DOCKETED

Docket Number:	12-AFC-02
Project Title:	Huntington Beach Energy Project
TN #:	202983
Document Title:	Coastal Commission response
Description:	N/A
Filer:	Thomas R Luster
Organization:	CA Coastal Commission
Submitter Role:	Public Agency
Submission Date:	8/25/2014 4:58:04 PM
Docketed Date:	8/25/2014

STATE OF CALIFORNIA – NATURAL RESOURCES AGENCY EDMUND G. BROWN, JR., GOVERNOR

CALIFORNIA COASTAL COMMISSION

45 FREMONT, SUITE 2000
SAN FRANCISCO, CA 94105- 2219
VOICE (415) 904- 5200
FAX (415) 904- 5400
TDD (415) 597-5885

August 25, 2014

Andrew McAllister
Commissioner and Presiding Member
California Energy Commission
1516 Ninth Street
Sacramento, CA 95814

Dear Mr. McAllister:

This letter responds to a brief filed on behalf of the California Energy Commission staff on August 20, 2014 (the CEC Staff Brief) regarding the Application for Certification of the Huntington Beach Energy Project (HBEP). I write to respectfully disagree with a new argument made in the CEC Staff Brief that has the effect of allowing the Energy Commission to not comply with Section 25523(b) of the Warren-Alquist Act. In addition, there are appear to be some misunderstandings regarding Coastal Commission recommendations and the evidentiary basis supporting them, so I would also like to correct the record.

Public Resources Code Section 25523

Consistent with the Memorandum of Agreement entered into between Coastal Commission and Energy Commission staff in 2005, at its July 10, 2014 meeting the Coastal Commission adopted the report required by Public Resources Code section 30413(d) (30413(d) Report). The 30413(d) Report was submitted to the Energy Commission on July 15, 2014, and it laid out proposed changes to conditions of approval for the HBEP that were needed to ensure the proposed project is consistent with the Coastal Act. Public Resources Code section 25523(b) requires the Energy Commission to adopt the provisions recommended by the Coastal Commission, with just two exceptions. The statute states:

> *(b) In the case of a site to be located in the coastal zone, specific provisions to meet the objectives of Division 20 (commencing with Section 30000) as may be specified in the report submitted by the California Coastal Commission pursuant to subdivision (d) of Section 30413, unless the commission specifically finds that the adoption of the provisions specified in the report would result in greater adverse effect on the environment or that the provisions proposed in the report would not be feasible.* Cal. Pub. Res. Code § 25523.

The CEC Staff Brief appears to be adding a third exception to the requirement in section 25523(b).[1] Energy Commission staff assert that in addition to the requirements of section 25523(b) there must also be substantial evidence in the Energy Commission hearing record that supports the Coastal Commission recommendation. This interpretation adds to the statute an exception that does not already exist, and it is an exception that would essentially eliminate this section from the Warren-Alquist Act.

Independent of any reports provided to the Energy Commission from the Coastal Commission, the Energy Commission is required to comply with the Coastal Act and must make its determinations based on substantial evidence in its administrative record. Thus, the suggestion that the 30413(d) Report recommendations need not be followed by the Energy Commission if the Energy Commission independently determines that there is not substantial evidence to support the Coastal Commission's report would eliminate any effect of Section 25523(b). The Energy Commission would only be doing what it is already obligated to do in the absence of a report submitted by the Coastal Commission – determine how to comply with the Coastal Act based on its own record.

The legislature did provide the Energy Commission with the authority to disagree with the Coastal Commission's recommendations, but only if it finds that the provisions recommended by the Coastal Commission would result in greater adverse effects on the environment or that the provisions recommended by the Commission are not feasible. In its brief, Energy Commission staff did not analyze whether the provisions recommended by the Coastal Commission in this case should be rejected for either of these two reasons.

The Energy Commission staff's analysis also does not explain why the 30413(d) Report itself does not provide substantial evidence in the Energy Commission's record. Like the Energy Commission, the Coastal Commission's actions must be supported by substantial evidence in its administrative record. As with other agency comments, the Coastal Commission's report is, itself, substantial evidence on which the Energy Commission may base its decision. (*Stanislaus Audubon Society, Inc. v. County of Stanislaus* (1996) 33 Cal. App. 4th 144, 152-154, 156 [holding that a memorandum from the California Department of Conservation provided substantial evidence as did findings from planning commission staff]; *Pocket Protectors v. City of Sacramento* (2004) 124 Cal. App. 4th 903, 931-32 [finding city planning staff and Planning Commission findings constituted substantial evidence]).

