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BEFORE THE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT
COMMISSION OF THE STATE OF CALIFORNIA
1516 NINTH STREET, SACRAMENTO, CA 95814
1-800-822-6228 – WWW.ENERGY.CA.GOV

APPLICATION FOR CERTIFICATION FOR THE:

PUENTE POWER PROJECT

Docket No. 15-AFC-01

STAFF'S OPENING BRIEF

I. Introduction

On August 8, 2017, the California Energy Commission Committee (Committee) assigned to conduct proceedings on the Application for Certification (AFC) for the Puente Power Project (Puente or proposed project) filed "Summary of Committee Identified Briefing Topics and Briefing Schedule," requiring opening briefs on Land Use, Biological Resources and Socioeconomics (Environmental Justice) to be submitted by September 1, 2017. Energy Commission Staff's (Staff) responses to the Committee and additional topics are briefed below.

II. Land Use

The Committee asked the parties to respond to two specific questions. Staff's response follows, as well as a discussion of Staff's consultation with the City of Oxnard regarding potential noncompliance with applicable laws, ordinances, regulations, and standards.

A. Identify the City of Oxnard General Plan and other policies, development standards, zoning ordinance provisions and any other development regulation(s) or standard(s) that the proposed project does not comply with, explaining the basis in the evidence and law for that conclusion.

The Energy Commission has exclusive jurisdiction over thermal power plants 50 megawatts or greater and the issuance of its permit is "in lieu of any permit, certificate, or similar document required by any state, local or regional agency, or federal agency to the extent permitted by federal law, for such use of the site and related facilities, and

shall supersede any applicable statute, ordinance, or regulation of any state, local, or regional agency, or federal agency to the extent permitted by federal law."
(Pub. Resources Code, § 25500.)

In determining the proposed project's compliance with applicable laws, ordinances, regulations, standards (LORS), relevant documents reviewed include the California Coastal Act, the City of Oxnard 2030 General Plan, and the City of Oxnard Local Coastal Program (LCP), which is comprised of the Coastal Land Use Plan and the Coastal Zoning Ordinance. (Ex. 2000, Final Staff Assessment (FSA), pg. 4.7-8.) Staff's discussion below focuses on two local polices at issue in the proceedings: General Plan Policy SH-3.5 and Coastal Land Use Plan Policy 52.

1. The Commission Should Find that the Proposed Project Does Not Conflict with General Plan Policy SH-3.5.

NRG Oxnard Energy Center LLC (Applicant) filed an AFC for the Puente Power Project on April 13, 2015, which states that the project would be built within the boundaries of the existing Mandalay Generating Station (MGS) on Oxnard's coastline. (Ex. 1000.) Over one year later, on June 7, 2016, the Oxnard City Council adopted General Plan Amendment PZ 16-620-01, which reads:

> The city recognizes that authority for new electricity generation facilities of 50 [megawatts] or more rests with the California Energy Commission. . . . [I]n areas where the City has documented that the location of [electricity generation facilities] is threatened by seismic hazards, wildfire, flooding, or coastal hazards including tidal inundation, storm wave run-up, beach and dune erosion or retreat, and/or tsunami inundation, the following uses are prohibited: (1) the construction of new electricity generation facilities of 50 megawatts or more, (2) modifications, including alteration, replacement, or improvement of equipment that result in a 50 megawatt or more increase in the electric generation capacity of an existing generating facility, and (3) construction of any facility subject to the California Energy Commission's jurisdiction under Public Resource Code 25500.

(Ex. 2005, pg.1-2; Ex. 3009, pg. 8.) On July 7, 2017, PZ 16-620-01 was incorporated into the General Plan by adding Policy SH-3.5 to the chapter on Safety and Hazards. (Ex. 2000, pgs. 4.7-6–4.7-7; Ex. 2005, pg.1.)

Generally, the City of Oxnard's General Plan land use policies are not effective in the coastal zone until incorporated into the LCP, the guiding document for land uses in the Oxnard coastal zone, and must be certified by the California Coastal Commission in order to take effect. (Ex. 2000, pg. 4.7-8.) However, on November 28, 2016, in response to a request from Staff, California Coastal Commission Deputy Chief Counsel Louise Warren submitted a legal opinion that SH-3.5 does not need to be incorporated into the LCP. In her letter, Ms. Warren states:

> Although in most circumstances land use changes that affect the coastal zone must be incorporated into LCPs and certified by the Coastal Commission before they may take effect, new policy SH-3.5 affects development that does not require a coastal development permit because it is under the exclusive permitting jurisdiction of the California Energy Commission. Thus, this portion of the General Plan only affects development that by statute is outside of the permitting jurisdiction of the City and the Coastal Commission, so it need not be incorporated into the LCP to take effect.

(Ex. 2005, pg. 2.)

Because Puente, a 262-megawatt natural gas-fired plant, is clearly within the jurisdiction of the Energy Commission, and based on the Coastal Commission's legal opinion, Staff stated in the FSA that the project conflicts with Policy SH-3.5. (Ex. 1000, pg. 1; Ex. 2000, pgs. 1-30, 4.7-1, 4.7-7, 4.7-24, 4.7-38.) However, Policy SH-3.5 prohibits projects within the Energy Commission's jurisdiction specifically in a location where "the City has documented" coastal and other hazards. In accordance with Public Resources Code section 25500, the Commission stands in the shoes of the City when issuing a license. Therefore, even though the City provided evidence to support that the proposed project site is a "Combined Hazard zone" in the 2016 *City of Oxnard Sea Level Rise Atlas*, it is for the Commission to make a finding regarding any documented hazards. (Ex. 2000, pg. 4.11-74.)

Staff determined that the risks due to flooding are low and the potential environmental impacts from the other hazards listed in SH-3.5 are less than significant or can be mitigated to less than significant with proposed conditions of certification. (Ex. 2000, pg. 4.11-74.) Specifically, using the Coastal Storm Modeling System (CoSMoS) 3.0

Phase 2, the best available science for modeling coastal floods, Staff determined that "projected flooding for the 100-year event with two feet of sea level rise does not reach the project site." (7/26/17 RT, pgs. 212, 221.) Furthermore, Staff concluded that two feet of sea level rise "does not place the project site in the FEMA hazard zone." (*Id.* at pg. 213.) And, although Staff determined that mitigation for maintaining reliability against flooding is not warranted, because the water level elevation projected for 2050 would not impact project operations, Staff is proposing Condition of Certification SOIL&WATER-6 to accommodate the Coastal Commission's recommended beach and dune monitoring plan. (*Id.* at pg. 215.) Additionally, Staff concluded that the potential adverse impacts to project facilities from geologic hazards, including seismic hazards, are less than significant with mitigation. (Ex. 2001, pg. 5.2-2). The proposed conditions of certification would also adequately ensure fire protection at the site. (*Id.* at pg. 5.7-1.)[1] Staff concludes that the risks due to seismic hazards, wildfire, flooding, or coastal hazards at the project site would be low and, therefore, would not be prohibited by City of Oxnard General Plan Policy SH-3.5. (Ex. 2000, pg. 4.11-74.)

