

## DOCKETED

<b>Docket Number:</b>	12-AFC-02C
<b>Project Title:</b>	Huntington Beach Energy Project - Compliance
<b>TN #:</b>	212948
<b>Document Title:</b>	Project Owner's Follow-Up to Status Conference - Additional PSA Comments (Alternatives - Clutches)
<b>Description:</b>	Project Owner's Follow-Up to Status Conference - Additional PSA Comments (Alternatives - Clutches)
<b>Filer:</b>	Judith Warmuth
<b>Organization:</b>	Stoel Rives LLP
<b>Submitter Role:</b>	Applicant
<b>Submission Date:</b>	8/25/2016 2:05:42 PM
<b>Docketed Date:</b>	8/25/2016



500 Capitol Mall, Suite 1600  
Sacramento, California 95814  
T. 916.447.0700  
F. 916.447.4781  
www.stoel.com

August 25, 2016

MELISSA A. FOSTER  
Direct 916.319.4673  
melissa.foster@stoel.com

**VIA ELECTRONIC FILING**

The Honorable Andrew McAllister, Presiding Member  
The Honorable Karen Douglas, Associate Member  
California Energy Commission  
1516 Ninth Street  
Sacramento, CA 95814

Hearing Adviser Susan Cochran  
California Energy Commission  
1516 Ninth Street  
Sacramento, CA 95814

Mr. John Heiser, Project Manager  
California Energy Commission  
1516 Ninth Street  
Sacramento, CA 95814

**Re: Huntington Beach Energy Project - Petition to Amend (12-AFC-02C)  
Follow-Up To Status Conference/Additional PSA Comments [Alternatives -  
Clutches]**

Dear Commissioners, Hearing Officer Cochran, and Mr. Heiser:

The following comments are provided to further clarify and expand upon Project Owner's comments regarding alternatives to the proposed Amended HBEP – specifically, clutches – as set forth in Project Owner's Comments on the Preliminary Staff Assessment ("PSA") docketed on July 21, 2016 (TN# 212379 at p. 17) and as discussed during the August 19, 2016 Status Conference. As previously stated, and for the reasons set forth below, the discussion of clutches in the Alternatives section of the PSA and forthcoming Final Staff Assessment ("FSA") should be clear that it is provided for informational purposes only. In a similar vein, any discussion of clutches by the Siting Committee in the forthcoming PMPD and Final Decision shall also be for informational purposes only.

CEQA requires that alternatives be designed to avoid or substantially lessen a project's significant effects. (CEQA Guidelines, section 15126.6(a).) Because there are no significant

August 25, 2016

Page 2

impacts of Amended HBEP<sup>1</sup> that would be avoided or lessened by installing a clutch, a clutch is not an appropriate or legal CEQA alternative. In fact, the PSA states that “no supplementation to the 2014 Commission Decision is necessary for Alternatives” (PSA at p. 6-1) but then includes five pages of discussion about clutches and synchronous condensers. What Staff fails to include, however, is an affirmative statement that the information is being included for informational purposes only and that since the Amended HBEP does not have any significant environmental effects that would be reduced or avoided by the inclusion of clutches, they are not a true project “alternative.”

Moreover, to the extent CEC Staff or the Commission has inquired about the need for clutches in the area, such a need or lack of need is an existing condition – not an impact resulting from the Amended HBEP. The Commission does not have jurisdiction to require project modifications or conditions to address existing conditions or existing needs that are not created by or resulting from the Amended HBEP. Without substantial evidence of a nexus between some project impact and the installation of a clutch, a requirement to install a clutch would be unlawful. (*Nollan v. California Coastal Commission* (1987) 483 US 825, 837; *Dolan v. City of Tigard* (1994) 512 US 374, 386; *Ehrlich v. City of Culver City* (1996) 12 Cal.4th 854, 880.)

Further, recent correspondence from the CAISO<sup>2</sup> confirms that there is no existing need for a clutch and a possible future need is not a basis for requiring a clutch. As discussed during the Status Conference, the CEC is statutorily prohibited from evaluating need in its analysis of a proposed project. (*See also* Pub. Resources Code, § 25009.) It is not appropriate to speculate about what LORS may apply to an activity in the future, and the CEC does not have authority to impose requirements on HBEP based on potential future LORS that may or may not be adopted and become effective,<sup>3</sup> nor to dictate changes in project design - especially in the absence of any significant impacts that require mitigation.<sup>4</sup>

---

<sup>1</sup> The California Independent System Operator Corporation (“CAISO”) also concluded there are no system impacts resulting from the Amended HBEP. *See* TN# 212678.

<sup>2</sup> *See* TN# 212725. In addition, it is important to note that the CAISO’s November 2015 letter to the CPUC (TN# 206824) requested that the CPUC “consider making clutches a default option in procurement decisions related to new combustion turbine generation projects.” (emphasis added.) Hence, the CAISO was requesting that the CPUC consider clutches in future procurement proceedings - not that the CEC evaluate clutches in siting cases.

<sup>3</sup> Doing so would be unlawful and would violate various legal authorities regarding, among other things, due process. To be enforceable as a matter of due process under the state Constitution (Article 1) and

August 25, 2016

Page 3

Based on the foregoing, Project Owner respectfully requests that the discussion of clutches either be removed from the FSA or clearly labeled as for informational purposes only and not under the heading of a CEQA Alternatives “environmental impact analysis.” Lastly, and as noted in Project Owner’s response to Amended Committee Scheduling Order (TN# 212311) and in Project Owner’s PSA Comments (TN# 212379), due to the critical schedule of the Project, Project Owner looks forward to receipt of Staff’s FSA as soon as possible and a Commission decision on the Amended HBEP by the end of 2016.

Very truly yours,



Melissa A. Foster

---

federal Constitution (Fifth and Fourteenth Amendments), a rule must be sufficiently clear and, fundamentally, must be duly adopted by an entity with the power to create the rule or obligations. (*See, e.g., Coates v. Cincinnati* (1971) 402 U.S. 611; *William & Mary Law Review*, Vol. 54:987, p. 988.) In addition, CEQA requires an agency to consider only existing laws and conditions, and not to speculate about potential future legal requirements. (*See generally Banning Ranch Conservancy v. City of Newport Beach* (2012) 211 Cal. App. 4th 1209, 1234 (when preparing an EIR and determining mitigation measures, an agency does not need to speculate about potential future legal developments); *Chaparral Greens v. City of Chula Vista* (1996) 50 Cal. App. 4th 1134, 1145 (“agencies are not required to engage in ‘sheer speculation’ as to future environmental consequences of the project. Similarly, in the case of draft or proposed regional conservation plans, there is no express legislative or regulatory requirement under CEQA that a public agency speculate as to or rely on proposed or draft regional plans in evaluating a project.”). A clutch is not part of the Amended HBEP and any potential future proposal to add clutches is also speculative and need not be evaluated. *Laurel Heights Improvement Association v. Regents of the University of California* (1988) 47 Cal. 3d 376 (“where future development is unspecified and uncertain, no purpose can be served by requiring an EIR to engage in sheer speculation as to future environmental consequences.”) (citations omitted); *see also* CEQA Guidelines §§ 15384(a) (speculation does not constitute substantial evidence); 15145.)

<sup>4</sup> As noted by Stephen O’Kane at the August 19 Status Conference, any changes in project design could trigger additional modeling and/or additional analysis, including possible revisions to the general arrangement (GA), etc.