

DOCKETED

Docket Number:	12-AFC-02C
Project Title:	Huntington Beach Energy Project - Compliance
TN #:	214869
Document Title:	Helping Hand Tools and Robert Simpson's Pre-hearing Conference Statement
Description:	N/A
Filer:	System
Organization:	Robert James Simpson
Submitter Role:	Public
Submission Date:	12/16/2016 4:33:24 PM
Docketed Date:	12/16/2016

Comment Received From: robert james simpson

Submitted On: 12/16/2016

Docket Number: 12-AFC-02C

PRE HEARING CONFERENCE STATEMENT

Additional submitted attachment is included below.

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STATE OF CALIFORNIA

**State Energy Resources
Conservation and Development Commission**

In the Matter of:

HUNTINGTON BEACH ENERGY
PROJECT AMENDMENT

NO. 12-AFC-02C

**HELPING HAND TOOLS'S AND
ROBERT SIMPSON'S PRE-HEARING
CONFERENCE STATEMENT**

I. INTRODUCTION

Pursuant to the Commission's Notice of Prehearing Conference and Evidentiary Hearing docketed on December 7, 2016, Helping Hand Tools and Robert Simpson (herein referred to as "Petitioners") submit this Prehearing Conference Statement.

Petitioners also concurrently submit a Petition to Intervene, as well as a Motion to Continue the Prehearing Conference and Evidentiary Conference. As explained in the Motion, the issues discussed below are not ripe for hearing because the affected community has not been adequately engaged to solicit their input.

II. STATEMENT

a. The subject areas that are complete and ready to proceed to the Evidentiary Hearing

Petitioners contend that none of the subject areas are complete and ready to proceed because the affected community has not been adequately engaged in this proceeding, affected community members have not had adequate opportunity to opine on the Final Staff Assessment, and the Evidentiary Hearing is scheduled to take place immediately following the Prehearing Conference, on the same day, and not in the affected community.

First, unlike other proceedings that have robust public participation, there are only two parties to this proceeding the applicant AES Huntington Beach Energy, LLC and CEC Staff. This shows that the local community must not have been adequately engaged by the Commission. At the next pre-hearing conference, Petitioners intend to present evidence that the affected community has not received adequate notice of the projects likely impacts on it.

Second, Part 2 of the FSA, a 302-page document that contains detailed findings on the critical issues of public health and air quality, issued only seven days ago on December 9, 2016. That is not enough time for the affected community members to adequately digest and comment on the Staff's conclusions.

Finally, CEC evidentiary hearings for most AFC proceedings typically take place in the affected community (which, in this proceeding, would be Huntington Beach), and some time after parties and member of the community have had adequate time to digest the Prehearing Conference. But in this case, the Evidentiary Hearing is scheduled to occur in Sacramento, and just two hours after the Prehearing Conference starts. (TN214701, Notice of Prehearing Conference and Evidentiary Hearing Etc.) The Prehearing Conference is intended to provide opportunity to "assess the adequacy of available information, identify issues, and determine the positions of the parties." As explained on the Commission's website:

Prehearing Conference: Following this, the Committee conducts a Prehearing Conference to assess the adequacy of available information, identify issues, and determine the positions of the parties. Based on information presented at this event, the Committee issues a Hearing Order to schedule formal evidentiary hearings. At the evidentiary hearings, all formal parties, including intervenors, may present sworn testimony, which is subject to cross-examination by other parties and questioning by the Committee. Members of the public may offer oral or written comments at these hearings. Evidence submitted at the hearings provides the basis for the Committee's analysis and recommendations to the full Commission and part of the evidentiary record.

http://www.energy.ca.gov/public_adviser/site_certification_process.html

Similarly, the Commission's Siting Process Guidebook explains that "[t]he primary purpose of the pre-hearing conference is to prepare for formal hearings;

- Identify issues in agreement and issues in dispute;
- Schedule witnesses for subsequent hearings on the Notice of Intention, Application for Certification, or Small Power Plant Exemption; and
- Establish procedures to be followed."

