DOCKETED

Docket Number:	15-AFC-01
Project Title:	Puente Power Project
TN #:	221009
Document Title:	Opening Brief of Center for Biological Diversity
Description:	N/A
Filer:	Kevin Bundy
Organization:	Center for Biological Diversity
Submitter Role:	Intervenor
Submission Date:	9/1/2017 2:57:31 PM
Docketed Date:	9/1/2017

STATE OF CALIFORNIA

Energy Resources Conservation and Development Commission

In the Matter of: APPLICATION FOR CERTIFICATION OF THE PUENTE POWER PROJECT	DOCKET NO. 15-AFC-01 INTERVENOR CENTER FOR BIOLOGICAL DIVERSITY

OPENING BRIEF OF INTERVENOR CENTER FOR BIOLOGICAL DIVERSITY

September 1, 2017

Lisa T. Belenky, Senior Attorney
Kevin P. Bundy, Senior Attorney
Center for Biological Diversity
1212 Broadway, Suite 800
Oakland, CA 94612
Phone: 510-844-7100
lbelenky@biologicaldiversity.org
kbundy@biologicaldiversity.org

STATE OF CALIFORNIA

Energy Resources Conservation and Development Commission

In the Matter of: APPLICATION FOR CERTIFICATION OF THE PUENTE POWER PROJECT	DOCKET NO. 15-AFC-01 INTERVENOR CENTER FOR BIOLOGICAL DIVERSITY

TABLE OF CONTENTS

OPENING BRIEF OF INTERVENOR CENTER FOR BIOLOGICAL DIVERSITY

I. Introduction

The Center for Biological Diversity ("Center") timely files this Opening Brief on several contested topic areas. The Center also reserves the right to submit additional briefing on these topic areas and others, both in reply to other parties' briefs and in the next round of briefing that is scheduled after the evidentiary hearings on September 14-15, 2017. As discussed at the evidentiary hearing on July 27, 2017 (TN # 220581, 7/27/17 Tr. at 348-356), the issues anticipated to be discussed at the September 14-15 hearings may affect briefing on project alternatives, project objectives, feasibility of alternatives, LORS compliance, and override findings, among other topics. As a result, it was agreed that the parties could defer the relevant parts of the briefing on those topics. (*Id.*) The Center has done so here.

II. Legal Background

A. Standard of Review and Burden of Proof

The Commission has exclusive power to certify sites and related facilities for thermal power plants in California. (Pub. Resources Code § 25500.[1]) A certificate issued by the Commission operates in lieu of other permits and supersedes most otherwise applicable ordinances, statutes, and regulations. (*Id.*) Accordingly, the Commission itself must determine (1) whether the proposed project complies with "other applicable local, regional, and state, . . . standards, ordinances, or laws," such that the Commission decision can properly substitute for the issuance "of any permit, certificate, or similar document required by any state, local or regional agency"; and (2) whether the Commission believes the proposed project is consistent with Federal standards, ordinances, or laws. (§§ 25523(d), 25500; *see also* Siting Regs.[2] § 1752(a).) The Commission may not certify any project that does not comply with applicable LORS unless the Commission finds both (1) that the project "is required for public convenience

[1] All further undesignated statutory references are to the Public Resources Code.
[2] References to the "Siting Regs." are to title 20 of the California Code of Regulations.

and necessity" and (2) that "there are not more prudent and feasible means of achieving public convenience and necessity." (§ 25525; Siting Regs. § 1752(k).)

The Commission also serves as lead agency for purposes of CEQA. (§ 25519(c).) Under CEQA, the Commission may not certify the Project unless it specifically finds either (1) that changes or alterations have been incorporated into the Project that "mitigate or avoid" any significant effect on the environment, or (2) that mitigation measures or alternatives to lessen these impacts are infeasible, and specific overriding benefits of the Project outweigh its significant environmental effects. (§ 21081; Siting Regs. § 1755.) These findings must be supported by substantial evidence in the record. (§ 21081.5; CEQA Guidelines[3] § 15091(b), 15093; *Sierra Club v. Contra Costa County* (1992) 10 Cal.App.4th 1212, 1222-23.)

The Commission must expressly ensure that any approvals it is issuing "in lieu" of approvals normally issued by another California agency or commission meet the required standards. Because of the unique statutory review provisions for power plant licenses in the Warren-Alquist Act, the only manner in which those other agencies' statutes and regulations can be enforced is through their inclusion in the Commission's decision. (*See* Pub. Resource Code, § 25531(c) ["Subject to the right of judicial review of decisions of the Commission, no court in this state has jurisdiction to hear or determine any case or controversy concerning any matter which was, or could have been, determined in a proceeding before the commission, or to stop or delay the construction or operation of any thermal power plant *except to enforce compliance with the provisions of a decision by the commission.*"] [emphasis added].) Accordingly, the Warren-Alquist Act requires that "[i]f the commission finds that there is noncompliance with a state, local, or regional ordinance or regulation in the application, before considering an "override" the Commission "*shall consult and meet with* the state, local, or regional governmental agency concerned to attempt to correct or eliminate the noncompliance." (§ 25523(d)(1) [emphasis added].)

[3] References to the "CEQA Guidelines" are to title 14 of the California Code of Regulations.

In this instance, for example, the Commission must address whether the proposed project complies with the California Coastal Act. In particular, its decision must incorporate "specific provisions to meet the objectives of Division 20 (commencing with Section 30000) as may be specified in the report submitted by the California Coastal Commission pursuant to subdivision (d) of Section 30413, unless the commission specifically finds that the adoption of the provisions specified in the report would result in greater adverse effect on the environment or that the provisions proposed in the report would not be feasible." (§ 25523(b).) Similarly, the Commission, acting in lieu of the California Department of Fish and Wildlife ("CDFW"), must ensure that all California laws regarding wildlife are complied with including the California Endangered Species Act and other Fish and Game Code provisions regarding special status plants, animals, birds of prey, and fully protected species, and other laws are complied with.

As detailed below, the Commission cannot show that the proposed project will comply with applicable LORS based on the inadequate review to date. The existing evidence shows that at minimum the proposed project would cause take of fully protected species without any exceptions to that statute having been met. The project also would conflict with local land use laws. Accordingly, it is not possible for the Commission to find that the proposed project complies with the law. And because the Commission has not consulted and met with the relevant agencies (e.g. CDFW and the City of Oxnard) to attempt to correct or eliminate the noncompliance with these or other LORS, it cannot make an override decision at this time.

The Applicant bears the burden of providing sufficient substantial evidence to support each of the findings and conclusions required for certification of the project including any evidence needed for override findings. (Siting Regs. § 1748(d).) The Commission must determine whether sufficient substantial evidence is in the record to support its findings and conclusions. In this instance there is insufficient substantial evidence to support the required findings and conclusions in many areas, as detailed below. Moreover, there is insufficient evidence to support an override in any area. Therefore, the Commission cannot certify the proposed project or adopt any override findings.

B. CEQA Background Law and Thresholds of Significance

The Commission's power plant siting process is a certified regulatory program for purposes of CEQA. (*See* § 21080.5; CEQA Guidelines § 15251(j).) Although certification exempts the Commission from CEQA's environmental impact report requirement, the Commission still must comply with CEQA's substantive and procedural mandates. (§§ 21000, 21002, 21080.5; *Sierra Club v. Bd. of Forestry* (1994) 7 Cal.4th 1215, 1236; *Joy Road Area Forest and Watershed Association v. Cal. Dept. of Forestry and Fire Protection* (2006) 142 Cal.App.4th 656, 667-68.) The Commission must ensure adequate environmental information is gathered and that the environmental impacts of a proposed project are fully identified and analyzed before it is approved. "To conclude otherwise would place the burden of producing relevant environmental data on the public rather than the agency and would allow the agency to avoid an attack on the adequacy of the information contained in the report simply by excluding such information." (*Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal. App. 3d 692, 724.)

Environmental review documentation

> is more than a set of technical hurdles for agencies and developers to overcome. [Its] function is to "ensure that government officials who decide to build or approve a project do so with a full understanding of the environmental consequences and, equally important, that the public is assured those consequences have been taken into account. [Citation.] For the [environmental review documentation] to serve these goals it must present information in such a manner that the foreseeable impacts of pursuing the project can actually be understood and weighed, and the public must be given an adequate opportunity to comment on that presentation before the decision to go forward is made.

(*Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 449-450.) The environmental review documents must "contain facts and analysis, not just the agency's bare conclusions or opinions." (*Laurel Heights Improvement Assn. v. Regents* (1989) 47 Cal. 3d 376, 404 [and cases cited therein].) The environmental review documents "must include detail sufficient to enable those who did not participate in [their] preparation to understand and to consider meaningfully the issues raised by the proposed

project." (*Id*.) The review must address all aspects of the proposed project as a whole. (CEQA Guidelines § 15378(a) [The term "project" means "the whole of an action" and "refers to the activity which is being approved and which may be subject to several discretionary approvals by governmental agencies"].) The environmental review must also analyze the effects of any proposed mitigation measures and their likely efficacy. (CEQA Guidelines § 15126.4(a)(1)(D) ["If a mitigation measure would cause one or more significant effects in addition to those that would be caused by the project as proposed, the effects of the mitigation measures shall be discussed . . ."]; *Save Our Peninsula Comm. v. Monterey Board of Supervisors* (2001) 87 Cal.App.4th 99, 130 ["An EIR is required to discuss the impacts of mitigation measures."].)

CEQA documentation must contain sufficient detail to help "insure the integrity of the process of decisionmaking by precluding stubborn problems or serious criticism from being swept under the rug." (C*oncerned Citizens of Costa Mesa, Inc. v. 32nd Dist. Agricultural Assn.* (1986) 42 Cal.3d 929, 935 [citations omitted].) As addressed in detail below, the FSA and other Staff submissions still have many shortcomings and, as informational documents, fail to fully comply with the requirements of CEQA.

Further, where information provided is insufficient or inaccurate the CEQA analysis will be misleading. The omission of required information renders an EIR inaccurate and inadequate because the severity and significance of the impacts may be gravely understated and the evaluation of alternatives and mitigation measures inadequate. (See, e.g., *Banning Ranch Conservancy v. City of Newport Beach* (2017) 2 Cal.5th 918, 942; *Lotus v. Department of Transportation* (2014) 223 Cal.App.4th 645; *Environmental Planning & Information Council v. County of El Dorado* (1982) 131 Cal.App.3d 350, 357-58 [where baseline was inaccurate "comparisons utilized in the EIRs can only mislead the public as to the reality of the impacts and subvert full consideration of the actual environmental impacts which would result."]; *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 717-718 [holding that a misleading impact analysis based on erroneous information rendered an EIR insufficient as an informational document].) Accordingly, in order to ensure that adequate information is before

the agency, it is well established that section 21160 vests the agency operating under a certified regulatory program with authority to require an applicant to submit additional information throughout the process if such information is necessary to enable the agency to determine whether a proposed project will have significant adverse impacts on the environment. (*Sierra Club v. Board of Forestry* (1994) 7 Cal.4th 1215, 1220-21 [holding that "[b]ecause the board approved the plans without having before it the data necessary to make an informed assessment of the environmental impact of the proposed timber harvest, that approval must be rescinded."].) As detailed below, the information in the FSA and current Staff submissions is inadequate under CEQA.

The need to adequately inform the public and decision makers in clear informational documentation is even more important where, as here, the Commission does not prepare a singular EIR; rather, the Commission has claimed in the past, variously, that the FSA, the PMPD or the "record as a whole" provides the EIR equivalent. The Commission cannot meet the CEQA requirement to inform the public and decision makers before a decision is made without providing more clarity regarding which documents comprise, and are being relied on, as the agency's CEQA analysis. As the Supreme Court succinctly put it, members of the public and decision-makers should not have to "ferret out an unreferenced discussion" in some other document:

> The data in an EIR must not only be sufficient in quantity, it must be presented in a manner calculated to adequately inform the public and decision makers, who may not be previously familiar with the details of the project. "[I]nformation 'scattered here and there in EIR appendices,' or a report 'buried in an appendix,' is not a substitute for 'a good faith reasoned analysis.'"

(*Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 442 (quoting *California Oak Foundation v. City of Santa Clarita* (2005) 133 Cal.App.4th 1219, 1239, quoting *Santa Clarita Organization for Planning and the Environment vs. County of Los Angeles* (2003) 106 Cal.App.4th 715,722–723.); see also *Kings County Farm*

Bureau v. City of Hanford (1990) 221 Cal.App.3d 692, 717-718 [holding that an unclear and misleading EIR was insufficient as an informational document].)