2. Puente Conflicts Partially with Coastal Land Use Plan Policy 52.

The proposed project is located within the coastal zone, as defined by the Coastal Act. (Ex. 1012, pg. 4.6-4.) Oxnard's Coastal Zoning Ordinance divides Oxnard's coast into subzones for purposes of permitting. (Ex. 2000, pg. 4.7-5.) The proposed project is located within the Coastal Energy Facility (EC) subzone. (Ex. 1012, pg. 4.6-4.)

The Coastal Land Use Plan contains the coastal development policies and standards by which projects proposed in the coastal zone are evaluated. (Ex. 2000, pg. 4.7-8; Ex. 1012, pg. 4.6-11.) The EC subzone allows for siting, construction, modification, and maintenance of power generating facilities and electrical substations consistent with Coastal Land Use Plan Policies 51, 52, 54, 55, and 56. Staff concluded that the project

[1] The Worker Safety and Fire Protection section of the FSA, Exhibit 2001, was incorrectly numbered on each page as "4.14," which is the correct numbering for the Visual Resources section. The Worker Safety and Fire Protection section should have been numbered as "5.7." To distinguish from citations to the Visual Resources section, this brief cites to the Worker Safety and Fire Protection section as "5.7," although that is not reflected in the FSA.

is consistent with Policies 51, 54, 55, and 56, but determined that the proposed project partially conflicts with Policy 52. (Ex. 2000, pgs.4.7-18 – 4.7-19.)

Policy 52 states, in relevant part:

> Industrial and energy-related development shall not be located in coastal resource areas, including sensitive habitats, recreational areas and archaeological sites. All development adjacent to these resource areas or agricultural areas shall be designed to mitigate any adverse impacts.

(Ex. 2000, pg. 4.7-18; Ex. 1012, pg. 4.6-17.)

a. *The Project Conflicts with Coastal Land Use Plan Policy 52's Prohibition of Siting Energy Facilities in Coastal Resource Areas, But Is Consistent with the Coastal Act.*

Policy 52 prohibits energy-related development in coastal resource areas. The Coastal Land Use Plan includes examples of a "coastal resource area," but does not include a precise definition. In the FSA, Staff concluded that the project would not be located within a sensitive habitat, recreational area, or archeological site because it would be constructed within the boundaries of the already-disturbed site of the existing MGS facility. (Ex. 2000, pg. 4.7-18.) After completion of the FSA, Intervenor City of Oxnard submitted testimony from Ashley Golden, Development Services Director of the City of Oxnard, who concluded that the proposed project is located in a coastal resource area because of the approximately two acres of Coastal Commission-designated wetlands on the project site. (Ex. 3019, pg. 2; Ex. 3009, pg. 13; 2/9/17 RT, pg. 265.)

The Coastal Commission's 30413(d) report notes the existence of 2.03 acres of one-parameter wetlands on the proposed project site. (Ex. 3009, pg.13; see discussion of wetlands below.) Identification of wetlands is the responsibility of the Coastal Commission (Cal. Code Regs., tit. 14, §13577(b)), and the Coastal Commission has not designated—and has no plans to designate—any additional wetlands within the project area. (Ex. 4043, pg. 4; 7/27/2017 RT, pgs. 280-281.) The City's opinion as to the existence of a coastal resource area on-site—and, therefore, the project's inconsistency with Policy 52—is based solely on the Coastal Commission's designation of 2.03 acres of wetlands. (2/9/2017 RT, pg. 275.)

Under the City's interpretation of coastal resource area, Policy 52 would prohibit the propose project without an override determination by the Energy Commission. The Coastal Commission acknowledges this fact: "Under city of Oxnard LCP Policy 52, energy-related development is not an allowable use within coastal resource areas and sensitive habitats, including wetlands . . . . " (Ex. 3000, pg. 13.) However, the Coastal Commission also noted that, in contrast to LCP Policy 52, the Coastal Act allows greater flexibility in locating energy facilities in coastal resource areas. (Ex. 3009, pg. 13.) Specifically, the Coastal Commission discussed section 30233(a) of the Coastal Act, which permits "[t]he diking, filling, or dredging of . . . wetlands . . . where there is no feasible less environmentally damaging alternative, and where feasible mitigation measures have been provided to minimize adverse environmental effects" specifically for "new or expanded . . . energy . . . facilities." (Ex. 3009, pgs. 10-11, 13.) The Coastal Commission concluded that the proposed project would be an allowable use under section 30233(a) because, "[t]he construction of a new natural-gas fired generating unit at the MGS would comprise a new or expanded energy facility . . . ." The Coastal Commission has not recommended that the project be prohibited from moving forward. (Ex. 3009, pg. 14.) Rather, the Coastal Commission discussed the feasibility of off-site and on-site alternatives to maintain compliance with the Coastal Act while avoiding designated wetlands. (*Ibid*.) However, the Coastal Commission further determined that, if relocation of the project to avoid filling coastal wetlands is determined by the Energy Commission to be infeasible, Staff's proposed Condition of Certification BIO-9 would be sufficient for consistency with section 30233(a). (*Id.* at pg. 15.) Staff incorporated the Coastal Commission's recommendations to modify Condition of Certification BIO-9 to mitigate wetland impacts. (Ex. 2000, pg. 4.3-76;[2] Ex. 3009, pg. 15.) Therefore, while the proposed project conflicts with Policy 52's prohibition of siting energy facilities in coastal resource areas, the project remains consistent with the broader goals of the Coastal Act.

[2] The Biological Resources section of the FSA, Exhibit 2000, was incorrectly numbered on each page as "4.2," which is the correct numbering for the Alternative section. The Biological Resources section should have been numbered as "4.3." To distinguish from citations to the Alternatives section, this brief cites to the Biological Resources section as "4.3," although that is not reflected in the FSA.

b. The Project Would Mitigate Potential Adverse Impacts From Development Adjacent to Coastal Resource Areas or Agricultural Areas.

Policy 52 also requires development adjacent to coastal resource and agricultural areas to mitigate adverse impacts. Coastal resource areas under Coastal Land Use Plan Policy 52 include "sensitive habitats." Additionally, Coastal Act section 30420 states: Development in areas adjacent to environmentally sensitive habitat areas . . . shall be sited and designed to prevent impacts which would significantly degrade those areas, and shall be compatible with the continuance of those habitat . . . areas." (Ex. 3009, pg. 11.)

The Coastal Commission considered that areas of coastal dune, scrub and riparian habitat surrounding the MGS site may qualify as environmentally sensitive habitat area (ESHA) under section 30107.5 of the Coastal Act. (Ex. 3009, pg. 13; Ex. 4043, pgs. 2-3.) Staff made appropriate changes in response to Coastal Commission recommendations to modify proposed conditions of certification to mitigate potential impacts to Biological Resources. (Ex. 2000, pgs. 4.3-54 – 4.3-57.) Additionally, agricultural fields are located approximately 800 feet north-east of the easterly project fence line. (Ex. 2000, pg. 4.1-19.) Puente would not have any impacts to agricultural lands or any land that is zoned for agricultural purposes and would not contribute to cumulative impacts to agricultural lands. (Ex. 2000, pg. 4.7-29.) Staff proposed sufficient mitigation measures to reduce any impacts to a level below significance for potential coastal resource areas and there are no impacts to agricultural areas adjacent to the project site; therefore, the proposed Puente project would be in compliance with Coastal Land Use Policy 52, in part, as well as Coastal Act section 30240.

