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STATE OF CALIFORNIA

CALIFORNIA ENERGY COMMISSION

IN THE MATTER OF: APPLICATION FOR CERTIFICATION OF THE **PUENTE POWER PROJECT**	DOCKET NO. 15-AFC-01 **OPENING BRIEF OF THE CALIFORNIA ENVIRONMENTAL JUSTICE ALLIANCE RE ENVIRONMENTAL JUSTICE**

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The California Environmental Justice Alliance ("CEJA") respectfully submits this opening brief regarding environmental justice. Pursuant to Hearing Officer Kramer's August 8, 2017 memorandum parties are encouraged to file opening briefs regarding, in particular, three specific topics at this time, including "Socioeconomics - Address the legal requirements of federal and state environmental justice laws, and the application of those laws to this proceeding."[1] CEJA intends to submit additional briefing related to the special study conducted by the California Independent System Operator as ordered by the Committee.

I. INTRODUCTION

CEJA is a statewide, community-led coalition that works to achieve environmental justice in low-income communities and communities of color. CEJA seeks to address toxic industries that pollute peoples' land, water, and health, and to create a green, locally-based and sustainable economy. CEJA was formed in 2001 and today represents approximately 20,000 Asian American, Latino, and African American residents across California.

CEJA advocates in administrative and legislative venues to ensure the voice of environmental justice communities affects land use planning, including, specifically, to determine whether and when new gas-fired generation is approved in California. CEJA's goal in these venues is to ensure that the state's transition from a fossil-fuel based electricity system to a sustainable energy system takes into account existing environmental injustice, including the cumulative impacts already suffered by low-income communities of color.

The Central Coast Alliance United for a Sustainable Economy ("CAUSE") is a member organization of CEJA. CAUSE builds grassroots power to achieve social, economic, and environmental justice for the people of California's central coast region. CAUSE began its environmental justice work in 2007, when diverse grassroots leaders came together to organize their community to stop the world's largest mining company from building a South Oxnard offshore liquefied natural gas import terminal. At that point, more

[1] TN#220614 "Summary of Committee Identified Briefing Topics and Briefing Schedule".

than 80 percent of the population in South Oxnard were people of color, with one-third of the community earning below the federal poverty level and 71 percent of its children qualify for free and reduced lunch programs. South Oxnard is twice as likely to have an environmental hazard as other communities of Ventura and Santa Barbara Counties. Building on its initial experience with a massive proposed energy project, the Oxnard chapter of CAUSE, and its members, have identified proposed gas-fired power plants as a threat to environmental justice.

CEJA has specific concerns around new gas-fired power plants in disadvantaged communities, and at the behest of its member organizations, has intervened in several administrative proceedings that determine whether new gas-fired generation is approved. CEJA was a party to the 2012 long term procurement planning proceeding ("LTPP") at the California Public Utilities Commission ("PUC") that evaluated local capacity requirements in the Moorpark sub-area in light of the State Water Board schedule to retire all Once Through Cooling ("OTC") units that chose not to reduce their water intake.

In 2015, CEJA intervened in the PUC proceeding reviewing Southern California Edison's application for approval of its procurement contract with NRG Oxnard for the proposed Puente plant, a simple-cycle gas-fired generating unit that would be located on Oxnard's coast at Mandalay Beach ("P3"). In that proceeding, CEJA provided expertise regarding use of CalEnviroScreen, technical information regarding the Oxnard community in which the Project would be located, and general legal representation of CEJA's and CAUSE's interests. The Administrative Law Judge ("ALJ") and two commissioners specifically relied on information provided by CEJA in their respective proposed decisions.[2]

As the proposed decisions by ALJ DeAngelis and Assigned Commissioner Florio and the final decision by Commissioner Peterman confirmed, the PUC record shows that Oxnard is a disproportionally burdened, environmental justice community. Environmental

[2] CEJA's testimony in the PUC proceeding was submitted into the CEC docket on October 15, 2015 by Maricela Morales, Executive Director of CAUSE, who also provided written and oral information summarizing the socioeconomic conditions in the area surrounding the proposed P3 project. CEC Docket 15-AFC-01, #TN 206369.

justice communities are marked by significant populations of low-income residents and residents of color bearing disproportionate environmental burdens. Oxnard fits this profile. As briefed by CEJA in the PUC proceeding and noted in the decisions, CalEnviroScreen, which is the singular screening tool developed by the California Environmental Protection Agency to evaluate community environmental health, identifies census tracts in Oxnard as "within the top 20% most environmentally burdened communities in California." This is in sharp contrast to the rest of the Moorpark sub-area, which contains many white, affluent communities, and no other communities in the top 80th percentile of CalEnviroScreen.

In particular, environmental burdens from power generation in the Moorpark sub-area have fallen disproportionately on the people of Oxnard. Indeed, Oxnard hosts the vast majority of the gas-fired generation in the Moorpark sub-area. Oxnard also has a toxic superfund site, and heavy pesticide contamination. The P3 project, as an additional gas-fired power plant in the City of Oxnard, would worsen environmental conditions in the area, and would deprive residents of a reliable energy source in the face of climate change, economic benefits associated with alternative energy projects, and non-industrial, clean natural recreational space.[3]

Although it relies on different measures, the FSA correctly concludes that Oxnard, and the communities in proximity to the proposed P3 plant, are environmental justice communities. Adding P3 to the cumulative effects of existing pollution sources would impose additional burdens on an already heavily disadvantaged and vulnerable population. Within the environmentally overburdened communities in Oxnard, 85% of the population is Latino, 29% lives in linguistic isolation, 56% lives below two times the federal poverty level, and 46% of those over 25 years of age have less than a high school education. In addition to the people who live in close proximity to the proposed plant, thousands of farm workers work in even closer proximity. Between 1,000 and 3,000 laborers work in surrounding fields less than half a mile from the site. The socioeconomic, public health and air quality benefits of alternatives to P3 are extremely meaningful for these communities.

[3] As noted above, CEJA intends to submit future briefing regarding alternatives to P3, related to the CAISO study.

The FSA generally employs an appropriate approach to environmental justice analysis, in that it first identifies communities, then focuses on the impacts to those communities. Unfortunately, the FSA generally concludes that because there is no signficant impact, generally, there can be no disproportionate impact to the particular environmental justice communities. This analysis is flawed. It fails to compare impacts, regardless of whether they would be significant in a generic CEQA setting, to the rest of the Moorpark sub-area, which includes cities like Goleta, Moorpark, and Santa Barbara. In addition, the FSA failed adequately to identify environmental justice impacts on parks access, traffic, and farmworkers from a noise and public health perspective. The FSA, and the record supporting it, do not form an adequate record for the CEC to adopt its conclusions regarding impacts to environmental justice communities from P3.