A significant environmental effect is "a substantial, or potentially substantial, adverse change in the environment." (§ 21068.) The CEQA Guidelines encourage public agencies to adopt their own standards as meaningful thresholds of significance. (CEQA Guidelines §15064.7.) In the absence of adopted standards, an agency must make its own thorough investigation of the environmental impacts and consider both quantitative and qualitative factors in determining a "site-sensitive threshold of significance." (*Berkeley Keep Jets Over the Bay Committee v. Board* (2001) 91 Cal. App. 4th 1344, 1380.) As the CEQA Guidelines explain: "The determination of whether a project may have a significant effect on the environment calls for careful judgment on the part of the public agency involved, based to the extent possible on scientific and factual data. An ironclad definition of significant effect is not always possible because the significance of an activity may vary with the setting. For example, an activity which may not be significant in an urban area may be significant in a rural area." (CEQA Guidelines §15064(b).) Similarly, the significance of the effect may depend on the nature of the resources affected. (See, e.g., CEQA Guidelines § 15065(a)(1) [mandatory finding of significance requiring preparation of an EIR where a project will cause certain impacts to wildlife populations or listed species].) The Commission has not adopted specific CEQA thresholds of significance. Where a project's impacts will violate LORS, the impacts should be presumed to be significant. However, mere consistency with a LORS or regulatory standard does not relieve the agency of its duty to determine whether or not impacts are significant. (See, e.g., *Communities for a Better Environment v. California Resources Agency* (2002) 103 Cal. App. 4th 98, 113-14 [holding that the trial court properly invalidated certain amendments to the CEQA Guidelines because mere application of significance threshold based on project's consistency with regulatory standard cannot supersede CEQA's fair argument standard].)

Guidance regarding impacts to wildlife that may be considered significant and thus trigger the need for a full environmental review in an EIR are found in the CEQA guidelines and

may also be relied on as a metric for determining significance once the environmental review has been performed. (*See* CEQA Guidelines § 15065(a)(1) ["A lead agency shall find that a project may have a significant effect on the environment and thereby require an EIR to be prepared for the project where there is substantial evidence, in light of the whole record, that any of the following conditions may occur: . . . The project has the potential to substantially degrade the quality of the environment; substantially reduce the habitat of a fish or wildlife species; . . . threaten to eliminate a plant or animal community; substantially reduce the number or restrict the range of an endangered, rare or threatened species; . . ."] .) Under CEQA the terms "endangered," "rare" and "threatened" include species that have been formally listed under state or federal law. (CEQA Guidelines § 15380(c).) In addition, the CEQA Guidelines contain independent definitions of "rare" and "endangered" that expand the scope of species that fall within those terms. (*See* CEQA Guidelines § 15380(b)(2) [rare][4], (b)(1) [endangered][5].) As a result, where a species meets CEQA's independent definitions for "rare" or "endangered" status, impacts to the species may be significant. Moreover, avoidance, minimization and mitigation measures may be required for those species and, if the impacts remain significant, a mandatory finding of significance may be required pursuant to CEQA, even for a species that has no specific legal status under CESA or other laws. (*See San Bernardino Audubon Society v. Metropolitan Water Dist*. (1999) 71 Cal.App.4th 382, 391-392.)

Impacts to environmentally sensitive habitat areas in the coastal zone are generally significant as well. As the California Supreme Court recently explained:

> CEQA requires every EIR to identify "[a]ll significant effects on the environment of the proposed project," which would generally include effects on sensitive

[4] Defining a species to be "rare" when "either: (A) Although not presently threatened with extinction, the species is existing in such small numbers throughout all or a significant portion of its range that it may become endangered if its environment worsens; or (B) The species is likely to become endangered within the foreseeable future throughout all or [a] significant portion of its range and may be considered "threatened" as that term is used in the Federal Endangered Species Act."

[5] Defines a species to be "endangered" when "its survival and reproduction in the wild are in immediate jeopardy from one or more causes, including loss of habitat, change in habitat, overexploitation, predation, competition, disease, or other factors . . . ."

> habitat areas. ([Pub. Res. Code] § 21100, subd. (b)(1); see Guidelines, § 15126.2.) [Environmentally sensitive habitat areas ("ESHA")], however, are "rare or especially valuable" habitat areas in the coastal zone, given enhanced protection by the Coastal Act. ([Pub. Res. Code] § 30107.5) They must be "protected against any significant disruption of habitat values, and only uses dependent on those resources shall be allowed within those areas." ([Pub. Res. Code] § 30240, subd. (a).) Development adjacent to ESHA "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." ([Pub. Res. Code] § 30240, subd. (b).)

(*Banning Ranch Conservancy v. City of Newport Beach* (2017) 2 Cal. 5th 918, 935-36.)

CEQA also requires a thorough alternatives analysis that looks at the proposed site and alternatives in a regional context:

> The Guidelines specifically call for consideration of related regulatory regimes, like the Coastal Act, when discussing project alternatives. An EIR must "describe a range of reasonable alternatives to the project," or to its location, that would "feasibly attain" most of its basic objectives but "avoid or substantially lessen" its significant effects. (Guidelines, § 15126.6, subd. (a).) Among the factors relevant to the feasibility analysis are "other plans or regulatory limitations, [and] jurisdictional boundaries (projects with a regionally significant impact should consider the regional context)." (Id., subd. (f)(1).) By definition, projects with substantial impacts in the coastal zone are regionally significant. (Guidelines, § 15206, subd. (b)(4)(C).) Thus, the regulatory limitations imposed by the Coastal Act's ESHA provisions should have been central to the Banning Ranch EIR"s analysis of feasible alternatives.

(*Banning Ranch, supra* at 936-37.) The *Banning Ranch* court also explained that "[i]n general, an EIR must take 'the regional setting' of a project into account, placing '[s]pecial emphasis . . . on environmental resources that are rare or unique to that region and would be affected . . . .' [T]he significant effects of the project [must] be considered in the full environmental context." (*Id.* at p. 937, n.6 [quoting CEQA Guidelines § 15125 (c)].)

As in Banning Ranch, the ESHA provisions of the Coastal Act should have been central to the analysis of alternatives, but they were not. Because this proposed project will substantially degrade the quality of the environment, including by reducing habitat for wildlife (such as foraging habitat and plant communities considered ESHA), creating a hazard risk in the flood

zone, and creating visual blight on the coast for a 30-year period, it may have a significant impact on the environment.

Several of the Committee's questions implicate CEQA standards in various ways as will be addressed below and in further briefing.

C. The Puente Project Is Inconsistent with Applicable State and Federal LORS.

1. California Endangered Species Act and Federal Endangered Species Act.

Several species that may be affected by the project are protected under the California Endangered Species Act ("CESA"), including the California least tern, western snowy plover, and tidewater goby. Each of these species could be harmed or killed by construction or operation of the proposed project. The purpose of CESA is "to conserve, protect, restore, and enhance any endangered species or threatened species and its habitat." (Fish & Game Code § 2052; see also *Department of Fish & Game v. Anderson-Cottonwood Irrigation Dist*. (1992) 8 Cal.App.4th 1554, 1563.) CESA broadly prohibits the "take" of species designated as endangered, threatened, or candidate species. (Fish & Game Code §§ 2080.) "Take" is defined in CESA to prohibit killing, or attempting to kill, such endangered, threatened or candidate species. (Fish & Game Code § 86.)[6] Under limited circumstances, the Department of Fish and Game may authorize take of species by issuance of an "incidental take permit." (Fish & Game Code §2081(b).) To do so, all of the following conditions must be met:

> (1) The take is incidental to an otherwise lawful activity.
>
> (2) The impacts of the authorized take *shall be minimized and fully mitigated.* The measures required to meet this obligation shall be roughly proportional in extent to the impact of the authorized taking on the species. Where various measures are available to meet this obligation, the measures required shall maintain the applicant's objectives to the greatest extent possible. All required measures shall be capable of successful implementation. For purposes of this section only, impacts of taking include all impacts on the species that result from any act that would cause the proposed taking.

[6] In addition, as relevant here, Fish and Game Code section 3503 makes it "unlawful to take, possess, or needlessly destroy the nest or eggs of any bird . . ."

> (3) The permit is consistent with any regulations adopted pursuant to Sections 2112 and 2114.
>
> (4) *The applicant shall ensure adequate funding to implement the measures required by paragraph (2), and for monitoring compliance with, and effectiveness of, those measures.*

(Fish & Game Code § 2081(b) [emphasis added].) "Fully mitigate" is construed so as to remedy the evils of "extinction as a consequence of man's activities" and of "destruction of habitat" expressly recognized by the Legislature. (Fish & Game Code § 2051.) In addition, the Department must make a determination that the issuance of the permit will not "jeopardize the continued existence of the species." (Fish & Game Code § 2081(c).) "The department shall make this determination based on the best scientific and other information that is reasonably available, and shall include consideration of the species' capability to survive and reproduce, and any adverse impacts of the taking on those abilities in light of (1) known population trends; (2) known threats to the species; and (3) reasonably foreseeable impacts on the species from other related projects and activities." (*Id.)*

CESA requires that "that *reasonable and prudent alternatives* shall be developed by the Department, together with the project proponent and the state lead agency, consistent with conserving the species, while at the same time maintaining the project purpose to the greatest extent possible." (Fish & Game Code § 2053 [Emphasis added].) Moreover, nothing in CESA abrogates the need to fully comply with CEQA's requirement that no project may be approved if feasible alternatives or mitigation measures are available to avoid or lessen the impacts of the proposed project. (§§ 21002, 21002.1(b), 21081.) As a result, to comply with both CESA and CEQA, the Commission (if it is acting in lieu of the Department) must first develop alternatives to the project that could avoid impacts to covered species and still maintain the project objectives to the extent possible, and only after consideration of those alternatives, ensure that all remaining impacts are also minimized and fully mitigated. (Fish & Game Code §2081(b)(2).)

Section 9 of the Federal Endangered Species Act ("ESA") specifically prohibits the "take" of listed species, , a term broadly defined to include harassing, harming, pursuing,

wounding or killing such species. (16 U.S.C. §§ 1532(19), 1538(a)(1)(B)[7].) The term "harm" is further defined to include "significant habitat modification or degradation where it … injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering." (50 C.F.R. §17.3.) "Harass" includes any "act or omission which creates the likelihood of injury to wildlife by annoying it to such and extent as to significantly disrupt normal behavior patterns which include, but are not limited to, breeding, feeding, or sheltering." (*Id*.) The ESA's legislative history supports "the broadest possible" reading of "take." (*Babbitt v. Sweet Home Chapter of Communities for a Great Oregon* (1995) 515 U.S. 687, 704-05.) "Take" includes direct as well as indirect harm and need not be purposeful. (*Id*. at 704; *see also National Wildlife Federation v. Burlington Northern Railroad* (9th Cir. 1994) 23 F.3d 1508, 1512.) The take prohibition applies to any "person" (16 U.S.C. § 1538(a)(1)), *including state agencies*. (16 U.S.C. § 1532(13).) The ESA further makes it unlawful for any person, including state agencies, to "cause to be committed" the take of a species. (16 U.S.C. § 1538(g).) Violations of Section 9 are enforceable under the ESA's citizen-suit provision. (16 U.S.C. § 1540(g).)

Courts have repeatedly held that government regulations authorizing third parties to engage in harmful actions can constitute an illegal taking under Section 9 of the ESA. (See *Strahan v. Coxe* (1st Cir. 1997) 127 F.3d 155, 158, 163-64, *cert. denied*, 525 U.S. 830 (1998) [state agency caused takings of the endangered right whale because it "licensed commercial fishing operations to use gillnets and lobster pots in specifically the manner that is likely to result in violation of [the ESA]"]; *Defenders of Wildlife v. Administrator, Envtl. Protection Agency* (8th Cir. 1989) 882 F.2d 1294, 1300-01 [federal agency caused takes of endangered black-footed ferret through its "decision to register pesticides" even though other persons actually distributed or used the pesticides]; *Loggerhead Turtle v. City Council of Volusia County* (11th Cir. 1998)

[7] The ESA's prohibition on take applies equally to endangered and threatened species, unless there is a species-specific rule promulgated by the Service for a threatened species pursuant to ESA section 4(d) that provides otherwise. 50 C.F.R. § 17.31(a).

148 F.3d 1231, 1253 [county's inadequate regulation of beachfront artificial light sources may constitute a taking of turtles in violation of the ESA].) Section 7 of the ESA provides an avenue to authorize incidental take of listed species for Federal agency actions, including permit approvals, by obtaining a biological opinion and incidental take statement, and section 10 of the ESA provides an avenue for private parties or non-federal agencies such as states and cities to apply for incidental take permits where habitat conservation plans have been approved by the U.S. Fish and Wildlife Service. Here, however, no Federal agency action is underway[8] and no HCP has been approved by the Service, nor have either of these been noticed for public review. As a result, the Commission cannot find that the proposed project is consistent with the Federal ESA.

In this case, impacts to individual terns and plovers that use the proposed project site on the beach, both where the outfall would be removed and other beach areas, will cause "take" and be significant even if project conditions ultimately might benefit these species and their habitat. The impacts to individual birds, including impacts from "take" due to harassment as defined under the Federal ESA[9] have not been considered. Here, the Commission cannot make a finding that the project complies with the federal ESA. The FSA concludes without adequate analysis that "[c]onstruction and operation of the proposed project would not result in any adverse impacts to federally-listed species or their critical habitat. Conditions BIO-1 through BIO-10 protect and benefit threatened and endangered species." (FSA at 4.2-46.) However, because the removal of the outfall would impact listed species, the applicant requires an incidental take permit or coverage under a biological opinion. While a permit may later be issued for the take of listed species under the ESA, or a biological opinion may be obtained by a federal agency, there is no evidence in the record that any such process is underway.

