Helping Hand Tools
P.O. Box 152994
San Diego, CA 92195
Rob Simpson

California Energy Commission
DOCKETED
11-AFC-3
TN # 68233
OCT. 29 2012

STATE OF CALIFORNIA
State Energy Resources
Conservation and Development Commission

In the Matter of: Docket Number: 11-AFC-03

Application for Certification
Of the Quail Brush Generating Project)
_____)

OBJECTION TO SCHEDULING ORDER DATED OCTOBER 2, 2012.
MOTION FOR CANCELATION OF APPLICATION OR NEW SCHEDULING ORDER.
REQUEST FOR POINT OF ORDER REGARDING PUBLIC AND AIR DISTRICT PARTICIATION.

The Scheduling Order contemplated a number of events that have apparently not, timely, occurred. It should be vacated and a new schedule considered after the San Diego Air Pollution Control District (SDAPCD) issues its Preliminary Determination of Compliance (PDOC). The Schedule contemplated; "SDAPCD issues Preliminary Determination of Compliance (PDOC) October 15, 2012." Instead on October 23, 2012 the record contains; "Applicant's Responses to Data Requests per the SDAPCD Letter Dated 10-19-12" While the underlying SDAPCD letter does not appear to be a part of the record for this proceeding, the response appears to indicate that the SDAPCD is nowhere near issuing a PDOC.

This application has been before the Commission for over 400 days in and the application is still not complete. The process is designed to be a one year process so that the environmental baseline is contemporaneous. The application and environmental information is already stale. There is no power purchase agreement (PPA) and none likely forthcoming. SDG&E's purported position is purely self-serving based upon potential profits for SDG&E not based upon any need for the facility. The Commission should deny the application at this juncture without prejudice and allow the applicant to reapply if and when it can submit an application that can be timely processed. The Commission should not waste valuable resources examining this incomplete application at this time.

The Scheduling Order further contemplates; “Applicant submits revised air quality modeling package, Emission Reduction Credits, mitigation information, an updated table of expected emissions and proposed CEQA mitigation for non-attainment pollutants October 3, 2012” The record does not reflect that the applicant has fully complied with this benchmark.

The Scheduling Order understands that; “Some deadlines may be contingent upon reviews to be conducted by federal, state, and local agencies. The Applicant must provide sufficient review time for the responsible agencies to meet the deadlines specified in the schedule.” This appears to be just such a situation.

The Scheduling Order states; “Final date for exchange of information (discovery) October 31, 2012” Even if the PDOC was timely submitted; 15 days would be inadequate to submit discovery requests.

POINT OF ORDER

In Carlsbad, upon my dissatisfaction with the SDAPCD PDOC, I appealed to the SDAPCD Hearing Board. Commission legal staff interjected into the proceeding that the Hearing Board did not have authority to consider the matter pursuant the preclusive nature of the Warren Alquist Act, therefore the Hearing Board dropped the matter. SDAPCD did respond to comments in that proceeding. The Commission first indicated that they would adjudicate the FDOC and later declined. In Pio Pico, apparently emboldened by the protection of the Commission, the SDAPCD failed to even respond to comments.

The PDOC typically offers a 30 day comment period. SDAPCD may or may not consider comments. The Commission should clarify its duties and those of “responsible agencies” Its failure to consider PDOC comments or compel SDAPCD to do so in the Pio Pico proceeding has resulted in the attached Supreme Court challenge. If and when the SDACD issues a PDOC for this proceeding what opportunities does the public have to influence the PDOC, within the constraints of the Warren Alquist Act? What recourse does the public have if dissatisfied with the Final Determination of Compliance (FDOC), within the constraints of the Warren Alquist Act?

For the above reasons the Commission should cancel this proceeding or at least clarify its procedures and issue a new scheduling order.

/
Rob Simpson
Helping Hand Tools
Director

No.

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

HELPING HAND TOOLS, AND ROB SIMPSON,

Petitioners,

v.

ENERGY RESOURCES CONSERVATION AND DEVELOPMENT COMMISSION,

Respondents.

