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STATE OF CALIFORNIA
Energy Resources
Conservation and Development Commission

In the Matter of:	)	Docket No. 15-AFC-01
	)	
APPLICATION FOR CERTIFICATION OF THE PUENTE POWER PROJECT	)	**OPENING BRIEF OF INTERVENORS SIERRA CLUB LOS PADRES CHAPTER, ENVIRONMENTAL COALITION OF VENTURA COUNTY, AND ENVIRONMENTAL DEFENSE CENTER**

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INTRODUCTION

The Puente Power Project ("Project") is arguably one of the most controversial power plant proposals in California Energy Commission ("Energy Commission") history, with the City of Oxnard, environmental and environmental justice groups, state legislators, and over 10,000 public comments registering their strong opposition. Sister agencies including the California Coastal Commission ("CCC") and California State Coastal Conservancy have also strongly cautioned against locating the Project at the proposed coastal site due to threats posed by coastal flooding and sea level rise.

Widespread opposition to the Project is unsurprising. The Project would require overriding City land-use policies designed to build climate resiliency and to achieve the community's long-held aspiration of moving past a legacy of industrialized coastal development to enjoy its beaches in the manner adjacent wealthier communities have long taken for granted. In addition to perpetuating environmental injustice, the Project site is uniquely set in a biologically rich span of rare coastal dunes and wetlands that provide habitat for a diverse community of rare and sensitive wildlife that would be wiped out by the Project. Finally, as will be more thoroughly discussed in subsequent briefing on the Special Study by the California Independent System Operator ("CAISO"), continued investment in new fossil-fueled power plants at a time when non-combustion reliability solutions provide feasible alternatives undercuts achievement of the state's aggressive decarbonization goals. Indeed, one could scarcely imagine a project more at odds with California's stated commitment to equity, greenhouse gas pollution reduction, and climate adaptation.

Especially in light of the many concerns raised by a broad spectrum of stakeholders and the profound negative implications Project approval will have on the Oxnard community, it would have been reasonable to expect the Final Staff Assessment ("FSA") to provide a robust and unbiased analysis of Project impacts, mitigation, and alternatives. Yet in almost every respect, the FSA falls far short of the standards of the California Environmental Quality Act ("CEQA") and the Coastal Act. The FSA's infirmities begin with an incomplete Project Description, the fundamental basis from which Project impacts are assessed. While the FSA repeatedly describes the Project as impacting only 3 acres of the Project site, the Project includes numerous additional components extending far beyond this footprint that are not clearly described, serving to understate and confuse a full assessment of Project impacts.

The FSA also fails to adequately identify the location and existence of rare species and the habitats that constitute Environmentally Sensitive Habitats Areas ("ESHA") under the Coastal Act and Oxnard Local Coastal Plan ("LCP"). The fundamental failure to disclose ESHA and conduct a robust assessment of the species it supports undercuts a legitimate analysis of the Project's impacts to biological resources.

In direct contravention of CEQA, the FSA's assessment of Project impacts and mitigation is inconsistent across impact areas. While quantifying some Project impacts based on its maximum permitted operating hours, the FSA arbitrarily assumes lower runtimes for the air quality mitigation, thereby leaving the Project's foreseeable impacts to air quality unmitigated.

In addition, the FSA's treatment of flood risk to the Project site reaches Icarus-like heights in its dismissiveness of nature's threats. Recent events in Houston highlight the profound dangers to human health and safety that result from underestimating flood risk and the exacerbation of these impacts from a lack of climate preparedness. Yet, in claiming the Project is not at risk of coastal flooding, the FSA disregards the analysis of the CCC and Coastal Conservancy and instead exclusively relies on a model that repeatedly and grossly under-predicts flooding documented during actual flood events in the area. A model that does not calibrate to real world events cannot be legitimately relied upon to predict future flooding. The FSA's flood assessment is nothing short of reckless. Moreover, while the FSA claims the unexpected loss of generation from the Project would not create electric reliability concerns, the Project was procured solely for the purpose of being available during emergency situations. Given the Project site's many vulnerabilities, which also include its location on a liquefaction zone, the Project is a thoroughly comprised reliability solution for the region.