[8] To date, no permit application has been publically noticed by the U.S. Army Corps of Engineers and no permit has been issued.

[9] While "take" under the CESA is more narrowly defined (Fish & Game Code § 86 ["Take" is defined to prohibit killing, or attempting to kill, endangered, threatened or candidate species]), as explained above, "take" under the Federal ESA is more broadly defined.

The FSA also erroneously states that "[r]emoval of the outfall structure would necessitate a Section 404 permit and is covered by Nationwide Permit 7." (*Id*.) However, a nationwide permit cannot be relied on for a project that will impact listed species. Although the Corps has adopted a Nationwide Permit Program (33 C.F.R. § 330.1 et seq.), which is "designed to regulate with little, if any, delay or paperwork certain activities having minimal impacts" (33 C.F.R. § 330.1(b)), Nationwide Permits cannot be used in all circumstances. As relevant here, the regulations specifically state that "no activity is authorized under any NWP [Nationwide Permit] if that activity is likely to jeopardize the continued existence of a threatened or endangered species as listed or proposed for listing under the Federal Endangered Species Act (ESA), or to destroy or adversely modify the critical habitat of such species." (33 C.F.R. § 330.4(f).) Where a proposed activity will affect any federally listed species or critical habitat, as the proposed project here may, the District Engineer must "initiate section 7 consultation in accordance with the ESA" and may "assert discretionary authority and require an individual permit." (33 C.F.R. § 330.4(f)(2)(i & ii).) As a result, the Staff's assumptions that the project will comply with both the CWA and the ESA, based on reliance on a nationwide permit, is erroneous. Before determining whether to allow use of a nationwide permit or require an individual permit the Corps must initiate consultation with the U.S. Fish & Wildlife Service regarding the impacts of the proposed project on species survival and recovery. Here, the District Engineer would likely exercise his discretion to require an individual permit. If the applicant obtains an individual Clean Water Act 404 permit, the Corps would be required to comply with the ESA as part of that permitting. Again, however, there is no evidence in this record that the 404 process has been initiated. Therefore, the Commission cannot rationally address whether this proposed project meets Federal ESA requirements or violates this LORS.

Further, the Commission has failed to adequately consider CESA and the Federal ESA in its review of this project. The Staff did consider construction impacts to listed birds associated with removal of the existing outfall structure on the beach and provided some seasonal requirements related to nesting birds and for "avoidance" of individual birds in **BIO-10**. (See,

e.g., TN # 215571 [Exhibit 2006, Staff rebuttal] at pdf 79.) However, Staff does not adequately address impacts to listed birds outside of the nesting season and the harm and harassment from the construction or "avoidance" activities—including erecting fencing —which constitute "take" under the Federal ESA. While these measures may hope to avoid killing listed birds or disturbing their nests, as required under CESA, nothing in **BIO-10** eliminates the likelihood of "take" under the Federal ESA. This condition alone cannot substitute for compliance with the Federal ESA.

Moreover, Staff did not consider other direct and indirect impacts such as the additional future erosion of the beach and sand dunes caused by the presence of the project at this sensitive site. Nor did Staff consider whether off-site alternatives could avoid these impacts. As discussed below, the CoSMoS modeling Staff relied on to show that there would not be coastal hazard flooding impacts even with sea level rise (TN # 218274 [Staff Supplemental Testimony; "Model results show that projected flooding for the 100-year event with 2.0 feet of sea level rise does not reach the project site."]), assumed that the project would not be built. The modeling actually showed that the site would not be flooded *only if the project is not built at this site*. Without the project, the dunes will be able to migrate inland and this will help to conserve the natural beach habitat and dunes these rare birds rely on under a climate change and sea rise scenario. (TN # 220581 at 8 [7/27/17 Transcript; Dr. Erikson confirming that the model assumes the site was not developed allowing dunes to migrate inland].) In contrast, if the project is built at this site, the dunes would erode and make the area more prone to flooding and other impacts from sea level rise. (*Id*. [confirming that if the site had infrastructure the dunes would erode under the model and the site would flood].) The lack of analysis of impacts and alternatives undermines Staff's conclusions and cannot provide a basis for a decision. Moreover, in discussing avoidance of impacts to California least tern and western snowy plover affected by the project, Staff relies on only general conditions. Because the Staff's analysis has failed to consider reasonable alternatives to avoid impacts to these CESA listed species, and failed to

provide the needed information to show that impacts to the species will be fully mitigated, the Commission cannot make the needed findings to show that these LORS are met.

2. California Fully Protected Species

"Take" of a fully protected species is prohibited by California law unless it falls within narrow exceptions. The peregrine falcon is a fully protected species under California law. (Fish & Game Code § 3511(b)(1).) Thus, any "take" of a peregrine falcon, which is a fully protected species, is prohibited by California law unless it falls within certain narrow exceptions. One exception, as relevant here, could allow such take under an approved Natural Communities Conservation Plan ("NCCP"). (Fish & Game Code § 2835.) Because no NCCP has been approved for this project or in this area and the Commission cannot itself adopt an NCCP,[10] the Commission cannot lawfully approve the project if it may "take" peregrine falcon.

Because the proposed project may "take" and adversely affect the fully protected peregrine falcon by removing foraging habitat and possibly impacting an active nest, the Commission must first ensure it has sufficient information to consider whether the proposed project is consistent with the fully protected species law and that all take can be avoided.

3. Public Trust in Wildlife

The FSA fails to note that the Commission must consider impacts to public trust resources. Pursuant to statute (as well as common law) the waters and wildlife resources of the State of California are held in trust for the people of the State. (Fish & Game Code §711.7(a); *see also* Fish & Game Code § 1801 [it is "the policy of the state to encourage the preservation, conservation, and maintenance of wildlife resources under the jurisdiction and influence of the state"].) The public trust doctrine "places on the state the responsibility to enforce the trust."

[10] Staff did not consider this fully protected species in its analysis for the in lieu permitting for this project or any take authorization which, as noted above, can only be provided as part of a comprehensive NCCP. An NCCP requires specific data and information, analysis and findings by the Department of Fish and Wildlife. (Fish & Game Code §§ 2800 *et seq*.) Therefore, even assuming for the sake of argument alone that the Commission could approve an NCCP in lieu of the Department of Fish and Wildlife, which the Center does not believe would be lawful, as part of the project approval, because the Commission has not considered the factors required for such a plan in this matter, no such approval or take may be authorized.

(*Center for Biological Diversity, et al., v. FPL Group, Inc*. (2008) 166 Cal App. 4th 1349, 1368, 1361 ["[I]t is clear that the public trust doctrine encompasses the protection of undomesticated birds and wildlife. They are natural resources of inestimable value to the community as a whole. Their protection and preservation is a public interest."].) The Supreme Court has identified this substantive duty "to protect the people's common heritage," holding that an agency may surrender "that right of protection only in rare cases when the abandonment of that right is consistent with the purposes of the trust." (*Nat'l Audubon Soc'y v. Superior Court* (1983) 33 Cal.3d 419, 441.)

As a result the Department, or the Commission if properly acting in the Department's place, must fulfill its trust duties in considering the project. These duties include maintaining healthy populations of wildlife species and habitats, providing for the beneficial use and enjoyment of wildlife by all citizens of the State, and perpetuating wildlife species for their intrinsic and ecological values. To the extent the Commission's permitting may affect public trust resources it must uphold the trust and protect public trust resources. In this capacity, the Commission must act as a trustee for the people of California. Further, the Commission's consideration of impacts to trust resources must be informed by the Department of Fish and Wildlife, which is the trustee for fish and wildlife resources. (Fish and Game Code § 1802.) In the CEQA review process, the Department discharges its public trust obligations through its role as a CEQA "trustee agency." During CEQA review, the Department is required to "consult with lead and responsible agencies and shall provide, as available, the requisite biological expertise to review and comment upon environmental documents and impacts arising from project activities, as those terms are used in [CEQA]." (Fish and Game Code § 1802.) During the CEQA process the Department is charged with using its biological expertise to "focus on any shortcomings" in the environmental review. (14 Cal. Code Regs § 780). Thus, pursuant to statute, the Department is obligated to provide its requisite biological expertise to review and comment upon environmental documents and the significance of any impacts to state protected species and other wildlife resources arising from proposed project activities. The Commission must consider and

should defer to the Department's expertise regarding impacts to special status species and trust resources.

Here, however, the record does not include any specific written recommendations from the Department regarding wildlife or show that Staff conferred with the Department in writing and relied on its expertise regarding trust resources. Staff must come forward with additional evidence showing that the Department provided its expertise in writing, and that Staff considered it, or the process must be reopened and the FSA revised and recirculated.

4. California Coastal Act

Among other requirements, the Coastal Act specifies that "[e]nvironmentally 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." (§ 30240(a).) "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." (§ 30240(b).)

Local governments in the coastal zone must submit a local coastal program for Coastal Commission approval consisting of a coastal land use plan ("CLUP") and implementing regulations. The CLUP may be completed first, with regulations developed later. (*Yost v. Thomas* (1984) 36 Cal.3d 561, 566; see also § 30500.) The City of Oxnard has a certified CLUP that gives "highest priority" to the "preservation of sensitive habitat areas and coastal resources." (TN # 215436 [Exhibit 4024] at I-2.) Policy 52 of the CLUP states that "[i]ndustrial and energy-related development shall not be located in coastal resource areas, including sensitive habitats . . . ." (*Id*. at III-42.) Policy 6 requires buffers of 100 feet for all wetlands and resource protection areas. (*Id*. at III-11.)

The Warren-Alquist Act provides that when a proposed project subject to the Commission's jurisdiction is being considered, the Commission's decision must include the "specific provisions to meet the objectives of Division 20 (commencing with Section 30000) as may be specified in the report submitted by the California Coastal Commission pursuant to

subdivision (d) of Section 30413, *unless* the commission specifically finds that the adoption of the provisions specified in the report would result in greater adverse effect on the environment or that the provisions proposed in the report would not be feasible." (§ 25523(b).)

The 30413(d) report for this proposed project was prepared in September 2016, before the FSA or the evidentiary hearings, and therefore did not have the opportunity to review newer information in the record. (TN # 213667 [Exhibit 3009, California Coastal Commission 30413(d) Report].) It included several "**Coastal Commission Recommended Specific Provisions"** which recommend re-siting of the proposed project out of the coastal zone to avoid conflict with laws and policies. (See, e.g., *id*. at 14 [coastal wetlands and LCP Policy 52], 15-16 [LCP Policy 6 buffer for wetlands and ESHA], 37-39 [100 year flood zone and coastal hazards Coastal Act and LCP Policies].) In each case the Coastal Commission report also suggested that the project might be relocated to areas that the Coastal Commission assumed, from the scant information provided at that time, would be less sensitive areas within the proposed project site and provided mitigation measures that should be implemented if, and only if, the "recommended specific provisions" were found infeasible. Because the statute requires the Commission to *first* make a finding that adopting the recommended specific provisions is infeasible, it cannot just skip that step and adopt the mitigation measures.

5. Federal Migratory Bird Treaty Act

The federal Migratory Bird Treaty Act ("MBTA") was enacted to fulfill the United States' treaty obligations to protect migratory birds. The MTBA provides that "[u]nless and except as permitted by regulations made as hereinafter provided in this subchapter, it shall be unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, kill, attempt to take, capture, or kill . . . any migratory bird." (16 U.S.C. § 703(a); *see also Missouri v. Holland* (1920) 252 U.S. 416, 434-35 [describing the "national interest of very nearly the first magnitude" in protecting migratory birds "that yesterday had not arrived, tomorrow may be in another State and in a week a thousand miles away"].)

The MBTA authorizes the Secretary of the Interior to promulgate regulations allowing the take of birds otherwise protected by the MBTA when doing so would be compatible with migratory bird conventions. (16 U.S.C. § 704(a).) The Secretary has delegated this authority to the U.S. Fish and Wildlife Service ("FWS"), which has promulgated regulations allowing the take of migratory birds after the issuance of a permit, under specified circumstances. (*See* 50 C.F.R. §§ 21.11, 21.27, 21.42.) FWS's regulations underscore the statute's categorical prohibition on taking migratory birds "except as may be permitted under the terms of a valid permit issued pursuant to the provisions of [the agency's MBTA regulations]." (50 C.F.R. § 21.11.) A Commission decision cannot act as a take permit under the MBTA; therefore it does not limit or preclude the Service from exercising its authority under any law, statute, or regulation, nor does it release any individual, company, or agency of its obligations to comply with Federal State, or local laws, statutes, or regulations. Accordingly, the project applicant remains liable for any take of MBTA covered species. The FSA and other Staff submissions have not done enough to analyze impacts, consider avoidance or offsets to species covered under the MBTA, as a result the Commission does not have sufficient information to base a finding regarding these impacts and cannot find that this LORS has been met.

