

## DOCKETED

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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 SIMPSON'S PETITION FOR RECONSIDERATION OF DECISIONS TO  
LICENSE THE CALRSBAD ENERGY CENTER AND MOTIONS TO REOPEN THE  
EVIDENTIARY RECORD AND RESTORE MY INTERVENTION RIGHTS.**

**Introduction**

**Intervenor Simpson hereby files this petition for reconsideration of the California Energy Commission's approval of the Amended Carlsbad Energy Center 07AFC-06C. Section 1720** of the Commission's regulations allows any party in a power facility certification case to file a petition for reconsideration of a decision or order, within 30 days after a determination is final. **Petitions for reconsideration are governed by Section 1720. Section 1720 provides:**

**(a)** Within 30 days after a decision or order is final, the Commission may on its own motion order, or any party may petition for, reconsideration thereof. A petition for reconsideration must specifically set forth either: 1) new evidence that despite the diligence of the moving party could not have been produced during evidentiary hearings on the case; or 2) an error in fact or change or error of law. The petition must fully explain why the matters set forth could not have been considered during the evidentiary hearings, and their effects upon a substantive element of the decision. In addition to being served on all parties as required by section 1210, the petition for reconsideration shall be filed with the chief counsel of the commission.

**(b)** The commission shall hold a hearing for the presentation of arguments on a petition for reconsideration and shall act to grant or deny the petition within 30 days of its filing. In the absence of an affirmative vote of three members of the commission to grant the petition for reconsideration, the petition shall be denied.

**(c)** If the commission grants a petition for reconsideration, or if on its own motion it orders reconsideration, then within 90 days, or within a longer period set by the commission for good cause stated, the commission shall hold a subsequent hearing, which may include the taking of evidence, and shall decide whether to change the decision or order. In the absence of an affirmative vote of three members of the commission to change the decision or order, it shall stand.

(d) The commission may stay the effective date of all or part of a decision or order pending reconsideration thereof. The commission shall specify the length of the stay, which shall expire no later than the end of the period for action upon reconsideration, as established in or pursuant to subdivision (c) of this section.

The CEC approved the project which effectively overrides the Coastal Act, Carlsbad Habitat Management Plan (HMP), Endangered Species Act and Coastal Zone Management Act (CZMA). The height of the structures and plumes, noise and light from the project all contribute to violations of the HMP. The emissions from the project are planned to be emit with a velocity, volume, temperature and with pollutants which will result in a closure of the airspace over the coastal zone. Scenic coastal flights will be restricted as well as California Highway Patrol and lifeguard helicopters that historically regularly fly within close proximity of the site during patrol of state highways and beaches. Air traffic may be further redirected to create another coastal impact. The 700 degree 80 mile an hour plumes intermitently emit from 6 new smokestacks directly adjacent to scenic Highway 1 will also incinerate any avian species that crosses its path.

The site basically bisects the inner and outer AGUA HEDIONDA LAGOON creating an ongoing death trap for endangered species trying to navigate the lagoon. This is a modification of an earlier approved project. A massive web of new power lines are proposed in the coastal zone and HMP zone despite the CEC "Solicitation For Agency Participation in the Review of Amendment Requests to the Licensed Carlsbad Energy Center Project 7/17/2014" (including the Coastal Commission) stating; "Transmission components and alignments will not be modified from the licensed CECP." This represent a threat to avian species and violations of the above referenced laws. Adequate evidence of a potential impact exists, it is a travesty that the committee failed to consider it and that the commission failed to require staff to demonstrate the effects of the impacts.

These issues could not have been raised during the Commission Business meeting because the Commission failed to turn on my microphone so that I could address these issues. Despite repeated calls and informing the operator, email communications with the public advisor during the meeting (exhibit 1) and diligently remaining on the phone until the very end. The commission never addressed me or allowed my microphone to be turned on again after my initial comments. This was just the last in a long line of prejudices against my participation. After full intervention in the original proceeding, the new proceeding commenced without notice to me. Upon my discovery of the amended proceeding I was informed that somehow I was no longer an intervenor and had to reapply. Despite virtually the same intervention petition that I used in the original proceeding and significant participation in all areas, I was denied full intervention.

It was probably because I caught Commissioner Douglas and filed a complaint in the Mariposa Proceeding in what should have been prohibited exparte conversations with PG&E during a break from the original hearings in the hallway. Subsequently she allowed PG&E to speak on the record for the proceeding without being sworn in or being subject to cross examination. I was also probably prejudiced for my history of proving the Commissions decisions regarding power plants to be

illegal. After the original proceeding for this project I litigated until the EPA admitted that a PSD permit determination was required for this facility.

It may also have been because I discovered Commissioner Weisenmiller conspiring with PUC Commissioner Peevy in another proceeding<sup>1</sup> which ultimately led to investigation by the Department of Justice and Peevy's ouster. It is shocking to me that Weisenmiller is still a Commissioner. He should have been arrested by now or at least put out to pasture like Peevy was from the PUC when I discovered the conspiracy. He can go back to openly representing the fossil fuel industry. He never seems to be able to resist the urge to point out, or even boast about his bias. On the transcript he states; "I did billions of dollars of due diligence for the banks on projects."

Commissioner Weisenmiller is thoroughly entrenched in his archaic ways. He even lambasted his fellow commissioner for the mere suggestion that plants should modernize. He essentially told him his assumption that some smooth talking carpet bagger must have secretly sold him a bill of goods and that we don't need no newfangled clutch technology. Commissioner Hochschild responded: "Yeah and thank you Mr. Chairman. And just, in response, no. No vendor came and contacted me. I did my own research."