The CEC Staff Reply Brief, dated August 24, 2014 states that the 30413(d) Report is not admissible in the Energy Commission's record because it is inadmissible hearsay.[2] Energy Commission staff rely on Title 20 California Code of Regulations section 1212(d) in support of this assertion. That section allows the use of hearsay evidence if that evidence would be admissible in a civil case. The 30413(d) Report is admissible in a civil case as the official act of a California state agency. Cal. Evid. Code § 452(c). Moreover, the 30413(d) Report was submitted by intervenor Monica Rudman in this case, and is part of the Energy Commission's record as Exhibit #4026, regardless of Energy Commission's staff's concerns about how the

[1] Energy Commission Staff Brief, August 20, 2014, p. 7.
[2] CEC Reply Brief, August 25, 2014, p. 2-3.

30413(d) Report was submitted by the Coastal Commission. For all of these reasons, the Energy Commission may rely on the 30413(d) Report as substantial evidence in its record.

In addition, AES Southland, Inc., the applicant for the HBEP, had the opportunity at the Coastal Commission's public hearing to raise substantive concerns with the 30413(d) Report or to correct any factual errors with the report, but it did not do so. AES submitted written comments and testified at the Coastal Commission hearing prior to the Coastal Commission's approval of the 30413(d) Report for the HBEP. The only substantive issue raised by AES, however, related to the Coastal Commission's characterization of potentially unpermitted development that had taken place at AES's Huntington Beach power plant. Had there been factual errors or a lack of substantial evidence to support the Coastal Commission's conclusions, AES should have raised them to the Coastal Commission before or during its hearing on the 30413(d) Report.

In sum, there is no legal basis for adding a third exception to the Energy Commission's obligations under Section 25523(b) when there is no such exception in the statute. The Coastal Commission's 30413(d) Report is evidence that is properly before the Energy Commission, and it provides substantial evidence in the Energy Commission's record supporting the modified conditions recommended by the Coastal Commission. This is all that is required by 25523(b). Additionally, there are applicable laws, ordinances, regulations and standards (LORS), and substantial evidence in the Energy Commission's own record, in addition to the Coastal Commission's 30413(d) Report, that support the provisions in the Coastal Commission's 30413(d) Report. This evidence and LORS are described below.

The HBEP Project

The CEC Staff Brief states that substantial evidence used by the Energy Commission staff include the Final Staff Assessment and other information provided as part of the AFC proceeding.[3] As noted in the Coastal Commission's 30413(d) Report, the Commission also used the Final Staff Assessment and other documents from this AFC proceeding, i.e., the same evidence referenced by Energy Commission staff.[4] Regarding LORS compliance, the CEC Staff Brief states that the proposed project, including the Energy Commission staff's recommended conditions, would be in compliance with applicable LORS.[5] It also states, in several instances,

---

[3] The CEC Staff Brief states at page 2:

> *Staff provided substantial evidence in its written testimony to support its recommendation that the Huntington Beach Energy Project, with staff's recommended conditions of certification, should be approved. Those documents include: the Final Staff Assessment (Ex. 2000) and the South Coast Air Quality Management District's Final Determination of Compliance (Ex. 2001). In addition, the applicant also provided substantial evidence orally and in writing that supported all of staff's testimony and independently met the applicant's burden of proof pursuant to Title 20, California Code of Regulations, section 1748(d).*

[4] The 30413(d) Report's *Attachment A – Substantive File Documents*, includes: "Energy Commission, Final Staff Assessment and associated docketed documents for 12-AFC-02, Application for Certification for AES Southland, LLC Huntington Beach Energy Project, filed prior to June 2014."

[5] See CEC Staff Brief, pages 4-5:

that the Coastal Commission's recommended conditions are not necessary for the project to conform to applicable LORS. As shown in the examples below, these statements appear to overlook some LORS.

Land Use

The CEC Staff Brief proposes the Committee reject the Coastal Commission's recommendation that AES reduce offsite impacts by using additional portions of its power plant site for parking and equipment laydown. The CEC Staff Brief suggests that these other portions of the power plant site are not part of the site and are outside of the Energy Commission's jurisdiction.[6] There is evidence in the record that the areas identified by the Coastal Commission are within the site owned by AES.