The Project's severe shortcomings and environmental threats compel a thorough and broad assessment of alternatives. Yet here again the FSA fails, excluding feasible alternatives that would avoid many of the Project's impacts and inconsistencies with General Plan and Coastal Plan policies as well as state and federal laws and regulations. For example, the FSA attempts to dismiss the viability of the Del Norte/5th Street off-site alternative by failing to account for atmospheric factors that would demonstrate no impact to aviation at that site. And even accepting the FSA's flawed methodology for estimating aviation impacts, the FSA fails to consider a smaller or better-configured fossil fueled project that would meet reliability needs for the area without impacting aviation.

The totality of the FSA's deficiencies and the extent of Project impacts is alarming. Commission approval would signal a disregard for both informed analysis and state climate and equity priorities. Because numerous other alternatives would avoid Project impacts while meeting local capacity need, the Project must be rejected.

STANDARD OF REVIEW AND BURDEN OF PROOF

Warren-Alquist Act

Under the Warren-Alquist Act, the Energy Commission has sole authority for permitting and siting power plants greater than a 50 MW capacity. Pub. Res. Code § 25500. The Energy Commission serves as the lead CEQA agency and its power plant siting process qualifies as a certified regulatory program for purposes of CEQA. Pub. Res. Code §§ 21080.5, 25519(c); CEQA Guidelines § 15251(j).

In order for the Energy Commission to issue a certificate to construct a proposed project, it must make a determination under Warren-Alquist Act § 25523(d)(1) that the Project complies with "public safety standards, applicable air and water quality standards and all other applicable local, regional, state, and federal standards, ordinances, or laws." The applicant bears the burden of providing sufficient evidence to support each of the required findings for certification of the project. Cal. Code Regs., Tit. 20 §1723.5.

When the proposed project is located in the coastal zone, the Energy Commission must allow the CCC to participate in the siting proceedings and review the project for compatibility with coastal resources. Coastal Act, Pub. Res. Code § 30413(d); Warren-Alquist Act, Pub. Res. Code § 25523(b). The CCC prepares a Report for the Energy Commission pursuant to the Coastal Act (Pub. Res. Code § 30413(d)(1)-(7)) detailing its recommendations regarding the Project's compliance with the Coastal Act and certified LCP. The Warren-Alquist Act requires the Energy Commission to adopt those specific provision specified in the CCC's 30413(d) Report as Conditions of Certification ("COCs") in its final decision unless it finds that a provision would either be infeasible or would cause greater adverse effect on the environment. Pub. Res. Code § 25523(b).

CEQA

The Energy Commission operates under a regulatory program that has been certified by the Secretary of Resources. CEQA Guidelines § 15251(j). As such, the Energy Commission is exempt from the requirements for EIRs, but must still comply with other mandates of CEQA, including the requirement "of avoiding significant adverse effects on the environment where feasible." CEQA Guidelines § 15250. Specifically, the Energy Commission may not approve a project "if there are feasible alternatives or feasible mitigation measures available that would substantially lessen a significant adverse effect that the activity may have on the environment." Pub. Res. Code § 21080.5(d)(2)(A). The agency's environmental review document must include a description of the proposed activity, alternatives, and mitigation measures that would minimize any significant adverse environmental effect. Pub. Res. Code § 21080.5(d)(3)(A).

Energy Commission action under CEQA may be challenged if the environmental review document is inadequate (Pub. Res. Code § 21080.5(g)) or if the Energy Commission abused its discretion as set forth in Code of Civil Procedure ("CCP") § 1094.5. Pub. Res. Code § 21168. The standard of review under CCP 1094.5 is founded on whether the agency "has proceeded without, or in excess of, jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion. Abuse of discretion is established if the agency has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence." CCP § 1094.5(b).