Commissioner Weisenmiller's ignorance of the clutch technology was particularly troubling because the research Commissioner Hochschild completed may very well been a review of literature purportedly authored by Commissioner Weissenmiller which stresses the importance of synchronous condensers and the GHG benefits thereof In; 2014 Energy Commission Priorities 2014 Energy Commission Priorities At a Glance January 22, 2014 Chair Robert B Weisenmiller<sup>2</sup> *and* Electricity Generation in California Chair Robert B. Weisenmiller California Energy Commission Robert.weisenmiller@energy.ca.gov University of California, Los Angeles April 21st, 2014<sup>3</sup>

Commissioner Weissenmiller's reports stress the importance of Synchronous Condensers in the region, pointing out that the devices are important for Contingency response and Voltage support (VARs), They also have medium GHG emissions. Both reports state; "[1] The GHG attributes of storage and synchronous condensers depend on the energy used from the grid"

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<sup>1</sup> <http://www.sandiegouniontribune.com/news/2015/feb/28/peevey-rallied-pio-pico-approval/>

<sup>2</sup> <http://www.energy.ca.gov/2014publications/CEC-999-2014-001/CEC-999-2014-001.pdf>

<sup>3</sup> <http://www.energy.ca.gov/2014publications/CEC-999-2014-003/CEC-999-2014-003.pdf>

It is incredible that Weisenmiller and Douglas both lectured during the meeting on Bagley Keene and ex parte issues in light of their records. Perhaps the stenographer had it more accurate in the spelling of their comments, bag-leaking and ex-party. I confirmed with the public advisor that the business meeting was opportunity to “influence the Commission” Exhibit 2

The Commission turned its own rules and Bagley Keene on their heads during the business meeting. Regarding Bagley Keene; In effect, the Legislature said that when a body sits down to develop its consensus, there needs to be a seat at the table reserved for the public. (§ 11120.) By reserving this place for the public, the Legislature has provided the public with the ability to monitor and participate in the decision-making process. There was no opportunity to influence the Commission. There should be the opportunity for meaningful public participation, instead the Commissioners implied that every public statement was untimely and that the commission had no choice but to accept the PMPD as is. My comments did not get the consideration that they warranted. The Commission played the same game against its own commissioner. The rules state;

**§ 1754. Hearings on Presiding Member's Proposed Decision.**

(a) Adoption hearings on the presiding member's proposed decision or the revised proposed decision, if any, shall be held before the full commission after the comment period on the presiding member's proposed decision. The hearing shall be conducted for the purpose of considering final oral and written statements of the parties and final comments and recommendations from interested agencies and members of the public. The hearing(s) on the presiding member's proposed decision may be the same hearing as the one to consider the final decision. If a revised decision is issued as provided in Section 1753, the presiding member may schedule additional hearing(s) before either the committee or the full commission prior to or at the same time as the final commission adoption hearing.

(b) The chairman may require that certain statements by parties and other persons be submitted in writing in advance of the hearings. The commission shall not consider new or additional evidence at the hearings under this section unless due process requires or unless the commission adopts a motion to reopen the evidentiary record. In such case, the commission shall afford such notice to the parties as is fair and reasonable under the circumstances.

(c) Any member may propose an alternative decision, including supporting findings

and conclusions. Such alternative may also be considered at the hearings under this section but need not be acted upon until the commission makes its final decision.

Note: Authority cited: Sections 25218(e) and 25541.5, Public Resources Code. Reference: Section 25522, Public Resources Code.

Each of my filings and comments throughout this process has been essentially ignored. When the hearing officer summarized the party's positions at the beginning of the business meeting, my position was not summarized. I was not allowed to opine or question the surprise biological witness that the Commission put on in the business meeting but everyone else was allowed to fully participate in the business meeting being recognized by the Commission and speaking freely.

The whole argument against consideration of the clutch technology was that it had not been raised previously (excerpts below), this is an error of fact. I had raised the issue and motioned that the CEC deny the project based upon the lack of its incorporation on June 3, 2015, as soon as practical after the June 2, 2015 introduction of the PUC decision, and the CEC dismissed my concerns on June 10<sup>4</sup>. The Committee seemed to have no recollection of this action just a month and a half earlier which was signed by Douglas and filed by Kramer. The Commission should ask itself. If the committee and hearing officer have such little knowledge of the record of the proceeding and the commission has not reviewed the evidence, can it really support the notion that a higher polluting 6 smokestack over 2, double plume velocity, closer to the protected habitat project should have no consideration of the increased impacts? The Commission should take a hard look at the record and realize that there is ample other evidence, as described in the 60 Day Notice of Intent to Sue, that I hereby incorporate into this Motion, which the Committee ignored or conveniently forgot. If I was allowed to participate I would have raised these facts.

The fact is that the PUC ordered that the clutch issue be considered and the CEC is the only regulatory body, at the state level, with authority to consider it. The project proponent failed to seek CEC consideration of the issue so the project should be denied. No other basis for not conditioning the project on the clutch technology was discussed beyond the assumption that the issue had not been raised before. Even, if it had not been raised before the commission could have simply added the condition pursuant § 1754 b. The repeated contentions that issues raised before the commission meeting are not timely and therefore ignored undermines Bagley Keene, due process, and the first amendment of the United States. The business meeting transcript states;

CHAIRMAN WEISENMILLER: NRDC -- raised the question of putting in clutch technology. Is there anything in this record

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<sup>4</sup> [http://docketpublic.energy.ca.gov/PublicDocuments/07-AFC-06C/TN204877\\_20150603T095657\\_Carlsbad\\_Motion\\_to\\_Deny.pdf](http://docketpublic.energy.ca.gov/PublicDocuments/07-AFC-06C/TN204877_20150603T095657_Carlsbad_Motion_to_Deny.pdf)

[http://docketpublic.energy.ca.gov/PublicDocuments/07-AFC-06C/TN204969\\_20150610T162109\\_Committee\\_Order\\_Denying\\_Robert\\_Simpson's\\_Motion\\_to\\_Require\\_Amen.pdf](http://docketpublic.energy.ca.gov/PublicDocuments/07-AFC-06C/TN204969_20150610T162109_Committee_Order_Denying_Robert_Simpson's_Motion_to_Require_Amen.pdf)

dealing with that issue? MR. KRAMER: The only mention is in the Public Utility Commission Order approving the 500 megawatt PPTA

MR. MCKINSEY: And if this question comes up in a proceeding early on and is something that is then analyzed for, you have the potential to modify the project. And even if you get a project at a late stage where it came up, it would be possible. But the issue that we have with this particular project is that the project has to be already be in its final design and procurement stages in order to meet the obligations that it now has, under its procurement. And so, the challenge from a timing perspective as opposed to a macro-commitment, say by NRG and I think even perhaps by the Commission, to make this a component of ongoing and future AFC Analysis is the timing component that's present here -- that this is being raised. As was noted, it was a one-sentence comment in the PPTA and Decision. And it's being made as a public comment at the approval hearing by the Commission. It's not a comment that was raised by a member of the public or a party a month ago, two months ago, six months ago. It appeared for the first time today. And that puts a significantly tough timing pressure on this particular project. That doesn't reflect at all, I think, on NRG's ability and commitment to do exactly what you described. and I even think your comments reflect some instruction on how maybe, things should be done differently, starting right now, in order to evaluate and make this a component of something that has to be proven that it can or can't be included in projects going forward. But the timing issue here would be very difficult to include.