B. Identify and apply the City of Oxnard policies and regulations applicable to the height of the proposed project, including any mechanisms such as a variance that could allow those height limits to be exceeded.

Two local planning documents provide guidance in determining the height restrictions applicable to the project: the certified LCP and the General Plan. There are inconsistencies regarding height limits between the LCP, which governs land uses

specifically in the coastal zone, and the City's General Plan, which is a city-wide land use planning document.

1. There Is No Applicable Height Limit In the LCP.

Within the LCP, the Coastal Zoning Ordinance contains the relevant discussion of height restrictions. Coastal Land Use Plan Policy 38 states, "Height restrictions as defined by City Zoning Ordinance shall be used to avoid blocking views." (Ex. 3019, pg. 7.) The applicable Coastal Zoning Ordinance subzone for the project is the EC subzone. There is no provision within the EC subzone which establishes a height limit. (Ex. 3019, pg. 6.) The general requirements of Coastal Zoning Ordinance, which are incorporated by reference in the EC subzone provisions, also do not specify a height limit. (*Ibid.*) In fact, the general requirements direct the reader to the applicable subzone provisions to determine any established height limit: "No building shall be erected nor any existing building be moved, reconstructed or structurally altered to exceed in height the limit established by this chapter for the sub-zone in which such building is located." (California Code of Ordinances, Oxnard, Article I, Section 17-5(a)(2).) Because there is no height limit established by the EC subzone, and no other applicable provisions of the Coastal Zoning Ordinance specify a height limit, there is no height restriction applicable to the project contained in the LCP.

2. The Height Overlay District in the Oxnard General Plan Must Be Incorporated Into a Certified LCP to Take Effect.

Ms. Golden's interpretations offered as oral testimony on behalf of the City of Oxnard contradict the unambiguous language in the General Plan that the coastal policies must be incorporated into a certified LCP to take effect. Staff's conclusion remains that, to apply in the coastal zone, the Height Overlay District land use designation would require incorporation into an amended LCP and certification by the Coastal Commission.

The recently amended 2030 General Plan established several new land use designations, including "Public Utility/Energy Facility" and "Height Overlay District." (Ex. 2022, pg. 3-17.) Public Utility/Energy Facility is an industrial land use designation that applies to "large electrical generating and transmission facilities," such as Puente.

(*Id.* at pg. 3-16.) The Height Overlay District applies in addition to underlying land use designations and limits new structures and remodels to six stories. (*Id.* at pg. 3-17.)

The General Plan repeatedly states, "The Oxnard LCP land use designations are included for reference purposes and land use changes in the Coastal Zone indicate legislative intent but are not effective until and unless certified by the California Coastal Commission." (Ex. 2022, pgs. 1-5, 3-5, 3-14; Ex. 3020 [text box on the City's Land Use Map].) The Coastal Commission's 30413(d) report confirmed that "no LCP amendment has yet been submitted to or approved by the Coastal Commission," and so the proposed Puente project would be a conditionally-permitted use of the EC subzone, and existing LCP policies apply. (Ex. 3009, pg. 8.)

As supported by the Coastal Commission's report, Staff concluded in the FSA that neither the Public Utility/Energy Facility land use designation nor the Height Overlay District debuted in the City's 2030 General Plan is effective in the coastal zone without certification of an amended LCP. (Ex. 2000, pg. 4.7-10.) City of Oxnard testified that "other generally applicable policies" contained in the General Plan apply in the coastal zone without Coastal Commission approval. (2/9/2017 RT, pgs. 269-70.) In particular, Ms. Golden testified that the Height Overlay District "is not a land use designation" and is, therefore, a general policy applicable to the proposed site within the coastal zone. (*Id.* at pg. 271.) However, Ms. Golden's statement is contrary to the plain language of the General Plan: "The 2030 General Plan establishes new land use designations as follows: . . . Height Overlay District . . ." (Ex. 2022, pg. 3-13.)

Staff further concluded that, even if these land use designations were effective without Coastal Commission review, and the project was designated as Public Utility/Energy Facility, the Height Overlay District still would not apply to the project. (Ex. 2000, pg. 4.7-10.) This conclusion was based on Table 3.2 in the General Plan, which states that the Height Overlay applies only to the Public Utility/Energy Facility in the "non-Coastal Zone." (Ibid.) City of Oxnard testified that Staff's conclusion was based on an error, and that the table incorrectly limited applicability of the Height Overlay District to non-coastal zones. (2/9/2017 RT, pgs. 295-96.)

However, there is additional language in the General Plan that indicates the limitation of Public Utility/Energy Facility to the non-coastal zone in the table was not in error. The paragraph immediately preceding Table 3.2, which describes the purpose of the table, states, “Zone designations are created within Chapter 16 of the Oxnard City Code and are intended to implement the 2030 General Plan through the zoning ordinance.” (*Id.*) Chapter 16 of the City Zoning Code does not address coastal zoning. In fact, the first section of Chapter 16 states, “The area within the coastal zone, as established by the California Coastal Commission, shall be governed by chapter 17 of the code.” (California Code of Ordinances, Oxnard, Article I, Section 16-1(B).) There are multiple instances, therefore, where the General Plan explicitly excludes the applicability of the Height Overlay District to the Public Utility/Energy Facility in the coastal zone.

3. <u>The Proposed Project Must Protect Views.</u>

While neither the LCP nor General Plan contains an applicable height restriction, this is not to say that an unlimited height is, therefore, permissible for the project’s stack. The City’s General Plan, as well as Ms. Golden’s testimony, indicates that the height limitation is intended to preserve coastal views. (Ex. 2022, pg. 3-18; Ex. 3019, pg. 7.) Additionally, Coastal Act section 32051 “requires new development to be sited and designed ‘to protect views . . . and be visually compatible with the character of the surrounding area.’” (Ex. 3019, pg. 7.) Staff concluded that the project’s proposed stack would not block views of scenic resources and would not have a substantial adverse effect on visual resources, and would be in conformance will all applicable laws, ordinances, regulations, and standards. (Ex. 2000, pgs. 4.14-1 and 4.14-8.) Specifically, Staff determined that the project would comply with “state and local requirements to maintain, enhance views, protect views, minimize aesthetic impacts,” and “restore and enhance . . . degraded views of the coastal zone.” (2/9/17 RT, pg. 218.) Furthermore, because Puente is a dry-cooled facility with a high exhaust temperature, “there is no potential for a visible water vapor plume . . . .” (*Id.* at pg. 221.)

In conclusion, while neither the LCP nor the General Plan impose limitations on the project’s stack height, Staff has concluded that the proposed project will protect coastal views, in conformance with the City’s General Plan and the Coastal Act.

4. The General Plan Allows For An Exceedance Of The Height Overlay District, If Necessary.

The General Plan definition of the Height Overlay District lists several exceptions to the six story limitation for new or remodeled structures; however, none apply to the proposed project. (Ex. 2022, pg. 3-17.) But, the General Plan also allows for development to exceed six stories by application, which requires payment of "an impact fee and/or equivalent mitigation" and "may require environmental review that includes shade and shadow and local wind impact analyses." (*Id.* at 3-18.)