The Coastal Commission's 30413(d) Report states:

> *The Huntington Beach power plant is an existing electrical generating facility located in the City of Huntington Beach (see Exhibit 1 – Area Map). It is owned and operated by AES Southland, LLC (hereafter, either "the applicant" or "AES"). The power plant site covers about 60 acres in the southeast portion of the City and borders the Pacific Coast Highway, the Magnolia Marsh wetlands, and a flood control channel (see Exhibit 2 – Site Plan). A switchyard within the site is owned and operated by Southern California Edison.*

This description is based on AES's June 2012 AFC Application and AES's November 2, 2012 Responses to Data Requests. The AFC Application describes the power plant site as including two parcels.[7] Those two parcels cover about 60 acres of the power plant complex, not including

---

> *California Code of Regulations, section 1744 requires that information on the measures planned by the applicant comply with all applicable federal, state, regional, and local LORS, and that each agency responsible for enforcing the applicable LORS assess the adequacy of the Applicant's proposed compliance measures to determine whether the facility will comply with the applicable LORS. The Staff is required to assist and coordinate the assessment of the conditions of certification to ensure that all aspects of the facility's compliance with applicable laws are considered. Section 1744 (e) also states that "comments and recommendations by an interested agency on matters within that agency's jurisdiction shall be given due deference by Commission staff"*
>
> *In this matter, Staff testified that it reviewed all applicable LORS for the proposed project and consulted with the appropriate federal, state, regional, and local jurisdiction. Staff concluded that the Huntington Beach Energy Project, with the recommended Conditions of Certification, in some cases including mitigation measures, would be in compliance with all applicable LORS. (Ex. 2000.) Furthermore, the Applicant's testimony supported the conclusion that the project would be in compliance with all LORS.*

[6] From page 8: *The Coastal Commission states incorrectly that "AES is currently proposing to use only a portion of the area designated for the HBEP's expansion. Of the approximately 58 acres of the AES power plant site, all of which is within the designated area, the proposed expansion would use only 28.6 acres." [Emphasis added] This statement comes from what appears to be a misconception by the Coastal Commission over what constitutes the project site, over which the Energy Commission has jurisdiction, and what adjacent areas exist within the coastal zone over which the Energy Commission has no jurisdiction, namely the proposed Poseidon Desalinization project and the Plains of America Tank Farm.*

[7] Section 1.2, page 1-4, and Section 5.6, page 5-2: "The Assessor's Parcel Numbers for the HBEP site are 114-150-82 and 114-150-96. HBEP will utilize 28.6 acres, using only a portion of APN 114-150-96. Following project

the Southern California Edison substation. This description is also reflected in the Application's Figure 1.1.3 – Site Location Map that shows the power plant site encompassing an area larger than just the 28.6 acres proposed for the HBEP. The Application also notes, in Section 2.1.1, that the on-site tank farm (which is different than the Plains America Tank Farm referenced in the CEC Staff Brief) is AES property that will be leased to Poseidon.[8] The Applicant's Responses to Data Requests provides further evidence of ownership and the extent of the power plant site.[9]

To Coastal Commission staff's knowledge, neither Energy Commission staff nor AES has presented any evidence to show that this area is no longer owned or controlled by AES. At the Coastal Commission's public hearing on the 30413(d) Report, AES appeared and testified but did not contest this description of its project site. The evidence therefore shows that AES continues to own and control the entirety of its approximately 58-acre site, which is available for power plant expansion.

Biological Resources

LORS Buffer Requirement: Regarding biological resources and the Coastal Commission's recommended minimum buffer between development and areas of sensitive habitat or wetlands, the CEC Staff Brief states:

> *The Coastal Commission correctly states that LCP Policy C7.1.4 requires a minimum 100-foot buffer between new development and ESHA/wetland areas, and recommends that condition of Certification* ***BIO-7*** *be modified to require that "AES move all project-related development to be at least 100 feet, and further, if feasible, from nearby areas that meet the Coastal Commission's definition of wetlands or ESHA." [Emphasis added]*
>
> *As noted in the FSA, the project generation equipment will be located 100 feet from the portion of Magnolia Marsh that is designated as an ESHA. (Ex 2000, Sections 3-1, 4.2-1, 4.5-1) The evidence demonstrates that the Huntington Beach Energy Project complies with this requirement. No further modifications to the Biological Resources conditions of certification are warranted in this regard.*

The CEC Staff Brief's conclusion appears to be based on a misreading of the definition of development in the City's Local Coastal Program ("LCP"), which is one of the LORS applicable to the proposed project and thus, part of the Energy Commission's official record. The CEC

---

approval, the Project Owner will obtain a lot line adjustment to establish a single parcel for the 28.6 acre HBEP site, prior to commencing construction of the first power block."

[8] Section 2.1.1 states: "The HBEP site is bounded... to the north by an out-of-service tank farm that will become the site of the proposed Poseidon desalination plant (the tank farm is AES property which will be leased to Poseidon)..."