If an agency fails to proceed in the manner required by law, the inquiry ends and the decision must be set aside; the court does not apply the "substantial evidence" standard of review. *Schoen v. Department of Forestry & Fire Protection* (1997) 58 Cal. App.4th 556, 565. For example, when an EIR omits important information, the agency has failed to proceed in the manner required by law. *Vineyard Area Citizens for Responsible Growth v. City of Rancho Cordova* (2007) 40 Cal.App.4th 412, 435; *see also Sierra Club v. State Board of Forestry* (1994) 7 Cal.4th 1215, 1236-1237 (agency failed to proceed as required by law when it omitted information regarding the presence of old-growth-dependent species on lands affected by proposed timber harvesting plan); *Santiago County Water Dist. v. County of Orange* (1981) 118 Cal.App.3d 818, 829 (EIR legally inadequate for failure to analyze lack of water supply and facilities); *Association of Irritated Residents v. County of Madera* (2003) 107 Cal.App.4th 1383, 1392 quoting *Kings County Farm Bureau v. City of Hanford* (1990), 221 Cal.App.3d 692, 712 ("a prejudicial abuse of discretion occurs if the failure to include relevant information precludes

informed decisionmaking and informed public participation, thereby thwarting the statutory goals of the EIR process"); *Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1208 (agency failed to proceed as required by law when it did not assess potential impact of shopping center on urban decay); *Citizens Ass'n for Sensible Dev. V. County of Inyo* (1985) 172 Cal.App.3d 151, 167 (agency violated CEQA by omitting analysis of cumulative impacts and economic and social effects of project). Not only has an agency failed to proceed as required by law when it omits information from an EIR, but such omission constitutes prejudicial error. *Rural Landowners Ass'n v. City Council* (1983) 143 Cal.App.3d 1013, 1023; see also *Resource Defense Fund v. LAFCO* (1987) 191 Cal.App.3d 886, 897 (failure to comply with CEQA procedures is necessarily prejudicial); *Cadiz Land Co. v. Rail Cycle* (2000) 83 Cal.App.4th 74, 95 (failure to recirculate draft EIR violated information disclosure requirements of CEQA and constituted a prejudicial abuse of discretion).

If it is claimed that the findings are not supported by the evidence, "abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in the light of the whole record." CCP § 1094.5(c). Under CEQA, "substantial evidence includes fact, a reasonable assumption predicated upon fact, or expert opinion supported by fact." Pub. Res. Code § 21080(e)(1). Substantial evidence "is not argument, speculation, unsubstantiated opinion or narrative, evidence that is clearly inaccurate or erroneous, or evidence of social or economic impacts that do not contribute to, or are not caused by, physical impacts on the environment." Pub. Res. Code § 21080(e)(2); *City of Redlands v. County of San Bernadino* (2002) 96 Cal.App.4th 398, 410. Under this test, a court must review the "whole record" to determine whether substantial evidence supports the agency's decision.

In determining whether an agency's findings are based on substantial evidence, a court must review the "whole record." CCP § 1094.5(c); *Bolsa Chica Land Trust v. Superior Court* (1999) 71 Cal.App.4th 493, 503. This means that the agency, and reviewing court, must consider all of the evidence presented. A court "cannot just isolate the evidence supporting the findings and call it a day, thereby disregarding other relevant evidence in the record. [Citation.] Rather, the court must consider all relevant evidence, including evidence detracting from the decision, a task which involves some weighing to fairly estimate the worth of the evidence. [Citation.]'" *Id.*

ARGUMENT

I. APPROVAL OF THE PROJECT VIOLATES CEQA.

A. <u>The Project Description is Incomplete and Unstable.</u>

One of the primary flaws of the FSA is its failure to provide an accurate and consistent Project Description. The FSA fails to meet one of CEQA's most fundamental requirements, to provide an adequate description of the proposed project. CEQA Guidelines § 15124. "An accurate, stable and finite project description is an essential element of an informative and legally sufficient EIR under CEQA." CEQA Guidelines §15124, citing *County of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185, 199. As addressed below, the lack of a clear, stable project description impairs the ability of the public, resources agencies and decisionmakers to determine the Project impacts or compare alternatives to the proposed Project. This deficiency

