

## DOCKETED

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**STATE OF CALIFORNIA  
ENERGY RESOURCES CONSERVATION  
AND DEVELOPMENT COMMISSION**

In the Matter of:

**Docket No. 12-AFC-02**

Application for Certification for the  
**HUNTINGTON BEACH ENERGY PROJECT**

**ENERGY COMMISSION STAFF'S OPENING BRIEF**

**I.  
INTRODUCTION**

On July 21, 2014, the Committee for the Huntington Beach Energy Project conducted an evidentiary hearing in Huntington Beach, California. The contested subjects that were identified and addressed at the hearing included Air Quality, Biological Resources, Cultural Resources, Visual Resources, and Alternatives. At the end of the session, the subjects of Land Use, Hazardous Materials, Water Resources, Soils, Geology, Greenhouse Gasses, and Compliance were continued for further proceedings to August 6, 2014.

A second day of evidentiary hearings was conducted on August 6, at which time the remaining contested subjects were addressed. Thereafter, the Committee for the Huntington Beach Energy Project issued a briefing schedule directing all parties to file Opening Briefs no later than August 20, 2014.

## II. ANALYSIS

### **1. PROJECT APPROVAL**

#### **A. Staff Provided Substantial Evidence in the Record to Support Its Recommendation of Project Approval.**

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).

#### **B. Staff's Testimony Determined That With the Proposed Conditions of Certification, the Huntington Beach Energy Project Will Not Cause Any Significant Adverse Impacts to the Environment.**

Pursuant to Title 20, California Code of Regulations, section 1742, the applicant is required to include in its Application for Certification information on the environmental effects of the proposed project. Energy Commission staff and all concerned environmental agencies are then tasked with reviewing the application to assess whether the application's "list of environmental impacts is complete and accurate, whether the mitigation plan is complete and effective, and whether additional or more effective mitigation measures are reasonably necessary, feasible, and available." <sup>1</sup>

Title 20, California Code of Regulations, section 1742.5 outlines staff's responsibilities in conducting its environmental assessment. Staff's duties include reviewing information from the applicant and other sources, assessing the

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<sup>1</sup> Cal. Code Reg., tit. 20, §1742(b)

potential environmental effects of the proposed project, assessing the completeness of the proposed mitigation, and the need for and feasibility of further or alternative mitigation. Staff is required to present its assessment in a report to be offered at an evidentiary hearing.

Portions of the Staff Assessment (Ex. 2000) comprised staff's written testimony in accordance with sections 1742 and 1742.5. In each section of these documents, staff analyzed the project's potential to cause direct, indirect or cumulative impacts, and concluded that the project, with appropriate mitigation, would not cause a significant impact to the environment. Additionally, the testimony of the applicant's witnesses fully supported staff's conclusions.

**C. Staff's Testimony Determined That the Huntington Beach Energy Project Will Be Reliable and Not Create a Significant Impact to Public Health and Safety.**

California Code of Regulations, section 1743 requires staff and interested agencies to assess the completeness and adequacy of the measures proposed by the applicant in terms of applicable health and safety standards and other reasonable requirements.<sup>2</sup>

Staff reviewed public health and safety in all of the applicable technical areas and in each section concluded that the Huntington Beach Energy Project would not adversely impact public health and safety. Once again, the applicant's testimony fully supported staff's conclusions. No other substantial evidence was offered into the record to refute staff's analyses or conclusions.

**D. Staff, Along With the South Coast Air Quality Management District, Determined That the Huntington Beach Energy Project Will Create No Significant Adverse Impacts to Air Quality.**

California Code of Regulations, section 1744.5 requires the local air pollution control officer, in this case the South Coast Air Quality Management District (SCAQMD), to conduct "a determination of compliance review of the

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<sup>2</sup> Cal. Code Reg., tit. 20, §1743(b)

application in order to determine whether the proposed facility meets the requirements of the applicable new source review rule and all other applicable district regulations. If the proposed facility complies, the determination shall specify the conditions, including BACT and other mitigation measures, that are necessary for compliance...”<sup>3</sup>

SCAQMD completed their Final Determination of Compliance on July 18, 2014, and determined that the proposed Huntington Beach Energy Project complies with all applicable District, state and federal air quality rules and regulations subject to the permit conditions, BACT and offset requirements discussed in the FDOC. (Ex. 2001) Furthermore, staff testified that the project would not result in significant air-related impacts. (Ex. 2000).

