withdrew these proposed regulations on August 4, 2021, the day before the OAL was statutorily required to approve or deny the proposed regulations.

On August 26, 2021, the OEIS provided notice that it intended to submit a second set of proposed emergency regulations to the OAL on September 3, 2021 and proceeded to submit the proposed regulations to the OAL on that date.

PG&E commends the OEIS on its effort to advance rules and regulations to ensure clear processes when collaborating with utilities on wildfire mitigation work. We share OEIS’s goal of eliminating the threat of catastrophic wildfires and welcome OEIS’s engagement. However, PG&E offers the following comments to help improve certain specific aspects of the proposed regulations.

Additionally, PG&E suggests that OEIS provide a reasonable amount of implementation time to allow the utilities to adapt to the proposed emergency rules and to allow them to create internal processes to comply with the new rules.

Section Number	Comments
§ 29200 – Confidential Information	The proposed confidentiality process remains overly burdensome. There will be significant overlap between documents submitted to the OEIS and the CPUC. PG&E recommends that the OEIS follow the confidentiality process used by the CPUC set forth in CPUC General Order No. 66-D to maximize efficiency and minimize confusion.
§ 29201 – Disclosure of Confidential Information	The proposed rule still does not adequately protect confidential information submitted to the OEIS. Subsection (a)(4) must clarify that the California Department of Forestry and Fire Protection (“CAL FIRE”), the California Energy Commission (“CEC”), and the CPUC will be required to keep confidential records from the OEIS confidential.
§ 29300 – Notifications	The newly proposed rules are vague, overbroad, and overly burdensome. The notification requirements should be limited to

Section Number	Comments
	faults or outages occurring within a one-mile vicinity of a wildfire that is 50 acres or greater in size. PG&E also recommends that the OEIS follow the Electric Incident Reporting process used by CPUC to promote efficiency and consistency in reporting.
§ 29301 – Incident Report	The proposed rule is still vague, overbroad, and overly burdensome. PG&E recommends that the OEIS follow the 20-day reporting process used by the CPUC and that utilities be expressly permitted to object to investigation information requests based on privilege.
§ 29302 - Investigations, Notices of Defects and Violations and Referral to the Commission	The proposed rule remains overbroad and potentially expands the authority of the OEIS. PG&E recommends that the proposed rule be amended to reiterate that OEIS investigations must be related to wildfire mitigation work and WMPs.
None	If adopted on an emergency basis, the newly proposed rules will become immediately effective without providing any time to allow the electrical corporations to implement the new rules, which, if not modified, will differ significantly from those of the CPUC and which are currently being used by the OEIS in an interim capacity. PG&E therefore recommends the OEIS allow a minimum of 60 days for the implementation of the new rules, which will require the creation of new internal protocols and procedures at the electrical corporations. Additionally, this implementation time would allow for joint sessions to be held between the utilities and OEIS to ensure there are no misunderstandings about the new rules.

SECTION 29200 – CONFIDENTIAL INFORMATION

PG&E again notes that the proposed confidentiality process—which was only minimally altered in this second set of comments—is unnecessarily burdensome given the vast amount of information and exceedingly short time frames in which to respond to data requests.

The second set of proposed rules again require that all parties providing confidential information to the OEIS submit an application with a confidentiality declaration for review by the Deputy Director. In the declaration, the parties must: identify the specific confidential information; state how long the information should be kept confidential; discuss how the Public Records Act or other laws allow the OEIS to keep the information confidential; identify any specific trade secrets or competitive advantages that would be lost by production of the confidential information; describe why any critical infrastructure information is confidential; state whether

the information could be disclosed in the aggregate or with certain portions masked; and explain how the information is currently kept confidential and if it has been produced previously.³ Following the submission, the Deputy Director would have thirty days to determine if the application for confidential declaration should be granted, followed by a review process.⁴

This process remains overly burdensome and not well suited for the WMP-related proceedings. The OEIS based the proposed confidentiality application process on the process used to submit confidential information to the CEC.⁵ That process is not ideal for the wildfire mitigation proceeding because utilities submit a limited amount of confidential information to the CEC. On the other hand, the utilities are generally required to submit a significant number of documents and tables containing confidential information to the OEIS as part of quarterly reporting obligations and in response to other compliance investigations. In addition, for the past two years, the utilities have been asked to respond to thousands of written discovery requests following the submission of their WMPs. The responses to these requests have been due in three business days. The CEC confidentiality process proposed by the OEIS is too cumbersome and time consuming to facilitate this level of information exchange efficiently.