COMMISSIONER HOCHSCHILD: Well, I appreciate those comments, but to be perfectly frank, I don't think that your company is treating this with the urgency that it requires. And the response just a few minutes ago about nobody could even identify what research has been done, I think President Picker and Commissioner Florio were absolutely right to raise this issue and I'm raising it again today. Because this is for me, as the environmental member in particular, not some extra issue, okay? This is a threshold issue. In fact, I'm not going to be able to support the project today absent a satisfactory response....

CHAIRMAN WEISENMILLER: Yeah. No, I certainly appreciate and share Commissioner Hochschild's issues on the urgency. My problem is we have no evidentiary record. and we were in a situation where, as I understand it, he would say, "You can't build the plant unless you do this," while the PUC has said, "Investigate the feasibility." And it may not be feasible. I assume some vendors came in and gave you the speech about the hardware, which has not been subject to any evidentiary hearing. ...

COMMISSIONER DOUGLAS: And in fact, there are bag-leaking issues and there are ex-party issues and communication with the

Energy Commission. And the committees on a case must happen in a Noticed Public Meeting on the case. And it hasn't on this issue, until today. And I think that's the issue that -- and that is how I see it. I think that this is the kind of the thing that the Commission is very receptive to. But, as the Chair points out, we don't have an Evidentiary Record. We know that the PUC has required a study. We are encouraged by that, based on what we know. But that is not a sufficient basis, I think, for us to put forward a condition that the project only be allowed to go forward if it includes this technology.

COMMISSIONER DOUGLAS: Chairman Weisenmiller, your comments reminded me of a couple of additional comments I wanted to make. you know, one is as you said, the fact that I am prepared in a few moments when we've completed our discussion, to make a motion to approve this project. And to refrain from the invitation or the temptation to add a last-minute condition requiring the clutch, because I don't think it's appropriate given the level of record that we have...

CHAIRMAN WEISENMILLER: NRDC -- raised the question of putting in clutch technology. Is there anything in this record dealing with that issue? MR. KRAMER: The only mention is in the Public Utility Commission Order approving the 500 megawatt PPTA... (emphasis added)

The Clutch technology should be incorporated into a BACT analysis for GHG because it will make the plant more efficient, clean and responsive to renewable resources. Claims that the project is too far along or ready for construction as a basis for not requiring the clutch technology are unfounded. If they were in such a hurry they could, ostensibly, build the plant that is already licensed. Or they could build the environmentally superior design that I proposed which offers that same MW's and better meets all the needs in the location. The FSA agreed with my contention and concluded; "Construction of the original project, augmented with 92 MW of battery storage, compared to the amended project, would result in an improvement in air quality as plant dispatch could be co-optimized with storage injections and removal to provide energy from a more efficient generation resource with fewer start-ups and less cycling." As it sits it will be years of demolition before the new plant is scheduled to be constructed. If, the CEC conditioned the development on incorporation of the clutch technology, (which is akin to the battery suggestion) it would not delay construction at all. Additionally if the developer found the clutch to be infeasible they could come back for another amendment, the very limited scope should ensure a rapid response and still not delay the project. They should not get a free pass just because they failed to conduct the analysis that the PUC required, instead they should be motivated to complete the analysis.

CEQA Guidelines Section 15088 (a) states, "*The lead agency shall evaluate comments on environmental issues received from persons who reviewed the draft EIR and shall prepare a written response. The Lead Agency shall respond to comments received*



*during the noticed comment period and any extensions and may respond to late comments”*  
My written and oral comments received no meaningful consideration or response, the transcript states; “MR. KRAMER: Yeah. I just received, along with you, the printed version of Mr. Simpson's comments this morning and I've been able to skim them...MR. KRAMER: we don't agree, as the project owner, with anything that Mr. Simpson advocates for in this document. And we don't agree with a significant amount of its premises, assumptions or statements of fact; that we believe are not fact, but are opinion and that we don't agree with...The verbal comments this morning do not match, they don't go as far, and they don't cover the same scope of topics that the written document does. But we disagreed with the premises and conclusions made by those comments and don't feel there is any need to make any changes whatsoever to the Errata, as a result of those comments....One example of where he has basically added to what he previously said. In a previous set of comments he just simply referred to the Ivanpah facility. Now he's got a whole excerpt from one of the Ivanpah reports to talk about the effects on birds. But again the Ivanpah is solar flux, which is a very different phenomenon than upwardly drifting exhaust from a gas turbine and not comparable.”

The Hearing officer claiming that Ivanpah's heat killing birds is a different phenomenon that Carlsbad's heat killing birds is not scientific evidence. He has not claimed to be an expert on plume v flux heat killing birds. The comment should be given no weight by the commission.

The CEC did not rely on the analysis and opinion of experts or employ the best evidence available. Kramer's misguided statement ignores the ample evidence that I have provided identifying the similarities. Actual scientific evidence would include the opinion of Dr. Longcore's that “accidental flight through high-temperature plumes is comparable with “solar flux” His letter, which has not been disputed, it states;

“As a scientist interested in bird collision issues and anthropogenic avian mortality in general, I am unaware of any published studies addressing the impacts of high-velocity, high-temperature thermal plumes on birds, especially in sensitive locations such as next to wetlands. The information put forth in the Final Staff Assessment is unconvincing, especially because the main focus of the reference cited in support of the evaluation has to do with raven attraction to thermal plumes and not the potential for accidental flight through high-temperature plumes causing injury or death, such as what occurs when birds encounter the solar flux at concentrating solar power plants (McCrary et al. 1986, Kagan et al. 2014). No information is presented on the effects of thermal plumes from gas-fired power plants on small passerines, shorebirds, waterbirds, waterfowl, or bats, all of which might attempt to fly over the project site.”