Section 1744.5(c) requires SCAQMD to provide a witness at the evidentiary hearings to explain the determination of compliance. At the evidentiary hearings on July 21, 2014, staff presented Andrew Lee, the Senior Engineering Manager for the SCAQMD. Mr. Lee was available for cross-examination by Intervenor Rudman, who declined to ask Mr. Lee any substantive questions regarding the FDOC and offered no evidence that the proposed project would not be in compliance with all laws, ordinances, regulations and standards (LORS) or would result in significant air-related impacts.

#### **E. Staff Concluded That the Huntington Beach Energy Project Will Be in Compliance With All Laws, Ordinances, Regulations and Standards.**

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

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<sup>3</sup> Cal. Code Reg., tit. 20, §1744.5(a)

recommendations by an interested agency on matters within that agency's jurisdiction shall be given due deference by Commission staff."<sup>4</sup>

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.

## **2. CALIFORNIA COASTAL COMMISSION PARTICIPATION**

### **A. What is the role of the Coastal Commission in this proceeding?**

The Huntington Beach Energy Project site is within in the Coastal Zone and therefore subject to the Coastal Act.<sup>5</sup> Were the Coastal Commission to exercise its permitting authority, it would review the project against the policies of the City of Huntington Beach's Local Coastal Program (LCP), general plan, and Land Use ordinances as well as the Coastal Act.

The Coastal Commission's permitting authority is in turn subject to the Energy Commission's jurisdiction over power plants.<sup>6</sup> The Energy Commission, when exercising its jurisdiction, conducts a similar analysis and solicits and considers the views of the agencies that would otherwise have jurisdiction over a proposed project, such as the Coastal Commission.

On April 14, 2005, the Energy Commission and the Coastal Commission entered into a Memorandum of Agreement, the purpose of which was 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. The agreement recognized the exclusive authority of the

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<sup>4</sup> Cal. Code Reg., tit. 20, §1744 (e)

<sup>5</sup> Public Resources Code § 30000 et. seq.

<sup>6</sup> Pub. Resources Code, §§ 25500, 30600

Energy Commission to certify sites and related facilities subject to the requirements of the Warren-Alquist Act<sup>7</sup>, as well as the Coastal Commission's role in AFC proceedings. The Warren-Alquist Act provides that:

"The commission shall prepare a written decision after the public hearing on an application which includes all of the following:

...(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 [CEC] 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." (Pub. Resources Code §25523(b) )

Hence, as set forth in the Memorandum of Agreement, and pursuant to requirements of Sections 25523(b) and 30413(d), the Coastal Commission is responsible, during the AFC proceeding for each project, for reviewing thermal power plant projects proposed in the coastal zone and providing a report to the Energy Commission specifying provisions regarding the proposed site and related facilities to meet the objectives of the California Coastal Act.

**B. If the Coastal Commission is not required to issue a formal report, how should the Committee treat the information contained in the Coastal Commission's letter of July 14, 2014 (TN 202701)?**

The Coastal Commission has submitted a report entitled "Coastal Commission's 30413(d) Report for the proposed AES Southland, LLC HBEP AFC," which included recommendations of the Coastal Commission in several areas, including Land Use, Biology, Geology, Soil and Water, and Traffic and Transportation.

There may be some confusion as to whether this report should be considered a report under § 30414(d), which mandates the participation of the Coastal Commission in NOI proceedings, or under 30413(e), which provides that

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<sup>7</sup> Public Resources Code Section 25500 et seq.

the Coastal 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.”<sup>8</sup> This is, however, a distinction without a difference, as the Coastal Commission has submitted a report pursuant to the Memorandum of Agreement. The question posed by the committee is therefore how the Committee should treat the information contained in the Coastal Commission’s report.

Section 25523 of the Commission’s regulations requires the inclusion of specific provisions of the Coastal Commission’s 30413(d) report “unless the commission specifically finds that the adoption of the provisions specified in the report would result in greater adverse effects on the environment or that the provisions proposed in the report would not be feasible.” But there is no requirement for the inclusion of the recommendations made in that report absent substantial evidence in the hearing record to support those recommendations.

The Memorandum of Agreement also provides that a representative of the Coastal Commission “will sponsor the report into the Energy Commission’s evidentiary record and be available at appropriate Energy Commission workshop(s) and hearing(s) to answer any questions about the report.” However, no representative was present during the July 21<sup>st</sup> or August 6<sup>th</sup> hearings to sponsor the report into the evidentiary record or otherwise participate in the hearings.