II. STATEMENT OF FACTS

Siting P3 on Mandalay Beach, a site that is greatly needed by the environmental justice community, would exacerbate existing environmental injustice. The City of Oxnard, which is majority minority, bears the burden of many pollution sources, in addition to low socioeconomic status, high linguistic isolation, and acute health impacts like high instances of asthma hospitalization. Oxnard is home to a large portion of the Moorpark sub-areas gas-fired generation, including four gas-fired once-through cooling power generating units (two at Ormond State Beach, and two at Mandalay State Beach), and two other gas-fired generating units, one at Mandalay and one at McGrath State Beach. These power plants have turned large swaths of Oxnard's beaches into industrial sites. Oxnard's majority Latino residents are also burdened by a toxic waste superfund site, and are broadly exposed to the pesticides used in this agriculture-based town.

A. Residents Near and Around the Plant Are People of Color Who Are Already Subjected to Disproportionate Shares of Environmental and Social Harms

California's premier environmental justice screening tool, CalEnviroScreen, provides information about pollution exposure, health and socioeconomic status, and separately

shows information about race. CalEnviroScreen ranks census tracts according to a combined burden score, so a rank of 86-90th percentile indicates that only 14-10 percent of census tracts in California suffers the same or worse cumulative burdens.

The census tract where P3 would be located, tract 6111002905, has a population of over 5,000 people that is 56% Latino and 75% people of color. It is in the 86-90th percentile range of the most environmentally burdened disadvantaged communities in the state, according to CalEnviroScreen 3.0.[4] It is in the 94th percentile in the state for pollution burden, the 100th percentile for pesticides, the 92nd percentile for cleanup sites, 92nd percentile for groundwater threats, 78th percentile for hazardous waste, 91st percentile for impaired water bodies, 79th percentile for solid waste, 92nd percentile for asthma, 89th percentile for low birth weight, and 92nd percentile for cardiovascular rate.
Oxnard has multiple census tracts within the top 25% most environmentally burdened communities in the state.

Two census tracts within 6 miles of the project rank in the top 5% of impacted communities in California on CalEnviroScreen 3.0.[5] Beginning with the Project site, the tracts to the east of the project create a swath of the city ranging from the 92nd-96th percentile rates in asthma in the state.[6] The concentration of industrial facilities and agricultural pesticides in Oxnard contribute to this health inequity.

The Moorpark Sub-Area contains many affluent communities, and only eight census tracts that score within the top 25% of environmentally impacted disadvantaged communities under Cal Enviroscreen 3.0. Six of those census tracts are either fully or partially within a 6 mile radius of the Puente project in Oxnard and Port Hueneme. The other two tracts are partially within a 6 mile radius, to the north in Ventura.[7] No other city within the Moorpark Sub-area suffers from the burdens faced by Oxnard's residents, as not

[4] Ex. 6000 at 7 (*citing* CALENVIROSCREEN 3.0 MAP search result Oxnard.)
[5] *Id.* (Tracts 6111009100 and 6111004902.)
[6] *Id.* (tracts 6111002905, 6111003300, 6111008600, 6111008700, 6111003201, 6111009100 and 6111004902.)
[7] *Id.* (Showing: tracts 6111002300 and 6111002400.)

even one census tract of those other cities score within the 90th percentile.[8] Altogether, at least 26,914 residents live in Oxnard communities ranked in the top 25% by CalEnviroScreen 3.0.[9]

B. Thousands of People Work, Learn and Recreate in Near the P3 Site

In addition to the number of disadvantaged communities living in close proximity to the Mandalay Power Plants, there are thousands of farm workers who *work* in even *closer* proximity to the plants.[10] The City of Oxnard is largely an agricultural city. According to the U.S. Census Bureau, over 15,000 Oxnard residents are employed in the agricultural industry, with well over 90% in non-management, non-sales jobs.[11]

Numerous agricultural fields surround the Mandalay Power Plants. The agricultural fields and their workers in closest proximity are less than half a mile away from the power plants. Of the body of fields immediately surrounding the power plants, those furthest out are only about four miles away. Between 1,000 and over 3,000 people labor in the agricultural fields surrounding the Mandalay Power Plants.[12]

Oxnard High School, in the same census tract as the project has an enrollment of over 2,800 students who spend 7-10 hours per day on campus five days per week. It is a Title I school, the federal designation for schools with socioeconomically disadvantaged students. It has a student body that is 84% Latino, 91% students of color, and 65% economically disadvantaged.[13]

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[8] Ex. 6000, (*citing* CALENVIROSCREEN 3.0 MAP search result Oxnard *Available at* http://oehha.maps.arcgis.com/apps/webappviewer/index.html?id=4560cfbce7c745c299b2d0cbb07044f5.)

[9] *Id.* (Showing: Tract 6111002905 pop 5,478; Tract 6111003201 pop. 4577; Tract 6111009100 pop. 5279; Tract 6111004704 pop 1469; Tract 6111004902 pop 5091; Tract 6111004715 pop. 5020.)

[10] Ex. 6000 at 8.

[11] *Id.* at 9.

[12] *Id.*

[13] Ex. 6000 at 10.

In addition to attending high school near the P3 site, some Oxnard youth work in the fields near the proposed plant. Some, for example, begin working in agriculture as young as 12, when their bodies and lungs are still developing.[14]

Children and families are also likely to be exposed to plant impacts during recreation hours. Public coastal access is a critical source of free outdoor recreation for Oxnard residents, as much of the community is designated as "park poor" by The City Project, with less than 3 acres of parkland per 1,000 residents in their neighborhoods and low median incomes that limit transportation to more distant recreational areas such as the Channel Islands National Park or the Los Padres National Forest.[15] The beach is the primary open space for recreational activity for Oxnard residents, who are consistently rated as having among the highest child obesity rates and lowest child physical fitness scores in the county.[16]

Industrial uses like power plants have limited public access to Oxnard's coast and serve as a major barrier to coastal wetlands restoration. Further, while the narrow strip of beachfront homes directly on the coast tend to be owned by fairly affluent households, the users of the public beach itself tend to reflect Oxnard's overwhelmingly Latino low-to-moderate income population.