The CEC has ample evidence in other proceedings that solar flux impacts are temperature related impacts, just like Carlsbad. In Hidden Hills<sup>5</sup> CEC biological staff

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<sup>5</sup> [http://www.energy.ca.gov/sitingcases/hiddenhills/documents/2013-02-15\\_CEC\\_Staffs\\_Rebuttal\\_Testimony\\_TN-69558.pdf](http://www.energy.ca.gov/sitingcases/hiddenhills/documents/2013-02-15_CEC_Staffs_Rebuttal_Testimony_TN-69558.pdf)

testified; “many types of adverse effects would be expected to occur at lower temperatures (i.e. lower flux exposures)...8. Question: Do birds have any physiological or sensory capabilities that would allow them to sense or control the temperature rise that is occurring in their flight or tail feathers as the result of exposure to increasing radiant flux levels? Answer: No. The flight feathers are essentially dead tissue like human hair or nails. There is no physiological mechanism available in avian species to increase cooling on primary and tail feathers...For the reasons explained in great detail below, birds will begin to experience abnormal levels of heat stress as soon as they enter a region that adds energy to their body systems that approaches the upper end of their normal operating core temperature range and certainly when that temperature exceeds their critical thermal maximum, both of which would be experienced soon after entering a region of elevated solar flux...The situation that concentrated solar flux places the bird in, is simply not anticipated by its natural response mechanisms to thermal stress...The Tucker study presents data that support our contention that birds will begin to experience abnormal levels of heat stress as soon as they enter a region that adds energy to their body systems that approaches the upper end of their normal operating core temperature range and certainly when that temperature exceeds their critical thermal maximum, both of which would be experienced soon after entering a region of elevated solar flux. A bird in flight near its thermal maximum can tolerate little additional stress (especially in the form of added heat). Thermal maxima for most bird species is around 42 °C and may be as high as 47 °C in only a few species...The PSEGS project will introduce several factors which could result in mortality, morbidity, and reduced reproductive success in birds and bats, and to insects. Potential impacts of the operating facility to birds, bats, and insects include physical injury resulting from collision with power towers, heliostats, or other project infrastructure features; electrocution; and disorientation (disturbance from lighting, mirror reflection, etc.). Ocular damage, hyperthermia and, depending on period of exposure and level of flux, burning and other heat-caused damage to internal and external body parts, as well as residual damage (morbidity) may occur to bats, birds, or insects that enter the airspace over the heliostat field where elevated solar flux exists. (Ex. 2000, p. 4.2-150.)...Risk of burning was evidently higher for aerial foragers (swifts and swallows) because of their feeding behavior. ..Although several features of the PSEGS facility impose additional threats that were not found with the PSPP (e.g., power towers, large mirror arrays, generation tie-lines), staff testified that the virtually invisible but very large fields of elevated solar flux may be the greatest of these threats to migrant and resident birds. (Ex. 2000, pp. 4.2-155 – 4.2-156.)...Species with the greatest potential to suffer adverse effects resulting from exposure to elevated levels of solar flux are expected to include members of two

families: swallows (Family: Hirundinidae) and swifts (Family: Apodidae)<sup>6</sup>. Emphasis added

## In the CEC; METHODOLOGY TO ESTIMATE AVIAN EXPOSURE TO CONCENTRATED SOLAR RADIATION

“The principle of thermodynamic equilibrium can be used to calculate the feather surface temperature at any radiant flux density given an ambient air temperature, flight speed of the bird, view factor, and applicable properties of air. This is the method that staff used to estimate surface temperatures resulting from avian exposures to different incident flux densities.”<sup>7</sup>

It is incredible that the CEC conducts avian/temperature related analysis for proposed solar facilities, which are isolated in the desert, but refuses to give serious consideration to the effects in the middle of an avian sanctuary and exacerbated by the velocity of an 80 mile per hour impact. The Transcript states; Mr. Kramer: “at this stage, being an amendment, already having a previous EIR, we need a good reason to reopen and redo the analysis -- re-perform it. And in the Committee's opinion, Mr. Simpson has not provided any rationale for us to conclude that we need to do so.” This is completely false. I have provided ample rationale for any reviewing body to understand that the impacts from the amended project are exponentially higher than the impacts from the prior approved project. Again there has been no consideration of my comments merely dismissal without basis.

The Commission examined testimony from a new rebuttal witness to my comments. Anwar Ali testified, after which Chairman Weisenmiller repeatedly made sure that it was clear that this was testimony from a witness and not merely a commenter, as he described all others. He stated; “Commissioners, do you have any questions to this witness on avian? Or noise? Or any questions for this witness, I guess I should have been more precise?” Mr. Ali had not previously testified as a witness in this proceeding. The Commission declined to reopen the evidentiary record on my motion but then reopened it without motion in violation of Section 1754 b The commission shall not consider new or additional evidence at the hearings under this section unless due process requires or unless the commission adopts a motion to reopen the evidentiary record. In such case, the commission shall afford such notice to the parties as is fair and reasonable under the circumstances.

The transcript states; “MR. ALI: With regard to the comments regarding the -- Mr. Simpson's comments on thermal plume we have addressed it in our analysis. And we did not see any -- there is no literature that supports what he claimed, that there are going to be thermal plumes that are going to be having impacts on the avian. So we looked at it. There are some -- there are reports from all the projects -- there being there is a report here that we looked at many projects. And there is no

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<sup>6</sup> Swallows and swifts are very closely related to the California Gnatcatcher

<sup>7</sup> [http://www.energy.ca.gov/sitingcases/riomesa/documents/2012-10-30\\_Solar\\_Flux\\_Appendix\\_Equations\\_TN-68266.pdf](http://www.energy.ca.gov/sitingcases/riomesa/documents/2012-10-30_Solar_Flux_Appendix_Equations_TN-68266.pdf)

data supporting that the thermal plumes are going to have impacts on birds at the coastal site.”