SAN DIEGO AIR POLLUTION CONTROLL DISTRICT And PIO PICO ENERGY CENTER, LLC,

Real Parties-In-Interest

PETITION FOR WRIT OF MANDATE; SUPPORTING MEMORANDUM AND EXHIBITS

Gretel Smith (SBN 272769)
Staff Counsel for
Helping Hand Tools and Attorney
for Rob Simpson
1901 First Avenue, Suite 219
San Diego, CA 92101
(619) 822-6261
Gretel.smith79@gmail.com

Attorney for Petitioners

PETITION FOR WRIT OF MANDATE

Petitioner Helping Hand Tools, bring this Petition for a Writ of Mandate under California Public Resource Code section 25531, and alleges the following:

1. Petitioner, Helping Hand Tools is a California non-profit corporation who has members throughout California, including members in San Diego County. Helping Hand Tools has standing because it, through its executive director, Rob Simpson, participated in the siting case 11-AFC-01 before the energy Commission and submitted public comments. Further, its members including Mr. Simpson will be adversely affected by the construction of the facility in question.

2. Petitioner, Rob Simpson is an individual and resident of California. Ms. Simpson has standing to bring this Petition since he formally intervened in the proceedings before the Energy Commission. Further, Mr. Simpson is the Executive Director of Helping Hand Tools. Additionally, Mr. Simpson will be adversely affected by the construction of the facility in question.

3. Respondent Energy Resources Conservation and Development Commission (commonly known as the California Energy Commission (CEC)) is a Commission within the Resources Agency of the State of California created pursuant to California Public Resources Code section 25200.

4. Real Party-In-Interest San Diego Air Pollution Control District is a local government agency with jurisdiction over the proposed project and identifies itself as the responsible agency under California Environmental Quality Act (CEQA).

5. Real Party-In-Interest Pio Pico Energy Center LLC a fund managed by Energy Investors Funds Management, LLC, is the applicant for application for certification (AFC) number 11-AFC-01.

6. This Petition is based on the Memorandum and declarations that follow, which are incorporated herein by reference.

WHEREFORE Petitioner prays for:

1. An order, ordering the CEC to prepare and submit to this Court a full transcript of the proceedings in case number 11-AFC-01 so this Court may determine whether the CEC has proceeded in a manner not required by law, or exceeded its jurisdiction;
2. Petitioner be awarded its cost of suit, including reasonable attorneys' fees; and
3. Petitioner be awarded other relief as may be just and proper.

DATED: October 15, 2012

Respectfully submitted,

_____

Gretel Smith, Esq.
Staff Counsel for
Helping Hand Tools

Points and Authorities

Table of Contents

I. STATEMENT OF ISSUES 1

II. INTRODUCTION 1

III. FACTS 2

IV. DISCUSSION 4

A. The Commission Failed to Comply With Due Process Requirements 5

1. The CEC Certified Pio Pico Without Responding to an Intervenor's Comments 5

2. The Commission Severely Limited Public Participation of an Intervenor Who Expressed Objections to the Entire Final Staff Assessment 6

B. CEC Relied upon Flawed Data Obtained Nine Miles from the Proposed Site to Establish an Ambient Air Quality Baseline 7

C. Greenhouse Gas Emissions from Pio Pico Will have a Significant Cumulative Effect on the Environment: BACT and Mitigation Measures are Required 8

D. The Alternative Analysis Fails to Fully Discuss Feasible Alternatives 11

E. Pio Pico is a Modification of the Existing Otay Mesa Generating Project and Not a New Project 12

F. The CEC Failed to Disclose the Effects Pio Pico would have on Air Quality in Any Public Notices 13

V. CONCLUSION 14

TABLE OF AUTHORITIES

Cases

Communities for a Better Environment v. City of Richmond (2012) 184 Cal.App. 4th 70 10
Communities for a Better Environment v. Southwest Air Quality Control District (2010) 48 Cal. 4th 310 7
Kings County Farm Bureau v. City of Hanford (1990) 221 Cal.App.3d 692 ..... 5, 7
Laurel Heights Improvement Assn. v. Regents of University of California (1993) 6 Cal. 4th 1112 11
Residents Ad Hoc Stadium Com. v. Board of Trustees (1979) 89 Cal.App.3d 274 5
San Joaquin Raptor Rescue Center v. County of Merced (2007) 149 Cal.App.4th 645 ... 10
San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaous (1994) 27 Cal.App.4th 713 12
Sundstrom v. County of Mendocino (1988) 202 Cal.App.3d 296 10
Sunnyvale West Neighborhood Assoc. v. City of Sunnyvale (2010) 190 Cal.App. 4th 1351 7