PG&E recommends that the OEIS use the process established by the CPUC—and previously used by the WSD—for submission of confidential materials. In General Order 66-D, the CPUC adopted an effective process that still requires parties to designate the confidential portions of each document provided, specify the basis for confidentiality, and sign a declaration in support of the legal authority cited. However, the level of detail needed for each confidentiality declaration is less. The stakeholders to the wildfire mitigation proceeding have used this process effectively in connection with submission of the 2020 and 2021 WMPs. The additional benefit of using General Order 66-D is that it will allow the utilities to use the same standard for submitting documents to the OEIS and the CPUC. Previously, it has been very common for the utilities to have to submit similar materials to the CPUC and the WSD, given the role of each agency. If the OEIS uses a different standard for submission of confidential materials from the CPUC, the utilities will have to prepare separate confidentiality declarations to submit the same materials to the CPUC and the OEIS. This will increase the likelihood of potential errors for similar submissions and will be overly burdensome.

SECTION 29201 - DISCLOSURE OF CONFIDENTIAL INFORMATION

In the second proposed regulations, the OEIS again states that it may disclose confidential information it receives to “other governmental bodies that need the records to perform their official functions and that agree to keep the records confidential and to disclose the records only to those employees or contractors whose agency work requires inspection of the records.”⁶ At

³ 14 CCR § 29200(a).

⁴ 14 CCR § 29200(c).

⁵ See 20 CCR § 2505.

⁶ 14 CCR § 29201(a)(3).

the same time, the OEIS states that it may share confidential information “with the California Department of Forestry and Fire Protection, California Energy Commission, and California Public Utilities Commission...without the need for an interagency agreement.”⁷

PG&E recognizes that the OEIS may need to share documents with confidential information with other agencies like CAL FIRE, the CEC, and the CPUC to fulfill its duties. However, the proposed regulations are ambiguous as to whether the three identified agencies will be required to keep the records confidential, especially if no interagency agreements are executed. PG&E is regularly asked to produce documents with confidential customer, employee, critical infrastructure, or trade secret information in connection with the wildfire mitigation proceeding. Therefore, it is crucial that the OEIS confirm that all agencies receiving confidential information from it agree to keep the information confidential prior to transmission.

PG&E recommends that the proposed regulations be amended to clarify that CAL FIRE, the CEC, and the CPUC will be required to confirm they will keep all confidential information received from the OEIS confidential. The OEIS should provide electrical corporations notice when submitting confidential information to other agencies. We also recommend that the OEIS finalize a memorandum of understanding with the CPUC to clarify the issue of sharing confidential information between agencies.⁸

SECTION 29300 – NOTIFICATION

The “notification” section of the second set of proposed rules is substantially different from the first set but again suffers from being vague, overbroad, and overly burdensome. The newly proposed rules require a regulated entity to notify OEIS within 12 hours of observing: (1) a fault, outage, or other anomaly on infrastructure it owns or operates occurring within the vicinity of a fire requiring a response from a fire suppression agency; or (2) a wildfire threat that poses a danger to infrastructure it owns or operates requiring a response from a fire suppression agency.⁹ Additionally, a utility must notify OEIS within four hours of receiving notice that infrastructure that it owns or operates is being investigated by a governmental agency for involvement in potentially causing an ignition.¹⁰

A. Notifications for Faults, Outages, or Other Anomalies

The requirement that a utility notify OEIS within 12 hours of observing “a fault, outage, or other anomaly” on its infrastructure within the vicinity of a fire is ambiguous, overbroad, and overly

⁷ 14 CCR § 29201(a)(4).

⁸ Govt. Code § 15476 states that the CPUC and the OEIS “shall enter into a memorandum of understanding to cooperatively develop consistent approaches and share data related to electric infrastructure safety....”

⁹ 14 CCR § 29300(a)(1)-(2).

¹⁰ 14 CCR § 29300(b).

burdensome, even with the limitation that the fire must require a response from a fire suppression agency. First, the term “anomaly” is largely subjective and should be defined, or at least have some limiting parameters set. Second, this requirement is not limited to wildfires, nor is it limited to fires of any particular size or scope, meaning that it will be repeatedly and frequently triggered by incidents which have no relation to the OEIS’s mission to drive “utility-related wildfire risk reduction for the State of California.”¹¹ For example, urban and suburban kitchen or garage fires regularly occur in PG&E’s service territory and regularly require the deenergization of PG&E infrastructure. A notification requirement that encompasses these types of residential fires would not be beneficial for either the electrical corporations or the OEIS. Therefore, PG&E proposes limiting this notification requirement to faults or outages that occur within a one-mile vicinity of a wildfire that is 50 acres or greater in size. Additionally, this requirement should be restored to the 24-hour timeline set out in the previous proposed rules, rather than the abbreviated 12-hour timeline of the newly proposed rules. There is no benefit to requiring utilities to report this information to the OEIS in the middle of the night to meet this 12-hour notification requirement.