I would have asked Mr. Ali who he felt had the burden of proof of an impact, the applicant of the intervener. I would have questioned Mr. Ali regarding the data in the record that there will be 6) 80 mile an hour 780 degree toxic plumes, plus cooling plumes. I would ask him what impact the plume would have with birds that impact it. I would also confirm that he has not disputed Dr. Longcore’s determination that there was insufficient evidence that there would be no impact. Dr. Longcore concluded; “This analysis, and the report upon which it relies, are insufficient to conclude that the high-velocity, high temperature plumes would not have an impact on birds and bats at the project site. The cited memorandum is focused on attraction of ravens to thermal plumes and relies on anecdotal reports from staff at power stations to assess any adverse impacts to wildlife. It is not clear that the observations were at stacks with high-velocity, high-temperature plumes from gas-fired turbines. The text of the report does not specify that any of the power plants described in that report were in fact of the type proposed for the Carlsbad Energy Center Project Amendment. The conclusion that birds will “avoid the site” is likewise tenuous, given that the project site is adjacent to wetlands and in fact birds might fly over the site to get from one part of the lagoon to another or to move from the ocean to the lagoon. Furthermore, the plumes reaching up several thousand feet would provide no visual cues whatsoever and birds approaching the lagoon would have no warning of them until they were encountered.”

Mr. Ali did not dispute Dr. Longcores finding; Avian collisions with structures are generally higher next to wetland sites (Drewitt and Langston 2008) and indeed researchers are particularly concerned about collisions with power lines that are located next to wetlands, where waterbirds, waterfowl, and shorebirds collide with obstructions A study of effects of the project on waterbirds, waterfowl, and shorebirds as they approach and take off from Agua Hedionda Lagoon, which is bisected by the project site, would be far more relevant to the impact analysis than is our research. It is critically important...”

No one disputed that the wires could be placed underground and mitigate this threat because the CEC declined to consider the threat, as if the wires for the new facility were considered in the original proceeding, despite the fact that it is an entirely new cluster of wires next to the habitat, not present in the original proceeding. To top it off, the record indicates that the CEC informed agencies that no changes in the transmission lines would occur.<sup>8</sup>

The FSA disclosed the extent of the new wires and, since some are planned to be underground, demonstrates that it is technically feasible to install them underground.

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<sup>8</sup> appears to exclude service to California Department of Fish and Wildlife and is sent without a particular recipient to the local USFWS office. [http://docketpublic.energy.ca.gov/PublicDocuments/07-AFC-06C/TN202717\\_20140717T093934\\_Solicitation\\_For\\_Agency\\_Participation\\_in\\_the\\_Review\\_of\\_Amendmen.pdf](http://docketpublic.energy.ca.gov/PublicDocuments/07-AFC-06C/TN202717_20140717T093934_Solicitation_For_Agency_Participation_in_the_Review_of_Amendmen.pdf)

It states; “The proposed generators would interconnect to the existing Encina switchyard at both the 138 kV and 230 kV. The 230 kV gen-tie line would be about 2,600 feet long, with 2,171 feet overhead and 450 feet underground. The overhead portion of the 230 kV line would be split into two segments, the first segment would be single circuit and about 1,018 feet long and the second segment, 1,153 feet, would use double circuit towers with the 230 kV gen-tie line on one side and the 138 kV gen-tie line on the other side (LL2014d, Section 3).”

The Decision specifically did not preclude undergrounding of the wires it states; “

**VIS-5** shall not preclude relocation or undergrounding of transmission poles or other features, if necessary to provide the stipulated visual buffer or achieve adequate longterm project screening.

The FSA states; “Commenter requests that the project owner be required to underground transmission lines or move them from the eastern side of the site during the construction phase of the amended project, rather than at a later date.

**Response:** Undergrounding the transmission line does not appear necessary to mitigate the visual impact caused by freeway widening. It would reduce impacts somewhat, but would not mitigate the visual impacts of the more dominant project features. This is because the potential loss of existing tree canopy and the resulting decline in both screening and visual quality require the preservation and enhancement of a landscape buffer, which undergrounding alone would not provide. Further, the establishment of a long-term landscape buffer, as required by Condition **VIS-5**, would provide adequate mitigation of the cumulative project impacts for all project features.”

Ok first undergrounding the wires is not to mitigate the mitigate the visual impact caused by freeway widening “it is to mitigate the impacts of the overhead wires, not to mitigates the Impacts of the “the more dominant project features” it is to mitigate the impacts of the overhead wires and there is no “landscape buffer” that will mitigate the 90 foot high power wires towering over scenic Highway One and the protected habitat even if some vendor offered them some magic beans.

The FSA further replied to comments;

**Comment:** The transmission lines should be buried.

**Response:** There are several issues associated with any underground transmission line alternative. The south side of the project is complicated with the NCTD railway tracks and infrastructure required for the proposed power plant. Importantly, absent surveys and analyses, we do not know whether or not the ground under the upper perimeter road or berm on the eastern edge of the project site is acceptable for underground cables. Undergrounding the proposed overhead lines on the eastern and southern area of the site would require building lines that start as overhead lines from the three CECP switchyards (amended CECP Units 6 & 7 switchyard; amended CECP Units 8 & 9 switchyard; and, amended CECP Unit 10 & 11 switchyard). It would then involve converting these overhead lines to underground lines along the ROW before converting back to overhead lines in order to cross the NCTD railroad tracks and then undergrounding again at the SDG&E Encina switchyard. Hence, such a combination of overhead and underground lines would require more components and infrastructure, would be very expensive, and would be

difficult to plan, install and maintain

The response relies on the failure to conduct “surveys and analyses” to reach an absurd conclusion, that the wires would need to go over the train tracks. It then relies on further ignorance to dismiss consideration of undergrounding in other locations “we do not know whether or not the ground under the upper perimeter road or berm on the eastern edge of the project site is acceptable for underground cables.” The FSA identifies a number of negative impacts from overhead wires but fails to consider the undergrounding in the context of biological impacts. It states;

- aviation safety,
- interference with radio-frequency communication,
- audible noise,
- fire hazards,
- hazardous shocks,
- nuisance shocks, and
- electric and magnetic field (EMF) exposure.

Further, there is no record on the docket that the committee complied with the rule to distribute the PMPD to interested agencies;

**§ 1749. Presiding Member's Proposed Decision; Distribution; Comment Period.**

(a) At the conclusion of the hearings, the presiding member, in consultation with the other committee members shall prepare a proposed decision on the application based upon evidence presented in the hearings on the application. The proposed decision shall be published and within 15 days distributed to interested agencies, parties, and to any person who requests a copy. The presiding member shall publish notice of the availability of the proposed decision in a newspaper of general circulation in the county where the site is located.