Statutes

42 U.S.C. §7401 5
H&S Code § 38500 ..... 5, 9, 11
Health & Safety Code § 39000 5
Pub. Res. Cod §25531 ..... 2, 4
Pub. Res. Code § 21091 5
Pub. Res. Code § 25523 5
Pub. Res. Code §21080.4 5
Pub. Res. Code §25530 ..... 2, 4
Public Res. Code § 25000 5

Other Authorities

Public Participation in the Siting Process: Practice and Procedure Guide (2006) p. 53-54 located at http://www.energy.ca.gov/2006publications/CEC-700-2006-002/CEC-700-2006-002.PDF (last accessed 10/11/2012) 6

Rules

SDAPCD Rule 20.3(4)(i) 5

Regulations

14 CCR § 15125 7
14 CCR § 15126 12
14 CCR §15064 7
14 CCR §15064.4 9
14 CCR §15065 7
20 CCR § 1752.3 5
20 CCR § 2022 7
20 CCR § 2027(a)(5) 11
20 CCR §1710 13
42 U.S.C. §7411 12

I. STATEMENT OF ISSUES

1. Whether the California Energy Commission (CEC) proceeded in a manner required by law when it certified Pio Pico Energy Center without addressing public comments and limiting an Intervenor's participation in the sole evidentiary hearing.

2. Did the CEC proceed in a manner required by law when it relied on data supplied by an air quality monitoring station 9 miles from the proposed site to determine the ambient air quality baseline?

3. Did the CEC fail to proceed in a manner required by law when it determined that the proposed Pio Pico Energy Center's Greenhouse Gas (GHG) emissions would not have a significant cumulative effect on the environment?

4. Did the CEC fail to proceed in a manner required by law in its alternatives review of the project?

5. Did the CEC fail to proceed in a manner required by law when it determined that Pio Pico Energy Center was a new project and not a modification of an existing project?

6. Did the CEC fail to proceed in a manner required by law when they failed to disclose the impact on Air Quality in its notices to the public?

Petitioners seek extraordinary relief from this Court because in addition to the matters set out above in paragraphs one through six, the following make it proper and necessary that a writ issue from this court because, the matters involved are of a widespread interest to the people of the state of California.

II. INTRODUCTION

This story is about the certification of a 300 megawatt(MW) peaker power plant. The proposed facility is located adjacent to an existing power plant, within six miles of four other power plants, across the street from several correctional facilities including a

juvenile detention facility, and approximately two miles from the United States/Mexico Border in Otay Mesa.

While a goal of the CEC is to ensure that all California residents receive uninterrupted electricity; that is not the entire goal of the CEC. The state legislature, California Residents, and Attorney General have all charged the CEC with implementing its goal of providing uninterrupted electricity in the most environmentally friendly way possible. Despite the voices of Californians screaming for a reduction in fossil fuel burning facilities, the CEC continues to certify fossil fuel burning power plants. The CEC, even when faced with cold hard data, crutches its decisions to certify these plants on the determination that alternative environmentally friendly technologies are not as efficient as the fossil fuel burning counter parts.

The California Energy Commission (CEC) granted an Application For Certification submitted by Pio Pico Energy Center, LLC on September 12, 2012. On September 17, 2012, the CEC docketed the final order. This matter is brought timely under Public Resources Code section 25530 and 25531.

III. FACTS

Pio Pico Energy Center LLC (the applicant) filed an Application for Certification (AFC) on or about February 9, 2011. The applicant proposed to build a 300 MW natural gas burning peaker power plant on nine acres of land located in Otay Mesa. The proposed site is 4000 feet from three existing detention facilities: East Mesa Juvenile facility, George Baily detention facility, and Donovan State Prison. Also, the proposed site is immediately next door to a recently built 510 MW facility known as the Otay Mesa Generating Project. Within less than six miles of the proposed facility, approximately three additional power plants operate. The applicant used an air quality monitoring station nine miles North West from the proposed site to demonstrate the ambient air

quality. Two other air quality monitoring stations exist less than two miles from the proposed site.

On or about April 20, 2011, the CEC accepted the AFC as complete. Mr. Rob Simpson filed a petition to intervene on or about November 2, 2011. The CEC granted Mr. Simpson's petition to intervene on December 16, 2011.