Furthermore, the OEIS arguably does not have the statutory authority to issue this broad notification requirement. The OEIS is the successor to, and vested with, all the duties, powers, and responsibilities of the WSD. The primary responsibility of the WSD has been to review and oversee compliance of the utilities’ WMPs.¹² This newly proposed notification requirement goes well beyond the wildfire mitigation efforts set forth in the electrical corporation WMPs to include any fault, outage or “anomaly” occurring in the vicinity of any type of fire, including non-wildfires, and whether caused by the utility or not.

B. Notifications for Wildfire Threats

The proposed 12-hour notification requirement for wildfire threats, like the previously proposed 24-hour notification requirement before it, is unclear. Most importantly, the term “wildfire threat” remains undefined and can cause confusion, despite the addition of language that the threat must be one “requiring a response from a fire suppression agency.”¹³ It remains unclear what constitutes a “threat” and when exactly infrastructure would be in “danger.” Therefore, as with the previous notification requirement, PG&E recommends adding language restricting this notification requirement to wildfires that are 50 acres or greater in size, and that encroach within one mile of PG&E’s infrastructure. Additionally, this notification requirement should also be returned to the previous 24-hour requirement, as there is no benefit to the OEIS to require reporting deadlines in the middle of the night.

The newly proposed notification requirement also remains overly burdensome. As indicated in the 2021 WMP, over half of PG&E’s service territory lies in Tier 2 and 3 High Fire Threat

¹¹ See <https://energysafety.ca.gov/>.

¹² See *e.g.* Pub. Util. Code, § 326(a)(1)-(3).

¹³ 14 CCR § 29300(a)(2).

Districts (“HFTDs”), and changes in weather patterns have increased the threat of fire over the past decade.¹⁴ Reporting all undefined “wildfire threats” to any electrical facility—even limiting it to those investigated by a fire suppression agency—within 12 hours would be incredibly time consuming, and difficult to accomplish, especially during the fire season. The proposed notification requirement may also distract from an electrical corporation’s need to quickly respond in the field to simultaneous wildfire threats.

Lastly, as discussed in the section above, the OEIS may be exceeding its statutory authority if it enacts this overly broad notification requirement. This notification requirement would extend beyond reviewing and overseeing the utilities’ wildfire mitigation work and include wildfire threats caused by circumstances unrelated to electrical infrastructure (e.g. lightning, human interactions, or other weather conditions).

C. Notification for Governmental Agency Investigations

The newly proposed rules requiring a utility to notify the OEIS within four hours of receiving notice that it is being investigated by a governmental agency for potentially causing a fire are overly burdensome and unnecessarily differ from the requirements imposed by the CPUC.

In lieu of the proposed 4-hour notification requirement relating to governmental agency investigations, PG&E recommends that the OEIS look to the thresholds set by the CPUC for reporting electric incidents described in D.98-07-097 for guidance. The CPUC requires that electric utilities report electric incidents that are attributable, or allegedly attributable, to electric utility facilities that are found to meet the following criteria within two hours during business hours (or four hours outside of business hours): a fatality or injury requiring overnight hospitalization; damage to property of the utility or others in excess of \$50,000; or significant public attention or media coverage. PG&E suggests that the OEIS use the same thresholds for determining when an electrical corporation is required to report investigations into HFTD ignitions that are attributable, or allegedly attributable to electric utility facilities. This will promote efficiency and reduce possible duplication of work.

D. Proposed Language for Section 29300 – Notification

Based upon the above recommendations, PG&E proposes, at a minimum, adding the following language to Section 29300:

- (a) A regulated entity shall notify the Office within ~~12~~ 24 hours of observing:
 - (1) A fault; ~~or outage, or other anomaly~~ on infrastructure it owns or operates occurring within ~~the~~ a one-mile vicinity of a 50 acre or greater wildfire requiring a response from a governmental fire suppression agency; or

¹⁴ 2021 Revised WMP, p. 3.

