

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

In the Matter of:	)	
	)	
Application for Certification of the	)	Docket No.: 11-AFC-03
Quail Brush Generation Project	)	
_____	)	

**ENERGY COMMISSION STAFF RESPONSE TO MOTIONS BY INTERVENORS  
HOMEFED FANITA RANCHO, LLC AND HELPING HAND TOOLS**

**I. INTRODUCTION**

Staff files this response to two scheduling motions filed by intervenors in this case. On October 25, 2012, HomeFed Fanita Rancho, LLC (HomeFed) filed a motion to extend the discovery period by 45 days (from October 31, 2012 to December 14, 2012) and pushing back other dates, including publication dates for the preliminary and final staff assessments, by a similar period of time. On November 2, 2012, intervenor Sunset Greens Homeowners Association filed a motion joining HomeFed’s motion for an extension of the discovery period.

On October 29, 2012, Helping Hand Tools filed a motion titled “Objection to Scheduling Order Dated October 2, 2012. Motion for Cancellation of Application or New Scheduling Order. Request for Point of Order Regarding Public and Air District Participation.” This motion asks the Energy Commission to cancel or deny the application without prejudice, or in the alternative for the Commission to issue a new scheduling order and to clarify the public’s opportunities to comment on or influence the preliminary determination of compliance (PDOC) and final determination of compliance (FDOC) issued for the project by the San Diego County Air Pollution Control District (SDAPCD).

In response to those motions and for the reasons explained below, staff supports revising the project schedule to allow for additional discovery, at least in the area of project alternatives, and to push back the publication date for the preliminary staff assessment (PSA) from December 14, 2012 to January 23, 2013, with corresponding changes to subsequent dates as well. This change in schedule is necessary because of significant delays in receiving needed documents on air quality and worker safety/fire protection.

Staff opposes Helping Hand Tool's motion to cancel or deny the application. Such action at this stage is simply not supported by the facts of this case.

## **II. DELAYS IN SUBMISSION OF THE PDOC AND FIRE RISK ASSESSMENT REQUIRE A DELAY IN THE PSA SCHEDULE**

Air quality and worker safety/fire protection are important sections of staff's analysis contained in both the PSA and the final staff assessment (FSA). Since the October 16, 2012 status conference, staff learned that necessary documents in both these areas will not likely be available until late November and mid-December.

The current schedule anticipated the PDOC would be filed by October 23, 2012. But SDAPCD revealed last month that it did not consider the project's amended application to be complete due to the changes proposed by the applicant to mitigate visual impacts. This mitigation involved clustering the stacks into two groups and reducing stack height, potentially affecting air quality impacts. Although the SDAPCD determined that the original application was complete, it informed the applicant in an October 19, 2012 letter that the amended application was not complete. SDAPCD asked the applicant for additional data on the nitrogen dioxide/nitrogen oxides ratio and additional information about placement of the facility's stacks to determine whether stack spacing would be sufficient to meet source testing requirements.

SDAPCD representatives have informed staff that SDAPCD will need approximately five weeks after the application is determined to be complete before it will be able to submit a PDOC. The applicant submitted information in response to the SDAPCD's request on October 23, 2012, and staff understands that a determination of completeness could be made by SDAPCD any day. Even if that determination is made today, the PDOC would not likely be available until approximately December 14, 2012, the current due date for the PSA.

The delay in the PDOC means staff will not be able to prepare a complete PSA by the December 14 publication date in the current schedule. The air quality section would be incomplete if it is prepared before the PDOC can be analyzed and incorporated into the section. Although the new anticipated date for receipt of the PDOC is more than eight weeks later than the date in the current schedule, air quality staff members will move as quickly as possible to prepare the PSA, and believe they can have their preliminary analysis with recommended conditions prepared within a few weeks after receiving the PDOC, which should allow publication of a complete PSA by January 23, 2013.

In the area of worker safety and fire protection, staff issued a data request on February 7, 2012 (staff data request No. 58) for the applicant to provide either a letter from the San Diego Fire-Rescue Department (SDFD) with information about project impacts on emergency response services, or alternatively prepare and submit fire and emergency services risk and needs assessments. On August 22, 2012, staff followed up with another request (staff data request No. 86) for a risk assessment and needs assessment for the project. At an October 19, 2012 workshop, staff and a deputy chief

of the SDFD agreed that instead of the more traditional risk and needs assessments, the applicant should focus the study on what on-site measures could be implemented to minimize the need for rescue and fire response from the City of San Diego. Staff is informed that study is underway and will not be available until approximately November 30, 2012.

Until the new fire and emergency response study is available, staff and SDFD will not be able to complete their assessment of fire risk issues and potential mitigation measures. The anticipated two-week window between filing of the new study and publication of the PSA does not allow sufficient time for SDFD to advise staff of its conclusions about project impacts, staff to complete its analysis of these impacts, and sufficient time for internal review and production of the PSA document.

The timing of the PDOC and fire response submittals is all the more problematic to PSA publication in December because air quality and worker safety/fire protection issues overlap with other technical sections of the PSA, including staff analysis of alternatives. Therefore, more than two sections of the PSA will need to receive substantial attention and be completed after receipt of the PDOC and fire risk assessment.

