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Nguyen, Ha T.

From: Nguyen, Ha T.
Sent: Wednesday, August 03, 2016 4:41 PM
To: Tom.Luster@coastal.ca.gov; Alison.Dettmer@coastal.ca.gov
Cc: Foster, Melissa A.; Castanos, Kristen T.; Stephen O'Kane; Jeffery Harris
Subject: AES Huntington Beach Energy, LLC Response to Staff's Draft Report re HBEP PTA (12-AFC-02C) (for August 10, 2016 CCC meeting)
Attachments: AES Huntington Beach Energy LLC Response to CCC Draft Report.pdf

Dear Mr. Luster and Ms. Dettmer:

On behalf of AES Huntington Beach Energy, LLC ("AES"), please find attached AES' response to the California Coastal Commission Staff's July 28, 2016 recommendations regarding Staff's Draft "Coastal Commission Report to California CEC on Petition to Amend, Application for Certification 12-AFC-02C - AES Huntington Beach Energy Project - Reviewed pursuant to Coastal Act Section 30413(d)." We respectfully request that these comments are forwarded to Chairman Kinsey and Commissioners as soon as possible.

Should you have any questions regarding the attached comments, please do not hesitate to contact Stephen O'Kane of AES, or Melissa Foster or Kristen Castaños of Stoel Rives LLP at (916) 447-0700.

Thank you,

Ha T. Nguyen | Paralegal
STOEL RIVES LLP | 500 Capitol Mall, Suite 1600 | Sacramento, CA 95814
Direct: (916) 319-4659 | Fax: (916) 447-4781
ha.nguyen@stoel.com | www.stoel.com

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Stephen O'Kane
Vice President

AES Huntington Beach Energy, LLC
690 N Studebaker Road
Long Beach, CA 90803
tel 562-493-7840
Stephen.okane@aes.com
www.aes.com

August 3, 2016

California Coastal Commission
45 Fremont, Suite 2000
San Francisco, CA 94105-2219

**RE: Agenda Item # 7c (August 10, 2016 Commission Meeting)
Coastal Commission Staff's Draft Report Regarding the California Energy
Commission's Petition to Amend the Huntington Beach Energy Project (12-AFC-
02C - AES Huntington Beach Energy Project)**

Dear Chairman Kinsey and Commissioners:

AES Huntington Beach Energy, LLC ("AES") is in receipt of Coastal Commission Staff's ("Staff") July 28, 2016 recommendations to the full Coastal Commission ("Commission") regarding Staff's Draft "Coastal Commission Report to California CEC on Petition to Amend, Application for Certification 12-AFC-02C - AES Huntington Beach Energy Project - Reviewed pursuant to Coastal Act Section 30413(d)" ("Comments"). AES submits these comments for the Commission's consideration to clarify legal and factual inaccuracies set forth in the Coastal Commission Staff's draft Comments.¹

The Licensed HBEP, approved by the California Energy Commission ("CEC") in October of 2014, replaces the existing Huntington Beach Generating Station with 939 megawatts of generating capacity², relying on air cooling instead of ocean water for cooling. After the CEC issued the Licensed HBEP Final Decision, Southern California Edison ("SCE") publicly announced that AES Southland had been selected in the 2013 Local Capacity Requirements Request for Offers to provide 644 MW of nominal generating capacity at the Huntington Beach site. Thus, the project configuration selected by SCE necessitated a modification to the Licensed HBEP.

The Amended HBEP, currently pending before the CEC, is in keeping with the original intent of the Licensed HBEP as a fully dispatchable, quick-start facility able to meet the current and

¹ AES also disagrees with and objects to the various recommendations in the Comments. The specific recommendations in the Comments need not be adopted because each of the issues identified in the Comments has been fully addressed in the original CEC Application for Certification ("AFC") proceeding or during the current Petition to Amend ("PTA") proceeding for the Licensed HBEP, all impacts of the project have been mitigated or reduced to the full extent feasible, and the project is consistent with applicable laws, ordinances, and regulations ("LORS").