[9] Applicant's November 2, 2012 Responses to Staff's Data Requests, Set 1A (#1-72), page 106, states: "Applicant described its legal interests in, and site control of, the HBEP site in the AFC. (See AFC pages 1-4, 5.6-2, and Figures 1.1-1 and 1.1-3.) As set forth in the AFC, the Assessor's Parcel Numbers for the HBEP site are 114-150-82 and 114-150-96. HBEP will utilize 28.6 acres, using only a portion of APN 114-150-96. Following project approval, the Project Owner will obtain a lot line adjustment to establish a single parcel for the 28.6 acre HBEP site, prior to commencing construction of the first power block."

Staff Brief acknowledges that the LCP requires new development to be at least 100 feet from wetlands and sensitive habitats and states that the project generation equipment will be located 100 feet from nearby wetlands. "Development," however, includes much more than just the project's generation equipment.[10] The proposed project, as described in numerous documents in the record, is shown to include new development that will be much closer than 100 feet from these wetlands. See, for example, the AFC's Figure 2.1-1 – General Arrangement Site Plan, Figure 5.2-2bR – Wetlands, and Appendix 5.15C – Preliminary Grading Drainage Plans that show new structures and grading at or near the site perimeter near adjacent wetlands. The project as currently proposed is therefore inconsistent with the LCP and therefore inconsistent with the LORS.

Adverse Effects of Pile Driving on Nearby Species and Habitat: The CEC Staff Brief states:

> *The Coastal Commission report also recommends a prohibition on pile driving activities during nesting seasons. The report acknowledges that Energy Commission staff have listed pile driving avoidance as one of several feasible noise reduction techniques that AES could implement in order to reduce adverse noise impacts to less than significant if its activities exceed the noise threshold. There is no evidence in the record, however, that supports such a prohibition of an activity that, through the implementation of appropriate mitigation, will have no significant adverse impact. Commission staff therefore recommends that the Committee reject this recommendation.*

The Commission's 30413(d) Report, citing the FSA, states that pile driving would create noise levels of 104 dBA at 50 feet, 86 dBA at 375 feet, and 73-78 dBA at 1000 feet. All of these noise levels exceed levels that the FSA describes as harmful to avian species and that could result in "take" of special status species. The FSA also describes various mitigation measures that could be used to reduce noise levels from construction-related activities, including pile driving. These measures include placing temporary barriers or sound baffles, reducing the number of simultaneous noise-generating activities, avoiding certain activities, and others. There is no evidence that any of the measures listed, other than avoidance, would adequately reduce pile driving noise to levels that would be below the levels known to adversely affect avian species, especially during breeding and nesting season.

---

[10] The LCP's definition of "development," is "on land, in or under water, the placement or erection of any solid material or structure; discharge or disposal of any dredged material or of any gaseous, liquid, solid, or thermal waste; grading, removing, dredging, mining, or extraction of any materials; change in the density or intensity of use of land, including, but not limited to, subdivision pursuant to the Subdivision Map Act (commencing with Section 66410 of the Government Code), and any other division of land, including lot splits, except where the land division is brought about in connection with the purchase of such land by a public agency for public recreational use; change in the intensity of use of water, or of access thereto; construction, reconstruction, demolition, or alteration of the size of any structure, including any facility of any private, public, or municipal utility; and the removal or harvesting of major vegetation other than for agricultural purposes, kelp harvesting, and timber operations which are in accordance with a timber harvesting plan submitted pursuant to the provisions of the Z'berg-Nejedly Forest Practice Act of 1973 (commencing with Section 4511).

As used in this section, "structure" includes, but is not limited to, any building, road, pipe, flume, conduit, siphon, aqueduct, telephone line, and electrical power transmission and distribution line."

The 30413(d) Report also notes that the FSA does not include an analysis of the vibration levels (VdB) caused by pile driving, which are known to adversely affect bird species, particularly during breeding and nesting season, and would likely result in additional "take."[11] The evidence in the record therefore suggests that avoidance of pile driving during breeding and nesting season is the only mitigation measure that would allow compliance with those LORS meant to protect nearby bird species.

