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STATE OF CALIFORNIA
State Energy Resources
Conservation and Development Commission

In the Matter of:)
)
APPLICATION FOR CERTIFICATION)
OF THE PUENTE POWER PROJECT)
_____)

Docket No. 15-AFC-01

**INTERVENORS SIERRA CLUB LOS
PADRES CHAPTER,
ENVIRONMENTAL COALITION
OF VENTURA COUNTY AND
ENVIRONMENTAL DEFENSE
CENTER'S OPPOSITION TO
APPLICANT'S MOTION TO
STRIKE INTERVENORS'
PROPOSED EXHIBIT NO. 4039**

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On behalf of Intervenors Sierra Club Los Padres Chapter, Environmental Coalition of Ventura County, and Environmental Defense Center (“EDC”) (collectively, “Intervenors”), the EDC submits this Opposition to “Applicant’s Motion to Strike Intervenors Sierra Club Los Padres Chapter, Environmental Coalition of Ventura County and Environmental Defense Center Proposed Exhibit No. 4039” (“Motion”) (TN #220357). First, Intervenors object to the untimely manner in which this Motion was filed. The Motion was filed at the last minute, less than twenty-four hours before the start of the evidentiary hearing, and more than two months after the proposed exhibit was filed. Applicant failed to identify Mr. Trautwein as a witness in its Prehearing Statement and provide a summary of the scope of the questions, the issues to which the questions pertain, and the time to question the witness, as required by the Committee’s July 10, 2017, “Notice of Evidentiary Hearing and Related Orders.”

Additionally, Intervenors object to the Motion because the proposed exhibit is responsive to the Committee’s request for supplemental information regarding biological resources that may be impacted by the proposed Puente Power Project (“Project”). The purpose of this evidence is to ensure that the Committee is fully informed when it makes its decision on the Project.

Finally, Applicant mischaracterizes Mr. Trautwein’s declaration as expert testimony when in fact the purpose of the declaration was to authenticate the two photographs of silvery legless lizards that were filed as evidence. The expert opinion identifying the lizards was made by Mr. Lawrence Hunt, who will testify as a witness and be cross-examined by Applicant.

Accordingly, the Motion should be denied.

BACKGROUND

On March 10, 2017, the Committee issued “Orders for Additional Evidence and Briefing Following Evidentiary Hearings” (“March 10 Orders”) (TN #216505). Of relevance herein, the

March 10 Orders requested additional evidence pertaining to biological resources, including focused biological surveys to determine the likelihood for the presence of Ventura marsh milk vetch, Globose dune beetle, Two-striped garter snake, California legless lizard, and Blainsville's horned lizard. (TN #216505 at pp. 1-2) Applicant was directed to file a survey plan for party and public comment. (TN #216505 at p. 1)

Applicant filed the proposed "Applicant's Biological Resources Survey Methodology" ("Survey Methodology") on March 27, 2017. (TN #216716) On April 7, 2017, the Energy Commission Staff filed "Protocols for Surveying and Evaluating Impacts to Special Status Native Plant Populations and Natural Communities" ("Protocols"). (TN #216897) The Protocols state that "[a]djoining properties should also be surveyed where direct or indirect project effects, such as those from fuel modification or herbicide application, could potentially extend offsite." (TN #216897 at p. 3.) The California Coastal Commission also submitted comments recommending changes to the Applicant's proposed Survey Methodology. (TN #216908) The Coastal Commission recommended that the survey area be expanded to include, *inter alia*,

any habitat areas outside the MGS property boundary within 100 feet of the proposed and alternative site footprints with potential to support the target species. In particular, the dunes and vegetated areas to the west and north of the proposed project site should be included in the [Biological Survey Area], as these areas could represent 'source areas' for sensitive wildlife species venturing onto the project site. Surveys for all species should be conducted within the expanded [Biological Survey Area].

(TN #216908 at pp. 1, 2) This recommendation was necessary to comply with Coastal Act protections for environmentally sensitive habitat areas ("ESHA") and the City of Oxnard's Local Coastal Plan. Specifically, the Coastal Act provides that "[d]evelopment in areas *adjacent* to environmentally sensitive habitat areas and parks and recreation areas shall be sited and designed to prevent impacts which would significantly degrade those

areas, and shall be compatible with the continuance of those habitat and recreation areas.”