Birds protected under the MBTA that may be impacted by the project and have been observed on or near very near the proposed project site, but that were not identified in the FSA, include Peregrine falcon and great horned owl. (*See* 50 C.F.R. § 10.13 [list of migratory birds]; TN # 214712 [FSA at 4.2-18 to 4.2-19; bird list in FSA includes only special status birds and omits common species; no reference to peregrine falcon or great horned owl].) Because many migratory birds that may be injured or killed by the proposed project are protected under the MBTA, and the project would violate the MBTA, it will also violate LORS.

III. The Commission Has Failed to Adequately Disclose, Analyze, Propose Mitigation for, and Develop Alternatives to the Project's Significant Environmental Impacts in Accordance with CEQA.

A. The Project Description Is Inaccurate and the Project Objectives Improperly Narrowed the Range of Alternatives for Analysis

The Center raised concerns with the truncated project objectives and alternatives analysis as early as the PSA comments. (TN # 213621 at 9-13.) The center also raised these concerns in testimony and at evidentiary hearings. (*See, e.g.,* TN # 215440-1 [Exhibit 7000, Powers Testimony]; TN # 216408 [February 7, 2017 Transcript ("2/7/17 Tr.")] at 150). Other parties have also raised this issue throughout the process. Unfortunately, the FSA and following Staff analysis continue to consider too narrow a range of alternatives and wholly failed to address alternative ways of meeting the need identified by the CPUC. Because these issues will be further addressed at the September hearings, however, the Center reserves the right to brief these issues at a later time.[11]

B. Incomplete and Inaccurate Environmental Setting and Baseline Information Render the CEQA Review Inadequate

The environmental setting or baseline used in evaluating environmental impacts must be fair and accurate, and cannot understate the value of the environmental resources so as to minimize the significance of the impacts of the proposed project. (*San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal. App. 4th 713, 725 [finding that failure to adequately describe adjacent riparian habitat and potential for wetlands on the project site "understates the significance of" the river adjacent to the site and avoiding discussion of those resources "precluded serious inquiry into or consideration of wetland areas adjacent to the site or whether the site contained wetland areas."].) An inaccurate baseline inevitably leads to a misleading CEQA review that subverts public participation and adequate consideration of impacts. (*See Environmental Planning & Information Council v. County of El Dorado* (1982) 131 Cal.App.3d 350, 357-58 [where baseline was inaccurate "comparisons utilized in the EIRs

[11] The Center has addressed unlawful inadequacies in the project description as they specifically pertain to greenhouse gas emissions and air quality impacts in Parts III.C.1 and III.C.2 below.

can only mislead the public as to the reality of the impacts and subvert full consideration of the actual environmental impacts which would result."].)

As discussed below, here, the biological surveys failed to provide an accurate baseline against which the impacts of the proposed project could be considered. Although the existing P1 and P2 towers are part of the proposed project footprint—i.e., their removal would be part of the project—the biological surveys failed to mention the presence of peregrine falcon nesting in the P1 tower. This fact was revealed only as an incidental note in the supplemental biological surveys when the falcon was observed foraging and perching by the smaller P3 footprint. This is a significant omission that cannot be attributed to a mere "oversight" in the biological surveys. It shows conclusively that the surveys have not been adequate and more must be undertaken to ensure the initial identification of all resources.

Further, the accuracy of the environmental setting is critical because utilizing an illusory baseline can lead to an inaccurate and truncated environmental review in violation of CEQA. (*Communities for a Better Environment v. South Coast Air Quality Management District* (2010) 48 Cal. 4th 310, 322 ["An approach using hypothetical allowable conditions as the baseline results in 'illusory' comparisons that 'can only mislead the public as to the reality of the impacts and subvert full consideration of the actual environmental impacts,' a result at direct odds with CEQA's intent."].) Here, the Staff assumed that only if the P3 proposed project is approved would the P1 and P2 facilities, including the towers, be removed from the beach. (TN # 214712 [FSA at 1-4, 4.2-1, 4.2-4 ["Demolition and removal of Units 1 and 2 is not included in the assumptions and analysis for the No-Project Alternative. The MGS Unit 3 would continue operating."].) The Coastal Commission expressly noted the fallacy of this assumption when Staff included it in the PSA:

> The PSA assumes that under all alternatives other than the proposed project the existing MGS Units 1 and 2 would remain in place, even after the cessation of operations in 2020. In effect, any alternative other than the proposed project is immediately put at a disadvantage because it is assumed that none of the benefits of the removal of the existing facility would be realized. In conversation with

> Commission staff, City of Oxnard representatives have stated that, if the MGS Units 1 and 2 were to remain in place following the 2020 shutdown, the City would consider declaring the structures a nuisance under state law and pursue all means of requiring their demolition. [] The Commission urges the CEC to reconsider its baseline for evaluating project alternatives, taking into account the likelihood that the existing MGS Units 1 and 2 would be removed even in the absence of the P3.

(TN # 213667 at 5 [Exhibit 3009, Coastal Commission 30413(d) report].) The Staff's conjecture that without the proposed project being approved the P1 and P2 units would definitely remain in place on the beach indefinitely, and thus form the baseline for analysis of the project's effects, is just the sort of "hypothetical allowable condition" that is impermissible and results in "illusory" comparisons.

The effect of this erroneous baseline on the CEQA analysis is clearly shown regarding visual resources; because Staff assumes that under the "no action" scenario units P1 and P2 will remain at this location indefinitely, a long-term visual blight on the coastal viewshed, Staff claims that the *substitution* of the new P3 will be insignificant or even beneficial in terms of visual impacts. (TN # 218274 at 83 [Exhibit 2025, Staff Supplemental Testimony].) However, if on the contrary, the no action alternative assumed that P1 and P2 would be removed as part of their decommissioning or by other action of law, then the true impact of building a new P3 unit on the visual landscape and its presence on this beach over the next 30 years would emerge as significant.[12]

C. The FSA and Other Staff Submissions Fail to Disclose, Analyze and Mitigate Impacts to Specific Resources in Accordance with CEQA.

1. The FSA Fails to Properly Disclose, Analyze, Determine the Significance of, and Propose Mitigation for the Project's Greenhouse Gas Emissions and Climate Impacts.

The FSA's discussion of greenhouse gas ("GHG") emissions from the Puente project does not satisfy CEQA's requirements. Specifically, the FSA fails to establish a clear standard for evaluating the significance of GHG emissions, fails to define or quantify the relevant

[12] The FSA's failure to articulate a proper baseline for evaluation of the projects greenhouse gas emissions is discussed in Part III.C.1.b, below.

baseline, and fails to provide a clear and consistent project description. Moreover, the FSA and the record as a whole fail to provide substantial evidence to support the FSA's assumption that Puente will operate only when it is the most efficient resource available, and thus will reduce overall "system" GHG emissions by displacing other, less-efficient generation. If anything, the evidence in the record indicates that the opposite is true. Finally, the FSA fails to show that Puente will comply with the Avenal precedent decision. Again, the record evidence shows that Puente likely will increase, not decrease, the overall heat rate of natural gas generation in California.

For all of these reasons, the Commission cannot lawfully approve Puente on the basis of the FSA and the current evidentiary record.

a. The FSA Fails to Establish a Clear Basis for Evaluating the Significance of GHG Emissions and Fails to Support Its Conclusions with Substantial Evidence.

CEQA requires agencies like the Commission to determine the significance of GHG emissions that contribute to climate change. First, agencies "should make a good-faith effort, based to the extent possible on scientific and factual data, to describe, calculate or estimate the amount of greenhouse gas emissions resulting from a project." (CEQA Guidelines, § 15064.4(a).) Second, agencies should consider three factors, "among others," in assessing the significance of the project's emissions:

> (1) The extent to which the project may increase or reduce greenhouse gas emissions as compared to the existing environmental setting;
>
> (2) Whether the project emissions exceed a threshold of significance that the lead agency determines applies to the project.
>
> (3) The extent to which the project complies with regulations or requirements adopted to implement a statewide, regional, or local plan for the reduction or mitigation of greenhouse gas emissions.

(CEQA Guidelines, § 15064.4 (b)(1-3).) Significance determinations must be supported by specific, substantial evidence in the record. (See *Center for Biological Diversity v. California Dept. of Fish & Wildlife* (2015) 62 Cal.4th 204, 228.) Substantial evidence includes "facts,

reasonable assumptions predicated upon facts, and expert opinion supported by facts." (CEQA Guidelines, § 15384(b).) On the other hand, "[a]rgument, speculation, unsubstantiated opinion or narrative, [or] evidence which is clearly erroneous or inaccurate . . . [do] not constitute substantial evidence." (*Id.*, subd. (a).)

The FSA fails to comply with these requirements. Although the FSA references CEQA Guidelines section 15064.4, its significance criteria do not reflect the Guidelines' approach. The FSA "does not include a specific numeric threshold of significance for GHG emissions." (See FSA at 4.1-140.) Instead, the FSA claims to evaluate Puente's emissions "in the context of the electricity sector as a whole and the AB 32 Scoping Plan implementation requirements for the sector. . . . [T]he assessment is completed in the context of how the project will affect the electricity sector's emissions based on its proposed role and its compliance with applicable regulations and policies." (*Ibid.*) This exceedingly vague standard does not provide any basis for determining whether Puente will increase or decrease emissions relative to existing environmental conditions. (See CEQA Guidelines, § 15064.4(b)(1).) Nor does it clearly articulate whether the FSA has developed a "threshold of significance" for the project, or whether Puente will exceed that threshold. (*Id.*, subd. (b)(2).) And although the FSA's standard makes vague references to the AB 32 Scoping Plan and other unspecified "regulations and policies," it does not reference specific "regulations or requirements" adopted to implement a "plan for the reduction or mitigation of greenhouse gas emissions." (*Id.*, subd. (b)(3).) As the California Supreme Court has observed, neither AB 32 nor the Scoping Plan "constitutes a set of 'regulations or requirements adopted to implement' a statewide reduction plan within the meaning of Guidelines section 15064.4, subdivision (b)(3)." (*Center for Biological Diversity*, *supra*, 62 Cal.4th at p. 223.)

To the extent that the FSA incorporates any significance standard at all, it appears to be some version of a "zero threshold" standard (i.e., a standard under which increases in GHG emissions would be deemed significant, but decreases in emissions would not be). The FSA concludes that Puente's GHG emissions will not be significant because—according to a chain of

assumptions unsupported by any specific evidence or analysis—the facility is expected to reduce overall "system" emissions. (FSA at 4.1-165.) The FSA's finding of non-significance also appears to hinge on Staff's conclusion that Puente will comply with the Avenal precedent decision by not increasing either the overall heat rate of natural gas-fired generation or statewide GHG emissions. (FSA at 4.1-166.) Both of these criteria, however, are *quantitative* criteria; the first requires a comparison between baseline "system" emissions and emissions from Puente, and the second requires a quantitative assessment of how Puente will affect the heat rate of gas-fired generation in California. As the Supreme Court has made clear, "when [an] agency chooses to rely completely on a single quantitative method to justify a no-significance finding, CEQA demands the agency research and document the quantitative parameters essential to that method. Otherwise, decision makers and the public are left with only an unsubstantiated assertion that the impacts—here, the cumulative impact of the project on global warming—will not be significant." (*Center for Biological Diversity*, *supra*, 62 Cal. 4th at p. 228).

The FSA and the record are devoid of evidence regarding the "quantitative parameters" essential to supporting any conclusion regarding the significance of Puente's GHG emissions. As discussed below, the FSA never even coherently describes, much less quantifies, the existing "system" emissions it purports to use as a baseline. Nor does the FSA provide any clear, quantitative basis for evaluating the significance of Puente's emissions—estimated at about 300,000 metric tons per year (FSA at 4.1-139)—against those of the existing "system" or any other baseline. Although the FSA relies heavily on the idea that Puente will displace other, less-efficient generation (see, e.g., FSA at 4.1-137), Staff admits in the FSA that they do not know what facilities Puente will actually displace. (FSA at 4.1-159.) The FSA's significance conclusions regarding Puente's GHG emissions are thus devoid of both legal and factual support.

b. The FSA Fails to Articulate an Adequate and Consistent Baseline for Analysis of GHG Impacts.

A CEQA document like the FSA must establish a clear and consistent environmental "baseline" against which the effects of the project under consideration can be measured. This

baseline typically consists of physical conditions existing at the time environmental review commences. "Before the impacts of a project can be assessed and mitigation measures considered, an EIR must describe the existing environment. It is only against this baseline that any significant environmental effects can be determined." (*County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, 952; *see also* CEQA Guidelines, § 15125, subd. (a).) "[W]ithout such a description, analysis of impacts, mitigation measures and project alternatives becomes impossible." (*County of Amador*, *supra*, 76 Cal.App.4th at p. 953; *see also Save Our Peninsula Committee v. Monterey County Bd. of Supervisors* (2001) 87 Cal.App.4th 99, 119 ["Without a determination and description of the existing physical conditions on the property at the start of the environmental review process, the EIR cannot provide a meaningful assessment of the environmental impacts of the proposed project."].) An agency's use of a legally inadequate baseline renders an environmental document inadequate as a matter of law. (See *Communities for a Better Environment v. S. Coast Air Quality Mgmt. Dist.* (2010) 48 Cal.4th 310, 319, 322.)