- (2) A wildfire threat that poses a danger to infrastructure it owns or operates requiring a response from a governmental fire suppression agency.
 - (i) For a fire to be considered a wildfire threat under this provision it must be at least 50 acres in size.
 - (ii) For a fire to be deemed to pose a danger to infrastructure under this provision it must encroach within one mile of that infrastructure.
- (b) A regulated entity shall notify the Office within two hours of receiving notice during business hours, or four hours of receiving notice outside business hours, that an electric incident occurred in a high fire threat district that is attributable, or allegedly attributable, to electric utility facilities, and in which any of the following occurred: infrastructure that it owns or operates is being investigated by a governmental agency for involvement in potentially causing an ignition.
 - (1) A fatality or injury requiring overnight hospitalization;
 - (2) Damage to property of the utility or others in excess of \$50,000;
 - (3) Significant public attention or media coverage.

SECTION 29301 – INCIDENT REPORT

The OEIS proposes that utilities be required to submit an incident report within 30 days “in the event that an ignition may have been started by the infrastructure owned or operated by a regulated entity.”¹⁵ The incident report would include: any factual or physical evidence related to the incident including photographs; witness information; a preliminary root cause analysis; actions taken to prevent recurrence of the incident; the identification of all incident documents; and any other information the OEIS may require.¹⁶ Electrical corporations would be required to preserve all incident evidence and documents for at least five years.¹⁷

The incident report proposal should be modified because it is overbroad and burdensome. Under the drafted regulation, electrical corporations may be required to file an incident report for every ignition, of any size, in any part of their service territory when the electrical corporation “suspects an ignition to have been started” by their infrastructure. It is unclear what standard should be used to determine if an ignition is suspected “to have been” started by electric facilities. Also, ignition investigations often take a significant amount of time to complete. It is common for agencies like CAL FIRE to collect physical evidence during their investigations for testing and evaluation. Thus, electrical corporations may not have access to the materials they

¹⁵ 14 CCR § 29301(a).

¹⁶ *Id.*

¹⁷ *Id.*

need to complete a root cause analysis for months or longer. For this reason, it can be difficult to create a detailed corrective action plan to prevent recurrence within 30 days. The OEIS has also provided no explanation for what types of “other information” it may require in the proposed incident reports.

The proposed regulations should also be modified because they do not recognize the right to object to the production of certain documents and information in the incident reports. The OEIS proposes that electrical corporations produce all documents relating to each incident, preliminary root cause analyses, and extensive witness information. However, some of that information may be protected from discovery under the attorney-client privilege and work product doctrine. The proposed regulations should recognize that electrical corporations do not waive these important rights by filing an incident report.¹⁸

PG&E is also deeply concerned about the requirement that electrical corporations produce a root cause analysis within 30 days.¹⁹ Even if this root cause analysis is described as “preliminary,” it still requires the utility to include a “detailed discussion of all findings.”²⁰ Producing a root cause analysis, which includes a detailed determination of all findings, can take several months and requires extensive input and support from field personnel. It is not reasonable to require this type of detailed analysis within 30 days.

Finally, the proposed regulation should be modified because it overlaps, and potentially interferes with, the CPUC’s reporting requirements for ignitions. As indicated in the Section 29300 – Notification analysis above, electrical corporations are required to report electric incidents to the CPUC that are attributable, or allegedly attributable, to electric utility facilities that are found to meet certain criteria, as described in D.98-07-097. Within twenty business days of the incident, the utility must provide:

A written account of the incident which includes a detailed description of the nature of the incident, its cause and estimated damage. The report shall identify the time and date of the incident, the time and date of the notice to the Commission, the location of the incident, casualties which resulted from the incident, identification of casualties and property damage. The report shall include a description of the utility's response to the incident and the measures the utility took to repair facilities and/or remedy any related problems on the system which may have contributed to the incident.²¹

¹⁸ The language of CPUC General Order 95, Rule 17 is instructive. In that General Order relating to accident investigations, the CPUC has stated the following: “Nothing in this rule is intended to extend, waive, or limit any claim of attorney client privilege and/or attorney work product privilege.”

¹⁹ 14 CCR § 29301(b)(3).

²⁰ *Id.*

²¹ D.98-07-097, Appendix B.

To prevent duplicative work for agencies with slightly different reporting requirements, PG&E strongly suggests that the OEIS follow the reporting requirements of the CPUC set forth above and collect 20-day reports from the utilities for all reportable ignitions as described in D.98-07-097. This is preferred because the CPUC is the primary agency responsible for investigating electrical incidents, including ignitions, in California. The 20-day report should provide enough information to the OEIS to allow it to determine if there is a connection between a fire and any of the initiatives described in the utilities' WMPs or if additional discovery is needed.