On or about December 28, 2011 the San Diego Air Pollution Control District (SDAPCD) submitted its Preliminary Determination of Compliance (PDOC). Mr. Simpson timely commented on the SDAPCD's PDOC. SDAPCD never responded to any of Mr. Simpson's comments despite numerous requests and a requirement to do so. Between January 2012 and May 2012, the CEC held several workshops with regards to the Pio Pico project. On May 22, 2012, Staff for the CEC submitted the Final Staff Assessment (FSA) for public comment and commission review.

Mr. Simpson had a variety of issues with the FSA. In his pre-hearing conference statement filed on June 5, 2012, Mr. Simpson requested an opportunity to cross-examine witnesses on all areas incorporated in the FSA. On July 12, 2012, the commission held a pre-hearing conference. The purpose of the pre-hearing conference was to set a schedule for a July 23, 2012 Evidentiary hearing. During the conference the commissioner refused to allow Mr. Simpson, one of two Intervenors, the opportunity to cross-examine all witnesses on all topics in the FSA. The Commissioner limited Mr. Simpson to four topics: Air Quality, Alternatives, Biological Resources, and Land Use. The Commission wanted to limit the length of the evidentiary hearing.

At the July 23, 2012 hearing the topic of Noise took three hours to discuss with an ultimate decision by the commissioner to brief the noise issue. Mr. Simpson, through his counsel spent two hours cross examining witnesses on Air Quality, Alternatives, Biological Resources and Land Use. Additionally, Mr. Simpson offered Mr. Bill Powers as an expert on Alternative energy. In preparation for Mr. Powers' testimony, the staff

submitted sur-rebuttal testimony of David Vidaver. The commission allowed Mr. Vidaver's late filed testimony but refused to allow Mr. Powers to submit a written response to Mr. Vidaver's testimony.

On or about August 6, 2012, the presiding commissioner submitted the Presiding Members Preliminary Determination (PMPD). The PMPD contained the findings by the Presiding commissioner. Mr. Simpson submitted comments on August 27, and September 5 rebutting several findings in the PMPD. On August 29, 2012 the Commission held a pre-hearing conference. Mr. Simpson, through his attorney argued that the project was not ready for certification because of the inadequate alternative analysis, health risks to the public that were not addressed thoroughly in the PMPD and Air Quality issues that should impose BACT but did not.

On September 12, 2012, the Commission held the final hearing. The commission allowed Mr. Simpson, through his attorney to argue against certification of the project, and heard testimony of Bill Powers. However, despite the information provided and a long diatribe from the presiding commissioner regarding the need for alternative energy sources, the Commission certified the Pio Pico Energy Center project.

The CEC certified the Pio Pico project on September 12, 2012. The CEC noticed the final decision on September 17, 2012. A true and correct copy of the Commission Adoption of Order docketed on September 17, 2012 is attached hereto as Exhibit "A." Petitioner has thirty days from the docketing of the notice of the final decision to file this petition. (Public Res. Code § 25530.) This court has exclusive jurisdiction to decide this matter (Public Res. Code § 25531(a).)

IV. DISCUSSION

A CEC power plant siting case is equivalent to a California Environmental Quality Act (CEQA) Environmental Impact Report (EIR) proceeding under Public Resources

Code section 21080.4. Additionally, the Warren-Alquist State Energy Resources Conservation and Development Act controls CEC power plant siting cases. (Public Res. Code § 25000 et. seq.) Finally, CEC siting cases are also controlled by the Federal Clean Air Act, California Global Warming Solutions Act, and California Clean Air Act. (42 U.S.C. §7401 et. seq.; H&S Code § 38500 et. seq.; H & S Code § 39000 et. seq.)