But for the exclusive authority of the Energy Commission to license Puente, the City of Oxnard would need to make the necessary findings to approve an exceedance of six stories. (Pub. Resources Code, § 25500.) It is, therefore, within the discretion of the Commission to find whether an application for exceedance of the height limitation is permissible. The City did not provide guidance on how such a determination should be made; in fact, Ms. Golden testified that no one has applied for an exception under the Height Overlay District. (2/9/17 RT, pg. 312.)

Staff concludes that the Commission may grant additional stories, if the General Plan Height Overlay District is applied to the project as proposed. The environmental review of the project contained in the FSA includes a visual resources impact analysis of the proposed exhaust stack. (Ex. 2000, pgs. 4.14-1.) As noted above, Staff concluded that, with the effective implementation of proposed mitigation measures, the project's stack would not have a substantial adverse effect on visual resources. (*Id*.)

C. Staff Consulted With the City of Oxnard Regarding Potential LORS Non-Compliance At Two Publicly Noticed Meetings.

Public Resources Code section 25523(d)(1) states in pertinent part:

> If the Commission finds that there is noncompliance with a state, local, or regional ordinance or regulation in the application, it shall consult and meet with the state, local, or regional governmental agency concerned to attempt to correct or eliminate the noncompliance. If the noncompliance cannot be corrected or eliminated, the commission shall inform the state,

> local, or regional governmental agency if it makes the findings required by Section 25525.

(Pub. Resources Code, §25523(d)(1).)

Furthermore, California Code of Regulations, title 20, section 1742 allows for Staff to consult with another jurisdiction when there is a potential LORS nonconformance:

> The staff assessment shall provide a description of all applicable federal, state, regional, and local laws, ordinances, regulations and standards and the project's compliance with them. In the case of noncompliance, the staff assessment shall provide a description of all staff efforts with the agencies responsible for enforcing the laws, ordinances, regulations and standards, for which there is noncompliance, in an attempt to correct or eliminate the noncompliance.

Shortly after the approval of Policy SH-3.5, and before it took effect, Staff published its Preliminary Staff Assessment with a footnote that Staff would address in the FSA any inconsistencies between the project and Policy SH-3.5.

Because the City is a party to the proceeding, Staff held discussions regarding nonconformance with LORS during publicly noticed meetings in accordance with California Code of Regulations, title 20, section 1711. On July 21, 2016, Staff held a nearly 13-hour PSA workshop in the City of Oxnard, during which Policy SH-3.5, the history of the City Council's vote, and its intent to disallow another power plant along the coast to create a tourist destination, were discussed at considerable length with the City's representatives.

In the City of Oxnard's January 3, 2017 Status Conference Statement, the City's counsel represented that “the City reiterates that no consultation with the City of Oxnard has taken place to determine whether the conflicts with City policies may be avoided." Based on the discussion that occurred at Staff's PSA workshop, this statement is not accurate.

Following publication of the FSA, in which Staff analyzed Policy SH-3.5, Staff held another public workshop on January 10, 2017, during which, once again, Policy SH-3.5 was discussed with City representatives. During the discussion, the City's legal counsel insisted "consultation" had not taken place. Upon Staff's questioning of the City's legal

counsel as to why she did not believe consultation had taken place, she responded that Staff and the City should be working to "redesign" the project. Staff counsel explained that this is not within Staff's authority. Based on the two extensive discussions of the City's LORS at two publicly-noticed workshops, Staff believes that "consultation" in accordance with the Warren-Alquist Act and the Energy Commission's regulations has been satisfied.

D. Staff's Conclusion Regarding Land Use

Staff concludes that Puente is consistent will all applicable land use laws, ordinances, regulations, and standards. Staff further determined that the LCP does not contain an applicable height limit and that the General Plan Height Overlay District is not effective in the coastal zone. However, if necessary, the Commission may grant an exceedance of the General Plan Height limitation. Lastly, Staff consulted with the City of Oxnard regarding potential LORS non-compliance.

III. Biological Resources

The Committee asked the parties to brief three questions on the topic of Biological Resources. Staff's responses are as follows.

A. Address whether any Environmentally Sensitive Habitat Areas (ESHA) exist on or near the proposed project construction, Units 1 and 2 demolition or outfall removal areas. Explain the criteria for determining ESHA existence, the facts that support or refute their existence, and any constraints that the existence of ESHA creates upon the proposed project activities.

An ESHA is defined in the Coastal Act: "'Environmentally sensitive area' means any area in which plant or animal life or their habitats are either rare or especially valuable because of their special nature or role in an ecosystem and which could be easily disturbed or degraded by human activities and developments." (Pub. Resources Code, §30107.5.)

The Coastal Act further addresses ESHAs in section 30240:

> (a) Environmentally sensitive habitat areas shall be protected against any significant disruption of habitat values, and only uses dependent on those resources shall be allowed within those areas.

> (b) Development in areas adjacent to environmentally sensitive habitat areas and parks and recreation areas shall be sited and designed to prevent impacts which would significantly degrade those areas, and shall be compatible with the continuance of those habitat and recreation areas.

(Pub. Resources Code, §30240.)

There are three important elements to the definition of ESHA: "First, a geographic area can be designated ESHA either because of the presence of individual species of plants or animals or because of the presence of a particular habitat. Second, in order for an area to be designated as ESHA, the species or habitat must be either rare or it must be especially valuable. Finally, the area must be easily disturbed or degraded by human activities." (Ex. 2000, p. 4.3-8, citing the Coastal Commission letter, from John Dixon, Ph.D., March 25, 2003.)

During the evidentiary hearings, all parties testifying agreed that individual biologists may have opinions about whether or not an area is an ESHA, but only the Coastal Commission can designate an ESHA. (7/27/17, RT, pgs. 95, 262, 288.) This is supported by the court in *Banning Ranch Conservancy v. City of Newport Beach*, which stated "that the ultimate findings regarding ESHA on [project sites] will be made by the California Coastal Commissioners themselves, not commission staff. But both the commissioners and interested members of the public are entitled to understand the disagreements between commission staff and the City on the subject of ESHA." (*Banning Ranch Conservancy v. City of Newport Beach* (2017) 2 Cal.5th 918, 940.)

1. <u>There are no designated ESHAs on the Proposed Project Site.</u>

During the Evidentiary Hearings, there was a considerable amount of cross-examination and discussion regarding the definition of the "project site". In the Final Staff Assessment and oral testimony, Staff defined the Puente project site as "approximately 3 acres of the northern portion of the existing MGS property." (Ex. 2000, pg. 3-3; 7/27/17 RT, pg. 97.) In addition, the proposed project would repurpose some existing facilities and buildings, and demolish Units 1 and 2 of the MGS facility. (Ex. 2000, pgs. 3-6 to 3-9.)

Implementation of the proposed project would remove approximately 2.03 acres of wetlands under jurisdiction of the Coastal Commission on the project site. (Ex. 2000, pg. 4.3-34; *See discussion below*.) The Coastal Commission has not determined that this wetland site or any other area on the 3-acre site to be an ESHA. In its 30413(d) report, the Coastal Commission states:

> The hydrophytic plant species found on the project site are relatively common in coastal wetlands, and the area is not known to support listed, rare or sensitive wildlife species. Thus, the project site does not meet the definition of an environmentally sensitive habitat area (ESHA) under Section 30107.5 of the Coastal Act.

(Ex. 3009, pg. 13, footnote 3.)