However, if the OEIS is unwilling to standardize its reporting requirements with those of the CPUC, PG&E proposes, at a minimum, the following revisions to Section 29301:

- (a) In the event that a regulated entity or fire investigation agency suspects reasonably believes an ignition to have been started by the infrastructure owned or operated by a regulated entity, the entity shall submit an incident report within 30 days of the incident.
- (b) The incident report shall contain the following information, to the extent known:
 - (1) Any factual or physical evidence related to the incident including, but not limited to, photographs of the relevant area.
 - (2) The name and contact information of any known witnesses.
 - (3) A preliminary root cause analysis, including a preliminary detailed discussion of all findings to date. If the entity does not have sufficient information to produce a preliminary root cause analysis within 30 days, the entity will provide an explanation as why it is unable to comply with this requirement and what additional information needs to be obtained.
 - (4) A description of all actions taken to minimize the recurrence of such incidents.
 - (5) The name and contact information of any person or entity that has taken possession of any physical evidence removed from the site of the incident.
 - (6) Identification of all documents related to the incident.
 - (7) Any other information that the Office may require and that the entity can reasonably obtain within the 30-day time period.
 - (8) Incident reports shall not include information protected from discovery under any applicable privileges, including the attorney-client privilege or the attorney work product privilege.
- (c) Each entity shall preserve all documents or evidence it collects as part of its incident investigation for at least five years and shall make the document available upon request by the Director or a Director's designee.

SECTION 29302 - INVESTIGATIONS, NOTICES OF DEFECTS AND VIOLATIONS AND REFERRAL TO THE COMMISSION

In the second proposed regulations, the OEIS again states that the Director may designate investigators to investigate: whether an approved WMP was followed; whether failure to follow a WMP contributed to the cause of a wildfire; whether the regulated entity is noncompliant with

its duties and responsibilities or has otherwise committed violations of any laws, regulations, or guidelines within the authority of the Office; and other related investigations requested by the Director.²²

California law does not give the OEIS the broad authority to investigate whether an electrical corporation was “noncompliant with its duties and responsibilities or has otherwise committed violations of any laws, [or] regulations.” As indicated above, under Public Utilities Code Section 326, the WSD has been responsible for reviewing, and overseeing compliance with, the WMPs. This same authority has been extended to the OEIS. However, the authority does not encompass investigations into utility compliance with all other laws or regulations implemented by other agencies that do not relate to wildfire mitigation work. The CPUC has already empowered its Safety and Enforcement Division (“SED”) to perform electric safety audits and conduct incident investigations, including wildfires. If the proposed regulations are implemented, it is likely that the SED and the OEIS will be performing simultaneous investigations into the same incidents. This creates the potential for inconsistent rulings and findings, and it duplicates the efforts of governmental agencies and utilities.

PG&E suggests that the proposed investigation rules be amended to reiterate that OEIS investigations are to be related to wildfire mitigation work and the WMPs submitted by electrical corporations. This will help avoid duplicative investigations by State agencies and allow parties more time to investigate reportable incidents. Thus, at a minimum, PG&E suggests the Section 29302, subsection (a) of the proposed rules be amended as follows:

- (a) The Director may designate investigators to investigate the following:
 - (1) Whether an approved Wildfire Mitigation Plan was followed;
 - (2) Whether failure to follow the Wildfire Mitigation Plan contributed to an ignition;
 - (3) Whether the regulated entity is noncompliant with its duties and responsibilities related to wildfire mitigation work or has otherwise committed violations of any laws, regulations, or guidelines related to wildfire mitigation work and within the authority of the Office; and
 - (4) Other wildfire mitigation related investigations within the authority of the Office, as requested by the Director.

IMPLEMENTATION TIME TO ALLOW FOR COMPLIANCE

Given that these proposed rules of practice and procedure differ substantially from those of the CPUC, if adopted without modification, PG&E requests that the OEIS provide an implementation period of at least 60 days to allow the utilities to adapt their internal processes to comply with the new rules once they are adopted. PG&E is concerned that despite its best efforts, it will be unable to develop internal protocols to comply with the new rules in the limited amount of time provided by the emergency rulemaking process. PG&E proposes that as part of

²² 14 CCR § 29302(a).

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this implementation period, that joint sessions be held among the utilities and the OEIS to ensure that there were no misunderstandings about the specifics of what is required under the new rules.

CONCLUSION

PG&E commends the OEIS for its effort to advance rules and regulations to ensure clear processes when collaborating with utilities on wildfire mitigation work. PG&E respectfully submits these comments and looks forward to working with the OEIS to promote wildfire safety going forward.

If you have any questions, please do not hesitate to contact me.

Very truly yours,

/s/ Meredith Allen

Meredith Allen

MA/aps