has placed an undue burden on the public to investigate several components of the Project that have been inexplicably omitted from the FSA and related Figures. This failure has also interfered with the public's ability to provide complete and meaningful comments on several aspects of the Project, undermining the very purpose of CEQA. Several courts have invalidated EIRs for their failure to provide an adequate Project Description. *See, e.g.*, *Friends of the Eel River v. Sonoma County Water Agency* (2003) 108 Cal.App.4th 859 (finding that an EIR was invalid because it omitted a meaningful discussion of the conditions in the northern part of the proposed water supply system); *see also Riverwatch v. Olivenhain Municipal Water District* (2009) 170 Cal.App.4th 1186 (an EIR that omitted an analysis of impacts from construction of an asphalt road and concrete loading pad associated with a landfill and recycling collection center, as well as impacts of trucking water to the landfill, failed to provide information required by CEQA).) It is a fundamental precept of CEQA that an environmental review document must define a "project" as "*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…" CEQA Guidelines § 15378(a) (emphasis added).

The Project Description is inconsistent throughout the FSA and presented so that the full Project area and Project components are not included in the environmental review. The proposed Project is mispresented and improperly analyzed by the applicant and throughout the FSA as a "nominal" 262 -megawatt (MW) electric power project on "a 3-acre portion of the 36-acre Mandalay Generating Station."[1] This inaccurate 3-acre description of the Project is further presented in Project Description Figure 2, which includes the full 36-acre MGS property, but limits the Project site to only 3 acres.[2] This same inaccurate 3-acre Project Description is portrayed in Project Description Figure 4 (AFC Figure 2.4-2), and throughout the AFC and FSA, including Biological Resources Figure 3, AFC Figure 4.2-2, and AFC Figure 4.2-4.

Yet, none of these maps show an accurate depiction that includes all of the Project's components and boundary, which extend and include several acres beyond the 3.26 acre portion of the Project site. According to the FSA and the AFC, the Project components that lie outside the 3.26 acre portion of the Project include:

- The decommissioning and demolition of MGS Units 1 and 2
- Construction of a 500 foot-long natural gas pipeline, at a depth of 4 feet, to connect new gas metering station through new gas compressor to the combustion turbine (AFC 2-26)
- Potential relocation of existing gas lines serving MGS 1, 2 and 3
- New water lines
- New gas metering station and use of existing gas metering station (AFC 2-39)
- New gas compressor enclosure (AFC 2-39; FSA 3-10)
- Construction of new 550-foot long ammonia line (AFC 2-24)
- 5.7 acres of construction lay down area, offices and parking (AFC 2-25)
- Remodeled warehouse
- Re-use of 3 retention basins (FSA 3-9)

[1] FSA at 1-1,1-3.
[2] FSA Project Description Figure 2.

- Removal of the outfall structure (.09 acres) (Biological Resources Survey Report 1-3)
- Demolition access roads (Biological Resources Survey Report Figure 1)
- Outfall access road (1.18 acres) (Biological Resources Survey Report 1-3)
- Transmission lines
- Edison Canal generating station intake

In fact, not one figure or map that has been presented by the applicant or included in the FSA depicts the proposed Project's site boundary and location of all of the Project's components, failing to provide a necessary component of a Project Description in accordance with CEQA. CEQA Guidelines § 15124(a).

To add to the confusion, neither the FSA or the application disclose how many acres will actually be occupied and disturbed by the proposed Project. The FSA does reveal that the "laydown areas along with construction worker parking areas for this Project would occupy approximately 5.7 acres in the MGS site location which would be used for construction laydown, offices and parking" and that only 0.9 of those acres is currently paved.[3] The remaining 4.6 acres would be graded and surfaced with 4 inches of crushed rock.[4] This description of the Project's parking and laydown acreage is inconsistent with the much smaller areas depicted just for parking and laydown areas in FSA Project Description Figure 1.

It is also unclear from the Project Description where many of these components are located, the acreage they will occupy, or how much grading they require. According to the FSA, many of the site's access roads will be graded and covered with 4 inches of crushed rock.[5] Yet, these were excluded from the definition of Project site used by the applicant in the Biological Resources Survey Report.[6] This is a critical omission since significant sections of these proposed access roads run through and adjacent to environmentally sensitive habitat areas ("ESHA") that support coastal dune habitat and rare species such as the Globose dune beetle and the Silvery legless lizard, and were excluded from the applicant's Biological Resources Survey Report (see discussion below in Section C).[7] The Biological Resources Survey Report did confirm that the outfall access road does provide habitat to the rare and protected Globose dune beetle.[8]