² Technically the original HBEP could have produced as much as 1094 mw but was electrically restricted to 939 mw.



projected electric reliability needs and market demands of the Western Los Angeles Basin. The Amended HBEP is part of a larger effort of replacement and retirement of coastal, ocean-cooled generating facilities with smaller, highly efficient, air cooled, flexible, and visually improved generating facilities. As documented throughout the CEC PTA proceeding, the Amended HBEP is smaller than the Licensed HBEP (844 megawatts compared to 939 megawatts), and has impacts that are less than or the same as those impacts that were analyzed for the Licensed HBEP.

In prior Coastal Commission submittals and in the Comments, Coastal Commission Staff has ignored and/or discounted the various benefits of the Amended HBEP. These include, among other benefits, significant benefits to coastal resources such as eliminating use of ocean water for once-through cooling, enhancement of the visual resources of the area, facilitating increased reliance on renewable energy generation which supports carbon emission reductions and minimizing impacts of climate change, including sea level rise, and, as part of the electrical system planning process, allowing the permanent closure of coastal generating units including entire power plant sites along California's coast, such as the AES Redondo Beach generating station. The modernization of the AES Huntington Beach Generating Station also ensures electrical system reliability for the Western Los Angeles Basin area. A reliable electrical system is essential to California's economy and infrastructure and is the very foundation upon which access to California's coastal resources for all Californians can be achieved. The Coastal Commission should take into consideration these benefits to the coast as part of its evaluation of Amended HBEP.

I. The Public Resources Code Clearly Delineates the Coastal Commission's Role to Provide "Comments" in Proceedings Before the California Energy Commission

As discussed below, the Warren-Alquist Act (the organic statute for the CEC), the Coastal Act, and the implementing regulations for both statutes clearly provide that the Coastal Commission has the discretion to offer "comments," but does not issue a "report" during the CEC's AFC proceedings. The Amended HBEP is a modification to the existing Licensed HBEP, which completed the AFC process with the issuance of a CEC Final Decision on October 29, 2014. Since the Coastal Commission may offer comments in an AFC proceeding, it is equally clear that Coastal Commission participation in an *amendment* proceeding, if any, is in the form of comments, not a report.

The Commission Staff's Comments should not be reviewed or treated as a "30413(d) Report" as contemplated by Public Resources Code section 30413(d). The Section 30413(d) process applies only to notice of intention ("NOI") proceedings. Specifically, Section 30413(d) provides that "the [Coastal] commission shall analyze each notice of intention and shall, prior to completion of the preliminary report required by Section 25510, forward to the [CEC] a written report on the suitability of the proposed site and related facilities specified in that notice."³ The language of Section 30413(d) is abundantly clear on its face that the requirements for a "report"

³ Emphasis added. Section 25510 is only relevant to NOI proceedings as it provides the timeline within which the CEC shall issue to the public a summary and hearing order on an NOI to file an AFC.



from the Coastal Commission pertain to NOI proceedings.⁴ While NOI proceedings are required for certain kinds of powerplant siting (e.g., nuclear facilities or coal plants), new thermal natural gas-fired powerplant facilities are statutorily exempt from the NOI process. (Pub. Resources Code, § 25540.6(a)(1).) The Amended HBEP is not in a NOI proceeding at the CEC.

Staff mistakenly assumes that if the Coastal Commission chooses to provide comments in the Amended HBEP proceedings before the CEC, the requirements of Section 30413(d) apply. This is incorrect. The only regulation that governs the requirements for amendments of existing CEC licenses, however, is California Code of Regulations, title 20, section 1769:

(3) If staff determines that a modification does not meet the criteria in subsection (a)(2), or if a person objects to a staff determination that a modification does meet the criteria in subsection (a)(2), the petition must be processed as a formal amendment to the decision and must be approved by the full commission at a noticed business meeting or hearing. The commission shall issue an order approving, rejecting, or modifying the petition at the scheduled hearing, unless it decides to assign the matter for further hearing before the full commission or an assigned committee or hearing officer.

(20 Cal. Code Regs., § 1769.) The CEC may approve such modifications only if it can make the findings set forth in Section 1769(a)(3)(A)-(D) of the CEC Siting Regulations. There are no other regulatory or statutory requirements that apply to amendment proceedings. In fact, certain modifications do not require approval by the full Commission. (20 Cal. Code Regs., § 1769(a)(2).)