The FSA fails to identify any clear and consistent baseline against which the Project's greenhouse gas impacts can be evaluated. Indeed, the FSA's failure to clearly define the assumptions underlying the CEQA baseline renders the document inadequate as a matter of law. In *San Joaquin Raptor Rescue Center v. County of Merced* (2007) 149 Cal.App.4th 645, for example, an Environmental Impact Report ("EIR") for a quarry expansion stated that "existing" baseline conditions consisted of "currently permitted" operations, but those conditions were not "defined or quantified" in the EIR. (*Id.* at p. 659.) The court concluded that the EIR's "failure to clearly and conspicuously identify the baseline assumptions for purposes of describing the existing environmental setting further degraded the usefulness of the EIR and contributed to its inadequacy as an informational document." (*Ibid.*)

The FSA here similarly fails to describe or quantify existing conditions or any other baseline sufficient to support an evaluation of Puente's environmental impacts. Instead, the FSA refers to an overall "system" of electrical generating facilities in exceedingly general and

imprecise terms. (See, e.g., FSA at 4.1-136 to 137 [describing energy "system" as "complex and ever changing"].) The FSA claims that Puente's climate effects have been evaluated "in the context of how the project will affect the electricity sector's emissions based on its proposed role" in the overall system. (FSA at 4.1-140; see also id. at 4.1-158 [clarifying that the "baseline . . . is the existing Western grid-wide generation system and its operation"].)[13] Emissions from this system, however, are never characterized or defined.

Like the EIR in *San Joaquin Raptor*, which failed to plainly describe the baseline used in impacts analysis (149 Cal.App.4th at page 659), the FSA here provides only vague references to the electricity generating "system" without any attempt to model or characterize emissions from that system. Indeed, the FSA provides even less information than the EIR found inadequate in *San Joaquin Raptor*; in that case, at least, a four-year production average baseline was used in impacts analysis, although this fact was not stated clearly. (*Ibid.*) Here, in contrast, responses to comments and hearing testimony confirm that Staff never attempted to quantify or define emissions from the baseline "system." The FSA flatly states that Staff "did not simulate the operation of the Western grid with and without Puente in order to determine whether GHG emissions would have increased or decreased with the addition of Puente." (FSA at 4.1-158.) Staff's expert, Mr. Vidaver, testified that "[t]he impact of the [Puente] project on system-wide emissions would be its difference from the [existing] system in the absence of the project." (2/7/17 Tr. at 120:17-20.) However, Mr. Vidaver conceded that he "did not quantify the emissions from the existing system." (*Id.*, at 121:1-4.) He also admitted that "it would be fair to state that we never calculated the difference in system-wide emissions from the system that did not include the project, and a system that did include the project." (*Id.*, at 121:21-25.) Yet this "difference" was precisely what the FSA needed to establish in order to assess the significance of Puente's GHG emissions. As the court observed in *San Joaquin Raptor*, "decision makers and

[13] The FSA states that "[o]perational impacts of the proposed project are described in detail in a later section titled 'Project Impacts on Electricity System' since the evaluation of these effects must be done by considering the project's role(s) in the integrated electricity system." (FSA at 4.1-141.) There is no "later section" in the FSA with this title.

general public should not be forced to sift through obscure minutiae or appendices in order to ferret out the fundamental baseline assumptions that are being used for purposes of the environmental analysis." (*Ibid.*) Here, those fundamental baseline assumptions were not even articulated in "obscure minutiae or appendices," and were not capable of being "ferreted out" at all.

Other portions of the FSA suggest that Staff compared Puente's emissions to emissions from the units it is ostensibly designed to replace (Mandalay 1 and 2). Again, however, the FSA fails to provide an adequate baseline for comparison. The FSA concludes Puente will be more efficient than Mandalay 1 and 2 (.508 $MTCO_2$/MWh for Puente, based on net output, as compared to .609-.612 $MTCO_2$/MWh for Mandalay 1 and 2). (FSA at 4.1-139, 4.1-153.) This superficially suggests that the Project will reduce emissions. However, the FSA acknowledges that overall mass emissions are likely to increase because MGS 1 and 2 have "very low annual capacity factors . . . due to their low level of efficiency." (FSA at 4.1-139.) The magnitude of this increase, however, is impossible to discern because the PSA does not disclose existing baseline emissions from MGS 1 and 2.

The FSA's failure to articulate a clear and discernible baseline renders the evaluation of impacts impossible, depriving the FSA of its value as an informational document under CEQA.

c. The FSA Fails to Provide a Stable and Consistent Description of the Project.

"An accurate, stable, and finite project description is the *sine qua non* of an informative and legally sufficient EIR." (*County of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185, 193.) Without an accurate description, decision-makers and the public cannot weigh a project's environmental costs and benefits, meaningfully consider mitigation measures, or evaluate alternatives. (See *id.* at 192-93; see also CEQA Guidelines § 15124 [requiring detail sufficient for "evaluation and review of the [project's] environmental impact"].) A project description must provide sufficient facts "from which to evaluate the pros and cons" of the project; an EIR in which "important ramifications" of the project remain "hidden from view" throughout the

approval process "frustrates one of the core goals of CEQA." (*Santiago County Water Dist. v. County of Orange* (1981) 118 Cal.App.3d 818, 829-30; *see also San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 729-30.) Where an agency's "omission of relevant information has precluded informed decisionmaking and informed public participation," the error is prejudicial "regardless whether a different outcome would have resulted if the public agency had complied with the disclosure requirements." (*Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1198.)

Inconsistencies in the FSA's description of the project fatally undermine the document's informational value. In order to understand and evaluate Puente's likely GHG emissions, one must know how often the facility is expected to run. Yet the FSA reflects a wide range of inconsistent assumptions regarding Puente's anticipated capacity factor. The facility's air permit will allow operations up to 2,150 hours per year (about a 24.5% capacity factor). (TN # 214005-13 [Exhibit 2019, FDOC Appx. K] at K-11 (Condition 48).) Both the FDOC and the FSA at various times express an expectation that Puente actually will run at this maximum permitted capacity. (See TN # 214005-2 [Exhibit 2008, FDOC Evaluation] at 40 ["The new P3 CTG is *expected to operate* with an annual capacity factor of approximately 25%."] [emphasis added]; FSA at 4.1-66 ["The new Puente CTG is *expected to operate* with an annual capacity factor of no more than 25 percent"] [emphasis added], 4.1-156 ["Puente is *proposed to operate* approximately 25 percent capacity factor [*sic*]."] [emphasis added]; see also FSA at 4.1-26 [describing permitted capacity factor of 24 percent as "upper bound" of operations].)

Other parts of the record contain contradictory information on Puente's anticipated capacity factor. The "Project Description" section of the FSA states that "[t]he power block would provide peaking power and is *expected to operate* at up to approximately 30 percent capacity factor." (FSA at 3-1 [emphasis added].) This prominent portion of the FSA was not changed or corrected, despite Staff's assertion in another part of the document that references to 30 and 31 percent capacity factors were erroneous. (FSA at 4.1-84.) On the other hand, in quantifying criteria air pollutant emissions under "reasonable worst case" operations and

proposing CEQA mitigation, Staff assumes a capacity factor of only 10 or 11 percent, based on the assumption Puente will produce the same amount of energy as Mandalay 1 and 2. (See FSA at 4.1-49 to 50; see also *id.* at 4.1-1, 4.1-83, 4.1-84.)

These contradictory statements as to Puente's expected capacity factor render the project description inadequate as a matter of law. In *San Joaquin Raptor*, the Court of Appeal held an EIR for a gravel quarry expansion proposal inadequate due to its conflicting statements concerning the actual impacts of the expansion. In that case, the quarry owner sought a permit allowing production of 550,000 tons per year of aggregate, but the EIR analyzed impacts and proposed mitigation based on the assumption that the quarry would actually produce less than half that amount. (See 149 Cal.App.4th at pp. 655-56.) Noting that this approach gave "conflicting signals to decisionmakers and the public about the nature and scope of the activity being proposed," the court held the EIR "insufficient as an informational document for purposes of CEQA, amounting to a prejudicial abuse of discretion." (*Id.* at pp. 655-56, 657.)

The FSA here suffers from exactly the same problem. Readers of the FSA are told on one hand that Puente is "expected" to operate at its full permitted capacity. Then they are told that "worst case" operations will be less than half of full permitted capacity. And in other places they are told that operations actually will be significantly above permitted capacity—as high as 31 percent—while still other portions of the document refer to this figure as erroneous. These inconsistencies deprive the public and Commissioners alike of the information necessary to understand and evaluate the significance of Puente's GHG emissions, rendering the FSA inadequate as a matter of law.

d. The FSA's Conclusion that Puente Will Reduce GHG Emissions Is Unsupported by Substantial Evidence.

The FSA concludes that Puente's GHG emissions are not significant for CEQA purposes because construction of Puente "would lead to a net reduction in GHG emissions across the electricity system that provides energy and capacity to California." (See FSA at 4.1-165.) Like all CEQA significance determinations, this conclusion must be supported by substantial

evidence—and because this conclusion is based on a quantitative comparison between "system" emissions with and without Puente, that supporting evidence must be both specific and quantitative. (See *Center for Biological Diversity*, *supra*, 62 Cal.4th at p. 228.)

At its core, the FSA's GHG analysis consists of a chain of assumptions. The FSA assumes (1) CAISO will dispatch Puente only as "economic logic" dictates (i.e., when Puente is the least-cost source of generation), (2) Puente's costs are mostly from fuel, and (3) lower cost entails greater efficiency, less fuel consumption, and thus lower emissions; from these assumptions Staff concludes Puente will *always* reduce emissions compared to any other facility that otherwise might be called upon to provide "system" electricity. (See, e.g., FSA at 4.1-147 to 148.)

This chain of assumptions, however, is unsupported by any analysis based on actual data or evidence in the record. Substantial evidence can include assumptions and expert opinions, but only when those assumptions and opinions are grounded in evidentiary fact. (CEQA Guidelines, § 15384(b).) Here, neither the FSA nor any other part of the record provides the factual basis for Staff's assumptions and opinions. The FSA's significance conclusions are therefore unsupported.

The FSA's core assumption—that Puente will always represent the cheapest, and therefore most efficient, source available whenever it is dispatched—is not supported by substantial evidence. The FSA assumes that ISO dispatch procedures will always result in dispatch of the cheapest, and thus lowest-emitting, generation sources. (See FSA at 4.1-147 to 148.) Staff never modeled generation system emissions with and without Puente, in order to discern whether Puente would increase or decrease emissions, because they believed the "economic logic" of a model "would have resulted in a reduction in GHG emissions." (FSA at 4.1-158.) Yet Staff's expert, David Vidaver, admitted in cross-examination that his testimony contains no actual evidence that the economic logic used in a simulation model actually controls the way that the ISO dispatches generation. (TN # 216408 [2/7/17 Tr.] at 122:22-123:4.) Mr. Vidaver also conceded that his testimony did not incorporate or otherwise describe ISO's actual

dispatch procedures. (*Id.* at 125:1-4.) Moreover, because actual ISO dispatch procedures are confidential (FSA at 4.1-152), the accuracy of Staff's assumptions is impossible to evaluate; this in itself undermines the FSA's value as an informational document under CEQA. (See *Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70, 88 [expert's reliance on undisclosed data does not meet the "informational" goals of CEQA].) In any event, a failure to analyze whether an impact will occur is not evidence the impact will not occur.

In responses to comments, the FSA claims that ISO's dispatch procedures do not matter, "*as long as [ISO] dispatches the lowest cost (i.e., most efficient/least emitting) resource(s)*." (FSA at 4.1-162 [emphasis in original].) But this is entirely circular. The FSA claims that ISO will dispatch the lowest-cost (most efficient/least emitting) resources "as long as" the ISO's dispatch procedures require dispatch of the lowest cost (most efficient/least emitting resources). This simply reiterates the FSA's same, core assumption about ISO's dispatch procedures; it does not provide any factual basis for that assumption. An unsubstantiated assumption, repeated, is still just an unsubstantiated assumption, not substantial evidence.

