

DOCKETED

Docket Number:	12-AFC-02C
Project Title:	Huntington Beach Energy Project - Compliance
TN #:	215424
Document Title:	Project Owner's Reply to Opening Brief of Helping Hand Tools and Robert Simpson
Description:	N/A
Filer:	Kimberly Hellwig
Organization:	Stoel Rives LLP
Submitter Role:	Applicant
Submission Date:	1/18/2017 1:48:30 PM
Docketed Date:	1/18/2017

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

In the Matter of:

The Petition to Amend the

HUNTINGTON BEACH ENERGY PROJECT

Docket No. 12-AFC-02C

**AES HUNTINGTON BEACH ENERGY,
LLC'S REPLY TO OPENING BRIEF BY
HELPING HAND TOOLS AND ROBERT
SIMPSON**

**AES HUNTINGTON BEACH ENERGY, LLC'S
REPLY TO OPENING BRIEF BY HELPING HAND TOOLS AND ROBERT SIMPSON**

January 18, 2017

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I. INTRODUCTION

Pursuant to the Committee’s January 5, 2017 Order Regarding Briefing Schedule (“Briefing Order”), Project Owner AES Huntington Beach, LLC herein submits its Reply Brief in support of the Petition to Amend (“PTA”) the Final Decision for the Huntington Beach Energy Project (“Amended HBEP”). Specifically, the Project Owner’s Reply is in response to the Opening Brief filed by Helping Hand Tools and Robert Simpson (collectively referred to herein as “Simpson” or “Intervenor”) (TN# 215259).¹ For the reasons set forth herein, the Simpson Brief should be treated as public comments by the Committee.

¹ The “Opening Brief By Helping Hand Tools and Robert Simpson” (TN# 215259) is referred to herein as the “Simpson Brief.”

II. LEGAL ARGUMENT

A. The Simpson Brief is Procedurally Defective

1. The Simpson Brief Contains Issues Outside the Scope of Simpson's Allowed Intervention

On December 20, 2016 the Committee published a “Committee Order Granting Petition to Intervene” granting Simpson’s Petition to Intervene on a limited basis. (TN# 214950.)

Specifically, the Order Granting Petition to Intervene ordered the following:

Petitioner’s participation is limited to the following topic areas:
Greenhouse Gas Emissions, Air Quality, and Public Health.
Petitioner’s intervention is subject to further modification at the discretion of the Presiding Member or the Committee. These limitations of Petitioner’s participation as an intervenor do not affect his ability to make public comments in the proceeding.

(*Id.* at p. 2.) Further discussion about the scope of Petitioner’s intervention occurred during the December 21, 2016 Prehearing Conference, wherein the limited scope of intervention was again reiterated by the Hearing Officer, again confirming that Petitioner’s intervention was allowed “only as to the following topic areas: Air Quality, Greenhouse Gases and Public Health.” (December 21, 2017 Prehearing Conference and Evidentiary Hearing Transcript (“December 21 Transcript”) (TN# 215154) at p. 6.) The Hearing Officer then reminded the parties that “Mr. Simpson may still offer public comment on any topic, even those not included in the order granting his intervention.” (*Id.* at pp. 6-7.) When Mr. Simpson challenged the limited scope of the intervention, it was noted on the record that Simpson’s “participation and the order issued by the Committee [on December 20, 2016] stands.” (*Id.* at p. 10.) Lastly, at the very end of the Evidentiary Hearing, the Committee discussed post-hearing briefing with the parties and again reiterated the limited scope of the briefing, in particular with regard to Simpson. (*See* December

21 Transcript at p. 127²; *see generally* December 21 Transcript at pp. 126-133.) Based on the foregoing, Simpson’s legal briefing could cover Air Quality, Public Health, and Greenhouse Gas Emissions.

From a review of the Simpson Brief, it is clear that it far exceeds the scope of his limited intervention. A few headings within the Simpson Brief on their face appear to fall within the scope of allowed briefing: “VIII. Green House Gas Emissions Synchronous Condensers”, “X. Briefings Should Not Be Required Prior to the Air Districts [sic] Response to Comments and the EPA Review”, and “XIII. Prevention of Significant Deterioration.” Project Owner responds to these three specific headings and content set forth therein in Part II.B.2., *infra*. All other portions of the Simpson Brief are outside the scope of Intervenor’s limited intervention and, therefore, should be stricken from the Simpson Brief and considered as public comment.