A. The Commission Failed to Comply With Due Process Requirements

1. The CEC Certified Pio Pico Without Responding to an Intervenor's Comments

The CEC may not certify a plant without first considering and reviewing the APCD's Preliminary Determination of Compliance (PDOC). (20 CCR § 1752.3; Pub. Res. Code § 25523 (d).) SDAPCD Local Rules require the SDAPCD Air Pollution Control Officer (APCO) to respond and consider all public comments made to a PDOC and include the response in the Final Determination of Compliance (FDOC). (SDAPCD Rule 20.3(4)(i).) For purposes of CEQA, the APCD was the responsible agency in the Pio Pico siting case. The CEC is the lead agency. A Lead agency must respond to and consider all public comments made. (Pub. Res. Code § 21091(d).) Comments play an integral role in the permitting process and should be relied upon by the decisionmaker. (*Residents Ad Hoc Stadium Com. v. Board of Trustees* (1979) 89 Cal.App.3d 274, 286.) The EIR must contain "sufficient detail to help ensure the integrity of the process of decisionmaking by precluding stubborn problems or serious criticism from being swept under the rug." (*Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 733.)

Petitioners made extensive and germane comments alleging a lack of authority to license the facility under its terms, to both agencies. Mr. Simpson repeatedly requested a response to the comments made. Neither agency bothered to make any record of

consideration, or denial, of the allegations. There is therefore no evidence on the record which contradicts Petitioners comments.

Petitioner requests this Court remand this matter back to the CEC to require responses to public comments.

2. The Commission Severely Limited Public Participation of an Intervenor Who Expressed Objections to the Entire Final Staff Assessment

Intervenors in a CEC power plant citing case have the right to cross examine all witnesses who have offered testimony in the matter. (see Public Participation in the Siting Process: Practice and Procedure Guide (2006) p. 53-54 located at http://www.energy.ca.gov/2006publications/CEC-700-2006-002/CEC-700-2006-002.PDF (last accessed 10/11/2012).) Any party may cross-examine witnesses during evidentiary hearings on all relevant matters. (20 CCR 1212(c).)

On July 12, 2012, the CEC held a pre-hearing conference to determine the scope of the only evidentiary hearing held in this siting case. Mr. Simpson submitted a pre-hearing conference statement timely and requested to cross examine all witnesses on the topics of Air Quality, Biological Resources, Cultural Resources, Hazardous Materials, Land Use, Noise, Public Health, Socioeconomics, Soil and Water Resources, Traffic & Transportation, Transmission Line Safety and Nuisance, and Worker Safety & Fire Protection. Mr. Simpson objected to the entire FSA and requested to cross examine all witnesses included in the FSA. The Chairman of the proceedings, denied Mr. Simpson's request to cross examine on the above topics and instead limited Mr. Simpson's participation in the evidentiary hearing to four topics; Air Quality, Biological Resources, Alternatives and Land Use. At the evidentiary hearing, when Mr. Simpson's attorney attempted to cross examine witnesses on several topics including socioeconomic issues. The Commissioners denied any cross examination outside the four areas.

Mr. Simpson, as an Intervenor, had a right to cross-examine all witnesses presented by the applicant and testifying in this matter. The Commissioners actions denied him that right. As such, the Commissioners circumvented an important process in public participation of the Pio Pico power plant siting case.

B. CEC Relied upon Flawed Data Obtained Nine Miles from the Proposed Site to Establish an Ambient Air Quality Baseline

Establishment of baseline ambient air quality is essential to determining whether or not a project will have a significant environmental impact. (*see* 20 CCR § 2022; 14 CCR §§15064(h)(1), 15065(a)(3).) An accurate measurement of air quality is essential to establishing the ambient air quality baseline and whether the project will have a significant effect on the environment. (14 CCR § 15125(a); *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 723-724.) Here, the CEC relied upon data provided by an air quality monitoring station nine miles from the proposed site to determine the baseline.

An EIR must focus its determination of whether a project will have a significant effect on the existing physical condition of the actual location of the planned project. (*Sunnyvale West Neighborhood Assoc. v. City of Sunnyvale* (2010) 190 Cal.App. 4th 1351, 1373.) "The baseline for CEQA analysis must be the existing physical conditions in the affected area, that is, the real conditions on the ground, rather than the level of development or activity that could or should have been present ..." (*Communities for a Better Environment v. Southwest Air Quality Control District* (2010) 48 Cal. 4th 310, 321.) The Baseline established for Pio Pico was determined by using date obtained from a monitoring station nine miles from the proposed site. The proposed site has two air quality monitoring stations within a mile and a half of the site.