Staff testified that the Coastal Commission has not changed its ESHA determination since the 30413(d) report. (7/27/17 RT, pg. 99.) Furthermore, Dr. Jonna Engle, of the Coastal Commission, testified that the Coastal Commission has no plans to supplement its 30413(d) report, therefore, no determination of an ESHA has been made on the 3-acre project site. (7/27/17 RT pgs. 280-281.)

2. <u>There are no designated ESHAs on the Demolition Site (MGS Units 1 & 2).</u>

Although the entire site was surveyed for the AFC, the Biological Survey Area (BSA) where Applicant's team conducted focus surveys in response to the Committee's March 10 Orders did not include the MGS Units 1 and 2. However, Applicant's witness, Julie Love, testified that a pair of Peregrine falcons and a pair of great horned owls were observed nesting on MGS Unit 1, which was in the vicinity of the BSA. (7/27/17 RT, pgs. 94, 236.) Intervenor witness, Dr. Lawrence Hunt, testified that "[n]ew information also reveals that a pair of Peregrine falcons, in fact, nest on the project site itself and use the entire project site as foraging habitat, which also triggers an ESHA designation." (7/27/17 RT pgs. 144, 246.) When asked if "foraging habitat generally qualify or would trigger an ESHA designation," Dr. Hunt replied, "It could, yes." (7/27/17 RT pg. 248.)

But, Ms. Love further testified that she did not observe Peregrine falcon foraging in the BSA and that she only observed the Peregrine falcon resting or perching, and that they

were “sedentary”. (7/27/17 RT, pgs. 233-234, 241.) She continued, “Foraging habitat is widespread in the area, and the habitats within the BSA are not unique. Furthermore, since MGS Unit 1 will be demolished as part of the project development, continued use of this nesting site will not occur.” (7/27/17 RT pg. 94.)

Dr. Hunt’s response was incorrect as to the location of the Peregrine falcons as being on the “project site” and speculative, at best, as to whether MGS Unit 1 would meet the definition of an ESHA. And, in fact, the Coastal Commission has not designated MGS Unit 1 as an ESHA.

Staff agrees with the Applicant and the Coastal Commission that MGS Units 1 and 2 have not been designated an ESHA. Furthermore, Staff testified that no direct impacts would occur to the Peregrine falcon with implementation of Condition of Certification BIO-8. (7/27/17 RT, pg.100.) Staff's proposed conditions of certification for biological resources assume presence of special-status species, and include sufficient mitigation to reduce impacts to species to below the level of significance on the site at the ocean outfalls and in the surrounding project area. (7/27/17 RT pg. 97.) Condition of Certification BIO-8 requires pre-construction nest surveys be conducted if construction or demolition activities occur between February 1 and August 31. (Ex. 2000, pg. 4.3-74; 7/27/17 RT pg. 253.) In addition, indirect impacts, such as those from the noise of demolition, are subsequently mitigated under conditions BIO-8 and BIO-10. (7/27/17 RT, pgs. 100; 253.)

As the testimony confirmed, the MGS Units 1 and 2 are not on the 3-acre project site, only the Coastal Commission can designate an ESHA, and that agency has not designated the MGS site as an ESHA.

3. <u>There is not a designated ESHA at the outfall removal area.</u>

The Coastal Commission has not designated the area of the outfall removal as an ESHA. In fact, it was the Coastal Commission’s recommendation that the outfall be removed to address public access requirements of Public Resources section 25529. (Ex. 3009, pg. 44.)

Applicant's witness, Ms. Love, testified that they conducted focused surveys in the outfall area. (7/27/17 RT, pg. 88.) Globose dune beetles were observed in the outfall area, and the access road and buffer area during both the transect surveys and pitfall trapping. (7/27/17 RT, pgs. 90-91.) Additionally, two individual California horned larks were observed in the open dune areas and the outfall access road buffer area. However, no nesting or breeding behavior was observed. (7/27/17 RT, pg. 94.) Ms. Love further testified that:

> The only area where the targeted special status species were observed are within areas of temporary impact. Avoidance and minimization measures outlying within the conditions of certification limit impacts to special status species. Additionally, the project will result in a cumulative net gain and habitat for special status species where the outfall will be removed.

(7/27/17 RT, pgs. 95.)

Staff's proposed conditions of certification for biological resources provide sufficient mitigation to reduce impacts to species to below the level of significance on the site, at the outfalls and in the surrounding project area. (7/27/17 RT, pgs. 97, 259.) Condition of Certification BIO-10 requires that prior to outfall removal activities or any associated ground-disturbing activities, the project owner shall prepare an Outfall Removal Impacts Avoidance Plan, which will at a minimum, detail the listed avoidance and minimization measures, and contain a Special-Status Species Translocation Plan. (Ex. 2026, pg. 10; 7/27/17 RT, pg. 101.)

4. <u>There are no designated ESHAs within the 100-foot buffer, yet the area meets the definition of an ESHA.</u>

In its 30143(d) report, the Coastal Commission addressed the habitat surrounding the project, but did not formally designate the area as an ESHA.

> Due to their rarity, sensitivity to disturbance, and the presence of special-status species, many of the coastal dune, scrub and riparian habitats surrounding the MGS site meet the Coastal Act and LCP definitions of ESHA, and thus require special protection.

(Ex. 3009, p. 17.)

At the Evidentiary Hearing, Dr. Engel expressed her opinion that the ice plant mats that abut the north and west boundaries of the 3-acre Puente site comprise dune habitat, and correspondingly would qualify as ESHA based on the sandy soil substrates and dune morphology, and the potential to support special-status species, such as the silvery legless lizard and globose dune beetle. Dr. Engel clarified that her opinion was based on her observations of select areas of the ice plant mats, that she was not making "any conclusion of an ESHA determination", and noted the Coastal Commission made no official determination that ESHA occurs on the perimeter of the site. (7/27/17 RT, pgs. 265-267, 270, 274-275.)

Staff agrees that these perimeter areas could meet the definition of an EHSA based on the discovery of special-status species. The Coastal Commission recommended those areas be protected with a minimum 100-foot buffer (Ex. 3009, pg. 16.) In response, Staff has proposed Condition of Certification BIO-7 requiring construction activities remain within a100-foot buffer from all ESHA. (Ex. 2000, pg. 4.3-74.)

The 100-foot buffer is also prescribed by the City of Oxnard's Local Coastal Program (LCP) that was approved by the Coastal Commission. LCP-6(d) states in part:

> New development adjacent to wetlands or resource protection areas shall be sited and designed to mitigate any adverse impacts to the wetlands or resource.
>
> A buffer of 100 feet in width shall be provided adjacent to all resource protection areas. The buffer may be reduced to a minimum of 50 feet only if the applicant can demonstrate the large buffer is unnecessary to protect the resources of the habitat area. All proposed development shall demonstrate that the functional capacity of the resource protection area is maintained. The standards to determine the appropriate width of the buffer area are:
>
> 1) biological significance of the area
> 2) sensitivity of species to disruption
> 3) susceptibility to erosion
> 4) use of natural and topographic features to locate development
> 5) parcel configuration and location of existing development
> 6) type and scale of development proposed
> 7) use of existing cultural features to locate buffer zones

(City of Oxnard Coastal Land Use Plan, pg. III-11.)