In accordance with § 1744(e) of the Commission’s regulations, staff gives due deference to a local agency’s assessment. As section 1744(e) states:

“Comments and recommendations by an interested agency on matters within that agency’s jurisdiction shall be given due deference by Commission staff.”

Due deference must be given in circumstances where an interested agency provides substantial evidence on matters within that agency’s jurisdiction

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<sup>8</sup> Pub. Resources Code § 30413(e)



that would justify a recommended change or addition to the Commission's Final Decision on a project. To give "due deference" to an interested agency is not to say that the Commission must blindly follow the recommendations of that agency. Pursuant to § 1748(e) of the Commission's regulations:

"The proponent of any additional condition, modification, or other provision relating to the manner in which the proposed facility should be designed, sited, and operated in order to protect environmental quality and ensure public health and safety shall have the burden of making a reasonable showing to support the need for and feasibility of the condition, modification, or provision. "

Here, the Coastal Commission has made recommendations that the Commission's Final Decision on the Huntington Beach Energy Project include additional conditions of certification. While due deference should be afforded to the Coastal Commission, this Committee is not bound to follow such recommendations that are not supported in the evidentiary record. These are discussed below.

### **1. Land Use**

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.

The Coastal Commission also requests that Commission staff assess the feasibility of using "these sites for the proposed project" to use for project-related construction parking.

The project site is adequately described in The FSA (Ex 2000) in sections 3 (Project Description) and 4.5-1 (Land Use), and does not include either

adjacent property. Energy Commission staff have concluded that the project itself conforms to both the Coastal Act and the City of Huntington Beach's LCP. (Ex 2000, Section 4.5-1). Furthermore, the impacts from the use of offsite construction laydown and construction worker parking are less than significant (Ex 2000, Section 4.10-1). The Coastal Commission's recommendation is not supported by the evidence, and the Committee should therefore reject the recommendation.

## **2. Biological Resources**

### a) 100 ft buffer

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.

### b) Noise and Vibration effects on biological resources

Coastal Commission staff have recommended additional language to condition of certification **BIO-9** that would limit sound levels in the marsh to 65dBA. This proposed language is not only unsupported by evidence, but it is contradictory to the rest of the language within **BIO-9** (which allows an 8dBA increase over ambient levels), and otherwise disregards the baseline noise levels within the marsh. To mitigate noise impacts to birds, Energy Commission staff has recommended that average construction and demolition noise must not exceed 60 dBA, or 8 dBA above ambient noise levels (whichever is greater) within Upper Magnolia and Magnolia marshes during the nesting season (February 1 to August 31). This threshold is consistent with those used by noise

staff to determine significance of project noise, and would ensure that loud noises that could impact breeding birds are minimized. Commission staff therefore recommends that the Committee reject this recommendation.

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.

### **3. Soil and Water Resources**

#### **a) Dewatering**

The Coastal Commission identified an area of concern that it entitled “Avoiding Effects of Construction Dewatering on Adjacent ESHA/Wetland Areas.” In their comments, the Coastal Commission correctly noted that Groundwater levels beneath both the HBEP and the adjacent wetlands are within a few feet of the ground surface, and that the results from groundwater monitoring wells on the HBEP site indicate that groundwater levels fluctuate with tidal levels in the adjacent flood control channel and show that the site’s groundwater is responsive to and directly connected to groundwater in nearby areas, including the adjacent wetlands. Coastal Commission staff recommended implementation of dewatering methods to avoid potential drawdown in those habitat areas. In response, staff have proposed a new condition of certification, **SOIL&WATER-8**, and urges the Committee to adopt that condition.

#### **b) 500-year flood damage prevention**

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.<sup>9</sup> 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.

c) Tsunami Run-up and sea rise issues

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**.

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<sup>9</sup> See e.g., Title 20, Appendix B(g)(14)(B)(iii).

#### **4. Traffic and Transportation**

##### a) City Parking

The Coastal Commission staff recommends that condition of certification **TRANS-3** be modified to delete the 225 beach parking area spaces from being available to the applicant during construction. Alternatively, the Coastal Commission staff recommends **TRANS-3** could be modified to require that the Parking/Staging Plan specify that the Huntington Beach City Parking Area be used only if there is insufficient parking space available in the other four proposed parking areas.