The CEC based its decision to use data obtained nine miles away because the air quality at the United States/Mexico border is bad due to Mexico's vehicle emissions standards. In other words, the air quality in the immediate vicinity of the proposed natural gas burning facility is so poor, that rather than use the actual surrounding air, the applicant, and CEC staff went nine miles North West to determine the baseline. The residents of Otay Mesa already have one natural gas burning power plant within feet of the proposed site for Pio Pico. The actual air surrounding the proposed site should be used to determine the baseline not the air nine miles away.

In addition to not utilizing the air quality monitoring station located 1.9 miles from the proposed site, the Final Determination fails to mention the existence of an air quality monitoring station less than 4000 feet away. The baseline used by the CEC is based on existing conditions nine miles from the proposed site, not existing physical conditions of the affected area. The applicant, CEC and SDAPCD had the means and ability to determine the actual ambient air quality immediately around the plant by using one of two air quality monitoring stations less than two miles from the proposed site.

Petitioner requests that this court order the Commission to use data from an air quality monitoring station located closer than nine miles from the proposed site, to demonstrate the baseline ambient air quality.

C. Greenhouse Gas Emissions from Pio Pico Will have a Significant Cumulative Effect on the Environment: BACT and Mitigation Measures are Required

The final decision in the CEC's citing process claims that Pio Pico's GHG emissions will be insignificant. Nothing could be further from the truth. Pio Pico will emit an estimated 621,500 metric tons of Carbon Dioxide (GHG) emissions per year. As stated in the previous section, the data relied upon to obtain the ambient air quality baseline was severely flawed because the data came from an air monitoring station nine

miles from the proposed site. As such, the CEC's conclusion that 621,500 metric tons of Carbon Dioxide will not have a significant cumulative effect on the environment is absolutely absurd.

The California Environmental Quality Act (CEQA) has guidelines for lead agencies to follow when determining whether GHG will have a significant impact. (14 CCR §15064.4.) The lead agency should consider factors such as:

> "(1) The extent to which the project may increase or reduce greenhouse gas emissions as compared to the existing environmental setting;
>
> (2) Whether the project emissions exceed a threshold of significance that the lead agency determines applies to the project.
>
> (3) The extent to which the project complies with regulations or requirements adopted to implement a statewide, regional, or local plan for the reduction or mitigation of greenhouse gas emissions. Such requirements must be adopted by the relevant public agency through a public review process and must reduce or mitigate the project's incremental contribution of greenhouse gas emissions. If there is substantial evidence that the possible effects of a particular project are still cumulatively considerable notwithstanding compliance with the adopted regulations or requirements, an EIR must be prepared for the project."
>
> (14 CCR 15604.4 (b)(1-3).)

Using similar guidelines, the Commission concluded that the Pio Pico plant's 621,500 metric tons of Carbon Dioxide would reduce GHG in San Diego. Further the commission determined that Pio Pico would not exceed a threshold of significance. Finally, the Commission decided that the project complied with all LORS.

The Commission relies upon confusing circular logic to reach its conclusions that 621,500 metric tons of Carbon Dioxide emissions will not have a significant cumulative effect on the environment. The CEC opines that the proposed plant will someday reduce the use of an older plant that emits more GHGs ultimately leading to a reduction in overall GHG. The California legislators have made reduction of GHG to 1990 levels a priority in California. (*see* H&S Code § 38500 et seq.) In direct opposition to the

California Legislator's intent, the CEC continues to certify plants that spew large amounts of GHGs basing its decision on flawed logic.

Introducing a GHG emitter will have an effect on the overall GHG in the air. The CEC speculates that Pio Pico will reduce overall GHGs in San Diego because this relatively small peaker power plant will take an older plant off line. The CEC has not provided any indication, which power plant Pio Pico will take the place of should the plant be built. Referring to speculative events that may happen in the future as a result of Pio Pico's construction should not be enough to determine that the 621,500 metric tons of Carbon Dioxide will not have a significant cumulative effect on the environment.

Because the CEC decided that the GHG emissions would not have a significant cumulative impact on the environment it did not discuss or require any BACT or mitigation measures to reduce the GHG emissions beyond the CARB's mandatory Cap and Trade program. Had the CEC used correct data, it would have found that GHG emissions would have a significant cumulative impact on the environment. In which case, the CEC should have implemented BACT and specific, non-speculative mitigation measures.