I did a public records request for information regarding the Committee compliance with the above law. The only documented communications that I received were between the CEC and CDFW was a short email in 2007 and an email to a CDFWS employee regarding Once Through Cooling issues in 2014. The 2014 communication does not even appear to be to the correct email address, neither could of course demonstrate compliance with the 2015 PMPD distribution law. This is a clear error of law that the Commission can only rectify by reissuing the PMPD notice in compliance with the law.

The surprise witness, Mr. Ali stated: “And the noise issue -- this noise issue, it is 60 dBA -- was addressed in our analysis. And that 60 dBA was an approved -- or discussed with the agencies at the time when the Carlsbad City Habitat Conservation Plan was adopted. And it has been accepted by the agencies as a level that's a threshold to where impacts have been noticed on avian issues. And it's an issue that's -- it's a large issue, because we have to abide by the ordinance or the Habitat Conservation Plan for the City of Carlsbad. So we addressed it with some other thresholds or we have some measures we indicated that would reduce the noise level to the 60 dBA. So it's been thoroughly addressed and there is no issue with regards to noise.”

Had I been given the opportunity to cross examine the witness I would have asked him to point to some evidence on the record which refutes the evidence that the noise will exceed the 60 db threshold or some evidence that the thermal plume will not harm birds that fly into it. I may have also asked some follow up questions.

Fortunately USFWS and/or the courts will take a hard look at the unfounded conclusions in this proceeding. The commission's decision is indefensible. The CEC cannot hide behind the lack of review available at the state level for its violations of Federal law. The fact is that there is ample evidence that the noise impact will be above 60 db and no evidence that it will be below 60 db. Mr. Ali's contention is simply false, it has no evidentiary basis.

Mr. Ali ignores Dr. Longcore's determination which states, "the Final Staff Assessment uses the "60-decibel rule" in assessing impacts to wildlife from noise. wildlife from noise. This threshold does not have biological validity and is not supported by current scientific research. The 60 dB(A) Leq threshold for impacts on avian species was first put forward in 1991 in an unpublished study conducted for the San Diego Association of Governments in which "it was theoretically estimated that noise levels in excess of 60 dB(A) Leq in [Least Bell's] vireo habitat would mask the bird's song, subsequently reducing the reproductive success of this species during their breeding season...." (County of San Diego 2000). This study has never been published or peer reviewed. The only citation in the scientific literature to the rule is a conference presentation by Bowles and Wisdom (2005), and this paper did not support the 60 dB(A) Leq standard...

The Commission took a step further in the overstep of its authority in the amendment decision," We delete existing Condition of Certification **AQ-SC11** as Prevention of Significant Deterioration (PSD) permitting does not apply to the ACECP" The CEC has no authority to make this determination.

The Coastal Commission does not have authority under the CZMA to delegate its authority to the CEC and that if it did delegate this authority it did not adequately supervise the CEC in this instance. The CEC process does not include the due process provisions, satisfy the public notice provisions or other procedures consistent with the Coastal Act. It violates the CZMA and Public Trust Doctrine.

Before a permit may issue, the commission must find that the development will not have a substantial adverse environmental or ecological effect and will be consistent with the policy and objectives of the Act. (§ 27402.) The burden of proof on all issues is upon the applicant. (§ 27402.)

The Act places on the applicant the burden of proof on all issues in connection with a permit application. (§ 27402.) The decision to place the burden on the applicant represents a reasonable exercise of legislative judgment. (See [\*Martin v. Alcoholic Bev. etc. Appeals Bd.\*, 52 Cal.2d 259, 265 \[341 P.2d 291\]](#); Cal. Administrative Agency Practice (Cont. Ed. Bar 1970) § 3.54, p. 183.) The rationale for this allocation in the Coastal Initiative has been well stated by one commentator as follows: "This provision represents a departure from the common law rule that the burden of proving harm rests upon one who objects to the utilization of resources, but in the days of the formulation of this common law rule there was neither the scarcity of resources nor the sharply competitive demands placed upon

them that exists today. Allocation of the burden of proof often serves as an effective tool for shaping social policies, and since it is imperative that the need for environmental protection and conservation be adequately reflected in the law, the consumer of natural resources should bear the responsibility for justifying his actions." (Note, *Saving the Seashore: Management Planning for the Coastal Zone*, 25 Hastings L.J. 191, 199-200, fns. omitted; see Krier, *Environmental Litigation and the Burden of Proof* (Law & Environment, 1970) pp. 105, 108-111.)

The data upon which the CEC relied was faulty, its decision is arbitrary, capricious, an abuse of discretion, and not in accordance with the law. The appropriate standard of review for administrative decisions involving the ESA is the "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" standard. 5 U.S.C. § 706(2)(A)

On the basis of this motion and with the incorporation of the attached 60 day notice to sue; The Commission should take a hard look at the record and accept that it is inadequate to defend the findings made in the licensing. These are **serious** flaws that are not adequately mitigated, which will cause the "take" of endangered species and other impacts. These issues have extensive implications and merit further review. The Commission must also give serious consideration to comments from the public if it is to function in a democratic society.

The Commission should reverse its decisions made at the business meeting and require actual environmental review of the potential impacts from the project, with an opportunity for consideration of public input.

Rob Simpson

Executive Director  
Helping Hand Tools  
27126 Grandview Ave.  
Hayward CA. 94542  
rob@redwoodrob.com



# Exhibit 1

I received your email Mr. Simpson and wanted to let you know I am still working on this issue. Thank you for your patience.

Alana

**Subject:** RE: comments for business meeting re Carlsbad  
**From:** "Mathews, Alana@Energy" <Alana.Mathews@energy.ca.gov>  
**Date:** Mon, Aug 10, 2015 11:20 am  
**To:** "rob@redwoodrob.com" <rob@redwoodrob.com>

Mr. Simpson,

I will relay your concerns and the facts that you have shared with me to the Chair in an effort to ensure this does not happen again.