In fact, the evidence in the record clearly shows that Puente likely will be dispatched ahead of more-efficient generation. James Caldwell, the City of Oxnard's expert, testified that in practice, Puente would *rarely if ever* displace less-efficient resources. Because Puente itself is extremely large and relatively inefficient, it would be "a very rare event" that Puente would be "started up or committed" solely because it "is the cost-effective supply of energy at the time." (TN # 216409 [February 8, 2017 Transcript ("2/8/17 Tr.")] at 93:10-14; see also TN # 215439 [Exhibit 3047, Testimony of Jim Caldwell] at 7 ["P3 dispatch being 'in the money' at full load will be an exceedingly rare event"].) This directly contradicts the assumption in the FSA that Puente will be dispatched *only* when it represents the most cost-effective source of energy. Rather, as Mr. Caldwell testified, Puente would likely be dispatched primarily "out of merit order," under ISO operational reliability protocols designed to avoid an N-1 or N-1-1 contingency. (Exh. 3047 at 5.) Under those protocols, Puente would be dispatched at minimum

load (80 megawatts), at which the facility would operate even more inefficiently than at full load, in order to ensure the facility's availability to the grid. (2/8/17 Tr. at 94:6-14; Exh. 3047 at 5.) Moreover, Puente would run at this inefficient minimum load "not because that energy is required to serve load," but in order to be available "in case something bad happens." (2/8/17 Tr. at 94:16-19.) This type of dispatch "end[s] up crowding out renewables and other more efficient things that could supply that energy because if you start up an 80-megawatt facility, somewhere else in the system you have to shut down 80 megawatts in order to maintain system balance. So you crowd out something that's more efficient." (2/8/17 Tr. at 94:20-25; see also Exh. 3047 at 5-6.) Mr. Caldwell's written testimony concluded that "[Puente] is highly likely to almost never be dispatched except out of merit order" for reliability reasons, and almost all of these "contingency dispatches" will be "at or near minimum load where P3 is much less efficient than the advertised . . . full load heat rate." (Exh. 3047 at 7.) Dispatch of Puente in such a scenario results in excess greenhouse gas emissions, not emissions reductions. (2/8/17 Tr. at 94:19; see also Exh. 3047 at 6.) In other words, Puente would *almost never* operate according to Staff's assumptions, but rather would primarily operate in a way that decreases the overall efficiency—and increases the overall GHG emissions—of the generating "system."

Bill Powers' testimony also undercuts Staff's assumptions. Mr. Powers testified that the FSA provides no actual evidence that efficient combined-cycle plants could not serve the same reliability, fast-ramping capacity needs Staff assumed Puente would serve. Indeed, as Mr. Powers points out, the applicant included a bid for a combined-cycle unit for the same duty in the same RFO as Puente, indicating that even the applicant thought a more efficient combined-cycle unit could serve the identified capacity need. (TN # 215440-1 [Exhibit 7000, Opening Testimony of B. Powers] at 6-7.) Mr. Powers testified that there is no evidence that fast-ramping capacity is unique to simple-cycle turbines like the one proposed for Puente. (Exh. 7000 at 7.) Rather, ramping demand due to afternoon decline in solar resources is entirely predictable, and more efficient resources can be scheduled to meet that demand. (Exh. 7000 at 7.) Nonetheless, as Mr. Powers testified, simple-cycle units are increasingly being dispatched at the expense of

more efficient combined-cycle units, resulting in higher GHG emissions per unit of power produced. (Exh. 7000 at 6-10.) This evidence further undercuts the FSA's assumption that Puente will always be the most efficient available resource, and thus will always reduce GHG emissions from the "system."

Nor is there any evidence to support a conclusion that Puente will displace generation only from the less-efficient Mandalay 1 and 2 units. As the FSA acknowledges, Puente may run far more often, and emit more, than Mandalay 1 and 2 despite its greater efficiency. (FSA at 4.1-139 ["[I]n the recent past MGS Units 1 and 2 have had very low annual capacity factors of due to their low level of efficiency. *Therefore, it is likely that Puente would have actual annual GHG emissions expressed in MTCO2E greater than MGS Units 1 and 2.*"] [emphasis added].) Moreover, the FSA admits that "we do not know which resources Puente would displace (in the provision of energy)." (FSA at 4.1-159.) There is no evidence, therefore, that Puente will exclusively displace low-efficiency peaking generation at Mandalay. Rather, the evidence shows Puente will likely displace other generation serving both current and future load.

Finally, the evidence in the record indicates that contrary to Staff's assumptions, Puente may displace not only fossil generation, but also generation from renewables and low-carbon alternatives like energy storage. The FSA states that Puente would never displace renewables in part because variable costs for renewables are lower than variable costs for fossil-fueled generation. (FSA at 4.1-149.) Again, however, this simply restates the same basic economic assumption underlying the rest of the FSA's analysis. Mr. Caldwell's testimony, in contrast, shows that Puente may crowd out or displace renewables and preferred resources in the future, because its "exorbitant price will appear as a sunk cost and stifle any economic incentive to design and procure cleaner and cheaper resources to serve the Moorpark region." (Exh. 3047 at 7.) As Bill Powers testified, moreover, the GHG footprint of Puente is far higher than the GHG footprint of SCE power; storing SCE grid energy would provide far lower emissions, which will continue to drop as the GHG efficiency of SCE grid electricity improves. Puente, in contrast, will always emit GHGs at the same, far higher rate. (Ex. 7000 at 5-6.) Staff's expert, Mr.

Bemis, confirmed that his testimony did not evaluate Puente's emissions against a system in which the demand proposed to be served by Puente could be met with other low- or zero-carbon resources, such as energy storage. (2/7/17 Tr. at 132:17-133:17.) Accordingly, the FSA's assumption that Puente would never displace renewable generation or other low-carbon resources is unsupported.

In sum, the FSA's conclusion that Puente will reduce "system" GHG emissions is based on a chain of assumptions that have no evidentiary support, and in fact contradict the record evidence. The FSA's determination that Puente's GHG emissions will not be significant is therefore inadequate under CEQA.

e. The FSA Fails to Support Its Conclusion that Puente Will Be Consistent with the Avenal Precedent Decision

The evidentiary record does not support the FSA's conclusion that Puente will comply with the Avenal precedent decision. (FSA at 4.1-155 to 156.) Rather, the evidence in the record indicates that Puente will conflict with the Avenal precedent decision by increasing the overall system heat rate for natural gas plants.

The FSA concedes that Puente's direct heat rate is higher than the system average heat rates for natural gas plants in both the WECC and California. (FSA at 4.1-156.) The FSA states that simple-cycle facilities like Puente "must be evaluated based on their function," but also acknowledges that Puente is expected to operate five to eight times as often as other peaking plants. (See FSA at 4.1-156; see also Exh. 2008 at 40 ["The new P3 CTG is expected to operate with an annual capacity factor of approximately 25%."].) The FSA also suggests that Puente will displace generation currently being provided by baseload facilities: "as California moves to a high renewable/low-GHG system, efficient resources like Puente may operate more than traditional, less flexible resources." (FSA at 4.1-156.) At least some of those "traditional, less flexible resources" presumably consist of GHG-efficient combined-cycle natural gas units, which have supplanted older steam units since 2001. (See TN # 215440-5 [Exhibit 7005, Staff Paper: Thermal Efficiency of Gas-Fired Generation in California: 2015 Update] at 2.) The

evidence provided in the FSA itself thus undermines its assumption that Puente will not increase the overall system heat rate for natural gas plants.

Bill Powers' testimony shows that in more recent years, less-efficient simple-cycle turbines are operating more often, while more-efficient combined-cycle units in California are operating less often, raising the overall heat rate of gas-fired generation. (Exh. 7000 at 4-5.) An Energy Commission report cited in Mr. Powers' testimony confirms that the average capacity factor of combined-cycle generation has trended downward in recent years, while the average capacity factor of simple-cycle peaking generation is trending upward. (Exh. 7005 at 4 [Table 3].) The average heat rate of simple-cycle generation is also significantly higher than the average heat rate of combined-cycle generation. (Exh. 7005 at 4 [Table 2].) Although the projected heat rate for Puente is lower than the state average for peaker facilities, it is far higher than the state average for combined-cycle facilities. (Compare Exh. 2008 at 6 [FDOC Evaluation, using net heat rate of 9,039 Btu/kWh], TN # 215553 [Exhibit 1121, Applicant's Rebuttal Testimony] at Tab 14 at 7:8-9, pdf 238 [applicant's expert, estimating net heat rate of 9,250 Btu/kWh], and Exh. 7000 at 9 & n.27 [Bill Powers, calculating net heat rate of 9,819 Btu/kWh based on FSA data] with Exh. 7005 at 4 [Table 2] [reporting average combined-cycle heat rate of 7,329 Btu/kWh].) Mr. Powers thus reasonably concluded that "[t]he more Puente is used, the more Puente will . . . drive upward the average heat rate of gas-fired generation in California and the WECC." (Exh. 7000 at 5.)

The applicant's expert, Gary Rubenstein, disagreed with Mr. Powers' general conclusion that simple-cycle generation is displacing combined-cycle generation, leading to higher GHG emissions. (See Exh. 1121, Tab 14, at 5:2-5, pdf 236.) But Mr. Rubenstein did not dispute that Puente will have a higher heat rate (and thus will require more fuel, and produce more emissions, to produce the same amount of electricity) than the state combined-cycle average.[14] Nor did Mr. Rubenstein attempt to refute the FSA's admission that Puente will likely run far more often than

[14] Staff's expert, Mr. Bemis, confirmed that Puente's heat rate "is substantially higher than that of the WEC and the California gas-fired heat rate." (2/7/17 Tr. at 130:22-131:1.)

other peaking plants or the FSA's concession that simple-cycle plants may operate more than "traditional, less flexible" resources—in other words, baseload resources—in the future. And Mr. Rubenstein's observation that the overall heat rate of natural gas generation in California has declined since 2001(*Id.* at 5:11-15, pdf 236) is irrelevant; as the Energy Commission report cited by Mr. Powers shows, that overall decrease was driven by a shift from older steam turbines to combined-cycle units. (See Exh. 7005 at 2 ["The significant improvement in the thermal efficiency of California's gas-fired generation is due to an increase in generation from combined-cycle (CC) power plants built since 2000 and reduced dependency on generation from aging power plants."].) The data cited in Mr. Powers' testimony for more recent years show that combined-cycle generation is now decreasing as simple-cycle generation increases, to the detriment of overall thermal efficiency. (Exh. 7000 at 4-5; Exh. 7005 at 4.) As Mr. Powers stated at the evidentiary hearing, Mr. Rubenstein's "focus on the efficiency of Puente, relative to the older units in the local area, is misplaced. The unit is adding to or contributing to a lower efficiency overall for gas-fired generation in California. That's the essential point." (2/7/17 Tr. at 152:1-5.)

Mr. Vidaver's testimony further confirms that simple-cycle facilities like Puente may displace combined-cycle resources: "changes in the shape of net load (the amount of energy needed to meet demand after solar and wind generation have been accounted for) and its variability have encouraged the dispatch of simple cycle resources as lower-cost (and thus lower-emitting) alternatives to the dispatch of combined cycles." (TN # 215571 [Exhibit 2006, Staff's Rebuttal Testimony and Responses to Hearing Officer's Request for Information] Att. 1 at 1, pdf 6.) Mr. Vidaver assumes, contrary to the heat rate data in the record, that Puente will be more efficient than these combined-cycle facilities, but this simply reflects the FSA's unsubstantiated assumption that Puente will always be the most efficient facility on the grid every time it is dispatched. The heat rate data cited by Mr. Powers, however, indicates the opposite, as does the testimony of Mr. Caldwell discussed above. Neither Mr. Vidaver's testimony nor the FSA provided any specific, quantitative data showing that Puente will be more efficient than the

combined-cycle units it will likely displace. As a result, the Commission cannot find on this record that Puente conforms to the Avenal precedent decision.

2. The FSA Fails to Disclose, Analyze, and Propose Adequate Mitigation for the Project's Air Quality Impacts.

The FSA identifies significant air quality impacts and purports to assess those impacts at a full, permitted capacity factor of 24.5%. Yet the FSA proposes to mitigate those same, admittedly significant impacts at a lower capacity factor of 11%. Whether the FSA thus fails to analyze impacts at full, permitted levels as CEQA requires, or simply fails to require feasible mitigation for identified significant impacts, the document's approach is plainly erroneous under CEQA.•

As previously discussed, CEQA requires evaluation of a facility's impacts at the full, permitted level, because permitted impacts are an aspect of the project itself. (*San Joaquin Raptor*, *supra*, 149 Cal.App.4th at p. 660 [citing *Christward Ministry v. Superior Court* (1986) 184 Cal.App.3d 180, 194.) The EIR in *San Joaquin Raptor* assessed an expanding gravel quarry's groundwater pumping impacts on the assumption that the quarry would maintain current levels of production, even though the facility's permit would allow peak operations at more than double current levels. (149 Cal.App.4th at pp. 662-663.) The court held that because the EIR's analysis failed to identify how much water would be used during baseline operations as opposed to peak permitted operations, the EIR's conclusions were "not supported by substantial evidence or reasoned analysis." (*Ibid.*) Because the quarry's maximum production levels were "specifically authorized" by the conditional use permit under review, the EIR was required to "disclose how much groundwater pumping would be needed to support such operations and analyze the impacts thereof." (*Id.* at p. 664.) The court reached similar conclusions as to the EIR's analysis of surface water impacts (*ibid.*) and traffic (*id.* at pp. 665-66), finding in each instance that the EIR failed to account for operations at full permitted levels. The court found that these errors prejudicially "precluded informed decision making and public participation," and ordered that approval of the project be voided. (*Id.* at p. 672.)