Siting Process Guidebook, p. 99, <http://www.energy.ca.gov/2006publications/CEC-700-2006-002/CEC-700-2006-002.PDF>

Holding the prehearing conference two hours before the evidentiary hearing interferes with the purposes of the conference—to allow preparation for the evidentiary hearing.

b. The subject areas upon which any party proposes to introduce testimony in writing rather than through oral testimony

None.

c. The subject areas that are not complete and not yet ready to proceed to the Evidentiary Hearing, and the reasons therefor

All subject areas, for the same reasons explained in section II.a. above.

d. The subject areas that remain disputed and require adjudication, the issues in dispute, and the precise nature of the dispute for each issue

The subject areas that remain disputed include:

- Land Use: impacts on coastal resources, habitat preserves, and wildlife.
 - Alternatives: whether energy storage and alternative siting locations are preferable and adequate to satisfy the energy needs this project intends to fulfill.
 - Visual Resources: blight on our coast zones.
 - Air Quality: failure to incorporate best available control technology.
 - Public Health: pollutant emission impacts on public health.
 - Biological Resources: impacts on habitat preserves, and wildlife.
- e. The identity of each witness the party intends to sponsor at the Evidentiary Hearing, the subject area(s) about which the witness(es) will offer testimony, whether the testimony will be oral or in writing, a brief summary of the testimony to be offered by the witness(es), qualifications of each witness, the time required to present testimony by each witness, and whether the witness seeks to testify telephonically**

None.

- f. Subject areas upon which the party desires to question the other parties' witnesses, a summary of the scope of the questions (including witness qualifications), the issue(s) to which the questions pertain, and the time desired to question each witness. (Note: A party who fails to provide, with specificity, the scope, relevance and time for questioning other parties' witness(es) risks preclusion from questioning witnesses on that subject area.)**

Petitioners propose to question other parties' witness as follows:

- a) For the subject area of land use, alternatives and visual resources, Petitioners desire to question all Coastal Commission witness and any other expert witnesses on the issue of recommendations in the Coastal Commission's Report to the Energy Commission, including alternative siting locations away from a coastal zone, likely impacts on coastal resources, and the potential hazards of sea-level rise. Petitioners would request approximately 15 minutes for each witness.

- b) For the subject areas of air quality, alternatives, and public health, Petitioners desire to question all Coastal Commission witness and any other expert witnesses on the issues of whether this facility incorporates best available control technologies, whether the selected EG resources comply with the State’s loading order, whether energy storage feasibly could be used instead of the LMS100 turbines, and whether the LMS100 turbines should be certified if they have not been approved by the California Public Utilities Commission. Petitioners would request approximately 15 minutes for each witness.
- c) For the subject areas of land use and biological resources, Petitioners desire to question all Coastal Commission witness and any other expert witnesses on the issues of nitrogen deposition, impacts on nearby habitat preserves, and plume impacts on birds and aircraft.
- g. A list identifying exhibits with transaction numbers (TNs) that the party intends to offer into evidence during the Evidentiary Hearing and the technical subject areas to which they apply (see below for further details on Exhibit Lists)**

None.

h. Proposals for briefing deadlines or other scheduling matters

<i>EVENT</i>	<i>DUE DATE</i>
Prehearing Conference and Evidentiary Hearing	2/1/17
Presiding Members Proposed Decision (PMPD) Published	Week of 3/13/17
Committee Conference on PMPD	Within 30 days of the publication of the PMPD
Close of public comment period on PMPD	30 days after publication of the PMPD
Errata/Revisions to PMPD	TBD
Final Adoption Hearing by the California Energy Commission	March/April 201

i. Legal briefing as set forth in the “Order Shortening Time; Order Granting Motion to Advance Date for Evidentiary Hearing; and Scheduling Order” filed December 2, 2016

i. Various Statutes Require the Report from the Coastal Commission Be Considered by the Committee

Regardless of whether the Coastal Commission’s Report is deemed submitted under § 30413(d) or other relevant statutes, it should be accorded great weight and deference.