The draft Comments also inappropriately rely on an April 14, 2005 Memorandum of Agreement⁵ between the CEC and the Coastal Commission (“MOA”) as “describ[ing] the manner in which the two Commissions will coordinate their respective reviews and identifies the process for the CEC to consider the Coastal Commission’s findings and recommended specific provisions.”

⁴ A primary purpose of the NOI process is to conduct a site selection process. Existing powerplants with a “strong relationship to the existing industrial site” are exempt from this site selection process. (Pub. Resources Code, § 25540.6(b).)

⁵ The MOA is not law and cannot change statutory requirements. Indeed, the Energy Commission has acknowledged such in its brief to the California Supreme Court in *City of Carlsbad v. California Energy Resources and Development Commission, et al.* (Case No. S203634): “Such an interagency agreement does not change existing statutory law, or create new statutory duties. The Energy Commission has sought to encourage Coastal Commission participation in its proceeding for coastal facilities, both by proposing and signing the MOA, and by directly requesting participation.” Thus, while the Energy Commission and Coastal Commission, through the MOA, can agree to whatever participation the agencies desire and can label Coastal Commission comments in any manner they choose, the Energy Commission’s obligations under Section 25523(b) are only triggered if a statutory 30413(d) Report is required. Further, the Energy Commission is only required to make the findings set forth in Section 25523(b) if the Coastal Commission submits a statutorily required 30413(d) report for a NOI proceeding. Accordingly, the Energy Commission should treat the Coastal Commission’s “Report” in the Amended HBEP proceeding as comments submitted by an interested agency participating in the PTA process.



(Comments at p. 5.) The express language of the MOA, however, states that “[t]he purpose of this agreement is to ensure timely and effective coordination between the Energy Commission and the Coastal Commission during the Energy Commission’s review of an Application for Certification (AFC) of a proposed site and related facilities under Energy Commission jurisdiction.” (Emphasis added.⁶)

AES acknowledges that the Coastal Commission may choose to participate in any CEC-related proceedings. In fact, the Public Resources Code makes it abundantly clear for non-NOI proceedings, the Commission has discretion to participate, or not, in CEC proceedings: “The commission may, at its discretion, participate fully in other proceedings conducted by the State Energy Resources Conservation and Development Commission pursuant to its powerplant siting authority.” (Pub. Resources Code, § 30413(e) (emphasis added).) However, such discretionary participation is governed by Public Resources Code section 30413(e) rather than section 30413(d).

Regardless of the title of Staff’s draft Comments, any comments or “report” provided by the Coastal Commission in the Amended HBEP PTA proceedings are as a matter of law participation by the Coastal Commission pursuant to Section 30413(e) and not a “report” as defined in Section 30413(d) as the latter is only applicable in NOI proceedings.

Because the draft document sets forth comments pursuant to Section 30413(e) of the Coastal Act, it is within the Commission’s discretion whether to approve the comments and submit them to the CEC. Based on the evidence set forth herein, AES respectfully requests that the Comments not be approved by the full Commission without revisions to the Comments to correct errors in fact and law. If the Commission determines that action on Staff’s draft Comments shall be taken, AES respectfully requests that the Comments first be revised based on the evidence set forth herein and be submitted to the CEC as comments pursuant to Section 30143(e).

If action is taken on the Comments, AES respectfully requests that the Motion and Resolution be revised as follows:

Motion

I move that the Commission adopt the attached ~~report~~ **revised comments** and direct staff to forward ~~this report~~ **such comments** to the California Energy Commission pursuant to Coastal Act section 30413**(e)**~~(d)~~.

⁶ Although Project Owner disagrees with the Coastal Commission’s interpretation of the MOA as requiring 30413(d) reports during AFC proceedings, a July 8, 2014 Memorandum from the Coastal Commission Legal Division in response to comments provided by AES related to the previous Commission draft report provides additional evidence that the MOA only addresses AFC proceedings. In that Memorandum, the Coastal Commission Legal Division takes the position that “[t]he MOA clarifies that Warren-Alquist Act Section 25523 as well as an Energy Commission regulation requires the Energy Commission to adopt the specific provisions from the Coastal Commission report as conditions in its final AFC decision that licenses a power plant, unless the Energy Commission finds that a condition is infeasible or would cause greater adverse effect on the environment.” (Emphasis added.)