> "An EIR is inadequate if "[t]he success or failure of mitigation efforts may largely depend upon management plans that have not yet been formulated, and have not been subject to analysis and review within the EIR." (*San Joaquin Raptor Rescue Center v. County of Merced* (2007) 149 Cal.App.4th 645, 670.) "A study conducted after approval of a project will inevitably have a diminished influence on decision making. Even if the study is subject to administrative approval, it is analogous to the sort of post hoc rationalization of agency actions that has been repeatedly condemned in decisions construing CEQA. [Citations.]" (*Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 307)."

(*Communities for a Better Environment v. City of Richmond* (2012) 184 Cal.App. 4th 70, 92.)

Recently, the CEC certified a plant in Palmdale that contained a solar component as BACT for GHG. Understandably, Pio Pico could not have a solar component on the large scale that the proposed Palmdale plant will have due to space constraints. However, even a small solar component would reduce some of the GHG emissions from the Pio Pico plant. Further, requiring Pio Pico to implement a mitigation strategy above and beyond CARB's mandatory Cap and Trade program, that has not started, would offset the astronomical GHG emissions from this proposed plant.

During the comment and discovery phase, Mr. Simpson commented on numerous occasions that the Pio Pico plant should contain a solar component as BACT for GHG. Unfortunately, the commissioners ignored Mr. Simpson's comments with regards to incorporating a solar component to reduce GHG emissions. The Commissioner has instead relied upon CARB's mandatory Cap and Trade program as a mitigation strategy to reduce the impact that 621,500 metric tons of Carbon Dioxide will have on the environment. (CA. H&S Code § 38500 et.seq.)

The CEC should have found that 621,500 metric tons of Carbon Dioxide contributed significantly to the cumulative effect of GHG emissions on the environment. The CEC failed to impose any mitigation measures beyond CARB's Cap and Trade program that has not gone into effect. Finally, CEC failed to impose BACT in reducing GHG emissions.

D. The Alternative Analysis Fails to Fully Discuss Feasible Alternatives

A CEC assessment of a proposed project must contain an alternative analysis. (20 CCR § 2027(a)(5).) The CEC's final determination Alternative Analysis section does not fully discuss alternatives. Further, an "environmental impact report…must consider a reasonable range of feasible alternatives to foster informed decision making and public participation." (*Laurel Heights Improvement Assn. v. Regents of University of California*

(1993) 6 Cal. 4th 1112, 1142.) When an alternative to a project is rejected, the EIR must explain why each alternative "either does not satisfy goals of proposed project, does not offer substantial economic advantages, or cannot be accomplished." (*San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaous* (1994) 27 Cal.App.4th 713, 718; see also 14 CCR § 15126(d).)

Here, the alternative analysis contained in the Final Determination determines that any alternatives proposed by the Intervenors and the public are non-feasible. Throughout the siting process Mr. Simpson provided evidence and information regarding project alternatives and BACT alternatives. The Final Determination dismisses all suggested alternatives as non-feasible without providing a thorough analysis. At the evidentiary hearing on July 23, 2012 Mr. Simpson offered the testimony of Bill Powers, an engineer to show that PV solar was a viable alternative to the project. Further, Mr. Simpson offered comments and evidence to show that solar components would be viable alternative to startup of the proposed plant. The Commission dismissed all evidence presented by Mr. Simpson and failed to properly analyze the feasible alternatives proposed by Mr. Simpson and his experts.

The Alternative section beginning at 3-1 of the final determination discusses at length alternative sites to the proposed project. Where the analysis fails is in its discussion of alternative technologies. The decision that no feasible alternatives exists is based on testimony of a CEC staff member who is not an engineer but an Electric Generation System Program Specialist. The analysis lacks any evidence to support the CEC's finding that solar is not a viable alternative to the Pio Pico natural gas project.

E. Pio Pico is a Modification of the Existing Otay Mesa Generating Project and Not a New Project

The Clean Air makes distinctions between modified projects and new source project. (42 U.S.C. §7411) San Diego Gas and Electric (SDG&E) and CAISO are two

entities who will control Pio Pico. These entities also have control over the Otay Mesa Generating Project. The land used by Otay Mesa Generating Project as a laydown area during the construction phase, will now become the site for Pio Pico.

Petitioners request this court remand this matter back to the CEC and to review Pio Pico as a modification of the existing Otay Mesa Generating Project rather than a new project.

