

DOCKETED

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Project Title:	Carlsbad Energy Center - Compliance
TN #:	204446
Document Title:	Robert Sarvey's Response to Applicant's Motion to Supplement the Evidentiary Record
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**BEFORE THE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT
COMMISSION OF THE STATE OF CALIFORNIA**

Petition to Amend
The Carlsbad Energy Center

Docket Number 07-AFC-06C

**Robert Sarvey's Opposition to the Motion of Carlsbad Energy for submission of the I-5
Widening FEIS/FEIR as an exhibit in this proceeding.**

Introduction

Pursuant to the April 27, 2015 Committee direction Robert Sarvey files opposition to Carlsbad Energy's motion to make the Interstate 5 North Coast Corridor Project FEIS/FEIR (TN 204378) an exhibit in this proceeding.

The project owner has not demonstrated good cause for his motion.

On April 24th the applicant Carlsbad Energy filed a motion to make the Interstate 5 North Coast Corridor Project FEIS/FEIR an exhibit in this proceeding. The applicant's motion to supplement the record comes over three weeks after the close of the evidentiary hearings. The applicant provides no good cause for his request to reopen and supplement the record. The only reason the applicant provides for its 11th hour request is that, "*At the CECP Evidentiary Hearings, Staff's visual resources expert, Dr. William Kanemoto, provided testimony regarding the potential impacts of I-5 widening on the CECP.*" Dr. William Kanemoto extensively discussed the impact of the I-5 widening project in his testimony in the Staff's PSA which was issued on 12-15-2014 over four months before the applicant's request that the FEIS/FEIR be included in the evidentiary record. Mr. Kanemoto lists the Interstate 5 North Coast Corridor Project FEIR/FEIS as a reference to his testimony on page 4.13-51 of the PSA.

The Interstate 5 North Coast Corridor Project Draft Environmental Impact Report/Environmental Impact Statement ("DEIR/DEIS") was published for the I-5 project after the evidentiary hearings in the licensed CECP occurred.¹ The visual impacts from the I-5

¹ 2012 Final Commission Decision Page 172 of 582

widening project were a controversial portion of the licensed CECP proceeding and the Draft EIR was discussed at great length in the original 2012 decision. The impacts of the I-5 widening are not a new topic.

The FEIS/FEIR for the I-5 widening was issued in 2013. At the project informational hearing on August 7, 2014 the I-5 widening impacts were discussed.² The applicant filed his testimony for the evidentiary hearing on February 10, 2015 and discussed the I-5 widening issue but did not offer the FEIS/FEIR at that time. The applicant filed his prehearing conference statement and exhibit list on March 13, 2015 and mentioned the I-5 widening issue in the filing but did not offer the Interstate 5 North Coast Corridor Project FEIS/FEIR at that time or request official notice of the document.³ The prehearing conference was held on March 18, 2015 and the applicant did not offer the I-5 FEIS/FEIR. Testimony and exhibits were due on March 13, 2015 but the applicant failed to offer the document then. Rebuttal testimony and exhibits were due on March 27 but still the applicant failed to enter the FEIS/FEIR as an exhibit in his exhibit list.⁴ The evidentiary hearings were held on April 1 and 2, 2015 and the I-5 widening was extensively discussed but the applicant failed to offer the document as an exhibit during the hearing. The morning of April 24th the very day briefs were due at 1:00 PM the applicant began to enter sections (TN 204341- TN 240348) of the Interstate 5 North Coast Corridor Project FEIS/FEIR into the docket log. The majority of the sections docketed were not entered into the docket log until after the 1 PM deadline for briefs.(TN 204368-204378)⁵

Acceptance of the Interstate 5 North Coast Corridor Project FEIS/FEIR as an exhibit would be prejudicial to the other parties.