During most of the day, Oxnard's coastal power plants are surrounded by thousands of local working-class immigrant families and youth of color attending school, working in the fields, and recreating on the beach. These exposures do not appear in residency statistics.

III. OVERVIEW OF ENVIRONMENTAL JUSTICE MANDATES APPLICABLE TO THE CEC CERTIFICATION OF P3

Because the CEC is analyzing P3's environmental justice impacts, the correct question is whether there is a disparate, or disproportionate, impact to Oxnard's environmental justice communities, compared to the Moorpark sub-area's other

[14] Ex. 6002 at 1.
[15] Ex. 6000 at 9-10.
[16] *Id.* at 48.

communities. State law, including California's anti-discrimination law and the California Environmental Quality Act ("CEQA"), in light of the CEC's own regulations and guidance, set out how the CEC must undertake this analysis.

The CEC is the state agency that is tasked with evaluating applications for certification for thermal power plants greater than 50 MW. As a state agency, the CEC is subject to environmental justice mandates as well as the state's anti-discrimination laws. In addition, the PUC, despite its intent in future review of contracts to consider environmental justice impacts, resoundingly established that the CEC is the only state agency that will conduct an environmental justice analysis of the P3 project.

To satisfy the anti-discrimination law, the environmental justice analysis must answer the questions:

1) is there an environmental justice community that may be affected by the project?

2) would permitting the project result in discrimination against that community, in other words, would the project have an impact on that community that is disproportionate to impacts incurred by communities that are not environmental justice communities?

3) even if permitting the project appears to be based on a racially-neutral analysis, is a less-discriminatory alternative?[17]

This metric is different from the standard employed under CEQA, in which an agency first determines whether there may be a significant impact, whether direct or cumulative, and then either selects alternatives with fewer impacts or establishes mitigation to address the impacts. As the lead agency, the CEC must of course also implement CEQA.

A. CEQA

The CEC administers a certified regulatory program under the California Environmental Quality Act ("CEQA"). While an agency operating a certified regulatory program is permitted to follow its own rules to prepare equivalent documents, it must

[17] *Darensburg*, 636 F.3d at 519. The parties are instructed to bifurcate briefing of alternatives, CEJA will present discussion of alternatives involving the CAISO study in future briefing.

implement CEQA's fundamental mandates, which are critical to providing reliable public information, protecting the environment, and ensuring that if a project is approved, its potentially significant impacts are mitigated or alternatives are selected.

The CEC has developed its own rules for implementing CEQA in its power plant certification process. These rules include a process for CEC staff evaluation as well as consideration of factors such as environmental justice impacts of a proposed plant. The CEC has "integrate[d] environmental justice into its siting process since 1995, as part of its thorough [CEQA] analysis of applications for siting power plants and related facilities." The CEC's final decision includes review of "disproportionate impacts on minority and low-income populations resulting from exposure to direct and cumulative impacts associated with the proposed facility." Where "potentially significant impacts are identified", "staff from other appropriate technical areas are involved to provide a comprehensive analysis." In other words, once environmental justice communities are identified, the CEC is committed to providing an analysis that is more comprehensive than, or in some way different from, the analysis it conducts under CEQA when there are no environmental justice communities that the proposed project may impact.

B. California Anti-Discrimination Law

The CEC acknowledges that California state law codifies a definition of environmental justice,[18] as "the fair treatment of people of all races, cultures, and incomes with respect to the … implementation, and enforcement of environmental laws, regulations, and policies."[19] To conduct an environmental justice analysis is to analyze whether people of all races and incomes are treated fairly with respect to environmental laws, regulations and policies. Government Code Section 11135 and its implementing regulations prohibit California agencies from utilizing criteria or

[18] http://www.energy.ca.gov/public_adviser/environmental_justice_faq.html
[19] Cal. Gov. Code § 65040.12(e).

methods of administration that have the effect of subjecting people to discrimination, or "perpetuat[ing] discrimination" by any recipient of state funding.[20]

California's anti-discrimination law applies to the CEC's analysis. The law provides that "No person in the State of California shall, on the basis of … race, … ancestry, national origin, [or] ethnic group identification, … be unlawfully subjected to discrimination under, any program or activity that is conducted, operated, or administered by the state or by any state agency…."[21] California defines "discriminatory practice" to include an instance when "a recipient, …on the basis of ethnic group identification, [or] color, … permit[s] selections of sites or locations of facilities that have the … effect of …subjecting [people]…to discrimination under any program or activity…[22]

1. As an Agency, the CEC Administers its Site Certification Program in Accordance with California's Anti-Discrimination Law

The CEC is a state agency, created by the Warren-Alquist Act of 1974.[23] Under the state anti-discrimination law, a state agency is "an administrative subdivision or instrumentality of State government, including, but not limited to, …commissions, which has the statutory or constitutional authority to provide State support to any person."[24] The CEC has significant statutory authority to provide support. It is the California entity with exclusive authority to permit thermal power plants greater than 50 MW, and thus provides support to power plant developers. In addition, the CEC is tasked with providing support in many other contexts. It provides "technical assistance and support for the development of petroleum diesel fuels which are as clean or cleaner than alternative clean fuels and clean diesel engines. That technical assistance and support may include the creation of research,

[20] Cal. Gov. Code. § 11135; 2 Cal. Code Regs. 11150 (as explained below, "'Recipient' does not include State agencies. However, State agencies may look to this Division for guidance in the administration of their programs and activities.")
[21] Cal. Gov. Code. § 11135.
[22] Cal. Gov. Code § 11134(j)(1).
[23] Cal. Pub. Resources Code §§ 25000 et seq.
[24] 2 Cal. Code Reg. § 11150.

development, and demonstration programs."[25] It "facilitate[s] development and commercialization of ultra low- and zero-emission electric vehicles and advanced battery technologies, as well as development of an infrastructure to support maintenance and fueling of those vehicles in California."[26] Even more directly, it administers funding for the Public Interest Research, Development, and Demonstration Program and the Electric Program Investment Charge Fund.[27]

While agencies are included in the broad prohibition against discrimination, the regulations do not include state agencies in the definition of "recipient", and despite the identification of "recipients" as the primary actors for whom discriminatory acts are defined, no formal regulation or guidance exists instructing agencies how to implement the prohibition.[28] Acknowledging that agencies are not exempt from the anti-discrimination laws, the regulation provides that "[s]tate agencies may look to this Division for guidance in the administration of their programs and activities."[29] Section 11139 suggests that section 11135 should be interpreted broadly, not "in a manner that would frustrate its purpose."[30] The statute's legislative history suggests that 2001 amendments, which broadened the scope of the law to include activities "conducted, operated or administered by the state or by any state agency" were intended to require state agencies to apply the same standards of nondiscrimination as other recipients of state funding.[31] Where an agency is given a duty by law, it should rely on optional guidance, rather than failing to implement its duty.