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[3] FSA at 3-16.
[4] *Id*.
[5] FSA 3-25.
[6] Ex. 1148 at 1-3.
[7] Ex. 1148 at pp 3-5 and 3-6 including Table 3, Biological Resources Survey Report showing one globose dune beetle found on outfall access road (TN 219898); *See also* Ex. 1148 Figure 4, Biological Resources Survey Report showing as many as nine globose dune beetles on or immediately adjacent to the outfall access road, and one globose dune beetle on or immediately adjacent to the demolition access road's northwestern segment (TN 219898). *See also* Ex. 4039 at pp 1 – 2 and Exhibit B showing legless lizard found approximately 10 feet from northeast segment of the demolition access road and approximately "14.5 yards west of outfall access road." (TN 217575)
[8] Ex. 1148 at pp 3-5 and 3-6 including Table 3, Biological Resources Survey Report showing one globose dune beetle found on outfall access road (TN 219898); See also Ex. 1148 Figure 4, Biological Resources Survey Report showing as many as nine globose dune beetles on or immediately adjacent to the outfall access road, and one globose dune beetle on or immediately adjacent to the demolition access road's northwestern segment. (TN 219898)

There is also little discussion and no detail disclosing the construction footprint from excavation required for underground systems, such as the Project's several thousand feet of new natural gas, water, and ammonia pipelines. Some of the pipelines appear to run through or very close to the existing leach field depicted on the Project Description Figure 7 (AFC Figure 2.7-8). Additional questions remain surrounding the precise location and footprint from the Project's new Gas Metering Station that runs "adjacent to the site."[9] Aside from the 4.6 acres of grading required for construction laydown, parking and employee offices, there is no information provided that quantifies how many acres in total will be graded as a result of the entire Project. Thus, the precise location and boundary of the Project's footprint from development, construction and demolition has not been fully and accurately disclosed. However, it is clear that the Project extends several acres beyond the "three-acre portion of the MGS property" presented to the public in the AFC and FSA.

This confusing presentation of the Project as only occupying a 3-acre portion of the MGS site omits many Project components and not only violates CEQA but robs the public, resource agencies, and decision-makers of a clear, stable project description for purposes of review and comparison. As discussed below in Section D addressing the Project's impacts to Biological Resources, the FSA and AFC's misleading description of the Project was also confusing to other agencies reviewing the Project, such as the CCC, which only reviewed the 3-acre portion of the Project site presented by the applicant and the CEC in the FSA.

B. The FSA Improperly Confines the Decommissioning and Demolition of MGS Units 1 and 2 to the Proposed Project.

The FSA includes the retirement, decommissioning, and demolishment of MGS Units 1 and 2 as part of the Project Description[10], but not as part of the Off-site Alternatives.[11] This distinction was criticized by the CCC, which noted that retirement, decommissioning, and demolishment should be considered under any scenario, in keeping with the State Water Resources Control Board's "Once-Through Cooling Policy" and State nuisance law:

> 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.[12]

[9] Ex. 2001 at p 5.4-3, FSA Part 2 (TN 214713).
[10] FSA, p. 3-6
[11] FSA, p. 4.2-1
[12] Ex. 3009 at 17, *CCC 30413(d) Report – Final Approved Report* (September 15, 2016). (TN213667).

NRG has stated that "it is not the case that there is any existing requirement to shut down MGS Units 1 and 2. … [which] could be retrofit to continue operating with alternative cooling technologies."[13] While technically true, this statement is misleading. While the Once-Through Cooling policy does provide multiple compliance paths, NRG has stated that it does not intend to use any of these alternate compliance paths and "intends to retire (and potentially replace) the plants [MGS 1 and 2] by the SWRCB compliance deadline."[14] Given that the planned retirement of Mandalay was the premise for the CPUC's need finding,[15] if alternative solutions to meet generation need in the Moorpark area were developed, there would be no need determination to support a contract for MGS Units 1 and 2. It seems highly unlikely NRG would attempt what would be a very expensive refurbishment and repower of these resources without a contract for the output.