Sincerely,

Alana Mathews

**From:** rob@redwoodrob.com [mailto:rob@redwoodrob.com]  
**Sent:** Friday, August 07, 2015 11:57 PM  
**To:** Mathews, Alana@Energy  
**Subject:** RE: comments for business meeting re Carlsbad

Hi,

I did not understand the witnesses name but he was providing rebuttal testimony to my comments regarding biological resources. It was difficult to understand his accent on the phone but it was clear enough that the commission allowed everyone to examine the witness but me. They simply did not recognize me or un-mute my mike. Just like in the beginning when the hearing officer summarized the interveners positions except mine and they all thanked everyone but me.

thanks

Rob

----- Original Message -----

**Subject:** RE: comments for business meeting re Carlsbad  
**From:** "Mathews, Alana@Energy" <[Alana.Mathews@energy.ca.gov](mailto:Alana.Mathews@energy.ca.gov)>  
**Date:** Fri, August 07, 2015 12:06 pm

To: "[rob@redwoodrob.com](mailto:rob@redwoodrob.com)" <[rob@redwoodrob.com](mailto:rob@redwoodrob.com)>

Mr. Simpson,

I am still following up with staff to make sure I accurately understand what happened that resulted in you not being able to comment again. However, it would be helpful to get further clarity from you as well. You mentioned you were not allowed to examine a surprise witness and I am unclear on who you are referring to as "the surprise witness." Please explain.

With regard to your second inquiry, please note the following: California Code of Regulations, title 20, section 1720 outlines the relevant information on a petition for reconsideration including the requirements for substantive content, service, and proper filing. Additionally, this regulation states that "Within 30 days after a decision or order is final, ...any party may petition for reconsideration thereof."

For your convenience a link to the regulation can be found here: <http://www.energy.ca.gov/2014publications/CEC-140-2014-002/CEC-140-2014-002.pdf>

If you are still unclear about section 1720 I am happy to connect you with our Chief Counsel's Office.

Sincerely,

Alana Mathews

**From:** rob@redwoodrob.com [mailto:rob@redwoodrob.com]

**Sent:** Tuesday, August 04, 2015 8:50 AM

**To:** Mathews, Alana@Energy

**Subject:** RE: comments for business meeting re Carlsbad

Hi Alana,

Yes I repeatedly called and informed the operator that I wished to comment. I do not think it was the operator's fault. It seemed to me that, although they addressed other parties and simply un-muted their microphones, the Commissioners never addressed me, allowed me to examine the surprise witness or otherwise attempted to un-mute my microphone. Do you have any information to the contrary or find out why I was precluded from participation? Can you tell me the rules for reconsideration of the decisions of the day including the time periods. It seems to me that there is a 30 day time period for reconsideration of the main decision but I do not know when that time period starts.

Thanks

Rob

----- Original Message -----

Subject: Re: comments for business meeting re Carlsbad

From: "Mathews, Alana@Energy" <[Alana.Mathews@energy.ca.gov](mailto:Alana.Mathews@energy.ca.gov)>

Date: Thu, July 30, 2015 1:08 pm  
To: "[rob@redwoodrob.com](mailto:rob@redwoodrob.com)" <[rob@redwoodrob.com](mailto:rob@redwoodrob.com)>

Please let me know if you let the operator know you wanted to comment. I'm trying to find out why you were not able to comment.  
Alana

Sent from my iPhone

**Subject:** RE: comments for business meeting re Carlsbad  
**From:** [rob@redwoodrob.com](mailto:rob@redwoodrob.com)  
**Date:** Thu, Jul 30, 2015 1:02 pm  
**To:** "Mathews, Alana@Energy" <[Alana.Mathews@energy.ca.gov](mailto:Alana.Mathews@energy.ca.gov)>

trying to comment

----- Original Message -----

Subject: Re: comments for business meeting re Carlsbad  
From: "Mathews, Alana@Energy" <[Alana.Mathews@energy.ca.gov](mailto:Alana.Mathews@energy.ca.gov)>  
Date: Thu, July 30, 2015 12:06 pm  
To: "[rob@redwoodrob.com](mailto:rob@redwoodrob.com)" <[rob@redwoodrob.com](mailto:rob@redwoodrob.com)>

Great.

Sent from my iPad

On Jul 30, 2015, at 12:05 PM, "[rob@redwoodrob.com](mailto:rob@redwoodrob.com)"

no i am good  
thanks

----- Original Message -----

Subject: Re: comments for business meeting re Carlsbad  
From: "Mathews, Alana@Energy" <[Alana.Mathews@energy.ca.gov](mailto:Alana.Mathews@energy.ca.gov)>  
Date: Thu, July 30, 2015 11:55 am  
To: "[rob@redwoodrob.com](mailto:rob@redwoodrob.com)" <[rob@redwoodrob.com](mailto:rob@redwoodrob.com)>

Are you still experiencing problems? I received this message after you made your comments.

Sent from my iPad

On Jul 30, 2015, at 10:49 AM, "[rob@redwoodrob.com](mailto:rob@redwoodrob.com)" <[rob@redwoodrob.com](mailto:rob@redwoodrob.com)> wrote:

i am on the phone being ignored  
r

----- Original Message -----

Subject: Re: comments for business meeting re Carlsbad  
From: "Mathews, Alana@Energy" <[Alana.Mathews@energy.ca.gov](mailto:Alana.Mathews@energy.ca.gov)>  
Date: Thu, July 30, 2015 10:27 am  
To: "[rob@redwoodrob.com](mailto:rob@redwoodrob.com)" <[rob@redwoodrob.com](mailto:rob@redwoodrob.com)>

you are welcome.

Sent from my iPad

On Jul 30, 2015, at 10:20 AM, "[rob@redwoodrob.com](mailto:rob@redwoodrob.com)" <[rob@redwoodrob.com](mailto:rob@redwoodrob.com)> wrote:

ok thank you

R

----- Original Message -----

Subject: Re: comments for business meeting re Carlsbad

From: "Mathews, Alana@Energy" <[Alana.Mathews@energy.ca.gov](mailto:Alana.Mathews@energy.ca.gov)>

Date: Thu, July 30, 2015 10:10 am

To: "[rob@redwoodrob.com](mailto:rob@redwoodrob.com)" <[rob@redwoodrob.com](mailto:rob@redwoodrob.com)>

The photos will be made available during your comments. Your comments are also available to the Commissioners present.