"Resource protection areas" are "applied only to sensitive habitat areas" (*Id*. at pg. II-5). LCP-6 allows the buffer to be reduced to 50 feet if the applicant can demonstrate through seven enumerated criteria that the 100-foot buffer is unnecessary to protect the resources of the habitat area.

In accordance with Public Resources Code, section 25500, the Energy Commission's permit of a power plant is in lieu of state and local permits. In other words, the Commission acts in place of the City in determining whether to grant a variance for the project. In past power plant cases, Staff would consult with the local jurisdiction to determine if the local jurisdiction would grant a variance for a similar project proposed under its jurisdiction. In this case, however, the City of Oxnard is a party that has expressed its opposition to the proposed plant from the beginning of the process. Staff has discussed potential LORS inconsistencies with City representatives at public workshops, and Staff, as an independent party, has analyzed potential LORS inconsistencies; however, during this proceeding, the parties neither were asked to, nor did they address the proposed project's conformance with the seven standards outlined in LCP-6.

If the Commission finds that the project cannot be located within a 100-foot buffer from a sensitive habitat area (even though the Coastal Commission has not designated an ESHA within the 100-foot buffer), Staff's position is that with some adjustments, specifically relocation of the access drive, and moving some smaller site elements on the north side of the new project footprint, a 50-foot buffer could be achieved between the proposed project and the adjacent potential dune habitat (the ice plant mats discussed above). In Staff's opinion, a 50-foot buffer is adequate to assure the protection of the resources and functional capacity of the habitat area, based on its existing degraded nature and limited resource value. The subject site and adjacent ice plant mats have been previously graded and partially compacted with roads, berms, and dredge spoils storage. (Ex. 1004, AFC, pgs. 2-3 - 2-4.) Therefore, a 50-foot buffer to any potential sensitive habitat would comply with the LCP and applicable LORS.

B. Address whether any wetlands exist on or near the proposed project construction, Units 1 and 2 demolition or outfall removal areas. Explain the criteria for determining wetlands existence, the facts that support or refute their existence, and any constraints that the existence of wetlands creates upon the proposed project activities.

Rather than utilizing a three-parameter approach (presence of hydrophytic vegetation, wetland hydrology, and hydric soils) used at the federal level by the U.S. Army Corps of Engineers (Corps) (Ex. 2000, pg. 4.3-11), the Coastal Act defines “wetlands” more broadly. This definition is generally referred to as the "one parameter approach,” which requires the presence of only one wetland indicator, i.e. plants, hydrology, or soils. The Coastal Act defines wetlands as:

> Wetland means lands within the Coastal Zone which may be covered periodically or permanently with shallow water and include saltwater marshes, freshwater marshes, open or closed brackish water marshes, swamps, mudflats, and fens.

(Pub. Resources Code, § 30121.)

As stated above in the Land Use section, the Coastal Act allows for filling of a wetland on a power plant site where there is no feasible less environmentally damaging alternative and feasible mitigation measures have been provided:

> (a) The diking, filling, or dredging of open coastal waters, wetlands, estuaries, and lakes shall be permitted in accordance with other applicable provisions of this division, where there is no feasible less environmentally damaging alternative, and where feasible mitigation measures have been provided to minimize adverse environmental effects, and shall be limited to the following:
>
> (1) New or expanded port, energy, and coastal-dependent industrial facilities, including commercial fishing facilities.

(Pub. Resources Code, § 30233.)

Staff testified that the site has been actively maintained to facilitate operation of existing power generation and has experienced varied uses such as a marine dredging spoils storage, is degraded, and contains upland growth. Therefore, the site does not support wetlands or other waters under the jurisdiction of the Corps or California Department of Fish and Wildlife. (Ex. 2000, pg. 4.3-13.) However, the Applicant delineated an

approximately 2-acre area within the site and found that it potentially could contain hydrophytic vegetation, one of the three parameters for classification as a wetland under Coastal Commission regulations. (*Id*.) During a May 19, 2015 site visit, Staff viewed and confirmed the presence of woolly seablite, other on-site vegetation, and general condition of the proposed project site and immediately adjacent environs. (Ex. 2000, pg. 4.3-14.) Thus, although the 2.03-acre wetland has diminished value, form, and function, it meets the one parameter required by the Coastal Commission to designate a wetland. (Ex. 2000, pg. 4.3-13.) The Coastal Commission staff's letter, sent subsequent to the 30413(d) report, did not make any changes in the Coastal Commission's determination of wetlands. (7/27/17 RT, pgs. 99-100.)

Because the feasibility of alternatives that would avoid filling the 2.03 acres of wetland onsite is uncertain, Staff developed mitigation for filling wetlands as required by the Coastal Act. (See Ex. 2000, "Alternatives", section 4.2.) Therefore, in accordance with Public Resources Code, section 30233, Staff originally proposed mitigation at a 2:1 ratio. Typically, the Coastal Commission has recommended mitigation of wetlands under its jurisdiction at a 4:1 ratio in order to "account for temporal loss of wetland habitat . . . and the significant likelihood that a wetland will fail (or only partially succeed) in meeting its performance standard." (Ex. 3009, pg. 16.) In its 30413(d) report, the Coastal Commission references the inherent difficulty in achieving successful wetland mitigation, and also notes that the emergence of vegetation "native to this historical landscape" may be in part due to decreases in site disturbance. (Ex. 3009, pgs.15-16.) Staff accepted the Coastal Commission's recommendation and modified Condition of Certification BIO-9 to require the Applicant to mitigate permanent impacts to on-site wetlands at a 4:1 ratio. (Ex. 2000, pg. 4.3-76.)

C. Address any recommended changes to staff-proposed Conditions of Certification BIO-9 and BIO-10 with specific revised condition language.

Upon further review of the evidentiary record, Staff is not proposing any changes to Condition of Certification BIO-9. Replacement of wetland habitat required in BIO-9 is considered replacement of foraging habitat for the Peregrine falcon. Although, the Peregrine falcon was observed on Unit 1 and in surrounding areas, there was not any

evidence of the Peregrine falcon foraging on the project site. If the Committee decides to add foraging habitat to BIO-9, Staff does not object, but it also does not consider this addition necessary for the protection of the special-status species.

For Condition of Certification BIO-10, it was suggested that the translocation efforts cover the proposed project site as well as the buffer around the project site. Staff has altered BIO-10 accordingly, using ~~strikeout~~ and **bold/underlined** text:

OUTFALL REMOVAL IMPACTS AVOIDANCE PLAN

BIO-10 Prior to initiation of outfall removal activities or any associated ground-disturbing activities, the project owner shall prepare an Outfall Removal Impacts Avoidance Plan. The Plan shall be developed in consultation with the Designated Biologist; and at a minimum, the plan shall detail the following avoidance and minimization measures, and contain a Special-Status Species Translocation Plan:

1. Pre-construction surveys for special-status plants shall be conducted in all impact areas and within 500 feet of said areas. If special-status species are found onsite or within 500 feet of the site, all individuals of these species shall be avoided.

2. Pre-construction surveys for special-status wildlife shall be conducted in all impact areas and within 500 feet of said areas. If special-status species are found onsite or within 500 feet of the site, all individuals of these species shall be avoided or relocated (**BIO-10** #8A and #8B).