Moving the PSA date to January 23 will, of course, require adjustment of subsequent dates in the schedule, including PSA workshop, the close of the PSA public comment period, and the FSA publication date. Staff's proposed revised schedule is attached, with entries relating to revised dates in boldface. Staff's proposed schedule would set project dates somewhat earlier than the schedule HomeFed proposes in its motion.

### **III. INTERVENORS' REQUEST FOR ADDITIONAL DISCOVERY**

HomeFed, joined by Sunset Greens Homeowners Association, seeks a 45-day extension in the discovery period, to December 14, 2012. Helping Hands Tools appears also to seek an extension in the time for submitting discovery requests because of the delay in SDAPCD's issuance of the PDOC, but is not specific in its motion.

Staff informed the Committee at the October 16 status conference that it anticipated completing its data requests by the scheduled end of discovery on October 31. However, after reviewing applicant's October 31 submittals on alternatives, staff now has additional data requests on alternatives. Those data requests are being held by staff pending a Committee order on the intervenors' motions for an extension of discovery.

Applicant's October 31 alternatives submittals were extensive, totaling 130 pages including errata compared to the 30 pages of alternatives analysis in the AFC. The October 31 material not only included analysis of many more project alternatives than previously provided to staff and intervenors, but also made substantial revisions to the project's basic objectives. For example, the applicant did not previously identify any particular construction schedule as a project objective, but now says that one of its basic project objectives is to have an operational plant in 2014. The stated project

objectives have been revised to add “quick-start capabilities,” to find a site close to a load center with available capacity, and to modify a prior basic objective that the project site have compatible zoning and adjacent land uses. Given the extensive new information submitted on the last day of the scheduled discovery period, and the fact the applicant is changing its basic objectives for the proposed project, staff believes discovery should be extended as requested by intervenors, at least as to certain topics.

Applicant argues in a November 6, 2012 opposition to HomeFed’s motion that the alternatives analysis is “limited in scope” and that other parties have had ample time to submit requests for information relating to the project itself. This argument ignores not only the amount of new analysis added into the record in late October, but also the fact that applicant revising its stated basic objectives for the proposed project.

Staff is most interested in extending discovery in the area of alternatives, but does not object to a general extension of the discovery period or an extension that would cover other specific areas. Extending discovery as requested by HomeFed and Sunset Greens Homeowners Association will not delay the overall project schedule, given the fact the PSA and subsequent deadlines need to be adjusted anyway, in staff’s view, because of the anticipated submittal in coming weeks of the PDOC and fire-rescue study.

#### **IV. OTHER ISSUES RAISED BY HELPING HAND TOOLS**

Staff joins applicant in opposing Helping Hand Tools’ motion for cancellation or denial of the application for certification (AFC). It is not clear what legal standard the intervenor would apply to this action. Section 1716.5 of title 20, California Code of Regulations (CCR) allows a party to file a motion or petition regarding any aspect of the proceeding. But Helping Hand Tool’s motion seems to closely resemble a motion for terminating an AFC proceeding as provided in section 1720.2, subdivision (a), title 20, CCR. Termination of an AFC proceeding under that section requires a showing that the applicant has failed to pursue the application with due diligence. Intervenor does not make that argument in its motion, and the docket filings in this proceeding clearly establishes that this application has been actively pursued.

Intervenor’s motion does not state any other legally sufficient grounds for cancellation or denial of the AFC, in staff’s view. Neither the Warren-Alquist Act, Public Resources Code section 25000 et seq., nor the California Environmental Quality Act, Public Resources Code section 21000 et seq., compels rejection of a project that has not been approved within a year of the time the application was accepted as complete, and Helping Hand Tools’ argument that environmental information in the AFC is too “stale” to rely on ignores the fact that the AFC information has been updated by supplemental filings. Furthermore, staff’s review of the information filed by the applicant is ongoing and will continue several months more. When complete, staff’s analysis will provide the Committee and Energy Commission additional information regarding project impacts and alternatives when it makes decisions whether to license the project.

Intervenor also argues that the absence of a power purchase agreement (PPA) supports denial of the petition. Staff understands that a power purchase agreement has been signed for this project, but has not yet been approved by the California Public Utilities Commission. Even the complete absence of a power purchase agreement would not derail the application, since the existence of an agreement is not a prerequisite to Energy Commission certification.

Helping Hand Tools also asks the Energy Commission to clarify what opportunities exist for public comment and influence over the PDOC and the final determination of compliance that are issued by SDAPCD. In reply to those questions, staff would point out that members of the public can comment directly to SDAPCD on the PDOC, and also comment on either determination during the Energy Commission siting process. Parties to the Energy Commission proceeding could also provide evidence to challenge any disputed content of the SDAPCD determinations.

## **V. CONCLUSION**

For the reasons stated above, staff respectfully asks the Committee to:

- a. Revise the schedule as set forth in staff's proposed revised schedule, to include a PSA publication date of January 23, 2012;
- b. Extend the discovery period to December 14, 2012, at least for purposes of data requests related to applicant's October 31 alternatives analysis; and
- c. Deny Helping Hand Tools' motion for cancellation or denial of the AFC.