Resolution

The Commission hereby adopts the attached ~~report~~ **revised comments** regarding the proposed ~~upgrade and expansion~~ **amendment** of the **licensed** Huntington Beach Energy Project ~~on grounds that the report includes the findings and conditions necessary to comply with the Commission's obligations under Coastal Act section 30413(d).~~

AES welcomes and appreciates Coastal Commission participation and comments in the Amended HBEP PTA proceedings currently pending before the CEC as provided by Section 30413(e) of the Coastal Act.

II. The Final CEC Decision Determined That There Are No Wetlands On the HBEP Site And No Changes Affecting Wetlands Are Proposed

Pursuant to section 1769 of title 20 of the California Code of Regulations, the scope of CEC Staff's analysis of the PTA is limited to an evaluation of the impacts of the proposed modifications on the environment and the proposed modifications compliance with LORS. Further, CEC Staff's evaluation of a PTA must be consistent with the requirements of CEQA Guidelines section 15162, which governs the requirements for subsequent environmental review under CEQA after a project has been approved. Section 15162 limits additional environmental review to "substantial changes" that will result in greater environmental impacts than what was analyzed in the Final Decision, and provides for reliance on the Final Decision (the prior environmental review) for areas that will not have substantial changes.

The Amended HBEP does not include any "substantial changes" that will result in new significant environmental impacts or a substantial increase in the severity of previously identified significant effects that would require additional analysis. (CEQA Guidelines, § 15162.)

The draft Comments state that "the previously approved project was based in part on there being no identified wetland areas within the project footprint." (Comments p. 4.) This statement is true. Where the Comments are in error, however, is in the assertion that the "currently proposed project . . . includes two areas of known or likely wetlands that would be directly affected by project activities." (*Id.*) The Comments fail to acknowledge that a wetland delineation of the HBEP site was done as part of the HBEP AFC proceeding. That information was docketed in January 2013 ([TN# 69020](#)) and stated, in part, the following:

The California Energy Commission (CEC) biologist, Anwar Ali, made an additional request during the Huntington Beach Energy Project (HBEP) workshop on November 14, 2012, that the Applicant complete an Arid West Region wetland determination data form for one soil pit within the fuel oil tank containment basin (the data form available in USACE, 2008). The completed Arid West Regional data form and photo log (showing the one soil pit) are included in this supplemental response. As documented in the attached data form and photo log completed by Melissa Fowler, Biologist, CH2M HILL, Inc., none of the three wetland indicators set forth in Section 13577 (hydrophytic vegetation, hydric soil,



and/or wetland hydrology) is present within the fuel oil tank containment basin on the HBEP site (SP-01).

The Final CEC Decision licensing the HBEP, which preempts the Commission on all state law matters, concluded that no wetlands existed on the HBEP site. This conclusion holds true even for the Commission's more expansive definition of wetlands, given that the CEC already determined that the Licensed HBEP is consistent with all applicable State LORS with respect to wetlands. In fact, CEC Staff's Preliminary Staff Assessment and Final Staff Assessment for the Licensed HBEP state the following in concluding that no wetlands exist at the HBEP site:

The fuel oil containment basin associated with Unit 5 of the existing Huntington Beach Generating Station is identified by the National Wetland Inventory (NWI) as PUBFx, a palustrine system with an unconsolidated bottom, which is semi-permanently flooded and has been excavated (USFWS 2013). The applicant delineated the potential wetland within the containment basin and found that it did not meet any of the three parameters for classification as a wetland (i.e., presence of hydrophytic vegetation, substrate is predominately undrained hydric soil, and substrate saturated with water or covered by shallow water at some time during the growing season of each year) (HBEP 2013a). Staff confirmed this condition during its site visit.

(See FSA at p. 4.2-28 ([TN# 202405](#)); PSA Part A at p. 4.2-33 ([TN# 200828](#)).) There is no new information and no "substantial changes" as that term of art is defined in CEQA Guidelines section 15162, and, thus, the requirements for subsequent environmental review on this issue are not triggered by the Amended HBEP.