3. Vegetation in the construction area shall be removed prior to March 1 (the beginning of the bird-nesting season) to avoid conflicts with nesting birds during the nesting season. Pre-construction surveys for nesting birds that are listed (including California least tern and western snowy plover) and all non-listed bird species shall be conducted in all areas within 500 feet of the perimeter of the project site. Construction during the breeding season (generally March 1 – August 30) is not allowed.

4. During demolition activities, exclusionary fencing shall be installed around the outfall structure demolition area and access road to prevent marine mammals from using the area.

5. Prior to each day, pre-construction/demolition surveys for marine mammals shall be conducted within 500 feet of the outfall structure. If a marine mammal is sighted within or is about to enter the demolition area, work shall be halted until the animal leaves the area. Alternately, an approved biologist may immediately notify the Channel Islands Marine Resource Institute (the local approved National Marine Fisheries Service) to make every reasonable effort to rescue such an animal.

6. Protective silt fencing shall be erected around patches of sand dune mats, and inspected daily by the Designated Biologist or Biological Monitor, to ensure that no

animals are entrapped, and that the fencing is in good repair. Fencing repairs shall occur within 1 business day of detection of damage.

7. Heavy equipment used during the demolition of the outfall structure shall use a soft-start (i.e. ramp-up) technique at the beginning of activities each day, or following an equipment shut-down, to allow any marine mammal that may be in the immediate area to leave before the sound source reaches full energy.

8. Special Status Species Translocation Plan (Translocation Plan)

The Translocation Plan shall describe in detail the monitoring and detection, animal husbandry techniques, and proposed translocation sites for silvery legless lizard and globose dune beetle and its larvae. Proposed translocation sites shall be subject to a habitat assessment by the Designated Biologist, and described in the Translocation Plan. The Translocation Plan shall require approval by the CPM, in consultation with CDFW.

A. For the silvery legless lizard, the Translocation Plan shall describe the undertaking of medium-intensity raking surveys, to occur no more than seven days before the onset of any ground disturbing activity at the **project site, access road, and** outfall structure. ~~All suitable habitat within the ocean outfall and associated access road~~ **Habitat** shall be raked to a depth of 18 inches. Biological Monitors/Designated Biologist shall accompany each piece of vegetation clearing equipment and will inspect disturbed soils and spoils piles for silvery legless lizards. Captured legless lizards shall be held in sterile containers filled with sand and leaf litter, and held in the shade. Translocation should only take place during suitable weather, as determined in consultation with CDFW, the Designated Biologist, and any other biological experts deemed necessary by the CPM. Captured legless lizards shall be spritzed with fresh water prior to translocation to suitable dune habitat to the immediate north or south of the ocean outfall. The Translocation Plan should include photographs and description of the proposed translocation site.

GPS coordinates and photographs of the translocation sites shall be recorded, and a Final Report prepared by the Designated Biologist at the conclusion of the removal of the ocean outfall. The Final Report shall be submitted to the CPM, and at a minimum shall detail detection methodologies used, weather conditions, the number and location of silvery legless lizards removed, data at the translocation site such as GPS coordinates and photographs, any modifications made to the Translocation Plan, and any proposed new methodology or lessons learned during the course of the translocation efforts.

B. For the globose dune beetle, the Translocation Plan shall describe the undertaking of a combination of pitfall traps and pedestrian transect surveys, to occur no more than seven days before the onset of any ground disturbing activity at the **project site, access road, and** outfall structure. Surveys for the globose dune beetle shall be timed to occur before raking for the silvery legless lizard, which would significantly disrupt any potential dune beetle habitat. ~~All suitable habitat at the~~ **The project site**, outfall and associated access road shall be subject to surveys and capture

of globose dune beetles. The Translocation Plan shall outline husbandry methods, such as keeping beetles in sterile containers with sand and leaf litter, during identification and translocation efforts. The project owner shall translocate globose dune beetles and unidentified beetles of the Coelus genera to suitable dune habitat immediately north or south of the ocean outfall. A Final Report, including GPS-recorded locations of translocated specimens, will be prepared as per #8A, above.

Verification: The project owner shall submit the Outfall Removal Impacts Avoidance Plan to the CPM for approval at least 30 days prior to the start of ground disturbing activities associated with the outfall removal. All impact avoidance and minimization measures related to the outfall removal and Special-Status Species Translocation Plan shall be included in the BRMIMP and implemented. Implementation of the measures shall be reported on the MCRs by the Designated Biologist. At the conclusion of the demolition of the outfall, the Designated Biologist shall prepare a final report detailing observations of any special status plants or wildlife, a table of common species observed, a description of any adaptive management or mitigation strategies implemented, and a discussion of the efficacy of said measures. The Designated Biologist will also prepare a final report on the Translocation Plan.

D. Staff's Conclusions Regarding Biological Resources

There are no designated ESHAs on the 3-acre project site, on the larger MGS site, or within the 100-foot buffer. However, there is dune habitat within the proposed 100-foot buffer that may meet the definition of an ESHA. If the Commission determines a 100-foot buffer is not feasible, the Commission could find that a 50-foot buffer would be sufficient to comply with local LORS. There is one 2.03-acre Coastal Commission jurisdictional wetland on the project site and Staff has proposed mitigation at a 4:1 ratio in Condition of Certification BIO-9.

IV. Socioeconomics

Staff's response to the Committee's question regarding Socioeconomics (Environmental Justice) follows.

A. Address the legal requirements of federal and state environmental justice laws, and the application of those laws to this proceeding.

Staff's Environmental Justice analysis contained in the FSA is not bound by any federal or state laws. However, Staff complied with nonbinding federal guidance and state law and policies developed in furtherance of environmental justice.

1. Staff Relied On U.S. EPA Guidance To Conduct Its Environmental Analysis.

Executive Order 12898, "Federal Actions to Address Environmental Justice in Minority Populations and Low-income Populations," requires each federal agency, including the United States Environmental Protection Agency (U.S. EPA), and any state agency receiving federal funds, to develop strategies to identify and address disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority and low-income populations. (Ex. 2000, pg. 4.5-2.) The Executive Order does not prescribe a particular methodology for conducting an environmental justice analysis. However, the U.S. EPA has issued guidance to assist federal agencies undergoing environmental review to effectively identify and address environmental justice concerns.

Neither the Executive Order nor the U.S. EPA's guidance are binding on Staff's review of the Puente Power Project, because review of the project does not fall under federal jurisdiction or rely on federal funding. Nevertheless, to ensure a robust analysis of potential environmental justice impacts, it is Staff's standard practice to refer to federal guidance documents. In the FSA, Staff relied on two guidance documents from the U.S. EPA: (1) *Environmental Justice: Guidance Under the National Environmental Policy Act*, and (2) *Final Guidance for Incorporating Environmental Justice Concerns in EPA's Compliance Analyses*. (Ex. 2000, pg. 4.5-3.) Staff's demographic screening using census data relied on the U.S. EPA guidance documents to define minority and below-poverty-level populations that qualify as environmental justice populations. (*Ibid.*)

Staff also relied on the U.S. EPA definition of environmental justice in ensuring effective public outreach related to the project. (*Id.* at pg. 4.5-7.) The U.S. EPA defines environmental justice as the "fair treatment and meaningful involvement" of all people "with respect to the development, implementation, and enforcement of environmental laws, regulations and policies." (*Id*. at pg. 4.5-1.) In coordination with the Public Adviser's Office (PAO), Staff facilitated meaningful public involvement, which, under U.S. EPA guidance, occurs when:

- Those whose environment and/or health would be potentially affected by the decision on the proposed activity have an appropriate opportunity to participate in the decision;
- The population's contribution can influence the decision;
- Concerns of all participants involved would be considered in the decision-making process; and
- Involvement of the population potentially affected by the decision on proposed activity is sought.