The FSA here commits a similar error by analyzing and proposing CEQA mitigation for air pollution at an 11% capacity factor, even though Puente is fully authorized (and, according to several passages in the FSA and Final Determination of Compliance discussed above, is "expected") to operate more than twice as often. Perhaps anticipating that analysis of impacts at the lower capacity factor might be problematic, the FSA disingenuously claims that the 11% capacity factor is not actually used for air quality "analysis," but rather only as a "CEQA mitigation basis." (FSA at 4.1-50 & n.4; see also *id.* at 4.1-75 [conceding that Staff used a capacity factor lower than permitted capacity "for CEQA purposes"], 4.1-84 [stating that "[t]he 10 to 11 percent capacity factor is only used to evaluate adequacy of CEQA emissions offsets"].) Staff's expert, Mr. Bemis, confirmed that the FSA attempted to use different approaches for impacts analysis and mitigation. Mr. Bemis testified that "[t]he permit levels assume an appropriate, approximate 24 percent capacity factor, and the emissions estimated in impact analyses are conducted at this capacity factor." (2/7/17 Tr. at 90:22-25.) Yet Staff tried to use a different "compliance method" in "the California Environmental Quality Analysis, the CEQA analysis, of the project emissions and impacts." (2/7/17 Tr. at 91:1-9.) Specifically, Staff used a lower capacity factor, "based upon the Puente annual operating hours, reasonably expected to occur, which was estimated at 10 percent in the PSA and 11 percent in the FSA, [only] to compute the amount of CEQA mitigation needed, not the impacts." (2/7/17 Tr. at 92:18-22.)

This approach violates CEQA for either of two equally valid reasons. First, the lower capacity factor used as a "CEQA mitigation basis" effectively renders any "impact analysis" at the full, permitted level a sham; by claiming that Puente will never run more than 10 or 11% of the time, even under "worst case" conditions, the FSA effectively substitutes the truncated, partial analysis of air pollution impacts at the lower capacity factor for the analysis of Puente's impacts at permitted levels that CEQA requires. (*San Joaquin Raptor*, *supra*, 149 Cal.App.4th at p. 660.) The FSA also leaves readers confused, if not affirmatively misled, as to what the real-world "worst case" impacts of the project will be. This falls far short of the good-faith effort at full disclosure of environmental impacts that CEQA requires. (CEQA Guidelines, § 15151.)

Alternatively, even assuming that the FSA does "analyze" impacts at the full permitted level, the FSA simply fails to mitigate the significant impacts identified in that analysis. One of the two "main significance criteria" used in the FSA was as follows: "[A]ll project emissions of nonattainment criteria pollutants and their precursors (NOx, VOC, PM10, and SO_2) are considered significant cumulative impacts that must be mitigated." (FSA at 4.1-30.) Mr. Bemis testified that "the emissions estimated in impact analyses" assumed the full permitted capacity factor of 24.5%. (2/7/17 Tr. at 90:22-25.) Yet Puente's emissions of nonattainment pollutants—which the FSA deems cumulatively significant in *any* amount—are proposed to be mitigated only at a far lower capacity factor. (FSA at 4.1-49 to 50.)

Accordingly, even if the FSA did analyze impacts—but not mitigation—at fully permitted levels, the document still clearly violates CEQA. CEQA requires that all identified significant impacts be mitigated. There is no authority under CEQA for using a different "compliance method" (2/7/17 Tr. at 91:1-9) in evaluating impacts and proposing mitigation for those impacts. The core purpose of any CEQA document is to identify significant impacts and then propose feasible mitigation for those impacts. (See, e.g., *Lotus v. Department of Transportation* (2014) 223 Cal.App.4th 645, 653.) The statute itself could not be more plain: "no public agency shall approve or carry out a project for which an environmental impact report has been certified which identifies one or more significant effects on the environment that would occur if the project is approved or carried out unless . . . [c]hanges or alterations have been required in, or incorporated into, the project with mitigate or avoid the significant effects on the environment." (Pub. Resources Code § 21081 and subd. (a)(1); see also Pub. Resources Code §§ 21002.1, subd. (b) ["Each public agency shall mitigate or avoid the significant effects on the environment of projects that it carries out or approves whenever it is feasible to do so."].) The Commission's own regulations impose identical requirements. (Siting Regs., §§ 1745.5, subd. (b)(2), 1748, subd. (b)(5).) Identification of significant impacts drives the imposition of mitigation measures. The FSA identified any emissions of nonattainment pollutants as significant, and purported to quantify these emissions at fully permitted levels. It then apparently

declined to provide mitigation for more than half of those admittedly significant emissions. The FSA's attempt to divorce impact analysis from mitigation is erroneous as a matter of law.

The only permissible basis for rejecting mitigation of Puente's full air quality impact would be a finding that full mitigation is infeasible, accompanied by a statement that overriding considerations justify proceeding with the project anyway. (See Pub. Resources Code § 21081, subd. (a)(3), (b); Siting Regs., § 1745.5(b)(5)(B).) However, Staff's expert, Mr. Bemis, admitted that additional mitigation *was* feasible. Asked whether the FSA contains any factual determination that additional CEQA mitigation would be infeasible if the facility were to operate at a capacity factor greater than 11%, Mr. Bemis responded: "It's not infeasible to require additional mitigation." (2/7/17 Tr. at 119:11-19.)

Finally, even if the FSA had not committed a fundamental legal error by using different capacity factors to assess impacts and mitigation, the document would still fail because the FSA's rationale for using the lower capacity factor in assessing mitigation is unsupported by substantial evidence. The FSA predicated its "mitigation basis" capacity factor on the assumption that Puente will run about as often as Mandalay 1 and 2; "staff has evaluated historical energy produced from both MGS Units 1 and 2 to develop a [11%] capacity factor value that would produce the same amount of energy from Puente as MSG Units 1 and 2 historically produced." (FSA at 4.1-83.) This assumption, however, contradicts other statements in the FSA that Puente will likely run substantially more often than Mandalay 1 and 2. The FSA explained that because Mandalay units had "very low annual capacity factors of due to [*sic*] their low level of efficiency," Puente would "likely . . . .have higher annual GHG emissions." (FSA at 4.1-139.) Because Puente is more efficient than Mandalay 1 and 2, the only way it could have greater mass emissions is by running far more often than Mandalay 1 and 2—as Puente's permitted capacity factor indicates it will. Staff's expert, Mr. Bemis, conceded that a facility (like Puente) operating at a 25 percent capacity factor would not serve "the same operational function" as a facility (like Mandalay 1 and 2) operating at at 3.5 percent capacity factor. (2/7/17 Tr. at 129:15-20.) Accordingly, even setting aside the FSA's plain legal error in divorcing

analysis from mitigation, the capacity factor used as the document's "CEQA mitigation basis" lacks evidentiary support.

3. Soil and Water (Hazards) Are Not Adequately Addressed

Impacts from hazards are potentially significant. The record shows that coastal flooding could inundate the site under various scenarios. This risk has not been accurately addressed by Staff.

Staff relied on the CoSMoS modeling rather than other evidence to conclude that the site would not be flooded in a 100-year event. (TN # 218274 [Staff Supplemental Testimony; "Model results show that projected flooding for the 100-year event with 2.0 feet of sea level rise does not reach the project site."].) However, Staff's reliance on the CoSMoS model in this instance is misplaced because they failed to take into account the assumptions used in the model run. It became clear after many hours of hearing that the CoSMoS modeling assumed the P3 site would not be developed—which is why it showed the P3 portion of the project site as not being flooded under the 2050 100-year flood scenario for both Sea Level Rise ("SLR") 0 cm and SLR 50 cm. (TN # 220878 at 25, 26 [model slides]; TN # 220581 at 8 [7/27/17 Transcript; Dr. Erikson confirming that the model assumes the site was not developed allowing dunes to migrate inland, and confirming that if the site had infrastructure the dunes would erode under the model and the site would flood]; TN # 220582 at 306-310 [7/26/17 Transcript; same, preliminary discussion].) CoSMoS was never used to model for a developed P3 site. This is significant because for undeveloped areas the model assumes existing dunes can migrate inland, thus here assuming the dune migration would maintain a protective barrier from waves and flooding at the undeveloped P3 modeled site. If the site had been modeled as developed, as were the P1 and P2 sites for example, it would most likely have shown dune erosion and flooding of the site under 100 year storm conditions for both SLR scenarios as it showed for most of the P1 and P2 sites. (TN # 220878 at 25, 26 [model slides].) Because the assumption skewed the results, the Commission cannot rely on the CoSMoS modeling here. If the USGS revises the modeling with

different assumptions, those results should be provided and brought forward at additional evidentiary hearings.

4. Biological Resources Are Not Adequately Addressed.

As detailed below, the Center is concerned that the biological surveys have not been adequate for the "project as a whole" in several ways. (CEQA Guidelines § 15378(a) [requiring review of "the whole of an action, which has a potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment . . . ."].) First, as discussed in detail at the July 27 hearing, the supplemental surveys looked at only a small subset of the project site (a 3 acre area for the P3 footprint and a buffer around that area, some roads, and the outfall area). However, the surveys ignored many other project components including the P1 and P2 sites and buffers around roads and the outfall area. Second, significant omissions and inaccuracies from the initial biological surveys were only brought to light incidentally from the supplemental surveys, including the presence of a pair of falcons nesting on the P1 site and foraging throughout the area, and the mischaracterization of coastal resources as "ice plant mats." It is unclear what other "oversights" or "omissions" may have resulted from the surveys. These omissions call into question the accuracy and sufficiency of the biological investigation to date. Without additional surveys, the Commission cannot show that it has met the most basic requirements of CEQA and other laws.

a. Coastal Resources, rare plant and animal communities and ESHA.

The characterization of coastal communities by the applicant and Staff is problematic and appears inaccurate. Dr. Engle explained in a letter and testimony that from her on-site observation of areas which the applicant had denoted "ice plant mats" these were more properly characterized as "coastal dune habitat" (TN # 220581 at 265-266, 268 [testimony]; TN # 217575 at 1 [report of conversation].) In addition, the Coastal Commission Executive Director docketed a letter regarding the new information from the supplemental biological surveys that had been undertaken after the 30413(d) report. (TN # 220302.) The letter explained that the ESHA

determination contained in the Coastal Commission's 30413(d) report would also apply to areas where new information was gathered regarding coastal dune, scrub and riparian habitats on and around the proposed project site. (*Id*.) Given this significant dispute regarding the biological resources on site, the Commission should require additional surveys to confirm the status of these plant communities and others on site and provide an opportunity for the Coastal Commission to review all new data and supplement or revise its 30413(d) report.

b. Peregrine Falcon

The applicant's initial submissions, the FSA and other Staff submissions failed to mention the Fully Protected Species Act or to address this LORS. It was not until supplemental testimony was filed on June 26, 2017, that the presence of the peregrine falcon pair at the project site was disclosed to the public by the applicant, although their presence was clearly known by applicant's employees at the existing P1 unit before that time.

> 3.6.2.1 Peregrine Falcon
>
> A pair of peregrine falcons (Falco peregrinus) was observed nesting on MGS Unit 1; plant staff reported that the birds had nested in that location for the previous 2 years (Mattesich pers. comm. 2017). Two adult peregrine falcons were observed regularly resting and foraging in the vicinity of the BSA during the surveys. Avian prey remains were observed in the BSA, particularly in the Laydown Area, indicating use of the BSA by foraging peregrine falcons, although such use was never directly observed.

(TN # 219898 [Exhibit 1148, Expert Declaration of Julie Love in Response to March 10, 2017 Committee Orders] at pdf 211; *see also id.* at pdf 214 [concluding "Additionally, two active raptor nests, including peregrine falcon and great horned owl, were identified outside but in the vicinity of the BSA. These nests were both located on the existing MGS Unit 1. Although the nests were outside the BSA, the BSA does support suitable prey species for both of these raptors, and is likely used as foraging habitat.]; *id*. at pdf 241, table D-1; TN # 220581 [July 27, 2017 Transcript ("7/27/17 Tr.") at 233 [Love testimony acknowledging falcon "resting" on P3 site and noting likely use of buffer and outfall sites].) This failure to disclose the presence of this fully protected species, along with other irregularities discussed below regarding characterization of

plant communities, call into question the completeness and accuracy of all of the biological survey results. Before proceeding further in this process, the Commission should require additional surveys to carried out by independently selected biologists to ensure fair and full consideration of this proposed project.

Because the proposed project is likely to adversely affect the fully protected peregrine falcon by removing foraging habitat and possibly impacting an active nest, the Commission must first ensure it has sufficient information to consider whether the proposed project is consistent with the fully protected species law and that all take can be avoided. On the record provided to date, the Commission could only conclude that the project is not consistent with the Fully Protected Species Act. While it may be possible to avoid take of the peregrine falcon, the Staff has provided no detailed analysis of the impacts or such avoidance measures and has not provided sufficient conditions of certification that would ensure avoidance of take of this species. (7/27/17 Tr. at 100, 253, 258-59, 261 [Watson testimony re condition BIO-8 and BIO-10 and impacts to the peregrine falcon]; *id.* at 143-144, 263 [Hunt rebuttal: re survey effectiveness, new information, and questioning whether the conditions are sufficient for a fully protected species and nesting falcons].)

c. Committee Questions:

As explained above, even based on the inadequate biological surveys to date, the proposed project site contains significant wetlands, ESHA and other sensitive resources that should be avoided. The Center reserves the right to provide specific answers to the Committee Questions Q3, Q4, and Q5 related to biological resources definitions and impacts, ESHA, wetlands and the proposed conditions of certification in reply briefing.

