

## DOCKETED

<b>Docket Number:</b>	15-AFC-01
<b>Project Title:</b>	Puente Power Project
<b>TN #:</b>	215786
<b>Document Title:</b>	Opposition to Motion to Strike Ex. No. 4030 and Supporting Declaration of Brian G. Trautwein
<b>Description:</b>	Opposition and Declaration by Intervenors Sierra Club Los Padres Chapter, Environmental Coalition of Ventura County and Environmental Defense Center
<b>Filer:</b>	Matthew A. Smith
<b>Organization:</b>	Environmental Defense Center
<b>Submitter Role:</b>	Intervenor
<b>Submission Date:</b>	2/6/2017 7:09:04 PM
<b>Docketed Date:</b>	2/7/2017

**STATE OF CALIFORNIA**  
**State Energy Resources**  
**Conservation and Development Commission**

In the Matter of: )

Docket No. 15-AFC-01

)  
**APPLICATION FOR CERTIFICATION )**  
**OF THE PUENTE POWER PROJECT )**

**INTERVENORS SIERRA CLUB LOS**  
**PADRES CHAPTER,**  
**ENVIRONMENTAL COALITION**  
**OF VENTURA COUNTY AND**  
**ENVIRONMENTAL DEFENSE**  
**CENTER'S OPPOSITION TO**  
**STAFF'S MOTION TO STRIKE**  
**EXHIBIT 4030**

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## I. Introduction

On January 26, California Coastal Commission Staff Ecologist Dr. Jonna D. Engel, Ph.D. stepped forward to correct a significant inaccuracy in the evidentiary record of this proceeding. She sent an email notifying Environmental Analyst Brian G. Trautwein of the Environmental Defense Center (EDC) that the 30413(d) Report submitted by the Coastal Commission was not based on any focused wildlife surveys and erred in failing to identify Environmentally Sensitive Habitat Areas (ESHAs) located on the proposed Project site.<sup>1</sup> The next day, Intervenors filed Dr. Engel's email together with a declaration from Mr. Trautwein establishing the elements of the business records exception to the rule against hearsay in California Evidence Code §1271.<sup>2</sup>

Rather than welcome Dr. Engel's email as a necessary correction of the evidentiary record, Staff delayed for over a week after the email was filed and, on the *day before* evidentiary hearings, moved to "strike"<sup>3</sup> Dr. Engel's email purportedly "in order to provide the Committee with the *most relevant* information on which to base their decision."<sup>4</sup> Failing to explain how *excluding* information will "provide" the Committee with relevant evidence, Staff's Motion implies spuriously that Dr. Engel's email is inadmissible. Nothing could be less true. As the Final Staff Assessment makes plain, *Staff* relies on the Coastal Commission's Report to reach its conclusions regarding the presence of ESHA<sup>5</sup> on the Project site.<sup>6</sup> Dr. Engel's email provides

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<sup>1</sup> Email from J. Engel, California Coastal Commission (TN # 215607) (Ex. 4030).

<sup>2</sup> *Id.*

<sup>3</sup> Motion to Strike Exhibit No. 4030 (TN # 215771) (hereinafter, "Mot."). For purposes of this Opposition, Intervenors interpret the Motion as seeking to exclude evidence.

<sup>4</sup> *Id.* at 2.

<sup>5</sup> ESHA refers to "Environmentally Sensitive Habitat Areas" as that term is used in the California Coastal Act, Cal. Pub. Res. Code §§ 30240(a) & 30107.5.

<sup>6</sup> Final Staff Assessment Part 1 of 2 (TN 214712) (Ex. 2000) at 4.2-4.

critical information about the scope of work performed by the Commission staff in preparing its Report and presents her personal observations as one of the authors of the Report.<sup>7</sup>

Given the clear relevance of Dr. Engel’s email in explaining the basis for the 30413(d) Report’s conclusions, Staff’s “Motion to Strike” is simply an attempt to prevent Intervenors from introducing evidence that calls into question Staff’s reliance on the Report’s analysis of ESHA. Couching its arguments in terms of whether the email is “more” or “less” relevant than other evidence,<sup>8</sup> Staff virtually concedes that its arguments go to the weight—*not* the admissibility—of Dr. Engel’s statements. Staff and all parties are free to debate the weight to be given to Dr. Engel’s statements (as with any other evidence), however, Staff identifies no permissible basis to exclude them. The Motion to Strike should be denied.