Floods

> *The Coastal Commission has recommended the adoption of proposed Condition* ***SOIL&WATER-8****, which it asserts "will ensure that the proposed critical facility is sited to be protected from both the current and future predicted 500-year flood elevation." There is no support in the record for this recommendation, however. The Energy Commission staff's analysis in the FSA concluded that the HBEP site is located in Zone X, and is protected from the one percent annual chance of flooding (100-year flood) by an accredited levee along the Huntington Beach Channel. (Ex 2000, Section 4.9-1) Additionally, there are no LORS requiring 500-year flood protection, and the proposed Huntington Beach Energy Project conforms to all applicable flood related LORS. Further, there is no evidence to suggest that protection greater than 100-year is necessary or appropriate for this site. Commission staff therefore recommends that the Committee reject this recommendation.*

The CEC Staff Brief incorrectly asserts that there are no LORS requiring 500-year flood protection. The LCP's Environmental Hazards Program I-EH 4, a LORS, requires that projects proposed in flood zones include mitigation measures that address flood risks and that these measures be identified and required during development or environmental review. The City's LORS also include two flood-related planning documents that establish the need to site critical facilities, which include the HBEP, to avoid risks from the 500-year flood event.[12] These LORS are part of the Energy Commission's record.

The 30413(d) Report also identifies expected flood elevations at the site ranging from about nine to 15 feet above mean sea level, which is the same elevation range as the HBEP site.[13] For just two of the several possible flood events, the 30413(d) Report also shows that the HBEP would have a 32% probability of experiencing a 100-year flood during its projected 38-year construction and operation period, and a 7% probability of experiencing the 500-year flood event during that period.[14] The above-referenced LORS requirements, when combined with these flood probabilities and the site's location and elevation, suggest that the CEC Staff Brief is incorrect when it states that the project is consistent with all applicable LORS and that "there is no evidence to suggest that protection greater than 100-year is necessary or appropriate for this site."

---

[11] See 30413(d) Report at page 15.

[12] As referenced in 30413(d) Report, pages 20-21.

[13] See analysis provided on pages 20-21 of the 30413(d) Report.

[14] See calculations provided on page 21 of the 30413(d) Report.

Tsunami and Sea Level Rise
The CEC Staff Brief states:

> *The Coastal Commission report recommends two conditions of certification,* ***GEO-3*** *and* ***GEN-2****, which are more correctly characterized as soil and water issues. The first new condition of certification,* ***GEO-3****, would require the project owner to submit a Facility Hazard Emergency Response Plan that includes measures needed to protect the facility from expected tsunami run-up levels, 100-year and 500-year flood events, as well as sea level rise. In addition, the Coastal Commission recommends inclusion of structural or nonstructural mitigation measures to address the asserted hazards in final project design submittals required pursuant to proposed condition of certification* ***GEN-2****.*
>
> *As noted in the FSA (Ex 2000), the HBEP site is approximately 14 feet above sea level, and by the year 2050, the maximum sea level rise predicted to reach 17 inches. The Coastal Commission report provides no evidence to contradict that which is already in the record of this proceeding. The design and engineering of HBEP will meet applicable LORS, including but not limited to the California and federal building codes, as well as applicable LORS of the City of Huntington Beach and Orange County. The detailed design and engineering for HBEP will be submitted to the Chief Building Official ("CBO") assigned to HBEP. Commission staff therefore recommends that the Committee reject the Coastal Commission's recommended additional language in* ***GEO-3*** *and* ***GEN-2****.*

The CEC Staff Brief incorrectly states that the FSA cites a maximum predicted sea level rise of 17 inches by 2050. The FSA, at page 4.9-24, cites one of the same sources cited in the 30413(d) Report – "Sea-Level Rise for the Coasts of California, Oregon, and Washington: Past, Present, and Future (2012)" – and identifies the same two-foot sea level rise by 2050 as identified by the Coastal Commission. Additionally, however, the 30413(d) Report cites the more recent 2013 *State of California Sea-Level Rise Guidance Document*, which has been adopted by state agencies. This 2013 report uses the data from the 2012 report but cautions that its sea level rise predictions likely underestimate the amount of increase.

This 2013 *State Guidance Document* also recommends that state agencies during project evaluation consider the projected lifespan of facilities, their costs, and the impacts or consequences of damage or loss of the facilities. Importantly, it also points out that the predicted increases in water levels are likely to occur not just at some point several decades in the future, but also during shorter term events in the very near future, such as storm waves, or during recurring events like El Nino. As noted in the 30413(d) Report, this has already occurred in Huntington Beach. Finally, the *State Guidance Document* also notes that, "[w]here feasible, consideration should be given to scenarios that combine extreme oceanographic conditions on top of the highest water levels projected to result from SLR over the expected life of a project."

It is unclear why the FSA does not use this more recent 2013 document, which was developed to provide guidance for state agency planning and review processes such as an AFC proceeding.

However, as cited in the 30413(d) Report, it should be considered evidence within the record of this AFC proceeding.

Thank you for the opportunity to submit these comments.

Sincerely,

Hope Schmeltzer
Chief Counsel