Ca. Pub. Res. Code § 30240(b), emphasis added. Accordingly, areas adjacent to the Project site were recommended for inclusion in the biological surveys.

On April 7, 2017, Intervenors submitted comments regarding the Applicant’s proposed Survey Methodology. (TN #216914) Similar to the Coastal Commission, Intervenors pointed out the need to expand the survey area to include offsite buffer areas. (TN #216914, Hunt comments at pp. 1, 3)

On May 12, 2017, Intervenors filed a “Submission of Additional Evidence of Rare Species.” (TN #217571) This submission consisted of a declaration by Brian G. Trautwein authenticating photographs of silvery legless lizards adjacent to the Project site. One of the lizards was observed just ten inches from the northern property line and fence, in the Project’s 100 foot buffer area. (TN #217571 at p. 1.) Applicant did not file an objection to the submission of this evidence.

On July 10, 2017, the Committee issued a “Notice of Evidentiary Hearing and Related Orders.” (TN #220100-1) (“July 10 Orders”) The July 10 Orders directed the parties to file Prehearing Statements no later than July 21, 2017, and to include in such Statements:

Subject areas upon which the party desires to question the other parties’ witness(es), a summary of the scope of the questions (including questions regarding witness qualifications), the issue(s) to which the questions pertain, and the time desired to question each witness. (Note: A party who fails to specify the scope, relevance and time for questioning other parties’ witness(es) risks preclusion from questioning witnesses on that subject area.)

(TN #220100-1 at p. 3)

On July 21, 2017, Applicant filed its Prehearing Statement. (TN #220308) Under the heading, “Biological Resources,” Applicant asserted a disagreement with aspects of Intervenors’ July 14, 2017, submission of “Lawrence Hunt Supplemental Testimony” and included Mr. Hunt

in its list of other parties' witnesses that it intended to question. (TN #220308 at pp. 3, 10.)

Nowhere in the Prehearing Statement did Applicant raise any concerns about Intervenors' May 12, 2017, "Submission of Additional Evidence of Rare Species" or identify Mr. Trautwein as someone that Applicant intended to question. Accordingly, Mr. Trautwein is not listed on the Committee's list of witnesses. (TN #220359)

ARGUMENT

Applicant's last-minute Motion should be denied because it raises new issues and concerns that should have been raised long ago. In particular, the Motion should be denied because these concerns were not raised in Applicant's Prehearing Statement. In addition, the Motion should be denied because the proposed evidence is well within the scope of the hearings pertaining to biological resources, and is necessary to ensure that the Committee can consider all relevant information before making a decision regarding the Project's potential impacts to such resources. Moreover, it is inconceivable how Applicant could state that Intervenors do not intend to make a declarant available as a witness when the Applicant itself did not identify the declarant as a potential witness in its Prehearing Statement. Finally, Applicant mischaracterizes Mr. Trautwein's declaration as expert testimony when in fact it was filed solely to authenticate photographs depicting the presence of the silvery legless lizard next to the Project site.

I. APPLICANT'S MOTION TO STRIKE IS UNTIMELY

As evidenced above, Applicant has had well over two months to object to Intervenors' submission of evidence regarding the presence of the silvery legless lizard. Not only did Applicant fail to object to the submission in a timely manner, but the Applicant also failed to include this issue or identify Mr. Trautwein as a potential witness in its Prehearing Statement. As noted above, the July 10 Orders required the parties to identify all witnesses, including witnesses

they intended to cross-examine, in their Prehearing Statements. (TN #220100-1) The July 10 Orders state that a party “who fails to specify the scope, relevance and time for questioning other parties’ witness(es) risks preclusion from questioning witnesses on that subject area.” (*Id.* at p. 3)

Rather than raise its concerns in a timely manner, Applicant instead filed its Motion to Strike less than twenty-four hours before the commencement of the hearing. Applicant has failed to follow the established protocols for ensuring an orderly, well-prepared hearing process.

Accordingly, Applicant’s Motion should be denied.