Allowing this document into the record at this time would be extremely prejudicial to the other parties in the proceeding. The applicant submitted the majority of the document into the docket log hours after the briefs were due at 1:00PM on April 24th. The applicant demonstrates no good cause for doing so as the document was referenced by Mr. Kanemoto in his testimony in the PSA in December. The document should have been offered as an exhibit for the evidentiary hearing so parties could have utilized it at the evidentiary hearing and in their briefs.

Parties were held to a much higher standard at the evidentiary hearing. At the evidentiary hearing I presented an email from myself to Dr. Moore of the SDAPCD to ask him some questions about it. Mr. Ratliff the Staffs attorney objected stating:

“And I would also say that the Committee has previously notified parties that documents will be prefiled. I don't like to receive a document when the

² TN 202995 8/27/2014 [Transcript of the August 7, 2014 Informational Hearing](#) Page 30 of 90

³ [Project Owner's Prehearing Conference Statement](#) Page 4 of 8 “ Project Owner does not intend to request that the Committee take official notice of any documents.” Page 7 of 8

⁴ [Project Owner's Revised Exhibit List](#)

⁵ TN 204368 was entered at 1:08 PM and the last section TN 204378 was docketed at 4:48 PM

panel has already been placed before us with the assumption that it is either fair or reasonable to expect cross-examinations to be based on new documents that are handed out at the hearing, so I do object when we have no context or any narrative accompanying this document. I don't think it would be consistent with the instructions that you have given us or with common fairness to allow that.”⁶

Mr. Mckinsey the author of this motion to supplement the evidentiary hearing was in agreement with Mr. Ratliff:

“ But if it was something that a party thought was relevant, then that should be something that was included in their exhibits and in their testimony so that the parties could be prepared for it. I'd have to say that just defies the basic procedural concept that you can't cross-examine about something that isn't there, it has to be an exhibit and all the parties have to be prepared to handle it, and we're not.”⁷

The hearing officer rejected my exhibit and would not even allow me to ask questions about it to DR. Moore who the email was addressed to:

However, that doesn't deal with its admissibility. Mr. Sarvey, the response -- or the question you need to answer is to explain to us why you could not have offered this as either your original testimony, because I think the deadline was March 13th, or at least by March 27th for the rebuttal testimony, why you could not have docketed it at that point. If you can satisfactorily answer that question, then perhaps it can be let in as an exhibit. If not, we'll exclude it and, for all purposes, including the purpose of asking questions of the witnesses.⁸

Conclusion

The applicant does not demonstrate good cause for allowing the Interstate 5 North Coast Corridor Project FEIS/FEIR to be submitted as an exhibit in this hearing. The applicants has had months to submit this document and failed to do so. Despite that the applicant went ahead and docketed it the day briefs were due and used it as though it was evidence in his opening brief. The other parties were prevented from using the document during the evidentiary hearings or in

⁶ [Transcript of April 2, 2015 Evidentiary Hearing](#) Page 59 of 283 Lines 16-15 and Page 60 Lines 1-5

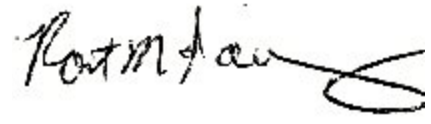
⁷ [Transcript of April 2, 2015 Evidentiary Hearing](#) Page 61 of 283 Lines 7-10 and Lines 15-19

⁸ [Transcript of April 2, 2015 Evidentiary Hearing](#) Page 61 of 283 Lines 23-25 and Page 62 Lines 1-9

their briefs. The document was not presented at the evidentiary hearing nor was a representative of CALTRANS provided.

The committee set up strict ground rules for submitting evidence. The applicant could have provided it as an exhibit on March 13th or March 27th but failed to do so. Other parties were held to that standard. It would be prejudicial and an abuse of discretion to allow this document to be submitted as an exhibit in this proceeding. The applicant should be admonished for attempting to do so.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Robert Sarvey", written in a cursive style. The signature is positioned above a horizontal line.

Robert Sarvey 4-29-15