2. The CEC Permits Selections of Sites or Locations of Facilities

[25] Cal. Pub. Resources Code § 25617.
[26] Cal. Pub. Resources Code § § 25618.
[27] Cal. Pub. Resources Code § 25620 (PIR); §§ 25710 et seq (EPIC.)
[28] 2 Cal. Code Reg. § 11150.
[29] 2 Cal. Code Reg. § 11150.
[30] Cal. Gov. Code § 11139.
[31] Danfeng Soto-Vigil Koon, *Cal. Gov't Code § 11135: A Challenge to Contemporary State-Funded Discrimination*. Stanford Journal of Civil Rights & Civil Liberties (Oct. 2011).

The CEC is the exclusive state law authority for approval of thermal power plants 50 MW or larger. No other state or local entity has authority to issue permits or approve siting. As the Final Staff Assessment explains,

> The Energy Commission has the exclusive authority to certify the construction, modification, and operation of thermal electric power plants 50 megawatts (MW) or larger. The Energy Commission certification is in lieu of any permit required by state, regional, or local agencies, and federal agencies to the extent permitted by federal law (Pub. Resources Code, § 25500). The Energy Commission must review thermal power plant AFCs to assess potential environmental and engineering impacts, including potential impacts to public health and safety, potential measures to mitigate those impacts, and compliance with applicable governmental laws or standards (Pub. Resources Code, § 25519 and § 25523(d)).
>
> The Energy Commission's siting regulations require staff to independently review the AFC, assess whether all of the potential environmental impacts have been properly identified, and whether additional mitigation or other more effective mitigation measures are necessary, feasible, and available (Cal. Code Regs., tit. 20, § 1742). In addition, this section requires staff to assess the completeness and adequacy of the measures proposed by the applicant to ensure compliance with health and safety standards, and the reliability of power plant operations. Staff is required to develop a compliance plan (coordinated with other agencies) to ensure that applicable LORS are met (Cal. Code Regs., tit. 20, § 1744(b)).[32]

There is no other agency in California that reviews siting or location issues for gas-fired power plants such as P3. Certification by the CEC is in lieu of every other state permit. Therefore, the CEC's action regarding P3 is the permit action regarding the siting or location of P3.

3. Siting Decisions Must Not Have the Effect of Subjecting People to Discrimination

California's prohibition on discrimination looks at whether a disproportionate impact is being imposed as compared to a community that is not affected by the siting decision.

[32] Final Staff Assessment, p. 2.2.

This analysis "involves a comparison between two groups—those affected and those unaffected by the facially neutral policy. . . . An appropriate statistical measure must therefore take into account the correct population base and its racial makeup."[33]

In *Darensburg*, plaintiffs alleged that decisions to cut funding for projects for a Bay Area transit agency that served a greater percentage of minority riders and fund projects for agencies with lower percentage minority riders violated the state's anti-discrimination law. The court held that the comparison of racial makeup of overall ridership of different transit agencies was not the correct population to measure whether a disproportionate impact would occur, because the funding plan affected everyone within the transit system. The court concluded that plaintiffs had failed to show that the de-funding of specific projects would have had a greater impact on racial minorities.[34] Because "'the appropriate inquiry is into the impact on the total group to which a policy or decision applies')[citations omitted], plaintiffs could not simply rely on regional ridership statistics, but rather had to present information about the specific projects' impacts.[35]

The question, from a siting perspective, is whether a project would have a disproportionate impact on an environmental justice community when compared to impacts incurred by communities that are not environmental justice communities. The relevant area is the population of the Moorpark Sub-area, which is the area in which the PUC found a need for new generation. Comparing impacts between one community within six miles of P3 to another community within six miles is exactly the kind of false comparison the *Darensburg* court rejected. Many of the census tracts within six miles of P3 are majority minority, as well as suffering from high asthma rates, high exposure to pollution, and low income. The question is whether the impacts to Oxnard communities as compared to the Moorpark sub-area's other communities, like Goleta, Santa Barbara, or Moorpark, are disproportionate.

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[33] *Darensburg v. Metro. Transp. Comm'n*, 636 F.3d 511, (9th Cir. 2011) at 519–20.
[34] *Darensburg*, 636 F.3d at 520.
[35] *Id.*

4. Protected classes under the state anti-discrimination law include "ethnic group identification" and "color"

Classes entitled to protection from disproportionate impacts from siting include those with ethnic group identifications and people who could suffer discrimination based on "color". In its siting decisions, the CEC should consider the ethnic group identification as well as color of communities that may be affected by the plant, as well as in the area for the relevant comparison.

In sum, the three-part analysis for every aspect of the project must first determine whether there is an environmental justice population that may be impacted; next, whether the impact is disproportionate to impacts suffered by relevant non-environmental justice populations; and if there are alternatives that would have less impact on environmental justice populations.

IV. THE CEC MUST COMPLY WITH CEQA AND ENVIRONMENTAL JUSTICE MANDATES

A. PROJECT DESCRIPTION

Accurate, consistent, accessible communications about the project description are critical from an environmental justice perspective. Further, under CEQA, an "accurate, stable and finite" project description is the *sine qua non* of an environmental impact report ("EIR").[36] Only through an accurate depiction of a project may the public, interested parties, and public agencies balance the proposed project's benefits against its environmental cost, consider suitable mitigation measures, assess the advantages of rejecting the proposal, and appropriately weigh alternatives.[37] The importance of an accurate project description cannot be overstated.

The FSA project description suffers several defects. These include a basic failure to identify what the project includes, and does not include – the construction and operation of

[36] *County of Inyo v. City of Los Angeles* (1977) 71 Cal. App. 3d 185, 199.
[37] *San Joaquin Raptor Rescue Center v. County of Merced* (2007) 149 Cal. App. 4th 645, 655.

P3, which is the activity within the CEC's jurisdiction to approve, and not the decommissioning and demolition of units that are otherwise required by law. It also fails to identify P3's operational characteristics – how many hours P3 will P3 operate. Finally, it fails to describe the project's objectives as required by CEQA.