Energy Commission staff analyzed the use of several parking areas, including the beach parking area in question, and determined that through the implementation of the proposed conditions of certification that there would be no significant adverse impacts. (Ex. 2000, section 4.10) Modification of this condition of certification to delete those parking spaces is therefore not supported by the evidentiary record. However, the record would support modifying this condition to allow that the Huntington Beach City Parking Area be used only if there is insufficient parking space available in the other four proposed parking areas, and both Energy Commission staff and the applicant support this modification.

##### b) Cumulative Impacts

The Coastal Commission staff recommends that HBEP's cumulative traffic assessment be modified to include two nearby projects – the proposed Poseidon desalination facility and the Ascon Landfill cleanup project and that the modified assessment should be incorporated into HBEP's traffic plan as required pursuant to condition **TRANS-3**.

The Energy Commission staff's analysis in the FSA includes an adequate cumulative traffic and transportation analysis. (Ex. 2000, Section 4.10) Staff have determined that through the implementation of the proposed conditions of certification that there would be no significant adverse impacts. The Coastal Commission provides no evidence to undermine the conclusions in the FSA

regarding cumulative impacts. Commission staff therefore recommends that the Committee reject the recommended additional language in **TRANS-3**.

### **3. REMAINING CONTESTED ISSUES**

#### **A. Air Quality**

Energy Commission Air Quality staff analyzed the project's potential to cause direct, indirect or cumulative impacts, and concluded that the project, with appropriate mitigation, would not cause a significant impact to the environment. Staff also reviewed all applicable LORS for the proposed project and consulted with the appropriate federal, state, regional, and local agencies. Staff concluded that the Huntington Beach Energy Project, with the recommended conditions of certification would be in compliance with all applicable LORS.

Commission staff have demonstrated that the Huntington Beach Energy Project would qualify for the SCAQMD Rule 1304 (a)(2) exemption: therefore, PM10 and PM2.5 emissions of the new gas turbines would be fully offset with credits from SCAQMD's internal bank. (Ex. 2000, section 4.1) In addition, HBEP would also pay electrical generating fees under Rule 1304.1 in order to use the offset exemption. The fees would be used to fund air quality improvement projects consistent with SCAQMD's Air Quality Management Plan, with a priority for air quality improvement projects located in communities surrounding the HBEP site; however, the timing of the air quality improvement projects is uncertain. Staff has shown that the construction emissions are significant and the mitigation measures required in **AQ-SC6** are necessary to reduce the impacts to less than significant.

Disagreement remains between Energy Commission staff and applicant with respect to the sufficiency of Rule 1304.1 fees to mitigate construction emissions to a level of less than significant. However, irrespective of the underlying disagreement, staff and applicant have agreed to the modified language in the proposed changes to condition **AQ-SC6** that does not otherwise

undermine staff's analysis in this area. Staff therefore urges the Committee to adopt the conditions of certification as submitted.

## **B. Biological Resources**

Energy Commission Biological Resources staff analyzed the project's potential to cause direct, indirect or cumulative impacts, and concluded that the project, with appropriate mitigation, would not cause a significant impact to the environment. Staff also reviewed all applicable LORS for the proposed project and consulted with the appropriate federal, state, regional, and local agencies. Staff concluded that the Huntington Beach Energy Project, with the recommended conditions of certification would be in compliance with all applicable LORS.

Commission staff and applicant have entertained a disagreement with respect to noise monitoring to protect wildlife in the vicinity of the project as set forth in condition of certification **BIO-9**. Staff's analysis demonstrates the need for noise monitoring, especially during potentially "noisy" activities, and the disagreement has been centered on the need for monitoring and the whether to set an absolute threshold for exceedance.

Since the evidentiary hearings, staff has submitted a revised compilation of conditions of certification that include new language to the condition of certification in question. The new proposed language is not only supported by staff's analysis and conclusions in the Final Staff Assessment, but staff believes it will address the concerns of applicant in this area of dispute. The revised conditions of certification are supported by staff's analysis and conclusions as set forth in the FSA (Ex 2000), and Energy Commission staff urge the committee to adopt those conditions as submitted.

## **C. Cultural Resources**

Energy Commission Cultural Resources staff analyzed the project's potential to cause direct, indirect or cumulative impacts, and concluded that the project, with appropriate mitigation, would not cause a significant impact to the

environment. Staff also reviewed all applicable LORS for the proposed project and consulted with the appropriate federal, state, regional, and local agencies. Staff concluded that the Huntington Beach Energy Project, with the recommended conditions of certification would be in compliance with all applicable LORS. Two issues remain in dispute between the parties, and are discussed below.