5. Land Use Is Not Adequately Addressed

The project is clearly inconsistent with local land use policies. The City of Oxnard's briefing will address these questions. The Center reserves the right to provide additional briefing on these issues on reply and in future briefing where applicable as well as regarding Committee Questions Q1 and Q2.

6. Socioeconomics and Environmental Justice Issues Are Not Adequately Addressed

a. Committee Question Q6: Address the legal requirements of federal and state environmental justice laws, and the application of those laws to this proceeding.

> "[E]nvironmental justice" means the fair treatment of people of all races, cultures, and incomes with respect to the development, adoption, implementation, and enforcement of environmental laws, regulations, and policies.

(Cal. Gov. Code, § 65040.12(e).) Thus, environmental justice review requires attention to many issues including the pollution burdens placed on disadvantaged communities. Environmental justice review must specifically consider disproportionate affects to communities in the area of the proposed project. These issues are particularly critical in considering development at the site where the P3 project is proposed. The legal requirements are further discussed in the opening brief filed by CBE and CEJA.

As an initial matter, the Staff's consideration of environmental justice communities was flawed from the outset. While the use of CalEnviroScreen 3.0 is helpful in identifying various ways in which a community may be burdened or disadvantaged, it is not a substitute for detailed, site specific identification and consideration of environmental justice concerns in the context of the proposed project's impacts on the local community. For example, at hearing it was clear that Staff had not fully considered impacts to workers and schools in the area. (See TN # 216408 [2/7/17 Tr. at 170-173; Testimony of Strela Cervas discussing farmworkers and proximity of high school not addressed by Staff].) Thus, it appears that Staff may not have ensured that the list of sensitive receptors, which had been provided by the Applicant, was accurate and complete. Because Staff relied on incomplete information in the FSA for conclusions regarding public health and environmental justice (See, e.g., TN # 214712 [FSA at 4.5-12 to 4.5-17]), the Commission cannot find that it has complied with CEQA. As a result, Staff's identification of the factors needed for the analysis was flawed and its conclusions regarding environmental justice impacts from the proposed project are not supported.

Staff's consideration of the significance of environmental justice impacts is also in error because it did not properly assess the disproportionate impact to communities in this area that will be affected by the proposed project in comparison to impacts to other communities where a project could be proposed to meet the same identified "need." This issue is further discussed in the Opening Brief submitted by CBE and CEJA.

Finally, the Staff has not appropriately addressed alternatives that could lessen environmental justice impacts, including alternatives relying on preferred resources. The Center reserves the right to address this issue, and associated environmental justice issues, in briefing after the September hearings.

b. Environmental Justice Impacts are Significant and Staff Has Failed to Identify, Analyze and Avoid Those Impacts Through Appropriate Alternatives or Mitigation

Staff has not adequately identified all of the relevant facts or addressed disproportionate impacts to local communities which raise environmental justice concerns. Therefore, the Commission has not complied with CEQA or adequately addressed environmental justice. A more thorough review is needed before the Commission can fully consider this issue. Because this issue is also closely related to the exploration of alternatives that will be considered further at the September evidentiary hearings, the Center reserves the right to address these issues in briefing after the September hearings.

D. Staff's Alternatives Analysis Is Inadequate and its No-Action Alternative Description is Inaccurate.

The Center and other parties have raised substantial concerns about the FSA's and Staff's alternatives analysis throughout these proceedings. However, because alternatives will be considered further at the September evidentiary hearings on the CAISO study, the Center reserves the right to address these issues in briefing after the September hearings.

IV. The Commission Cannot "Override" the Project's Noncompliance with State and Federal LORS.

A. Standards for Override Under CEQA and the Warren-Alquist Act.

"[T]he Commission has consistently regarded a LORS override [as] an extraordinary measure which . . . must be done in as limited a manner as possible." (*Eastshore Energy Center,* Final Commission Decision, October 2008 (06-AFC-6) CEC-800-2008-004-CMF, at p. 453 [quotation omitted].) In order to approve a project that conflicts with LORS, the Commission must make two independent findings: (1) that public convenience and necessity require the project, and (2) that there are not more prudent and feasible means of achieving public convenience and necessity. (§ 25525; Siting Regs. §§ 1752(k), 1755(b).) Where, as here, the proposed project is in the coastal zone, the Commission's decision must include the "specific provisions to meet the objectives of Division 20 (commencing with Section 30000) as may be specified in the report submitted by the California Coastal Commission pursuant to subdivision (d) of Section 30413, unless the commission specifically finds that the adoption of the provisions specified in the report would result in greater adverse effect on the environment or that the provisions proposed in the report would not be feasible." (§ 25523(b).) Moreover, "[i]f the commission finds that there is noncompliance with a state, local, or regional ordinance or regulation in the application," before considering an "override" the Commission "*shall consult and meet with the state, local, or regional governmental agency* concerned to attempt to correct or eliminate the noncompliance." (§ 25523(d)(1) [emphasis added].)

None of the required findings can be made on the record here, and therefore no override can properly be adopted.

Further, the Commission cannot properly make any decision on the proposed project based on inadequate CEQA review. A thorough CEQA analysis including a range of alternatives is critical before the Commission can consider an override. Where, as here, more information is needed regarding baseline environmental setting and the likely impacts to resources, alternatives and environmental justice concerns, the Commission must engage in additional CEQA review before making any decision.

Finally, because the Commission's ability to override LORS inconsistencies rests on a finding that there are not more prudent and feasible alternatives, override issues are inextricably bound to the alternatives issues that will be considered in the September evidentiary hearings. The Center thus reserves the right to address override issues in briefing following the September hearings.

B. The Provisions Specified in the § 30413(d) Report from the Coastal Commission Must Be Adopted in the Decision – Alternative Sites Must Be Further Considered.

Specific provisions of the Coastal Commission Report recommended that an off-site alternative should be adopted to avoid the significant impacts to coastal resources. (TN # 213667 [Exhibit 3009], *passim.*) As explained above, the Commission's alternatives analysis has been unfairly truncated by overly narrow project objectives and inadequate identification of environmental impacts. Therefore, without additional CEQA review and factual development the Commission cannot rationally find that "adoption of the provisions specified in the report would result in greater adverse effect on the environment or that the provisions proposed in the report would not be feasible." (§ 25523(b).) The Center reserves the right to provide additional briefing on this point after the September hearings related to alternatives as well.

C. Public Convenience and Necessity Do Not Require the Project.

The Applicant has not met its burden of presenting substantial evidence to support a finding that public convenience and necessity require this project. (*See* Siting Regs. § 1748(d).) The phrase "public convenience and necessity," depending on the facts presented, can mean anything from "indispensable" to "highly important" to "needful, requisite, or conducive." (*San Diego & Coronado Ferry Co. v. Railroad Com. of California* (1930) 210 Cal. 504, 511-12.) A more recent decision defines the phrase as meaning "a public matter, without which the public is inconvenienced to the extent of being handicapped in the practice of business or wholesome pleasure or both, and without which the people of the community are denied, to their detriment, that which is enjoyed by others similarly situated." (*Luxor Cab Co. v. Cahill* (1971) 21 Cal.App.3d 551, 557-58.) In *Eastshore*, the Commission stated that its practice is to balance the

benefits of each project against the public purposes of the LORS with which it conflicts. (See *Eastshore* at p. 455.) Under any of these tests, public convenience and necessity do not require this Project, and as a result it cannot be certified.

D. There Are More Prudent and Feasible Means of Achieving the Identified Need.

As the Commission itself has stated and the law requires, California must move forward with the development of new sources of clean, renewable energy. Building a new gas-fired power plant undermines those goals. The CPUC identified a need for additional power in this subarea but did *not* require that this specific, proposed project fulfill that need. Nor did the CPUC provide any CEQA analysis before approving the PPA. Moreover, there are other ways of meeting the identified need. Alternatives and other gas-fired power plant proposals proceeding through the approval process provide feasible alternative means of achieving the identified need without this project's multiple conflicts with LORS, particularly regarding land use conflicts, impacts to ESHA, and violations of CESA and CEQA. Although the Commission has been pressed by the Applicant to rush this process forward, there is no showing that the public will be inconvenienced or handicapped in any way if the Commission takes the time so ensure that feasible alternatives, including renewable energy alternatives, are fully explored. To that end as well, the Commission must supplement the existing environmental review to obtain additional information and provide adequate CEQA review of this application including feasible alternatives. As Staff explained in another matter where an override was being considered:

> Section 1755 of the Commission's siting regulations (title 20, California Code of Regulations) states that if the Commission cannot find that changes or alterations have been required in, or incorporated into, the project that mitigate or avoid the significant environmental effects identified in the proceeding, then it may not certify the project unless it specifically finds both (1) that specific economic, social, or other considerations make infeasible the mitigation measures or project alternatives identified in the application proceeding, and (2) that the benefits of the project outweigh the unavoidable significant adverse environmental effects that may be caused by the construction and operation of the facility.
>
> California Environmental Quality Act (CEQA) Guidelines section 15093, title 14, California Code of Regulations, states that CEQA requires the decision-making

> agency to balance, as applicable, the economic, legal, social, technological, or other benefits, including region-wide or statewide environmental benefits, of a proposed project against its unavoidable environmental risks when determining whether to approve the project. If the specific economic, legal, social, technological, or other benefits, including regionwide or statewide environmental benefits, of a proposed project outweigh the unavoidable adverse environmental effects, the adverse environmental effects may be considered "acceptable."
> . . .
> In considering section 1755's mandates, Staff first looked at whether specific economic, social, or other considerations make infeasible the project alternatives identified in the application proceeding. Staff identified three alternatives.
> . . .
> Therefore, Staff has identified two alternatives, . . . which are environmentally superior to the proposed project. The project proponent has identified economic considerations that it believes makes these alternatives infeasible, but Staff does not have sufficient information to make that conclusion.
> . . .
> CEQA Guidelines section 15093 allows the Commission to find the adverse environmental effects "acceptable" if there are region-wide or statewide environmental benefits, among other things. Staff has pointed out the region-wide and statewide environmental benefits of this solar project. However, Staff does not believe this technology is superior to other renewable projects that have fewer significant adverse impacts.
>
> Staff's position on this project should not be read as a blanket rejection of this technology. Our determinations will be made on a case-by-case basis. As with all electricity infrastructure projects, there are project-specific attributes, like site selection, that are critical factors in determining impacts and Staff's position on whether a Commission override is appropriate or warranted.

(Palen Solar Energy Generating Station ("PSEGS"), Energy Commission Staff Opening Brief in Palen SSG; TN # 201338, November 26, 2013, at 37-39.) That proceeding was for a proposed solar project, and Staff opined that the environmental benefits of renewable energy generation by a solar plant should be considered in an override context. As Staff there noted, the solar project "could provide critical environmental benefits by helping the state reduce its greenhouse gas emissions, and Staff must weigh these positive attributes against the project's adverse impacts in deciding whether to recommend that the Commission adopt a statement of overriding considerations." (*Id*. at 38.) The eventual Presiding Member's Proposed Decision likewise found that although the proposed project "will cause or contribute to significant direct and

cumulative environmental impacts," on balance the single power tower solar project would help California achieve its Renewable Portfolio Standard goals and benefit the state. (Palen SEGS TN # 203267, September 15, 2014, at pdf 1082, 1084.)

> Producing electricity from renewable resources provides a number of significant benefits to California's environment and economy, including improving local air quality and public health, reducing global warming emissions, developing local energy sources and diversifying our energy supply, improving energy security, enhancing economic development and creating green jobs. (2009 CEC Integrated Energy Policy Report, page 231.) The Reduced Acreage Alternative would provide these economic, social, technological, and other benefits to California.

(*Id*. at 1084.) Notably, in that proceeding, the Commission considered several technological alternatives as well as the reduced acreage alternative and siting alternatives, it should do no less here before considering any override of significant impacts. Here, in contrast to the solar project at issue in that proceeding, approval of the proposed gas-fired power plant would undermine California's goals for the reduction of greenhouse gas emissions. Moreover, as will be discussed further in later briefing, in this instance there are alternatives utilizing preferred resources (including renewable energy) available, alternatives utilizing other energy technologies that would have fewer significant adverse impacts than the proposed project, and other alternatives that could reduce significant impacts. As a result, an override should not be considered.

There are clearly additional opportunities in the Moorpark subarea for development of additional renewable energy resources and use of storage and other technologies to meet the identified need. Yet these opportunities have not been fully addressed to date by the Commission, although they have begun to be explored in recently filed testimony, the CA ISO report, and will be further discussed at the September hearings. Moreover, additional opportunities are emerging every day to enhance the use of demand response, conservation, energy storage, and other preferred resources to address these grid issues and minimize the need for any additional fossil fuel generation.

V. CONCLUSION: The Commission Should Deny the Application.

For all of the foregoing reasons, the Commission cannot lawfully approve the application on the current record. Accordingly, the application should be denied. Again, the Center reserves the right to brief this point further following the September evidentiary hearings.

Respectfully submitted,

/s/ Lisa T. Belenky
Lisa T. Belenky, Senior Attorney
Kevin P. Bundy, Senior Attorney
Attorneys for Intervenor Center for Biological Diversity

Dated: September 1, 2017