1. The Project is Construction and Operation of P3; it does Not Include Decommissioning and Demolition of MGS OTC Units

From the very start of the FSA, the description of the P3 project is incorrect and deceptive to the public. The FSA errs in describing the Project as one that includes both construction and operation of P3 **and** decommissioning and demolition of the two existing Mandalay Generating Station Once Through Cooling units ("MGS Units 1 and 2"). An average reader, reviewing the sentence "If Puente is approved and developed, the existing MGS Units 1 and 2 would be decommissioned", would assume that decommissioning will occur only if Puente is approved and developed.[38] After explaining that California's Once Through Cooling policy requires elimination of waste water from OTC units, rather than admitting that NRG has not advanced any plan other than retirement of MGS Units 1 and 2, the executive summary continues to assert that "If Puente is approved and developed, MGS Units 1 and 2 would be retired by the completion of commissioning of Puente."[39] As part of its environmental justice section, the FSA explains at length the efforts the CEC has made to communicate with the pulbic.[40] Meaningful involvement of the public, especially of environmental justice communities that may be affected by a decision, is the absolute minimum prerequisite to addressing environmental injustice. The information an agency provides must be both targeted at reaching the affected community and accurate.

While CEJA strongly supports the decommissioning and demolition of MGS Units 1 and 2, they must be considered as mitigation for the significant impacts the P3 project imposes. The distinction is significant.

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[38] Ex. 2000 at 1-1.
[39] Ex. 2000 at 1-2.
[40] *See*

NRG submitted its Application for Certification for P3 describing a project that would consist of construction of P3.[41] This was the project for which the PUC considered a contract. As the PUC final decision observed, while NRG subsequently filed a description of the demolition of MGS Units 1 and 2 with the CEC, proposing to include the demolition by late 2022, "[n]either NRG's proposal nor the contract presented in this proceeding included the demolition at the proposed site…."[42] Likewise, for months NRG asserted its intention to leave MGS Units 1 and 2 in place.

Although NRG submitted a "Project Enhancement and Refinement, Demolition of Mandalay Generating Station Units 1 and 2" on November 19, 2015, CEC staff must consider whether this "enhancement and refinement" is, as NRG asserts, part of the project, a necessary mitigation measure, or simply an undertaking that would be required of NRG whether or not the CEC approves P3.[43] The FSA errs in describing the project as the construction of a 262 MW electric power project, the decommissioning of MGS Units 1 and 2, and the demolition and removal of the power blocks and exhaust structure.[44] CEJA is concerned that this project description is inaccurate, distorts the public understanding of the project, and wrongfully includes mitigation measures in violation of CEQA.

A "project" under CEQA is defined to be "the whole of an action, which has the potential for resulting in . . . a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment."[45] In contrast, the term "mitigation" involves "feasible changes in any or all activities involved in the project in order to substantially lessen or avoid significant effects on the environment."[46] Mitigation may not be incorporated into project description, because doing so makes it impossible to evaluate

[41] D.16-05-050, pp. 14-15 ftn 33; *see also* NRG filing CEC Docket 15-AFC-01, #TN206698, 11/19/2015.
[42] D.16-05-050, pp. 14-15 ftn 33.
[43] Note that under the Warren-Alquist Act and CEQA, if NRG engages in a separate project of demolition of its existing units the CEC's delegated program and authority to implement LORS, which applies only to certification of thermal power plants greater than 50 MW, will not apply. Other authorities will conduct environmental review and issue requisite permits.
[44] Ex. 2000 at 1-1.
[45] 14 Cal. Code Regs. § 15378.
[46] 14 Cal. Code Regs. § 15041(a).

the true impacts of the project and prevents the agency and the public from evaluating whether the mitigation measures are tailored to address the project's impacts.[47]

The court in *Lotus v. Department of Transportation* confirmed that under CEQA, project descriptions should not include mitigation measures.[48] In that case, petitioners challenged the sufficiency of an EIR for a highway construction project that would affect a redwood forest.[49] The lead agency, Caltrans, concluded that "no significant environmental effects" were expected as a result of the project because it was going to "implement[] special construction techniques" as part of the project.[50] The court found that these "special construction techniques," which included restorative planting, invasive plant removal, and use of an arborist and of specialized equipment, were mitigation measures that could not be considered parts of the project.[51] The court found that by incorporating mitigation measures into its significance determination, and relying on those measures to determine that no significant effect would occur, Caltrans violated CEQA.[52]

The court stated it that would "not provide Caltrans a shortcut to CEQA compliance by allowing Caltrans to rely on mitigation measures that ha[d] not been adequately adopted."[53] The court explained that this failure to comply with the requirements of CEQA constituted a failure to "proceed in a manner required by law" and thus, constituted an abuse of discretion.[54] Further, the court explained that this failure was prejudicial because it "subvert[ed] the purposes of CEQA [by] . . . omit[ting] material necessary to inform decisionmaking and informed public participation."[55]

Generally, an activity is mitigation when it is a "proposed subsequent action by the project proponent to mitigate an environmental impact of the proposed project"[56] and in

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[47] *See Lotus v. Department of Transportation* (2014) 223 Cal. App. 4th 645.
[48] *See id.*
[49] *Id.* at 647.
[50] *Id.* at 651.
[51] *Id.* at 657.
[52] *Id.* at 655.
[53] *See id*. at 658 (citing Cal. Pub. Resources Code, § 21168.9).
[54] *Id*.
[55] *Id*.
[56] *See e.g., Save the Plastic Bag Coalition v. City and County of San Francisco*, 222 Cal. App. 4th 863 (2013).

certain circumstances, when the activity works to address a "preexisting problem."[57] The *Lotus* court provides examples of what would be considered part of an EIR's project description -- use of a "certain type of cement that affected redwood roots less than other types of cement."[58] The court stated that it would be "nonsensical" in that case to "analyze the impact of using some other composition of paving then to consider use of this particular composition as a mitigation measure."[59] By contrast, landscaping and restorative plantings were mitigation for project impacts.