## **II. Background**

Staff filed its Final Assessment of the Puente Power Project on September 19, 2016 (FSA).<sup>9</sup> The FSA relies on the California Coastal Commission’s 30413(d) Report in its half-page discussion of Environmentally Sensitive Habitat (ESHA).<sup>10</sup> The Coastal Commission’s Report addresses the on-site occurrence of ESHA in a two-sentence footnote stating that “the project site does not meet the definition of an environmentally sensitive habitat area (ESHA)” because “[t]he hydrophytic species found on the project site are relatively common in coastal wetlands, and the area *is not known to support* listed, rare or sensitive wildlife species.”<sup>11</sup>

On January 18 and 24, 2017, Intervenors Environmental Defense Center, Sierra Club Los Padres Chapter, and the Environmental Coalition of Ventura County (Intervenors) submitted the

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<sup>7</sup> Ex. 4030 (TN # 215607).

<sup>8</sup> Motion at 1.

<sup>9</sup> Exs. 2000 & 2001 (TN 214712-713).

<sup>10</sup> Ex. 2000 at 4.2-8.

<sup>11</sup> California Coastal Commission 30413(d) Report (TN # 213667) (Ex. 3009) at 13 n.3 (emphasis added).

opening and rebuttal testimony of local biologist Lawrence Hunt.<sup>12</sup> Mr. Hunt's testimony presents his conclusions, based in part on focused surveys for special status wildlife, that the project site contains ESHA.<sup>13</sup> After reviewing Mr. Hunt's opening and rebuttal testimony, Dr. Jonna Engel, Ph.D, a Coastal Commission Ecologist and one of three authors of the Coastal Commission Report, sent an email on January 26 to an Environmental Analyst at the Environmental Defense Center.<sup>14</sup> Dr. Engel reported in her email that the Coastal Commission's 30413(d) Report is not based on the results of any focused surveys for special status wildlife, that her assignment was limited to delimiting a 2.03-acre wetland located on the site, and that she agrees with Mr. Hunt's conclusions that there is ESHA present on the Project site.<sup>15</sup> Intervenors filed Dr. Engel's email the next day.<sup>16</sup> Staff filed nothing in response.

The parties and the Committee held a Prehearing Conference on February 1, 2017. During the Conference, both the Applicant and Intervenors requested that the California Coastal Commission make Dr. Engel present for testimony during evidentiary hearings. Counsel for Staff did not request that the Coastal Commission make Dr. Engel present. The Coastal Commission denied Intervenors' request.

Dr. Engel submitted a letter in the docket of this proceeding on February 2, 2017.<sup>17</sup> In her letter, Dr. Engel states that her January 26 email was not sent on behalf of the Coastal Commission and that the information provided to her would not have changed the Coastal Commission's recommendation that the Energy Commission require the Puente Power Project

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<sup>12</sup> See Exs. 4017 & 4027 (TN # 215434 & 215543).

<sup>13</sup> See *generally id.*

<sup>14</sup> Ex. 4030 (TN # 215607).

<sup>15</sup> *Id.* at 1-2.

<sup>16</sup> See TN # 215607.

<sup>17</sup> See TN # 215757.

be relocated to an alternative site.<sup>18</sup> Dr. Engel's letter did not state that any of the representations contained in the January 26 email were inaccurate, and did not retract any portion of the email.<sup>19</sup>

### **III. Argument**

Dr. Engel's January 26 email is admissible in this proceeding and may be relied on by the Commission to make substantive findings. While Staff recite several arguments regarding admissibility of the email, the bulk of Staff's arguments are addressed to the weight, not the admissibility, to be accorded. Staff fails to address the admissibility of the email under § 1212(c)(3) of this Commission's procedural rules, which expressly allows out-of-court statements by non-testifying witnesses to be admitted if they "would be admissible over objection in civil actions."<sup>20</sup> As explained below, Dr. Engel's email is relevant to numerous disputed issues in this proceeding and fully admissible under well-established evidentiary principles as well as this Commission's allowance of hearsay "for the purpose of supplementing or explaining other evidence."<sup>21</sup> For all these reasons and as explained further below, Staff's Motion misconceives or fails to address the application of these principles and should be denied.

#### **A. Dr. Engel's Email is Relevant to Numerous Disputed Issues in this Proceeding**

Dr. Engel is fully competent to describe the methodologies used by the Coastal Commission staff in completing its Report and to give her opinion as to whether ESHA is present on the Project site.<sup>22</sup> Both are matters within her personal knowledge and observation as author of the Report. Dr. Engel's email is relevant for at least three purposes: first, to demonstrate that the CCC Report's finding that ESHA "is not known" to be on the Project site

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<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> 20 C.C.R. §1212(c)(3).