III. The Final CEC Decision Approved the Use of the 3-acre Newland Street Construction Worker Parking Area

The use of approximately three (3) acres along Newland Street for construction worker parking was evaluated throughout the Licensed HBEP AFC proceedings.⁷ The inclusion of the 3-acre Newland Street site was thoroughly evaluated during the proceedings as a construction worker parking area, and the Coastal Commission provided comments related to parking proposed in the Licensed HBEP proceeding. ([TN# 202701](#).)

The Final CEC Decision Commission Adoption Order states that the "HBEP will, with implementation of the Conditions of Certification, avoid any substantial adverse environmental effects on nearby state, regional, county, and city parks; and areas for wildlife protection."

⁷ The Final CEC Decision clearly states that the 3-acre Newland Street site is included as part of the HBEP project to be used as "parking for workers during the demolition of the existing units at HBGS and during construction of the HBEP" . . . "spaces will be provided at the following locations: ... Approximately 3 acres of existing paved/graveled parking located adjacent to HBEP across Newland Street (approximately 300 parking stalls)."



Use of the 3-acre Newland Street site is part of the Licensed HBEP and is not part of the requested amendments to the Final CEC Decision, does not constitute “substantial changes” that will result in greater environmental impacts than what was analyzed in the Final Decision, and, therefore, is not under consideration in the CEC PTA proceedings.

Similar to the discussion above, the Comments also incorrectly rely on “information provided during the current project review” as the basis for including comments on the potential for wetlands at the area on Newland Street proposed for use as construction worker parking. The Comments actually cite to a 2007 Mitigated Negative Declaration (“MND”) prepared by the City of Huntington Beach related to the Newland Street Widening Project for support, and claim that this is “new information made available since the Coastal Commission’s previous review [in July 2014].” However, a 2007 MND is not new evidence or information not previously available to the Coastal Commission Staff, CEC Staff, the City of Huntington Beach, AES, or any other interested party in the Amended HBEP PTA proceeding or the Licensed HBEP AFC proceeding. (See CEQA Guidelines, § 15162.) Moreover, as discussed above, the issues were adjudicated and decided in the subsequent 2014 CEC approval of the Licensed HBEP pursuant to the CEC’s CEQA-equivalent certified regulatory program.

The Comments later conclude that the proposed Newland parking area “includes areas of Commission-jurisdictional wetlands” and requests that the parking area be removed from the license. (Comments at p. 19.) However, there is no evidence to support the claim that the designated parking area contains wetlands other than a general reference to a superseded, nine year-old City document, and the wetland locations generally referenced therein are not clearly described as falling within the area already licensed for construction parking as part of the Licensed HBEP. Moreover, the MND is not new information triggering subsequent environmental review.

IV. The Amended HBEP Will Meet All Existing Conditions of Certification Related to Noise

Coastal Commission Staff acknowledge that “the currently proposed project’s equipment and activities are largely the same as the previously proposed project.” (Comments at p. 14.)

The Comments then incorrectly rely on arguments made by CEC Staff that were refuted by AES’ expert witness and rejected by the CEC during the Evidentiary Hearing for the Licensed HBEP, as reflected in the Final CEC Decision. CEC Staff’s arguments set forth in the Final Staff Assessment and Preliminary Staff Assessment relied on in the Comments were rejected in the Final CEC Decision. Thus, the CEC has already expressly and preemptively ruled on the very state law requirements that the Comments seek to impose.

On the topic of noise impacts on biological resources, the CEC Final Decision provides the following resolution in favor of the Licensed HBEP:

The issue of the potential for the project’s noise to impact special-status bird species in the Upper Magnolia Marsh and Magnolia Marsh was contested by Energy Commission staff and applicant.



Energy Commission staff recommended Condition of Certification **BIO-9** that would have required noise monitoring and noise management during the nesting season (February 1 to August 31). Staff premised this condition on the project's contribution to increased ambient noise levels, particularly during pile-driving activities. For most areas of the project, Energy Commission staff initially suggested that the project owner be required to monitor construction and demolition noise. Any noise over 60 dBA, or 8 dBA over ambient conditions, whichever was greater, would require additional noise mitigation measures. For an area known as M5, Condition of Certification **BIO-9** would require continuous noise monitoring during construction and demolition activities within 400 feet of the fence line. (Ex. 2000, pp. 4.2-33 – 4.2-36.)