The ENERGY COMMISSION is the lead agency, required to seek input from other agencies with overlapping jurisdiction, such as the COASTAL COMMISSION.

20 CCR § 1714 states:

(c) The executive director shall also transmit a copy of the notice or application to the Coastal Commission for any site located in the coastal zone, to the Bay Conservation and Development Commission (BCDC) for any site located in the Suisun Marsh or the jurisdiction of the BCDC, to the California Department of Fish and Wildlife, to the Air Pollution Control District in which the project is located, to the Regional Water Quality Control Board in which the project is located, to all federal, state, regional, and local agencies which have jurisdiction over the proposed site and related facility, or which would have such jurisdiction but for the commission's exclusive authority to certify sites and related facilities pursuant to Chapter 6 (commencing with section 25500) of Division 15 of the Public Resources Code, and to any other federal, state, regional, or local agency which has been identified as having a potential interest in the proposed site and related facility, and shall request analyses, comments, and recommendations thereon.

Cal. Code Regs. tit. 20, § 1714 (emphases added). Thus, CEC’s duty to request input from the Coastal Commission is mandatory, distinguishing the Coastal Commission from other potential “commenters.”

The commission shall not approve as a site for a facility any location designated by the California Coastal Commission pursuant to subdivision (b) of Section 30413, unless the California Coastal Commission first finds that such use is not inconsistent with the primary uses of such land and that there will be no substantial adverse environmental effects and unless the approval of any public agency having ownership or control of such land is obtained.”

Pub. Res. Code § 25526(a). *See also* Pub. Res. Code § 25216.5(a) (CEC must take “actions to secure adequate evaluation of applications”).

And the Coast Commission has a mandatory duty to provide comments to the CEC as well. “Local and state agencies having jurisdiction or special interest in matters pertinent to the proposed site and related facilities shall provide their comments and recommendations on the project within 180 days of the date of filing of an application.” Cal. Pub. Res. Code § 25519(h).

CEC has no authority to issue a coastal development permit, which is essentially what certification of this project in this proceeding would do. Typically, the Coastal Commission issues coastal development permit under the Coastal Zone Management Act. Given the import of this decision, CEC should defer to the Coastal Commission’s expertise.

Project applicant advocates a strict construction interpretation of Section 30413(d) because that provision refers to the obsolete notice of intention (NOI) proceeding and not the application for certification (AFC) proceeding. But applicant’s reading is too literal and ignores the obvious *intent* of the legislature, as well as the *intent* of this Commission and the Coastal Commission in entering the Memorandum of Understanding. The Energy Commission may be the lead agency, but it has the obligation to defer to agencies with expertise in specific subject areas. Here, the Coastal Commission is the agency with jurisdiction over and expertise in coastal zone impacts, including the subject areas of land use, biology, geology, soils and water and other coastal impacts that the proposed project will have.

The attempt to distinguish between an amendment proceeding and a regular proceeding also lacks any basis and is too literal. The relevant facts remain the same: Coastal Commission has expertise and jurisdiction over coastal issues; this project is proposed to be sited on the coast for decades to come; the same subject areas and CEQA analyses are involved. The Coastal

Commission's Report, drafted by experienced experts in the subject areas at issue, should be treated with more respect than a mere "comment" by any given member of the public— regardless of whether this is an amendment proceeding or not.

ii. Water Code section 10910, subdivision (h) Does Apply to the Project's Water Supply Assessment.

Since October 2014, when the prior water supply assessment occurred, California has suffered severe drought conditions affecting water supply in the Huntington Beach area. This drought qualifies as "[c]hanges in the circumstances or conditions substantially affecting the ability of the public water system" under Water Code section 10910(h)(2) and "[s]ignificant new information" under Water Code section 10910(h)(3).

III. CONCLUSION

For all the reasons stated above and in the accompanying Motion for Continuance, Petitioners request the Commission continue the Prehearing Conference and Evidentiary Hearing until February 1, 2017, at the earliest, and hold them in Huntington Beach.

DATED: December 16, 2016

Robert Simpson