<sup>21</sup> *Id.*

<sup>22</sup> *See* Ex. 4030 (TN # 215607).

(on which the FSA relies<sup>23</sup>) was not supported by on-site surveys;<sup>24</sup> second, to demonstrate that the CCC Report's ESHA finding and the FSA's reliance on it are not credible due to lack of sufficient methodology;<sup>25</sup> and third, to demonstrate that one of the lead authors of the Report agrees with the findings of another biologist that ESHA is present on the Project site.<sup>26</sup> When admitted for any of these purposes, Dr. Engel's statements would easily satisfy the test of relevance applied in civil proceedings, which admits "evidence, including evidence *relevant to the credibility* of a witness or hearsay declarant, having *any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.*"<sup>27</sup> Because the presence of ESHA on the Project site and the methodology behind the Staff and Coastal Commission's conclusions regarding ESHA are central issues in this proceeding, the email is unquestionably relevant evidence and should be admitted to address these issues.

Staff's Motion fails to muster any argument that Dr. Engel's email is irrelevant; at most, it claims that the email is not the "*most* relevant information."<sup>28</sup> This contention raises only a question of the *weight* to be given to Dr. Engel's statements, not their admissibility.<sup>29</sup> Staff's remaining arguments provide no basis for exclusion.

## **B. No Declaration or Testimony by Dr. Engle is Necessary to Admit Exhibit 4030**

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<sup>23</sup> Ex. 2000 (TN 214712) at 4.2-4.

<sup>24</sup> *E.g.*, Ex. 4030 (TN 215607) at 1 (reporting that conclusions regarding ESHA were not based on any onsite focused or protocol-level wildlife surveys).

<sup>25</sup> *E.g.*, *id.* at 1 ("I think that focused/protocol level surveys should have been conducted for these species on the site.").

<sup>26</sup> *E.g.*, *id.* at 2 ("I concur with Mr. Hunt's findings . . .").

<sup>27</sup> Cal. Evid. Code. §210.

<sup>28</sup> Staff Mot. at 2.

<sup>29</sup> *See, e.g., Kinda v. Carpenter* (2016) 247 Cal. App. 4th 1268, 1283 ("The fact conflicting inferences can be drawn" regarding a document's authenticity "goes to the document's weight as evidence, not its admissibility.").

Staff criticize Exhibit 4030 for omitting a declaration by Dr. Engle, and complain that Dr. Engle is unavailable to testify.<sup>30</sup> Notably, Staff has not issued a subpoena for Dr. Engle to appear at the evidentiary hearings,<sup>31</sup> and Staff’s counsel was *silent* during the Prehearing Conference when counsel for the Applicant and EDC together requested the Dr. Engle appear at the evidentiary hearings. Worse, Staff’s arguments betray their misunderstanding of the applicable evidentiary rules. The Commission’s Rules permit the use of hearsay evidence “to support a finding [if] it would be admissible over objections in civil actions.”<sup>32</sup> Staff’s assertion that Exhibit 4030 should be excluded because Dr. Engle is not available to testify constitutes a textbook hearsay objection, i.e., that the Exhibit contains statements by a non-testifying declarant who is unavailable to corroborate its contents.<sup>33</sup> But as Staff fails to acknowledge, California Evidence Code §1271 expressly *allows* for the admission of a writing by an out-of-court declarant that was “made in the regular course of a business” where “*the custodian* or other qualified witness testifies to its identity and the mode of its preparation[.]”<sup>34</sup> As the courts have held in admitting business records based on the declarations of persons who did not prepare the records, “**qualified witness need not be . . . the person who created the record**, or the one with personal knowledge in order for a business record to be admissible under the hearsay exception.”<sup>35</sup>

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<sup>30</sup> Staff Mot. at 2 pt. A. & B.

<sup>31</sup> See 20 C.C.R. § 1203(b).

<sup>32</sup> 20 C.C.R. § 1212(c)(3).

<sup>33</sup> See Cal. Evid. Code. § 1200(a) (defining “hearsay” as “a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated”).

<sup>34</sup> *Id.* § 1271(a) & (c).