In another case, a city's 10-cent fee as part of an ordinance restricting the use of plastic bags at retail stores was an "integral" part of the City's plan to address the problem of single-use bags, and was part of the project. [60] There, the fee was not a mitigation measure because it was not a "proposed subsequent action[] by the project proponent to mitigate or offset the alleged adverse environmental impacts" of the project.[61]

The court in *Berkeley Hillside Preservation v. City of Berkeley* used the standard of what constituted a "mitigation measure" from *Save the Plastic Bag Coalition* to determine that a traffic-management plan for a project to build a house on the Berkeley hillside was not mitigation because it was not a "proposed subsequent action taken to mitigate any significant effect of the project."[62] The court determined that the project was exempt from CEQA, and that the traffic plan was a part of the project because managing traffic during home construction is a "common, typical concern."[63] The court thus rejected that the traffic plan amounted to a mitigation measure, which would have preempted the project from CEQA exemption.

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[57] *See Wollmer v. City of Berkeley*, 193 Cal. App. 4th 1329 (2011).
[58] *Lotus v. Department of Transportation*, 223 Cal. App. 4th at 657, fn. 8.
[59] *Id.*
[60] *Save the Plastic Bag Coalition* (2013) 222 Cal. App. 4th 863, 868.
[61] *Id.* at 882-83.
[62] *See Berkeley Hillside Preservation v. City of Berkeley*, (2015) 241 Cal. App. 4th 943.
[63] *Id.*

Under *Lotus*, mitigation may not be included in the CEC's description of the P3 project.[64] Because of this, decommissioning, demolition and removal of the existing MGS Units 1 and 2 constitute mitigation that should not be included in P3's project description.

First, decommissioning of MGS Units 1 and 2 will occur regardless of the P3 project, and should not be included as part of the project description. Similarly, regardless of whether P3 is approved, once the Once Through Cooling regulation operates to shut down MGS Units 1 and 2, the City of Oxnard may exercise its police power or public nuisance authority to mandate demolition. From a practical perspective, mis-defining the P3 project to include decommissioning, demolition and removal prevents the CEC from adequately considering alternatives to the project. The project benefits of decommissioning, demolition and removal are all lacking from every alternative considered. Because these actions will occur independent of P3, it is incorrect to lump decommissioning in with the P3 project. Suggesting to the entire community, in English and Spanish, that only if P3 is approved will retirement will occur, is a cynical play at securing support through deception.

Second, to the extent the CEC considers demolition and removal of the power blocks and exhaust structure of the MGS as part of this project (rather than concluding they are projects in their own right, subject to separate jurisdiction) the actions constitute mitigation. As described in *Save the Plastic Bag Coalition* and *Berkeley Hills Preservation*, demolition and removal would be "proposed subsequent action[s] taken to mitigate . . . significant effect[s] of the project."[65] Unlike the 10-cent fee for plastic bags in *Save the Plastic Bag Coalition* and the traffic plan in *Berkeley Hillside Preservation*, which both courts deemed "integral" to their respective projects, here, the only "integral" part of the P3 project is its construction – not the decommission, demolition, or removal of existing, appendage structures. Decommissioning of Unit 1 is scheduled for after P3 construction, and demolition and removal of both power blocks and exhaust structure are scheduled for after P3 construction. They are therefore subsequent actions. Further, these actions would

[64] *See Lotus v. Department of Transportation*, (2014) 223 Cal. App. 4th 645.
[65] *See Save the Plastic Bag Coalition*, 222 Cal. App. 4th 863 (2013); *Berkeley Hillside Preservation v. City of Berkeley*, 241 Cal. App. 4th 943 (2015).

mitigate some of the aesthetic, environmental and socioeconomic impacts P3 would impose. Like restorative planting or invasive plant removal in *Lotus*, decommissioning, demolition and removal of MGS Units 1 and 2 would provide after the fact relief from some of the project's impacts.

2. The CEC Must Not Rely on Project Objectives that Are So Narrow as to Preclude Alternatives

The FSA does not articulate project objectives from the perspective of the CEQA authority, but rather copies from the Application for Certification the objectives articulated by NRG. The description overly narrows the range of alternatives that may be considered, thwarting CEQA alternatives analysis requirement.

In particular, CEJA objects to the inclusion of the first articulated project object – "Fulfill NRG's obligations under its 20-year Resource Adequacy Purchase Agreement (RAPA) with SCE requiring development of a 262-MW nominal net output of newer, more flexible and efficient natural-gas generation"[66]

Inclusion of NRG's contract obligations in the CEC's project objectives is precisely the concern CEJA raised at the PUC. Under CEQA, the applicant's desires for its project do not set the agenda the agency considers.[67] Indeed, narrowing the objectives to include satisfaction of the contractual obligations NRG voluntarily committed to, and insisting that the contract be finalized prior to CEC review, would provide an incentive for every developer to tie the CEC's hands in that way.

The PUC final decision rejected the concern that CEJA and other parties raised, specifically finding that "[c]onsideration of the NRG Puente Project contract by this Commission does not prejudge the CEC review."[68] Under CEQA, at a minimum the first project objective should be removed from the FSA, to assure that a reasonable range of alternatives can be considered.

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[66] Ex. 2000 at 3-4.
[67] *See Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal. App. 3d 692, 736-37.
[68] D.16-05-050, p. 22.

B. PROJECT IMPACTS

CEQA requires environmental review to address all of a proposed project's anticipated environmental impacts.[69] "An EIR shall identify and focus on the significant environmental effects of the proposed project."[70] It must "identify and focus on the significant environmental effects of the proposed project," including providing an analysis of both short-term and long-term significant environmental impacts.[71] Agencies, moreover, should not approve projects if there are feasible mitigation measures or project alternatives available to reduce or avoid the significant environmental impacts contained in the project's EIR.[72]

In addition, the CEC must first determine whether there is an environmental justice population that may be impacted, whether the impact is disproportionate to impacts suffered by relevant non-environmental justice populations; and whether there are alternatives that would have less impact on environmental justice populations. An impact that is not significant for one population may be significant for another. For example, risk perception varies widely, depending on demographics. This reflects the experiences that people with privilege versus people with disadvantage occupy."[73] For a person whose employer offers health insurance and compensated sick leave, contracting bronchitis is not pleasant, but it is not catastrophic, by contrast to someone without benefits. Evaluating the impact of pollutants on Oxnard communities by comparison to communities throughout the Moorpark sub-area is, for this reason, vital.

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[69] Public Resource Code § 21100(b)(1); *See also, County of Inyo v. City of Los Angeles* (1977) 71 Cal.App. 3d 185, 199.
[70] 14 Cal. Code Regulations § 15126.2(a).
[71] *Id.*
[72] Cal. Pub. Resources Code §§ 21002, 21002.1(a).
[73] Evidentiary Hearing Transcript 02/08/17 at 135.