F. The CEC Failed to Disclose the Effects Pio Pico would have on Air Quality in Any Public Notices

Public notice and participation is important in the power plant siting process. It is important for an agency to fully disclose all issues the public may have an interest in when deciding to certify a power plant. The CEC is required to provide full public notice. (20 CCR §1710.) None of the public notices given to the public mentioned the effects that Pio Pico would have on Air Quality. Had proper notice been given members of the public concerned with air quality would have been informed of the possible effects Pio Pico will have on air quality. The CEC violated the rights of the public when it failed to notify the public that Pio Pico may have effects on air quality.

/ / /

/ / /

/ / /

/ / /

/ / /

/ / /

/ / /

/ / /

/ / /

V. CONCLUSION

Helping Hand Tools and Rob Simpson denied due process when the CEC failed to adequately provide public notice, precluded full public participation and failed to respond to public comments. Further, the CEC did not proceed in a manner required by law to establish the baseline ambient air quality. Because of the improper baseline ambient air quality analysis, the determination that GHG would not have a significant effect on the environment is incorrect. Additionally, the CEC failed to proceed in a manner required by law when it provided its inadequate alternatives analysis. Finally, petitioners believe that Pio Pico Energy, LLC should have been reviewed as a modification of the existing Otay Mesa Generating Project instead of a new source. For the reasons stated above, this case merits review by this court.

DATED: October 15, 2012

Respectfully submitted,

_____

Gretel Smith, Esq.
Staff Counsel for
Helping Hand Tools

EXHIBIT “A”

CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, Rule 8.504(d)(1))

I, Gretel Smith, declare as follows:

I certify that the attached MEMORANDUM OF POINTS AND AUTHORITIES uses 13 point Times New Roman font and contains 4,051 words, based on the word count of the computer program used to prepare this document.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 15th day of October, 2012, at San Diego, California.

_____

Gretel Smith, Esq.
Staff Counsel for Helping Hand Tools
And Attorney for Rob Simpson

VERIFICATION

I, Gretel Smith, am staff counsel for Helping Hand Tools and attorney for Rob Simpson, petitioners in this action and am authorized to execute this Verification on their behalf.

I have read the foregoing PETITION FOR WRIT OF MANDATE AND SUPPORTING MEMORANDUM OF POINTS AND AUTHORITIES and know the contents thereof. The same is true of my own knowledge, except as to those matters which are alleged on information and belief, and as to those matters, I believe them to be true.

I declare under penalty of perjury under the laws of the State of California that the forgoing, including any attachments, is true and correct.

Executed on the 15th day of October, 2012 at San Diego, California.

_____

Gretel Smith, Esq.
Staff Counsel for Helping Hand Tools
and Attorney for Rob Simpson

PROOF OF SERVICE

At the time of service I was over 18 years of age and not a party to this action. My business address is 1901 First Avenue, Suite 219, San Diego, CA 92101. On October 15, 2012, I served the following documents:

PETITION FOR WRIT OF MANDATE; SUPPORTING MEMORANDUM AND EXHIBITS

I enclosed the documents in a sealed envelope or package provided by an overnight delivery carrier and addressed to the persons at the addresses listed below. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of the overnight delivery carrier.

California Supreme Court (Original +13 copies)
Clerk of the Court
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-4797

Attorney for California Energy Commission
Michael J. Levy, Chief Counsel
California Energy Commission
1516 Ninth Street, MS-14
Sacramento, CA 95814

Office of the Attorney General
1300 "I" Street
Sacramento, CA 95814-2919

California Energy Commission
Docket Unit
Attn. Docket No. 11-AFC-01
1516 Ninth Street, MS-4
Sacramento, CA 95814-5512

Attorney for Real Party-In-Interest
Pio Pico Energy Center, LLC
John A. McKinsey
Melissa A. Foster
Stoel Rives, LLP
500 Capitol Mall, Suite 1600
Sacramento, CA 95814

Attorney for Real Party-In-Interest
San Diego Air Pollution Control District
Paula Forbis, Esq.
Air Pollution Control District
10124 Old Grove Rd.
San Diego, CA 92131

San Diego Board of Supervisors
Clerk of the Board
1600 Pacific Highway, Rm 402
San Diego, CA 92101

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on October 15, 2012, at San Diego, California

_____

Gretel Smith