<sup>35</sup> *Unifund CCR, LLC v. Dear* (2015) 243 Cal. App. 4<sup>th</sup> Supp. 1, 8 (citing *Jazayeri v. Mao*, (2012) 174 Cal. App.4<sup>th</sup> 301, 322 & 1 Witkin, Cal. Evidence § 243 (5<sup>th</sup> Ed.)).



“A proper foundation is laid for business records simply by an affidavit that attests to the requisite elements of” the business records exception.<sup>36</sup> Here, Mr. Trautwein’s sworn declaration satisfies this requirement by testifying to all elements of the exception.<sup>37</sup> Because an exception to the hearsay rule applies, the Commission’s rules allow Exhibit 4030 to be considered for its substance.<sup>38</sup> Nonetheless, to the extent the Commission considers it necessary to hear additional testimony from Mr. Trautwein concerning the circumstances in which Exhibit 4030 was maintained by EDC, Intervenor’s submit a supplemental declaration by Mr. Trautwein together with this opposition providing additional detail.

### **C. Alternatively, Exhibit 4030 May be Admitted to Supplement or Explain the Coastal Commission Report**

Even if the law and the facts were otherwise and all predicates to the business record exception to the hearsay rule were unfulfilled, Exhibit 4030 *still* should be admitted pursuant to this Commission’s rule allowing hearsay evidence to be “used for the purpose of supplementing or explaining other evidence[.]”<sup>39</sup> Dr. Engel’s email provides the Commission with important context regarding the scope of the Coastal Commission Staff’s review of the Project site, particularly with regard to the Report’s opaque statement that “the area *is not known* to support [ESHA].”<sup>40</sup> At a minimum, Dr. Engel’s email clarifies that the reason the area was “not known” to support ESHA was because the Coastal Commission staff’s biological survey of the site was

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<sup>36</sup> *United States v. Towns*, 718 F.3d 404, 409 (5<sup>th</sup> Cir. 2013); *accord, e.g., Penberg v. Healthbridge Management*, 823 F. Supp.2d 166, 188-89 (E.D.N.Y. 2011) (admitting email based on testimony of the email recipient establishing elements of the business record exception); *Abdelrhaim v. Guardsmark, LLC*, (Cal. Ct. App. 2009) 2009 WL 3823283 \*3 (admitting email as business record based on declaration satisfying the elements of the exception).

<sup>37</sup> Ex. 4030 (TN # 215607) at 3.

<sup>38</sup> See 20 C.C.R. § 1212(c)(3) (admitting hearsay evidence that “would be admissible over objections in civil actions”).

<sup>39</sup> *Id.*

<sup>40</sup> (Ex. 3009) (TN # 213667) at 13 n.3.

limited to confirming the presence of a 2.03 acre wetland.<sup>41</sup> Given Staff's reliance on the CCC Report in the FSA's brief discussion of on-site ESHA,<sup>42</sup> the information Dr. Engle provides in her email is useful for the purpose of explaining that the Commission's conclusion regarding the presence of on-site ESHA was formulated after only a narrow review of the site. Thus, even if Exhibit 4030 were inadmissible under the hearsay exception (which is it not), Exhibit 4030 must be considered on this alternative basis.

**D. Exhibit 4030 is Relevant for Purposes Other Than Demonstrating the Coastal Commission's Views**

Staff's contentions that Dr. Engle was not speaking on behalf of the Coastal Commission, and that her email does not change the Coastal Commission's recommendations, are red herrings.<sup>43</sup> Intervenors concede both points. Neither warrants exclusion of Exhibit 4030. As explained in Part A, *supra*, Exhibit 4030 is relevant and admissible for at least three purposes, *none* of which is to demonstrate the Coastal Commission's views or to argue that its recommendations have changed. It is "well settled that if evidence is admissible for any purpose it must be received, even though it may be highly improper for another purpose."<sup>44</sup> Moreover, questions regarding a hearsay declarant's authority to make the statement in question typically go to the weight, not the admissibility, attributed to the statement.<sup>45</sup> Further, while Staff seizes on Dr. Engle's subsequent letter regarding the impact of her email on the Coastal

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<sup>41</sup> Exhibit 4030 (TN # 215607) at 1.

<sup>42</sup> Ex. 2000 (TN 214712) at 4.2-4.

<sup>43</sup> Staff Mot. at 2-3.

<sup>44</sup> *Brown v. Affonso* (1960) 185 Cal. App.2d 235, 239 (internal quotation marks omitted).

<sup>45</sup> *Cameron v. Desert Pac. Council* (2005), 2005 WL 2655000, \*9 (rejecting argument that hearsay document should be excluded due to declarant's lack of authority).