At the July 21, 2014 [evidentiary hearing], Energy Commission staff indicated that it would modify Condition of Certification **BIO-9**. The modifications would continue the requirement for noise monitoring, but would not treat the ambient noise and exceedance as thresholds for action. Instead, Condition of Certification **BIO-9** would now require a “meet and confer” process to determine whether the cause of the increase to ambient noise levels was the result of construction and demolition activities or due to weather, traffic, or other conditions unrelated to the HBEP. (07/21/14 RT 176:12-177:17.)

Applicant, on the other hand, contends that construction and demolition noises do not impact birds in the same way as humans, given bird anatomy and physiology.

Applicant's witness, Dr. Robert Dooling, testified that human hearing would be graphed as roughly bowl-shaped, with people hearing less well at low and high frequencies. Bird hearing, when graphed in connection with human hearing, appears as a “V” shape in the middle of the bowl. The placement of the “V” in the graph is based on the frequencies at which birds vocalize. Construction noise occurs at low frequencies outside of the vocalization range of birds. Thus, concluded Dr. Dooling, birds are not as impacted by construction noise as humans. (07/21/14 RT 178:1-178:23; Ex. 1127.)

We find Dr. Dooling's testimony⁸ to be persuasive. We also find that special-status species, such as the light-footed clapper rail, are not currently breeding in Magnolia Marsh. We further note that it is speculative that the restoration activities in the marsh will, in the long-term, support nesting habitat of these bird species of special concern. (See discussion of the light-footed clapper rail, above.) We thus decline to impose Condition of Certification **BIO-9**.

(Final Decision at pp. 5.1-22 - 5.1-23.) Thus, the issues as framed in the Comments were adjudicated and decided by the CEC and are not before the CEC in the Amended HBEP proceeding.

⁸ Dr. Dooling's testimony is included as Exhibit C in CEC TN#s [202635](#), [202614](#), and [202838](#) (beginning on page 171); see also CEC [TN# 202959](#).



In addition, the Comments incorrectly state that the Amended HBEP would “bring major noise- and vibration-generating power plant components even closer to the sensitive species in the adjacent ESHA/wetland area than the previously proposed project and would create even more significant adverse effects.” (Comments at p. 14.) This statement is false. While the Amended HBEP has a different general arrangement than the Licensed HBEP, the equipment associated with the Amended HBEP will not be located any closer to the ESHA/wetland area than the Licensed HBEP. In addition, the Licensed HBEP would have included an 8’ wall on the wetland side of the facility for the attenuation of noise, and the Amended HBEP includes a 50’ wall. AES is not seeking any changes to the existing Noise Conditions of Certification as part of the Amended HBEP.

V. Cumulative Traffic Impacts Have Been Analyzed in the Amended HBEP PTA Proceeding

Aside from parking, the Comments also recommend specific information be included in the Traffic Control Plan required by TRANS-3 related to cumulative projects. However, the Comments fail to acknowledge that Project Owner docketed additional details regarding cumulative traffic impacts during the course of the PTA proceeding. (See [TN# 210262](#).) Cumulative traffic impacts were thoroughly analyzed during both the Licensed HBEP AFC proceeding and during the current Amended HBEP PTA proceeding, and those analyses demonstrate that there will be no significant project or cumulative impacts on traffic. Accordingly, public beach access will not be impacted. AES is not seeking any changes to the existing Traffic Conditions of Certification as part of the Amended HBEP.

VI. Conclusion

As demonstrated above, the Coastal Commission Staff Comments on the Amended HBEP PSA contain errors in fact and law and must be considered prior to any action being taken by the Commission. Based on the evidence set forth herein, AES respectfully requests that the Comments not be approved by the Commission without significant revisions and corrections. If the Commission determines that action on Staff’s draft Comments shall be taken, AES respectfully requests that the Comments first be revised based on the evidence set forth herein.

As previously noted, AES welcomes and appreciates Coastal Commission participation in the Amended HBEP PTA proceedings currently pending before the CEC as provided by Section 30413(e) of the Coastal Act.

Sincerely,

Stephen O’Kane
Vice-President
AES Huntington Beach Energy, LLC