II. THE PROPOSED EVIDENCE IS RELEVANT AND MATERIAL TO THE PURPOSE OF THE REQUIRED ADDITIONAL BIOLOGICAL SURVEYS

The March 10 Orders were issued to address inadequacies and gaps in the biological surveys for the proposed Project, and to ensure a complete analysis of the Project’s potential impacts on biological resources. This information is critical to informed decision-making.

As set forth in the Protocols and Coastal Commission recommendations described above, the Project’s impacts to biological resources are not necessarily limited to on-site species and habitats. The Coastal Commission recommended surveys extending 100 feet from the Project and Alternative sites in order to inform the Committee regarding the full scope of potential impacts. (TN #216908, pp. 1-2) As noted by the Coastal Commission, the Coastal Act requires that indirect impacts to environmentally sensitive habitats be identified and prevented. Ca. Pub. Res. Code § 30240(b). Nothing in the Committee’s March 10 Orders precludes this analysis, and to do so now would deprive the Committee of the full suite of information necessary to make a sound decision.

Energy Commission staff appears to agree. On July 21, 2017, the staff filed a document titled “Puente Power Project Biological Resources Illustrative Figures for Presentation at Evidentiary Hearing.” (TN #220289) These figures depict the 100-foot buffer area on the

northern property boundary where one of the silvery legless lizards was found. This area is critical to the Committee's decision-making. The Orders explicitly identified additional species which could be impacted by the proposed Project; to limit evidence of such impacts would undermine the very purpose of the Orders.

Despite the clear relevance of this information, Applicant bemoans the fact that the evidence is beyond the scope of the Orders. (TN #220357 at pp. 2-3) And yet, the Applicant itself raised new information regarding the on-site wetland delineation which *is* beyond the scope of the Committee's Orders. (TN #219898) On the contrary, information regarding the presence of a species that was specifically identified in the March 10 Orders is relevant to the evidentiary hearings because it relates to potential impacts to that species.

III. APPLICANT DID NOT IDENTIFY THE DECLARANT AS A WITNESS AND CANNOT NOW CLAIM THAT INTERVENORS DECLINED TO MAKE HIM AVAILABLE.

Intervenors first note that it is too late to call a witness that was not identified in the Prehearing Statements. (TN #220100-1 at p. 3) On July 21, 2017, Applicant submitted its Prehearing Statement and identified twelve witnesses for cross-examination. (TN #220308 at pp. 10-11.) The declarant, Brian G. Trautwein, was not listed. It is unreasonable to identify a new witness for cross-examination less than twenty-four hours before the hearing. Applicants are fully aware that Intervenors are busy preparing for the hearing schedule and witnesses already identified in the Committee's Orders and the Prehearing Statements. Moreover, it is disingenuous for Applicant to state that Intervenors have "declined" to make the declarant

available (TN #22037 at pp. 4-5) when the Applicant never identified him as a witness. This inexplicably tardy request must be denied.¹

Additionally, Applicant mischaracterizes the declaration. Mr. Trautwein's declaration was prepared to authenticate evidence – two photographs – and was not submitted to provide an expert opinion. The actual identification of the lizards was conducted by Mr. Lawrence Hunt, who is already listed as a witness and will be cross-examined for sixty minutes by Applicant. (TN #217571, Declaration of Brian G. Trautwein at paragraph 10.) Moreover, the declaration already addresses the issues identified in the Motion, in that it describes the process by which Mr. Trautwein observed the lizards and the precise location of the lizards.

CONCLUSION

Applicant's Motion to Strike should be denied because it is untimely and because the issues raised were not identified in Applicant's Prehearing Statement. The evidence presented in Intervenor's May 12, 2017, filing is relevant to the Committee's inquiry regarding potential impacts to the silvery legless lizard. This evidence will help inform the Committee's ultimate decision. Accordingly, Intervenor respectfully request that the Committee deny Applicant's Motion to Strike.

Dated: July 25, 2017

/s/

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¹ To the extent Applicant complains that Intervenor did not list Mr. Trautwein as a witness, this complaint is disingenuous because the Applicant did not list several biologists who conducted studies that were part of the Final Biological Resources Survey Report.