By inaccurately limiting the decommissioning of these aging facilities to the Project Description for Puente but not the offsite alternatives, the FSA inherently poisons the well for the entire document, including the critical assessment of alternatives to the project. This assessment carries both procedural and substantive implications, because CEQA prohibits agencies from approving projects with significant environmental effects if "there are feasible alternatives or feasible mitigation measures available which would substantially lessen the environmental effects of such projects." Pub. Res. Code § 21002.

C. The FSA Fails to Disclose ESHA and Provide an Accurate Baseline and Environmental Setting.

Although the FSA identified an on-site wetland, it failed to disclose all of the biological resources on the Project site, including ESHA that is protected under the Coastal Act and LCP. As explained herein, the failure to provide complete information regarding the environmental setting renders the FSA inadequate as a matter of law.

One of the most significant CEQA violations of the FSA is its failure to accurately describe the environmental setting and identify protected ESHA on and surrounding the Project site. As stated in the CEQA Guidelines, "[t]he environmental setting will normally constitute the baseline physical condition by which a lead agency determines whether an impact is significant." CEQA Guidelines §15125(a). An EIR must include an accurate description of the physical environmental conditions in the vicinity of the project, as they exist at the time the notice of preparation is published. *Id*. The environmental setting constitutes the baseline physical conditions by which the CEC will use to determine whether an impact is significant. *Id.*

When the environmental baseline is not properly understood, as is the case here, environmental impacts cannot be properly assessed. As a result, there is no basis to determine whether avoidance is feasible or what other mitigation measures are necessary to reduce significant impacts to the extent possible before a project can be approved, as required pursuant

[13] Ex. 1085 at 11, *NRG, Responses to Comments on the P3 PDOC* (Sept. 2, 2016). (TN 213482).
[14] Ex. 4029 at p 3, Comments on PSA-Environmental Coalition, Sierra Club, Environmental Defense Center (Intervenors) (TN 213635).
[15] *Id*. at 3-4; *See* Cal. Pub. Util. C., D. 16-05-050, Finding of Fact 13 (June 1, 2016): "The need determination of the Moorpark sub-area in D.13-02-015 depended upon the retirement of Mandalay Units 1 and 2 and Ormond Beach once-through-cooling generation units."

to CEQA Guidelines §§ 15002(a)(3) and 15021(a)(2). *See also* Pub. Res. Code §21081(a)(3) and *Mountain Lion Foundation v. Fish and Game Commission* (1997) 16 Cal.App.4th 105, 134.

An inadequate baseline will provide the basis for the court to invalidate an EIR. For example, in *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 729, the court invalidated an EIR due to the failure to disclose nearby wetland and wildlife preserve. *See also Save Our Peninsula Committee v. Monterey County Board of Supervisors* (2001) 87 Cal.App.4th 99, 119-128; *Galante Vineyards v. Monterey Peninsula Water Management District* (1997) 60 Cal.App.4th 1109 (court found EIR deficient for failure to identify wineries in area that would be impacted by the proposed project).

As part of the baseline, CEQA requires that an EIR must identify and discuss which areas qualify as ESHA, and address impacts to ESHA. *Banning Ranch Conservancy v. City of Newport Beach* (2017) 2 Cal.5th 918, 930. An omission of essential information is a procedural question subject to de novo review by the courts. *Id.* at 935. The Supreme Court determined the city had abused its discretion when it certified an EIR that did not identify potential ESHA or discuss it in "any substantive detail," *Id.* at 930, resulting in "inadequate evaluation of project alternatives and mitigation measures." *Id.* at 942.

As detailed below, the FSA's Environmental Setting fails to identify and address the location and existence of several rare species and habitats that constitute ESHA under the Coastal Act – both on the Project site, and in its vicinity. Contrary to the unsupported conclusions in the FSA, there is a considerable amount of evidence provided by qualified experts, the Oxnard LCP, and the CCC that demonstrates the Project site sustains a myriad of protected rare and sensitive habitats and species that qualify as ESHA under the Coastal Act and Oxnard LCP. Yet, the FSA omitted this essential information and failed to identify and discuss ESHA areas as required by CEQA. *Id*. As discussed below, it is not surprising that a proposed coastal site like Puente, surrounded on three sides by ESHA that support special-status species, rare dunes, riparian habitat, and wetlands,[16] is almost entirely constrained by these same biological resources under local and state law.