1. Environmental Justice

The FSA dedicates a section to analysis of environmental justice.[74] It correctly concludes there are environmental justice communities within geographic proximity to the Puente site.[75] The FSA relies on federal Environmental Protection Agency guidance, which looks to race and income, ignoring the reality that environmental justice is a result of cumulative impacts from many social and environmental stressors.[76] The FSA also considers information from CalEnviroScreen, declining to use it to define environmental justice communities, but acknowledging that CalEnviroScreen is science-based tool that identifies relative burdens among census tracts statewide. The FSA notes several caveats provided by CalEPA regarding use of CalEnviroScreen, include that "[t]he [CalEnviroScreen] score cannot be used in lieu of performing analysis of the potentially significant impacts, including the cumulative impacts, of a specific project."[77]

The FSA explains that staff were instructed to analyze environmental justice impacts for 12 technical areas. The results of the twelve analyses are summarized, and based on that summary, the FSA concludes there are no impacts to environmental justice communities, including, in particular, no disproportionate impacts.[78] Staff reaches this overall conclusion based on the analysis that 12 technical areas, which it concludes have no individual impact to environmental justice communities. Overall the FSA analysis is a bald assertion, after reviewing information, that because there are no significant impacts, there are no disproportionate impacts. The FSA environmental justice section fails to compare the impacts, whether or not significant, that would be suffered by Oxnard's communities, to the Moorpark sub-area's non-environmental justice communities. These includes cities like Goleta, Moorpark, and Santa Barbara.

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[74] Ex. 2000 section 4.5.
[75] Ex. 2000 - poverty at 4.5-10; race at 4.5-9, additional information based on CalEnviroScreen at 4.5-12.
[76] *See* Ex. 2000 at 4.5-3 to 4.5-7.
[77] Ex. 2000 at 4.5-6.
[78] Ex. 2000 at 4.5-13 to 4.5-17.

The FSA does not adopt a uniform approach to ensure that each technical area performed the appropriate comparison. Rather, each technical area performed its environmentral justice review differently. For example, for socioeconomics, staff considered hypothetically whether housing impacts would be disproportionate, in other words, would it be harder to find housing due to racial discrimination, or due to financial barriers, as compared to hypothetical people who did not face those barriers.[79] For water impacts, staff looked to see whether there were any standards specific to these environmental justice communites. Finding none, she compared impacts to the Basin Plan, which is regionwide.[80]

In addition, the FSA failed adequately to identify environmental justice impacts on parks access, transportation, and farmworkers from a noise and public health perspective.

2. Air Impacts

Air Quality is one of the technical areas that conducted and environmental justice analysis. The section extracts the two ambient air quality measures from CalEnviroScreen, ozone and particulate matter, and states that, from 2009-2011, average levels of either pollutant exceeded annual air quality standards in the census tracts identified as disproportionately impacted communities under CalEnviroScreen. Since it did not, the FSA concludes there is no disproportionate impact to EJ communities.

The FSA air quality environmental justice analysis begins by identifying the impacts each of these criteria air pollutants may have on human health. The analysis fails to include analysis of current air quality monitoring information for those census tracts. Indeed although applicant operates several stationary sources in the immediate area, the record lacks any ambient air quality monitoring near farmworkers, near Oxnard high school, or near Mandalay. While copious testimony explains that ozone is a "regional" pollutant that forms hours after emission of its precursors, locally

[79] Evidentiary Hearing Transcript 2/8/17 at 233, 237.
[80] Evidentiary Hearing Transcript 2/8/17 at 237.

emitted particulate matter does not necessarily behave like ozone precursors. The FSA also fails to assess accute (hourly or daily) air quality.

Having compiled the air data found in CalEnviroScreen, the FSA then baldly asserts there will be no individual or cumulative contribution to disproportionate air quality impacts in EJ populations. The FSA fails make any connection between the historic (2009-2011) average annual air quality levels and the emissions from P3. Further, it fails to compare the impact on these populations of emissions of ozone precursors or particulate matter to the impacts to other communities in the Moorpark sub-area. For example, the FSA correctly notes that "$PM_{2.5}$ …. can have adverse effects on the heart and lungs, including lung irritation, exacerbation of existing respiratory disease, and cardiovascular effects."[81] It does not, however, review the degree to which each census tract suffers from instances of lung irritation or respiratory disease such as asthma, or carbiovascular effects. It does not compare the impact of additional particulate matter, whether local or regional, on Oxnard communities as opposed to other communities in the Moorpark sub-area.

The air quality analysis of environmental justice appears to rely on the premise is that CalEnviroScreen is a statewide metric, comparing relative burdens among census tracts. The rank indicators for particulate matter and ozone make the impacted tracts appear relatively clean compared to the rest of the state. The FSA then concludes there is no disproportionate impact to them. Specifically, the FSA says:

> For CalEnviroScreen, the indicator ozone is determined by the amount of daily maximum 8-hour ozone concentration over the California 8-hour standard (0.070 parts per million (ppm)), averaged over three years (2009-2011). According to CalEnviroScreen data from 2009- 2011, ozone concentrations in the census tracts in Air Quality Table 32 were all below the 8-hour ozone health based standard of 0.070 ppm. For this reason, the proposed project would not individually or cumulatively contribute to disproportionate air quality impacts, as it relates to ozone, to the EJ population.
>
> …
>
> For CalEnviroScreen, the indicator $PM_{2.5}$ is determined by the Annual mean concentration of $PM_{2.5}$ (average of quarterly means), averaged over three years (2009-

[81] Ex. 2000 at 4.1-62.

> 2011). According to CalEnviroScreen data from 2009-2011, $PM_{2.5}$ concentrations in the census tracts in Air Quality Table 32 were all below the annual mean $PM_{2.5}$ health based ambient air quality standard of 12 $\mu g/m^3$. For this reason, the proposed project would not individually or cumulatively contribute to disproportionate air quality impacts, as it relates to $PM_{2.5}$, to the EJ population.[82]

This is not the metric. If it were, every tract with a score over 50 would be suffering a disproportionate impact, and yet the FSA concludes that not a single environmental justice population is already suffering a disproportionate impact, as measured by a single burden. The metric, rather, is whether, compared to other communities in the Moorpark sub-area, the *project* could have a disproportionate impact on the Oxnard communities.[83] In looking at the two criteria pollutants, PM and ozone, staff should have compared how the emissions would affect the environmental justice community as compared to how they would affect communities in the Moorpark sub-area that are not identified as environmental justice communities. The FSA already acknowledges that ozone and $PM_{2.5}$ have negative impacts to human health, but it fails to apply that information to assess whether the impacts would be disproportionate.