Alana Mathews

On Jul 30, 2015, at 9:36 AM, "[rob@redwoodrob.com](mailto:rob@redwoodrob.com)" <[rob@redwoodrob.com](mailto:rob@redwoodrob.com)> wrote:

Hi I am not clear from your responses if my comments have been delivered to the commissioners or if the slides will be displayed as I speak

Thank you

Rob

----- Original Message -----

Subject: Re:comments for business meeting re Carlsbad

From: "Mathews, Alana@Energy" <[Alana.Mathews@energy.ca.gov](mailto:Alana.Mathews@energy.ca.gov)>

Date: Wed, July 29, 2015 4:31 pm

To: "[rob@redwoodrob.com](mailto:rob@redwoodrob.com)" <[rob@redwoodrob.com](mailto:rob@redwoodrob.com)>

Mr. Simpson,

As a follow up to my staff's initial email acknowledging receipt of your comments on the Carlsbad Energy Center PMPD, I wanted to share some additional procedural information with you. I understand that you intend your comments serve "also as a motion to reopen the evidentiary record and restore [your] full intervention rights and consider testimony on the subject."

California Code of Regulations section 1716.5 is the general regulation regarding Motions, Hearings and Decisions in power plant site certification proceedings. Additionally, "General Orders Regarding Electronic Document Formats, Electronic Filing and Service of Document and Other Matters" issued by the Committee on June 20, 2014 and docketed in the Carlsbad Energy Center Compliance Docket, TN# 202478 outline specifically how motions in this proceeding should be filed.

I hope you find this information helpful.

Sincerely,

Alana Mathews  
Public Adviser

California Energy Commission  
1516 9<sup>th</sup> Street  
Sacramento, CA 95814  
916.654.4489  
800.822.6228  
[www.energy.ca.gov](http://www.energy.ca.gov)  
<image001.jpg>

**From:** [rob@redwoodrob.com](mailto:rob@redwoodrob.com) [<mailto:rob@redwoodrob.com>]  
**Sent:** Wednesday, July 29, 2015 10:45 AM  
**To:** Energy - Public Adviser's Office  
**Subject:** comments for business meeting re Carlsbad

Hello,  
I read the agenda for the business meeting tomorrow and it stated;

To avoid occasional technical problems with the Commission's telephone link, the Commission recommends that a written comment also be submitted either by facsimile or e-mail to the Public Adviser by 5 p.m. two days before the scheduled business meeting. Fax (916) 654-4493 or e-mail [publicadviser@energy.ca.gov](mailto:publicadviser@energy.ca.gov).

Please submit my attached comments to the commission for agenda item 5.  
I also wish to speak at the meeting and have images displayed as I speak, Can you arrange for the last image in both of the following to be displayed during my comment?

[http://docketpublic.energy.ca.gov/PublicDocuments/07-AFC-06C/TN203942\\_20150323T215028\\_Photo\\_Update\\_No\\_1.pdf](http://docketpublic.energy.ca.gov/PublicDocuments/07-AFC-06C/TN203942_20150323T215028_Photo_Update_No_1.pdf)

[http://docketpublic.energy.ca.gov/PublicDocuments/07-AFC-06C/TN203943\\_20150323T215029\\_Photo\\_Update\\_No\\_2.pdf](http://docketpublic.energy.ca.gov/PublicDocuments/07-AFC-06C/TN203943_20150323T215029_Photo_Update_No_2.pdf)

Thank you  
Rob Simpson

# Exhibit 2

----- Original Message -----

Subject: RE: information request  
From: "Pittard, Shawn@Energy" <Shawn.Pittard@energy.ca.gov>  
Date: Thu, July 02, 2015 3:30 pm  
To: "rob@redwoodrob.com" <rob@redwoodrob.com>  
Cc: "Mathews, Alana@Energy" <Alana.Mathews@energy.ca.gov>, "Murphy, Laura@Energy" <Laura.Murphy@energy.ca.gov>

Hello Mr. Simpson,

Filing comments on the PMPD on July 9 is an opportunity to influence the Committee.

Commenting on the PMPD at the July 30 hearing is an opportunity to influence the full commission and its Final Decision. In the case of the full commission hearing, it's important to note that sometimes oral comment is limited to 3 minutes per speaker.

Shawn

**From:** rob@redwoodrob.com [mailto:rob@redwoodrob.com]  
**Sent:** Monday, June 29, 2015 11:04 AM  
**To:** Pittard, Shawn@Energy  
**Cc:** Energy - Public Adviser's Office  
**Subject:** RE: information request

Hi,

I am following up on the below communication and; I am trying to figure out the difference between commenting for example on the Carlsbad project by "The deadline for filing comments on the PMPD is 5:00 p.m. on July 9, 2015" or at the full energy commission hearing THURSDAY, JULY 30, 2015 Beginning at 10:00 a.m. California Energy Commission Art Rosenfeld Room (Hearing Room A) 1516 Ninth Street Sacramento, California 95814...Parties and members of the public may participate and offer oral and written comments on the document

[http://docketpublic.energy.ca.gov/PublicDocuments/07-AFC-06C/TN204955\\_20150609T165254\\_Notice\\_of\\_Availability\\_of\\_the\\_PMPD\\_Notice\\_of\\_Committee\\_Conferen.pdf](http://docketpublic.energy.ca.gov/PublicDocuments/07-AFC-06C/TN204955_20150609T165254_Notice_of_Availability_of_the_PMPD_Notice_of_Committee_Conferen.pdf)

5. CARLSBAD ENERGY CENTER PROJECT AMENDMENTS (07-AFC-06C). a. Possible approval of an order approving the Presiding Member's Proposed Decision (PMPD) and Errata on the Carlsbad Energy Center Amendments. The Committee issued the PMPD on June 9, 2015. The amendments would change the approved project from a 540 megawatt (MW) combined-cycle to a 632 MW simple-cycle power generation facility. The proposed amended project would be located on the eastern portion of the existing Encina Power Station between Carlsbad Boulevard and Interstate-5, east of the railroad corridor and south of the Agua Hedionda Lagoon, in Carlsbad. Contact: Paul Kramer. (Staff presentation: 10 minutes) California Energy Commission BUSINESS MEETING AGENDA California Energy Commission • 1516 Ninth Street, MS-38 • Sacramento, California 95814 • 916-654-4989 Page - 2 b. Possible closed session deliberation on the above described PMPD. [Government Code Section 11126(c)(3)]

Are the comments considered differently or why would one comment one time over the other?

Thanks

Rob Simpson