2. Intervenor Improperly Seek to Admit New Evidence Into the Record and Improperly Rely on Evidence not in the Amended HBEP PTA Proceeding Evidentiary Record

As confirmed in the Evidentiary Hearing Transcript, the evidentiary record for the Amended HBEP PTA proceeding was closed during the December 21, 2017 Evidentiary Hearing:

10 HEARING OFFICER COCHRAN: Thank you.
11 Are there any public comments on Public Health?
12 Seeing none, at this point is the evidentiary
13 record ready to be closed? Is there additional evidence
14 that we have not received?
15 MS. FOSTER: Project Owner does not have any
16 additional evidence or see the need for additional evidence
17 at this time.

² “Hearing Officer: Mr. Simpson, obviously you can provide briefing, legal briefing, on the issues that you were admitted on. You can provide comment on all issues at any time. However, that is when we talk about comment and briefing, though, we are not talking about additional factual information that’s not already included in the record, including what was stated today.”

18 HEARING OFFICER COCHRAN: Okay.
19 Mr. Bell?
20 MR. BELL: Nothing further on behalf of Staff.
21 HEARING OFFICER COCHRAN: Mr. Simpson?
22 MR. SIMPSON: Nothing further right now.
23 HEARING OFFICER COCHRAN: Okay. Then I will
24 declare the evidentiary record closed.

(December 21 Transcript at p. 125:10-24 (emphasis added).) Thus, any factual information provided after the close of the evidentiary record at the Evidentiary Hearing is outside the scope of the proceeding record³ and is inadmissible extra-record evidence.

Project Owner herein objects to Intervenor's reliance on extra-record evidence and moves to strike any such evidence from the record of this proceeding. Project Owner objects to Intervenor's reliance on extra-record evidence in the Simpson Brief on the basis that the information lacks foundation, is irrelevant, falls outside the scope of the allowed intervention, and is untimely. Specifically, Project Owner objects to information set forth in footnote citations,⁴ factual "testimony," and "Exhibits" attached to the Simpson Brief.⁵ Project Owner

³ The exhibits for this proceeding are available at <https://efiling.energy.ca.gov/Lists/ExhibitList.aspx?docketnumber=12-AFC-02C>. Instructions for accessing the aforementioned Exhibit List are also set forth on page 2 of the Committee Briefing Order dated January 5, 2017 (TN# 215168).

⁴ The following footnotes and information cited therein in the Simpson Brief rely on information not included in the evidentiary record for this proceeding and should be stricken from the Simpson Brief: FN15, FN16, FN19, FN24, FN26, FN28, FN29, FN30, FN31, FN33, FN35, FN36, FN37, FN38, FN39, FN40, FN50, FN53, FN54 and FN55.

⁵ See "Comments and Exhibits to Rob Simpson's Opening Brief" attached to the Simpson Brief, which include: "**Exhibit 1.** Aviation Safety Support Services for the Bureau of Safety and Environmental Enforcement Task 5: Study on Effects of Combustible Gas on Helicopter Operations; **Exhibit 2.** Aviation Safety Support Services for the Bureau of Safety and Environmental Enforcement Task C.4.5: Study on Effects of Combustible Gas on Helicopter Operations; **Exhibit 3.** GAP Distribution Map; **Exhibit 4.** Orange County Water District article titled "BIG "WIIN" FOR ORANGE COUNTY AS PRESIDENT SIGNS BILL THAT WILL PROVIDE RELIEF TO DROUGHT-STRICKEN CALIFORNIA"; and **Exhibit 5.** Letter from Professor Travis Longcore to Rob Simpson RE: Avian Collisions."

objects and moves to strike all statements made in the Simpson Brief by the Intervenors that are new “evidence” or “testimony” in this proceeding, as well as statements from others, such as the purported information from Ben Smith (Simpson Brief at p. 27) and the various reports cited within the Simpson Brief (*see, e.g.*, July 2012 LLNL Report (Simpson Brief at p. 5); Aviation Safety Support Services for the Bureau of Safety and Environmental Enforcement Task C.4.5 (Simpson Brief at p. 31)).⁶

3. The Simpson Brief Does Not Comply with the Committee Order Re: Briefing Schedule And Shall Be Treated as Public Comment

The Committee’s Briefing Order required opening briefs to be filed “no later than 3:00 p.m. on January 11, 2017.” (Briefing Order at p. 2, Item 1.) The Simpson Brief, however, was submitted to the docket at 4:08:32 PM on January 11, 2017 - well after the ordered deadline. Further, the brief exceeds the Committee’s 30-page limit. (*Ibid.*) Thus, the entirety of the late-filed Simpson brief shall be treated as public comment by the Committee.