November 9, 2012

Respectfully submitted,

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QUAIL BRUSH GENERATION PROJECT (11-AFC-3) – STAFF-PROPOSED SCHEDULE 11-09-12

	ACTIVITY	Calendar Day
1	Applicant files Supplement #3 to the AFC	08-30-12
2	Applicant files outstanding data responses	09-17-12
3	Staff files data requests (round 7)	09-15-12
4	Staff workshop (Air Quality, Biological Resources, Cultural Resources, Fire Protection and Public Health )	10-03-12
5	Staff files data requests (round 8)	10-11-12
6	All parties file status reports	10-15-12
7	Status Conference	10-16-12
8	Applicant files data responses	10-18-12
9	Staff workshop ( Biological Resources, Fire Protection, Noise, Soil & Water and Visual Resources)	10-19-12
10	Staff files data requests (round 9)	10-22-12
11	Staff files data requests (round 10)	10-31-12
12	Applicant files data responses	10-31-12
13	Applicant files Supplement to Alternatives / Data Responses	10-31-12
14	Responses to HomeFed’s motion are due	11-09-12
15	Responses to Helping Hand Tool’s motion are due	11-13-12
16	All parties file status reports	11-15-12
17	Applicant files data responses	11-15-12
18	Status conference or hearing to consider pending motions**	TBD
19	HomeFed Fanita Rancho files data responses	11-21-12
20	Applicant files data responses (incl. Fire Risk Assessment)	11-30-12
21	SDAPCD issues Preliminary Determination of Compliance (PDOC)	12-14-12
22	Discovery phase ends	12-14-12
23	All parties file status reports	12-15-12
24	Status Conference (if needed)**	TBD
25	<b>Preliminary Staff Assessment (PSA) filed</b>	<b>01-23-13</b>
26	SDAPCD issues Final Determination of Compliance (FDOC)	01-31-13
27	Status Conference (if needed)**	TBD
28	<b>PSA workshop(s)*</b>	<b>02-08-13</b>
29	Public and agency comments on PSA are due	2-25-13
30	<b>Final Staff Assessment (FSA) filed</b>	<b>03-22-13</b>
31	Prehearing Conference**	TBD
32	Evidentiary hearings**	TBD
33	Committee files Presiding Member’s Proposed Decision (PMPD)**	TBD
34	Hearing on the PMPD**	TBD
35	Committee files errata or revised PMPD (if necessary)**	TBD
36	Full Commission issues its Final Decision**	TBD
	<b>*Staff workshop dates are tentative and subject to change</b>	
	<b>**Items 18, 24, 27, and 31-36 will be scheduled by the Committee</b>	



**BEFORE THE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT  
COMMISSION OF THE STATE OF CALIFORNIA  
1516 NINTH STREET, SACRAMENTO, CA 95814  
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***APPLICATION FOR CERTIFICATION FOR THE  
QUAIL BRUSH GENERATION PROJECT***

**DOCKET NO. 11-AFC-03  
PROOF OF SERVICE  
(Revised 10/29/2012)**

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DECLARATION OF SERVICE

I, Janice Titgen, declare that on November 9, 2012, I served and filed copies of the attached **ENERGY COMMISSION STAFF RESPONSE TO MOTIONS BY INTERVENORS HOMEFED FANITA RANCHO, LLC AND HELPING HAND TOOL**, dated November 9, 2012, 2012. This document is accompanied by the most recent Proof of Service list, located on the web page for this project at: <http://www.energy.ca.gov/sitingcases/quailbrush/index.html>.

The document has been sent to the other parties in this proceeding (as shown on the Proof of Service list) and to the Commission's Docket Unit or Chief Counsel, as appropriate, in the following manner:

*(Check all that Apply)*

For service to all other parties:

- Served electronically to all e-mail addresses on the Proof of Service list;
- Served by delivering on this date, either personally, or for mailing with the U.S. Postal Service with first-class postage thereon fully prepaid, to the name and address of the person served, for mailing that same day in the ordinary course of business; that the envelope was sealed and placed for collection and mailing on that date to those addresses marked *"hard copy required"* or where no e-mail address is provided.

**AND**

For filing with the Docket Unit at the Energy Commission:

- by sending an electronic copy to the e-mail address below (preferred method); **OR**
- by depositing an original and 12 paper copies in the mail with the U.S. Postal Service with first class postage thereon fully prepaid, as follows:

CALIFORNIA ENERGY COMMISSION – DOCKET UNIT  
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1516 Ninth Street, MS-4  
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**OR, if filing a Petition for Reconsideration of Decision or Order pursuant to Title 20, § 1720:**

- Served by delivering on this date one electronic copy by e-mail, and an original paper copy to the Chief Counsel at the following address, either personally, or for mailing with the U.S. Postal Service with first class postage thereon fully prepaid:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, that I am employed in the county where this mailing occurred, and that I am over the age of 18 years and not a party to the proceeding.

s/ Janice Titgen \_\_\_\_\_  
Janice Titgen