### **1. CUL-1: Selection of delegated personnel**

In its final staff assessment, staff proposed eight conditions of certification that would constitute a reasonable and responsible set of mitigation measures for potential impacts on cultural resources, including **CUL-1**. These conditions define the personnel with delegated responsibility for implementing the conditions, their qualifications, and accountability measures among these personnel, staff, the project owner, and other parties that would be involved in the construction and operation of the proposed Huntington Beach Energy Project. The conditions also define reporting and construction monitoring requirements.

To address concerns of the Committee and the applicant regarding the manner in which personnel such as a Cultural Resources Specialist are selected and managed, commission staff has submitted as revised set of conditions of certification with new proposed language. The revised conditions of certification are supported by staff's analysis and conclusions as set forth in the FSA (Ex 2000), and Energy Commission staff urge the committee to adopt those conditions as submitted.

### **2. CUL-6: The need for a Cultural Resource Monitor / Native American Monitor During Excavation**

Staff concludes that the proposed Huntington Beach Energy Project could result in significant, direct impacts on buried archaeological resources, which may qualify as historical or unique archaeological resources under the California Environmental Quality Act (CEQA). Imposition of condition of certification **CUL-6** would reduce the potential for impacts to historical or unique archaeological



resources to a less-than-significant level and ensure the project complies with applicable laws, ordinances, regulations, and standards (LORS).

Applicant acknowledges that in the area of Power Block 1, a 16-foot by 55-foot area would be excavated. Applicant also acknowledges that the native sediments that could prospectively be impacted in that area is approximately one and a half feet into those native sediments. (TR 242, Ins.12-16) Staff concluded that the proposed excavations described above could damage or destroy buried, as-yet-unidentified archaeological resources in the proposed project site.

Commission staff testified that “we do know in fact that they are not just native soils, but also of the sort that would preserve any archeological resources if present. Additionally, if this is a very small area, it’s going to be quick monitoring. You know, the way the condition is written, we’ve asked for monitoring at locations where excavation would go below fill and only for the duration of that excavation.” (TR 243, Ins. 15-22)

Staff also testified, in rebuttal to applicant’s characterization that “...no Native American sacred sites or areas of concern are located within or near the HBEP site and no individual, group, or tribe indicated such resources exist at HBEP” (Ex. 1132, p. 1), that the United Coalition to Protect Panhe wrote that they believed the project site is culturally sensitive and encouraged staff to promote avoidance as mitigation for any cultural resource discoveries made in connection with the HBEP. The FSA also states, “In addition, the tribal village map provides general locations of two village locations along the coastline in the vicinity of the HBEP”. Three other Native American entities have advocated for cultural resources monitoring during construction to protect resource values as well. (Ex. 2000, pp. 4.3-17, 4.3-39) Staff’s proposed condition of certification **CUL-6** takes into account this input and information.

Under other circumstances, staff would request that the applicant conduct an excavation-supported geoarchaeological study to determine the likelihood of encountering buried archaeological deposits in the proposed project site. In the present case, however, staff concluded that a disproportionate amount of

excavation into non-fill sediments would be required for such a study when compared to the potential project impacts. Furthermore, the existence of radiocarbon dates from an adjacent property in the same environmental setting gives staff high confidence that the potential for buried archaeological deposits in native soils under the proposed project site is moderate. (EX 2000, Section 4.3, pg. 50) Therefore staff concluded that existing information is adequate to assess potential impacts and that the Energy Commission's historic preservation responsibilities are best served by implementing a cultural resources mitigation and monitoring program for the proposed project as set forth in **CUL-6**. Implementation of such monitoring in the affected area would reduce the potential project impacts to a less-than-significant level. The revised condition of certification **CUL-6** is supported by staff's analysis and conclusions as set forth in the FSA (Ex 2000), and Energy Commission staff urge the committee to adopt that conditions as submitted.

#### **D. Visual Resources**

Staff reviewed all applicable LORS for the proposed project and consulted with the appropriate federal, state, regional, and local agencies. Staff and applicant agree that the Huntington Beach Energy Project would be in compliance with all applicable LORS with the imposition of the recommended Visual Resources conditions of certification which require the preparation and implementation of plans to visually screen the project site with architectural enhancements, surface treatments, landscape plantings, and other screening measures.