(*Id.* at pgs. 4.5-7 – 4.5-8.)

Therefore, although no federal environmental justice laws apply to Staff's review of the proposed project, Staff relies on federal guidance to design and improve its environmental justice analysis and public outreach efforts.

2. Staff Complied With Statewide Policy and Used Statewide Tools.

The California Environmental Quality Act (CEQA) requires public agencies to identify significant environmental impacts of specified actions and to avoid or mitigate those impacts, to the extent feasible. A "significant effect on the environment" is found, in part, when "[t]he environmental effects of a project will cause substantial adverse effects on human beings, either directly or indirectly." (Pub. Resources Code, § 21083(b)(3).) By requiring broad evaluation of potential significant effects on humans, CEQA promotes the furtherance of environmental justice. Staff's analysis of the project under the California Energy Commission's CEQA-equivalent program adheres to required CEQA principles, and ensures the discussion and consideration of potential impacts to humans in the project area, including those within identified environmental justice communities.

While not directly applicable to Staff, SB 535 (de León, chapter 830, Statutes of 2012) requires the California Environmental Protection Agency (Cal/EPA) to identify disadvantaged communities based on geographic, socioeconomic, public health, and environmental hazard criteria. (Ex. 2000, pg. 4.5-5.) To do so, Cal/EPA employs CalEnviroScreen, a publicly-available mapping tool that can be used to identify California communities that are burdened by multiple sources of pollution and most vulnerable to its effects. (*Id.*)

Staff is not required by law to use CalEnviroScreen. Staff used 2010 decennial United States Census data to determine the presence and number of minority populations and current data from the American Community Survey to determine the presence and number of individuals living below the federal poverty level within a six-mile radius of the project site. However, based on public comment, Staff also used CalEnviroScreen 2.0 and 3.0 to identify census tracts designated as disadvantaged communities within the same area. (*Id.* at pgs. 4.5-3 and 4.5-11; 2/8/17 RT, pgs. 210-213.) Staff then used those minority and below-poverty-level populations that qualify as environmental justice populations and those areas identified as disadvantaged communities within the six-mile radius to determine the existence or absence of populations subject to potential impacts from the proposed project.

Additionally, although not a statutory requirement, the California Natural Resources Agency issued a policy that "all departments, boards, commissions, conservancies and special programs of the Resources Agency must consider environmental justice in their decision-making process if their actions have an impact on the environment, environmental laws, or policies." (Ex. 2000, pg. 4.5-2.) Such actions include enforcement of environmental laws or regulations, making discretionary decisions or taking actions that affect the environment, and interacting with the public on environmental issues. (*Ibid.*) The Energy Commission falls under the authority of the California Natural Resources Agency, and Staff's environmental justice analysis contained in the FSA was conducted in compliance with this policy.

B. Staff's Conclusion Regarding Socioeconomics

Staff is not bound by any federal or state laws regarding environmental justice. However, in the furtherance of environmental justice analysis, Staff complied with federal guidance and state policy in conducting a thorough environmental justice analysis.

V. Compliance

On January 13, 2017, Applicant filed "Comments on the Proposed Conditions of Certification in the Final Staff Assessment for the Puente Power Project," which

included proposed changes to Condition of Certification COM-13. Applicant proposed three changes. First, Applicant recommended changes to the definition of forced outages, which are required to be reported to the California Energy Commission Compliance Project Manager; second, Applicant recommended that only “serious” injuries be required to be reported; and, third, Applicant proposed the addition of language to allow the project owner to submit notifications and reports “under confidential cover.”

At the Evidentiary Hearings for the Puente Power Project, which took place on February 7, 2017 through February 10, 2017, Staff presented direct testimony which addressed Applicant’s three proposed changes to COM-13. Staff stated their disagreement with the first two proposed changes and requested clarification on the third proposed change, which Staff stated is duplicative of existing California Energy Commission confidentiality designation procedures. Applicant agreed at the Evidentiary Hearings not to pursue the first two proposed changes. Furthermore, Staff and Applicant publicly discussed options to revise Applicant’s request for confidentiality to reflect existing Energy Commission regulations regarding confidential designation.

The Puente Committee requested that Staff and the Applicant file agreed-upon language for COM-13 after the close of the Evidentiary Hearings. In accordance with the Committee’s request, Staff offers the following proposed changes to COM-13. Applicant has reviewed and provisionally agreed to Staff’s proposed language.

The proposed changes are shown in comparison to the language included in the Final Staff Assessment, Part 2 of 2 (Ex. 2001). New text is shown in bold, underlined, italicized font.

COM-13 **Incident-Reporting Requirements**. The project owner shall notify the CPM within one hour after it is safe and feasible, of any incident at the facility that results in any of the following:

1. An event of any kind that causes a "Forced Outage" as defined in the CAISO tariff;

2. The activation of onsite emergency fire suppression equipment to combat a fire;

3. Any chemical, gas or hazardous materials release that could result in potential health impacts to the surrounding population; or create an off- site odor issue; and /or

Notification to, or response by, any off-site emergency response federal, state or local agency regarding a fire, hazardous materials release, on- site injury, or any physical or cyber security incident. Notification shall describe the circumstances, status, and expected duration of the incident. If warranted, as soon as it is safe and feasible, the project owner shall implement the safe shutdown of any non-critical equipment and removal of any hazardous materials and waste that pose a threat to public health and safety and to environmental quality (also, see specific conditions of certification for the technical areas of **Hazardous Materials Management and Waste Management.**

Within 6 six business days of the incident, the project owner shall submit to the CPM a detailed incident report, which includes, as appropriate, the following information:

1. A brief description of the incident, including its date, time, and location;

2. A description of the cause of the incident, or likely causes if it is still under investigation;

3. The location of any off-site impacts;

4. Description of any resultant impacts;

5. A description of emergency response actions associated with the incident;

6. Identification of responding agencies;

7. Identification of emergency notifications made to federal, state, and/or local agencies;

8. Identification of any hazardous materials released and an estimate of the quantity released;

9. A description of any injuries, fatalities, or property damage that occurred as a result of the incident;

10. Fines or violations assessed or being processed by other agencies;

11. Name, phone number, and e-mail address of the appropriate facility contact person having knowledge of the event; and

12. Corrective actions to prevent a recurrence of the incident.

The project owner shall maintain all incident report records for the life of the project, including closure. After the submittal of the initial report for any incident, the project owner shall submit to the CPM copies of incident reports within 48 hours of a request. ***If the project owner requests that an incident notification or report be designated as a confidential record and not publicly disclosed, the project owner shall submit copies of notices or reports with an application for confidential designation in accordance with California Energy Commission regulations.***

IV. Conclusion

In conclusion, Staff has responded to the Committee's identified issues and has provided agreed-upon language to revise proposed Condition of Certification COM-13.

Date: September 1, 2017

Respectfully submitted,

Kerry A. Willis

KERRY A. WILLIS
MICHELLE E. CHESTER
Attorneys for Energy Commission Staff