Commission Report, her letter notably *does not* retract the accuracy or truthfulness of her statements.<sup>46</sup>

**E. The Timing of Exhibit 4030 is Fully Justified**

Grasping for its last straw, Staff baldly asserts that Exhibit 4030 was filed late and “without good cause.”<sup>47</sup> That is false. As is clear from the date-stamp on the email itself, Dr. Engel did not transmit her email until 4:17 PM on January 26.<sup>48</sup> EDC promptly filed the email as an Exhibit the very next day.<sup>49</sup> While Staff is correct that the Exhibit was filed after the January 18 and 24 deadlines for opening and rebuttal testimony, EDC could not have filed the email before it existed. EDC filed the email as soon as possible after receiving it. Staff fails to identify any prejudice arising from the filing date.

**IV. Conclusion**

For the foregoing reasons, Staff’s Motion to Strike Exhibit 4030 lacks merit and should be denied.

Date: February 6, 2017

Respectfully submitted,

/s/ Matthew A. Smith

Matthew A. Smith

Alicia Roessler

*Attorneys for the Sierra Club Los Padres Chapter,  
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Alison Seel

*Attorney for the Sierra Club Los Padres Chapter*

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<sup>46</sup> TN # 215757.

<sup>47</sup> Staff Mot. at 3 pt. E.

<sup>48</sup> Ex. 4030 (TN # 215607) at 1.

<sup>49</sup> TN # 215607 (dated January 27, 2017).

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## DECLARATION OF

Brian G. Trautwein

I, Brian G. Trautwein, declare as follows:

1. I am a Staff Environmental Analyst & Watershed Program Coordinator at the Environmental Defense Center. I am providing this Supplemental Declaration in order to provide the California Energy Commission with further context in relation to my receipt of an email from California Coastal Commission Biologist Jonna D. Engel, dated January 26, 2017, that has been marked as Exhibit 4030.
2. For the last nineteen years I have, in the normal course of my job duties, contacted and worked with resources agencies, such as California Coastal Commission staff ecologists, on a broad range of land use projects. This includes corresponding with the staff of resources agencies in instances where the Environmental Defense Center has become involved in, or is contemplating becoming involved in, judicial or administrative proceedings. My understanding is that the agencies that I correspond with are public agencies that are responsible for responding to public inquiries of this nature.
3. My communications with resource agency staff typically occur over the telephone and by email. It is part of my official responsibilities as a Staff Environmental Analyst & Watershed Program Coordinator to maintain copies of emails that I receive from resource agency staff, including from the staff of the Coastal Commission.
4. On or about January 24, I spoke with Dr. Jonna Engel on the telephone. We discussed whether focused surveys for special status species had been conducted on the Project site. On January 24, I emailed Dr. Engel copies of Mr. Hunt's opening and rebuttal testimony in this proceeding that described the presence of ESHA and a dune swale on-site. Later that day, Dr. Engel called me. Mr. Joseph Street was also on the phone. We discussed Mr. Hunt's opening and rebuttal testimony as well as the content of the 30413(d) report, particularly with regard to ESHA, the presence of a dune swale wetland, and rare species. I asked if Dr. Engel could respond in writing about Mr. Hunt's findings and how they relate to the 30413(d) Report. Dr. Engel said that she would probably be able to do that and would work with Mr. Street to send an email responding to my questions in writing.
5. Based on our discussion during the January 24 call, on the morning of January 25, I emailed Mr. Street and Dr. Engel three questions regarding the 30413(d) Report and Mr. Hunt's conclusions. Dr. Engel responded to me by email and copied Mr. Street, stating that "we are working on" answers to the questions I had posed. She further wrote in the

same email, copying Mr. Street, that she would do her best to get her draft answers to Mr. Street and that Mr. Street would “review/edit them ASAP.”

6. At 4:17 pm on January 26, Dr. Engel responded with the email that appears in Exhibit 4030, copying Mr. Street. At no point in my correspondence with Dr. Engel and Mr. Street was there any indication that either they or the Coastal Commission were unwilling to have this email entered into the record.
7. The correspondence that I have described, and the email that is marked as Exhibit 4030, is typical of my correspondence with public resource agencies as part of my professional responsibilities as Staff Environmental Analyst & Watershed Program Coordinator.

I declare under penalty of perjury that the foregoing is true to the best of my knowledge and belief.

Dated: February 6, 2017



Brian G. Trautwein

Executed at: Santa Barbara, CA