⁶ With respect to the evidentiary record, Simpson’s notes the Coastal Commission “report” was not offered by Staff or Project Owner as an exhibit in this proceeding. (Simpson Brief at pp. 9-10.) As explained at length in Project Owner’s Comprehensive Prehearing Conference Statement (Exhibit 5121, Part IX.A. at pp. 20-25), the Coastal Commission comments are fully addressed in Staff’s FSA Part 1 and, regardless of the title of the Coastal Commission Comments, any written comments or “report” provided by the Coastal Commission in these 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). (*See also, e.g.*, 20 Cal. Code Regs. § 1745.5(3)(C) (“for applications for certification . . . concerning sites in the Coastal Zones” the PMPD shall contain “a discussion of the issues raised by the California Coastal Commission, if any, pursuant to section 30413(e) of the California Public Resources Code”; *c.f.* § 1745.5(3)(D) (“for sites in the Coastal Zones . . . for which a notice of intent as defined in Public Resources Code section 25113 has been filed” the PMPD shall include “(i) a discussion of provisions to meet the objectives of the California Coastal Act, as may be specified in the applicable report submitted by the California Coastal Commission under section 30413(d). . .”).) There are no requirements in the Warren-Alquist Act, the Coastal Act, the MOA between the CEC and the Coastal Commission, or the CEC Siting Regulations for the Coastal Commission to provide a 30413(d) report in a Section 1769 proceeding to amend a Final Decision.

Moreover, and as set forth in Parts II.A.1, II.A.2, and FN2, *supra*, the Simpson Brief contains new factual information, testimony, and exhibits that are inadmissible as they fall outside the scope of Simpson's intervention and were submitted after the close of the evidentiary record in this proceeding.

B. The Amendment Proceeding and Associated Environmental Review Fully Complies with the Law

As documented throughout the PTA proceeding, the Amended HBEP is smaller than the Licensed HBEP (844 MW compared to 939 MW) and has impacts that are less than or the same as those impacts that were analyzed for the Licensed HBEP. 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, CEQA Guidelines section 15162 limits Staff's environmental review of the Amended HBEP 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 for areas that will not have substantial changes. (Exhibit 6000 (FSA Part 1 at p. 1-6); CEQA Guidelines, § 15162.) 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. (*Id.*)

Friends of the College of San Mateo v. San Mateo Community College District (2016) 1 Cal.5th 937, confirms that a lead agency has the discretion to determine whether additional environmental review is necessary when a project is modified post-approval. In citing this case, Intervenor selectively omitted important language in the holding, thereby misrepresenting what the Supreme Court has actually said about environmental review of modified projects. The Court's holding in full is:

When an agency proposes changes to a previously approved project, CEQA does not authorize the courts to invalidate the agency's action based solely on their own abstract evaluation of whether the agency's proposal is a new project, rather than a modified version of an old one. Under the statutory scheme, the agency's environmental review obligations depend on the effect of the proposed changes on the decisionmaking process, rather than on any abstract characterization of the project as 'new' or 'old.' An agency that proposes project changes thus must determine whether the previous environmental document retains any relevance in light of the proposed changes and, if so, whether major revisions to the previous environmental document are nonetheless required due to the involvement of new, previously unstudied significant environmental impacts. These are determinations for the agency to make in the first instance, subject to judicial review for substantial evidence."

(*Friends of the College of San Mateo v. San Mateo Community College District*, *supra*, 1 Cal.5th at 944.) It is up to the Commission, therefore, to determine based on substantial evidence whether major revision to the prior environmental review is necessary. Staff has undertaken this specific analysis with respect to every issue area for the Amended HBEP. According to the law, Staff determined based on substantial evidence that there were no new, previously unstudied significant environmental impacts requiring major revisions to the previous environmental document. (*See generally* Exhibits 6000 and 6003.) The amendment proceeding fully complies with the requirements of section 1769 of title 20 of the California Code of Regulations, as well as CEQA requirements for subsequent review of post-approval project modifications.