1. Legal Standard to Identify ESHA: Coastal Act and Oxnard LCP

Although the CEC has exclusive jurisdiction over siting the proposed Puente Power Project under Section 25500 of the Warren-Alquist Act, it must still make findings, based on substantial evidence, that the Project is consistent with the City of Oxnard's LCP and the Coastal Act. Pub. Res. Code §§ 25523(a), 25523(d)(1).[17] Additionally, both the Warren-Alquist Act and the Coastal Act require that the CCC evaluate whether the Project conforms to the Coastal Act's resource protection policies and the certified LCP, and submit a report to the CEC containing its analysis and recommendations to bring the proposed Project into conformity if necessary. Pub. Res. Code § 30413(d). The CEC must include the CCC's recommendations in its decision,

[16] Ex. 3009 at 17. *See also*, Oxnard Coastal Land Use Plan, Map No. 7, p. 27, showing the Project site is covered and surrounded by ESHA.

[17] The substantial evidence standard of review requires that the CEC must look at the whole record and cannot simply disregard relevant evidence. Code of Civil Procedure § 1094.5; *Sierra Club v. California Coastal Commission* (1993) 19 Cal.App.4th 547, 557.

unless they are not feasible or would result in greater harm to the environment. Pub. Res. Code § 25523(b).

Under the Coastal Act, the protection of the state's "natural and scenic resources is a paramount concern," and these coastal resources must be protected to prevent further deterioration or destruction. Pub. Res. Code §§ 30001(b), (c). Accordingly, the Coastal Act requires analysis of the impacts of each proposed development or project on coastal environments. *Bolsa Chica Land Trust, supra,* 71 Cal.App.4th at 506. Although all environmental impacts are relevant when reviewing a project, the Coastal Act affords enhanced protections to ESHA. *Id*. CEQA also requires that an EIR must identify and discuss which areas qualify as ESHA, and address impacts to ESHA. *Banning Ranch Conservancy, supra,* 2 Cal.5th at 930. An omission of essential information is a procedural question subject to de novo review by the courts. *Id*. at 935. In *Banning Ranch*, the Supreme Court determined the City had abused its discretion when it certified an EIR that did not identify potential ESHA or discuss it in "any substantive detail," *Id*. at 930, resulting in "inadequate evaluation of project alternatives and mitigation measures." *Id.* at 942.

ESHA is defined in the Coastal Act and the Oxnard Coastal Land Use Plan ("CLUP") as "any area in which plant or animal life or their habitats are either rare or especially valuable because of their special nature or role in an ecosystem and which could be easily disturbed or degraded by human activities and developments." Pub. Res. Code § 30107.5; Oxnard CLUP, p. IV-2. The CCC uses three criteria to help identify ESHA:

1) "A geographical area can be designated ESHA either because of the presence of an individual species of plants or animals or because of the presence of a particular habitat;"
2) "The species or habitat must be either rare or especially valuable;" and
3) "The area must be easily disturbed or degraded by human activities."[18]

The CCC's 30413(d) Report summarizes these elements and notes that habitats that exhibit "rarity, sensitivity to disturbance, and the presence of special-status species" meet both the Coastal Act and CLUP definitions of ESHA.[19] To help determine whether a habitat species is "rare," the CCC recommends using the following resources:[20]

- The list of rare, threatened or endangered species under the California or Federal Endangered Species Act;
- The list of Fully Protected species or species of special concern by the California Department of Fish and Wildlife ("CDFW");
- The list of "1b" species prepared by the California Native Plant Society;
- The CDFW List of California Terrestrial Natural Communities Recognized by the California Natural Resources Diversity Database ("CNDB").

[18] FSA at 4.2-8, citing to a CCC Memorandum: Designation of ESHA in the Santa Monica Mountains, March 25, 2003.
[19] EX. 3009 at 17.
[20] CCC Local Coastal Program Update Guide – Part I – Section 4. Environmentally Sensitive Habitats and Other Natural Resources (July 31, 2013).