CEJA agrees with, and for the sake of efficiency incorporates by reference the Comments of Environmental Coalition of Ventura County, Sierra Club Los Padres Chapter, and Environmental Defense Center regarding Air Quality impacts.[84] In particular, the FSA's failure to mitigate the maximum permitted emissions of criteria pollutants is a signficant flaw.[85]

3. Public Health

One of the critical technical areas for environmental justice is public health. The human beings who live, work and play in environmental justice communities suffer physical

[82] Ex. 2000 at 4.1-62.
[83] *Darensburg*, 636 F.3d at 519.
[84] Opening Brief of Environmental Coalition of Ventura County, Sierra Club Los Padres Chapter, and Environmental Defense Center.
[85] Ex. 2000 at 4.1-50.

effects of their environments. The FSA describes a Health Risk Assessment ("HRA") that assumes maximum exposure to Puente's toxic and hazardous air emissions at the point of maximum exposure for 70 years. The conclusion of the HRA is that there would be no significant impacts. The section acknowledges concerns about the health of farmworkers, and identifies many sensitive receptors, like schools, within a six mile radius.

To consider environmental justice impacts that could affect the EJ populations, "potential public health risks were evaluated quantitatively by conducting a health risk assessment, and the results were presented by level of risks."[86] Having conducted the HRA, staff "concluded that no one (including the public, off-site nonresidential workers, recreational users, and EJ populations) would experience any acute or chronic cancer or non-cancer effects of health significance …. Given such lack of impacts, there would be no case of disproportionate public health impacts for all populations, including the EJ populations…."[87] In other words, the public health analysis of environmental justice asked the question whether a generic individual would suffer impacts from maximum exposure, then extrapolated that answer to environmental justice communities.

This approach fails to take into account the underlying status of concern – that environmental justice communities are already suffering the combined effects of environmental and social ills, and in the case of Oxnard, have elevated levels of conditions that make them more vulnerable to maximum, or even less-than-maximum, exposure to pollution. As staff witness testified, "In Public Health, what we focus is the incremental risk, not the total risk including the background risk."[88]

The information that was analyzed with respect to environmental justice communities was also incomplete. For example, although the FSA considered impacts from diesel particulate matter ("DPM"), emissions from the diesel generator back-up system were assumed to be sporadic and weekly.[89] It was also assumed that workers in the fields, the

[86] Ex. 2000 at 4.9-28
[87] *Id.*
[88] Evidentiary Hearing Transcript 2/7/17 at 110.
[89] Ex. 2000 at 4.9-28

nearest of which is only .2 miles from the maximum exposure location, were working 8 hour days, 40 hour weeks, 49 weeks per year.[90] Staff did not assume any attributes for workers that was different residents except duration of exposure, so no assumptions were made about their age or preexisting health conditions, which would make them sensitive receptors.[91]

These basic assumptions result in severely underestimating exposure. Farmworkers do not standard workdays, but signifcantly longer hours.[92] Further, farmworkers may be youth, even children, and they may have attended one of the many schools near the facility, so they would be breathing pesticides in addition to the pollutants P3 would add.

Further, while the public health assessment purports to consider pesticide exposure, but no data on actual pesticide use, or exposure, was reviewed or included in the analysis.[93] The effects of pesticides on public health are broadly documented, and community members submitted evidence into the record describing personal experience with pesticide exposure and illness ranging from asthma to migraines to gastrointestinal disorders.[94]

The public health assessment of environmental justice impacts must do more that "reasonably assumed that there would not be significant impacts at any other location, including the EJ communities."[95] It must compare impacts to Oxnard's environmental justice communities to other Moorpark sub-area communities. Particularly with respect to public health, this comparison is vital. Low-income people of color, and farmworkers in particular, may have significantly less access to

[90] Evidentiary Hearing Transcript 2/7/17 at 117-118.
[91] *Id.* at 135.
[92] *Id.* at 186-187.
[93] Evidentiary Hearing Transcript 2/7/17 at 106 (explaining that CalEnviroScreen ranks based on quantities of pesticide used per census tract) and 117 (explaining that staff believed the Department of Pesticide Regulation regulated pesticide use to control background pesticide levels, but had not reviewed any exposure data, only CalEnviroScreen.)
[94] Ex. 6001 at 2, Ex. 6002 at 2.
[95] Ex. 2000 at 4.9-28

health care, less financial security to allow them to take time off to recuperate from illness, and less job security, so that the impact of the same illness to a differently-situated person would be insignificant, while the impact to a worker in Oxnard would be extremely signficant.

4. Parks (Socioeconomics / Land Use)

Among the key aspects of the P3 siting decision is the facility's proposed location on the beach. Access to the beach is critical for the Oxnard communities, from an environmental justice perspective.[96] Public coastal access is a critical source of free outdoor recreation for Oxnard residents, as much of the community is designated as "park poor", with less than 3 acres of parkland per 1,000 residents in their neighborhoods and low median incomes that limit transportation to more distant recreational areas such as the Channel Islands National Park or the Los Padres National Forest.[97] The beach is the primary open space for recreational activity for Oxnard residents, who are consistently rated as having among the highest child obesity rates and lowest child physical fitness scores in the county.[98]

No CEC staff analyzed impacts of project on access to parks by existing residents (as compared to new residents who might need parks.) No evidence regarding beach use by existing residents was considered in the FSA.[99] Further, staff did not analyze adverse economic impacts of plant on future Oxnard recreational use.[100]

V. CONCLUSION

The CEC has obligations under state law and its own rules to consider environmental and environmental justice impacts P3 may have in comparison to impacts incurred by other communities in the Moorpark Sub-area. While the FSA takes steps in the right direction

[96] Ex. 6002 at 2.
[97] Ex. 6000 at 9-10.
[98] *Id.* at 48.
[99] Evidentiary Hearing 2/8/17 at 267; Evidentiary hearing 2/9/17 at 257.
[100] Evidentiary Hearing 2/8/17 at 268.

toward identifying and considering environmental justice communities, it fails to conduct an actual comparison to determine whether there are disproportionate impacts.

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