1. Intervenor's Greenhouse Gas "Briefing" Is Really A Discussion of "Alternatives" and The Topic Synchronous Condensers Has Been Fully Analyzed by Staff In the Amended HBEP PTA Proceeding

The Simpson Brief contains a heading "VIII. Green House Gas Emissions Synchronous Condensers," but the discussion contained therein pertains to alternatives and is outside the scope of Intervenor's limited intervention. This entire discussion, therefore, should be treated as comments by the Committee. To the extent Intervenor's briefing within this topic touches on greenhouse gas emissions, the evidentiary record for the Amended HBEP is replete with

information evaluating greenhouse gases, clutch technology, and synchronous condensers. (*See, e.g.*, Exhibit 6000 at pp. 1-10 and 6-4 through 6-8; Exhibits 5034 and 5037.) In addition, contrary to the statement in the Simpson Brief that “CEC staff ignores prima fascia evidence of the fact that synchronous condensers are already being operated at the Huntington beach site and those synchronous condensers are slate [sic] to be demolished in 2020,” (Simpson Brief at p. 14), Staff specifically addressed the Huntington Beach Generating Station (“HBGS”) Units 3 & 4 that are now operating as synchronous condensers (Exhibit 6000 at p. 6-5) and the timing of demolition of those units that is slated to commence in early 2020 throughout the record for this proceeding. (*See, e.g.*, Exhibit 5001 at pp. 1-2, 2-1; Exhibit 6000 pp. 1-10, 6-4 through 6-8; and, Exhibit 6003 at pp. 1-2, 1-10, 3-3, 3-4, and 4.1-28.)

2. Simpson’s Air Quality “Arguments” Are Without Merit

As stated in Project Owner’s Opening Brief, even though Air Quality Staff determined that the Amended HBEP’s modifications “constitute a considerable change in fact and circumstance from the project as licensed,” Staff concluded that “there are no new significant environmental effects or a substantial increase in the severity of previously identified significant effects associated with those modifications.” (Exhibit 6000 at p. 4.1-1.) Thus, Air Quality Staff concluded that no supplementation to the 2014 Final Decision is necessary for Air Quality. (*Id.*) Project Owner reiterates that the Amended HBEP’s air emissions are more than fully mitigated, even beyond what is required by law, regulation, and District rules. (*See* Project Owner’s Post-Evidentiary Hearing Opening Brief (TN# 215249) at pp. 11-12.)

While the Simpson Brief contains very little discussion of air quality, Project Owner agrees that the Amended HBEP is subject to permit requirements under the PSD program, which

is administered by the SCAQMD. As the Simpson Brief correctly states, Project Owner did submit a PSD application to the SCAQMD in September 2015. (Simpson Brief at pp. 24-25.)

To the extent that the topic of air quality is raised by Intervenor as it relates to other topic areas (*i.e.*, Biological Resources), such arguments fall outside the scope of the allowed limited intervention. If the Committee, however, determines that the comment related to nitrogen deposition set forth on page 21 of the Simpson Brief is within the scope of the limited intervention, contrary to Intervenor's assertion, Staff evaluated nitrogen deposition impacts in both the Licensed HBEP proceeding and in this proceeding. (*See* Exhibit 6000 at p. 4-5⁷; Exhibit 5114 at pp. 5.1-28 through 5.1-29 and 5.1-33.)

C. Simpson's Objections To The Briefing Schedule Are Unsupported

Simpson's Brief summarily concludes: "X. Briefings Should Not Be Required Prior to the Air Districts [sic] Response to Comments and the EPA Review". (Simpson Brief at p. 15.) Simpson cites to no authority for this statement and there is no basis for it. The record for the PTA proceeding is complete and the Commission has all information necessary to proceed to decision. There is no basis for delaying briefing. Moreover, as noted at the Prehearing

⁷ "Staff determined that nitrogen emissions from the amended HBEP would be approximately 42 percent less than those of the approved HBEP. Although the exhaust stack dimensions of the amended HBEP would be different than those approved, the formation of depositional nitrogen from gaseous nitrogen compounds requires time and sunlight, which are independent of exhaust stack parameters. The reduction in nitrogen emissions would lead to a reduction of nitrogen deposition. In addition, the amended HBEP would be required to purchase RECLAIM Trading Credits to offset the annual nitrogen emissions on a 1:1 offset ratio (see the **Air Quality** section of this document). The amended HBEP would not result in a net increase in nitrogen emissions in the South Coast Air Basin coastal zone. Nitrogen deposition impacts on sensitive species and habitats would remain less than significant as identified in the Decision for the approved HBEP."

Conference, Simpson is participating in the Air District's permitting process, and the briefing in this proceeding does not impact that participation. (December 21 Transcript at pp. 8-9.)⁸

III. CONCLUSION

For the reasons set forth herein, the Simpson Brief shall be treated as public comment by the Committee. Project Owner looks forward to publication of the PMPD and a favorable decision by the Commission.

Date: January 18, 2017

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⁸ It is also worth noting that, although Simpson was allowed to intervene on the topics of air quality, GHG, and public health, the Simpson Brief contains almost no substantive discussion of these three issues, further raising questions about the need for delay in briefing.