While Energy Commission staff and the applicant are in agreement over the preparation and implementation of a visual treatment plan to comply with LORS, there remains disagreement between the parties as to whether there is a significant impact to visual resources that would also require such treatment plans as mitigation. The Energy Commission Visual Resources staff analyzed the project's potential to cause direct, indirect or cumulative impacts, and believes that the project would cause a significant adverse impact absent specific

mitigation measures. (Ex 2000, section 4.12) The applicant's analysis does not account for viewer response or viewer sensitivity in its assessment of project impacts, and discounts the visual changes at the power plant.

According to the 1990 USDOT guidelines considered by staff, a key assumption of the analysis method is that low visual quality does not necessarily mean there will be no concern over the visual effects of a project (Ex 2000, Appendix VR-2). Methods to improve the visual quality of the environment (e.g., incorporating design arts into a project) deserve careful consideration simply because a project such as the HBEP is viewed frequently by many local residents and visitors to the area.

Staff's assessment of visual impacts involves evaluating the effects of the proposed project on visual quality for the KOPs and estimating viewer responses to the visual change. Staff's analysis also considers the degree of change that would occur from introducing new built elements in the view. The overall visual change is typically based on an average of the values for contrast, dominance, and view blockage for each KOP. The rating scale to assess visual sensitivity and visual change ranges from low to high for each variable. The ratings for overall visual sensitivity and overall visual change are combined to determine the visual impact for each KOP.

Rather than use a reliable and tangible methodology, applicant's approach to determining whether there are significant adverse impacts to visual resources could be summed up thusly: the new project will be smaller and sleeker than the existing project, so therefore there cannot be any significant adverse impact. This approach does not consider visual sensitivity or viewer concern, two necessary components of staff's analysis.

Of note is the intimation by applicant's witness that the State CEQA Guidelines Appendix G checklist for aesthetics supports the notion that considering viewer sensitivity is not required because there is no mention of it in the checklist questions (TN 202838, pp. 118, 128, & 129). The suggestion by applicant is that the checklist questions have the effect of limiting the content of a

project analysis. This is incorrect. The Environmental Checklist Form in Appendix G of the State CEQA Guidelines provides a sample format for a lead agency to conduct an Initial Study to determine whether a project may have a significant effect on the environment.<sup>10</sup> As stated at the beginning of Appendix G, the sample questions “are intended to encourage thoughtful assessment of impacts...” The Appendix G checklist questions do not serve to limit the scope or content of the analysis.

Viewer response is an important part of any analysis into potential impacts to visual resources. Applicant’s witness, Thomas Priestly, actually advocated using the federal agencies’ visual impact assessment methods in his comments on the PSA (Exhibit 1096, TN 201582, p.15) At the hearing, however, he testified that an analysis of viewer response, per the federal agencies’ visual impact assessment methods, would have been included only in the event that this been a NEPA document (TR, p. 128, Ins 15-19), implying that the federal methods should not be applied to a CEQA analysis. This contradiction in testimony is important as it demonstrates the applicant’s acknowledgement of the importance of viewer response, at least until such time as it became an issue of contention.

Commission staff cannot see the wisdom in applicant’s implication that visual impact analysis has nothing to do with the viewers and their estimated concern for visual changes. There would be no purpose to identifying and analyzing different KOPs to represent sensitive viewing locations if the impact analysis didn’t account for the viewers in the assessment of impacts. This is especially relevant for a project like the Huntington Beach Energy Project, which has thousands of daily viewers in a coastal setting. And, if the viewers are omitted from the analysis, it implies that nobody is affected by the visual impacts of a project. To accept applicant’s position that viewer response is irrelevant in visual impact assessments, and that CEQA doesn’t require such an analysis, would be to turn a blind eye to what is required to protect, and in this case enhance, visual resources.

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<sup>10</sup> Cal. Code Regs., tit. 14, § 15063(a) and (f)

### III. CONCLUSION

By law, the Commission is required to make its findings and conclusions on whether the proposed Huntington Beach Energy Project will cause a significant adverse impact on the environment or public health and safety based on substantial evidence offered into the hearing record by the parties. Staff and the Applicant offered substantial evidence in their written testimonies and orally during the evidentiary hearings, clearly demonstrating that the proposed project, with the recommended mitigation, would not cause a significant adverse impact on the environment, public health, or safety, and the project would be in compliance with all LORS. Intervenor Rudman, on the other hand, has not provided substantial evidence to support her claims that the project should not be permitted, offering on the primary issues of contention only argument, speculation, and unqualified and unsubstantiated opinion. Therefore, Staff recommends that the Commission approve the Huntington Beach Energy Project's Application for Certification.

DATED: August 19, 2014

Respectfully submitted,

  
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KEVIN W. BELL  
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