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

***APPLICATION FOR CERTIFICATION FOR THE:***

***PUENTE POWER PROJECT***

**Docket No. 15-AFC-01**

# STAFF'S REPLY BRIEF AND BRIEF ON ISO REPORT


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September 29, 2017

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## I. Introduction

On August 8, 2017, the California Energy Commission Committee (Committee) assigned to conduct proceedings on the Application for Certification (AFC) for the Puente Power Project (Puente or proposed project) filed "Summary of Committee Identified Briefing Topics and Briefing Schedule," requiring opening briefs on Land Use, Biological Resources and Socioeconomics (Environmental Justice) to be submitted by September 1, 2017, and reply briefs to be submitted on September 29, 2017. Legal briefs on the California Independent System Operator's (ISO) Moorpark Sub-Area Local Capacity Study are also to be submitted on September 29, 2017. Energy Commission Staff's (Staff) response to the parties' opening briefs and brief on the ISO Study follow.

## II. Energy Commission Siting Process

Several of the Intervenors state in their opening briefs that the Final Staff Assessment (FSA) is either "defective" or that the California Environmental Quality Act (CEQA) will be "violated" if the project is approved. Many of the statements are without any citations at all or any correct legal or factual citations. The Commission may make findings "based on any evidence in the hearing record, if the evidence is the sort of information on which responsible persons are accustomed to relying on in the conduct of serious affairs. Such evidence does not include, among other things, speculation, argument, conjecture, and unsupported conclusions or opinions." (Cal. Code Regs., tit. 20. §1212(c)(2).) CEQA Guidelines also require decisions based on substantial evidence in

the record, stating that "argument, speculation, unsubstantiated opinion or narrative, evidence which is clearly erroneous or inaccurate, or evidence of social or economic impacts which do not contribute to or are not caused by physical impacts on the environment does not constitute substantial evidence." (Cal. Code Regs., tit 14, §15384.)

Many of the issues raised by Intervenor City of Oxnard (City) are arguably based on the City's perception that the proposed project is inconsistent with local laws, ordinances, regulations and standards (LORS). Yet, the City's main premise misstates the Energy Commission's regulations addressing LORS consistency. The City writes, "When evaluating LORS consistency, Commission staff must defer to an agency's determination of whether a proposed project is consistent with that agency's policies and regulations." (City Opening Brief, pg. 5, citing Cal. Code Regs., tit. 20, §1714.5(b); emphasis added.) Yet, the actual regulation does not say anything about an agency's determination of its LORS, or that the Staff must defer to that determination. Instead, section 1714.5(b) states:

> (b) Consistent with Section 1742, comments and recommendations submitted to the commission pursuant to this section regarding the project's conformance with applicable laws, ordinances, and standards under the agency's jurisdiction shall be given due deference by staff. (Cal. Code Regs., tit. 20, §1714.5(b); emphasis added.)

Giving "due deference" to a local jurisdiction's "comments and recommendations" generally requires that Staff will request and respectfully consider the local jurisdiction's comments on its applicable LORS. But, Staff's role still is to provide an independent analysis of both environmental impacts and LORS consistency (See Cal. Code Regs., tit. 20, §1710), the result of which may be that Staff does not interpret the local LORS the same as the City. And, in no case, does section 1714.5(b) state that Staff must defer to an agency's determination.

A. The Energy Commission *Process* is Equivalent to CEQA

Some of the Intervenors are confused about the Energy Commission's Certified Regulatory Program, equating a Final Staff Assessment to an Environmental Impact

Report (EIR), required under CEQA. Although Staff explained the Commission's process in-depth in the Final Staff Assessment (See Ex. 2000, Executive Summary and Introduction), it seems necessary to reiterate the process.

Pursuant to Public Resources Code, section 25519(c):

> The commission shall be the lead agency as provided in Section 21165 for all projects that require certification pursuant to this chapter and for projects that are exempted from such certification pursuant to Section 25541. . . If the commission prepares a document or **documents** in the place of an environmental impact report or negative declaration under a regulatory program certified pursuant to Section 21080.5, any other public agency that must make a decision that is subject to the California Environmental Quality Act, Division 13 (commencing with Section 21000), on a site or related facility, shall use the document or documents prepared by the commission in the same manner as they would use an environmental impact report or negative declaration prepared by a lead agency. (Emphasis added.)

As stated above, the Commission's power plant siting process is a certified regulatory program under CEQA, section 21080.5, and thus must follow the list of requirements enumerated in that section. (Pub. Resources Code, §21080.5; Cal. Code Regs., tit.14, §15251(j).) However, the Commission's siting process is more complex than a Draft and Final EIR. At the beginning of the process, the Committee, consisting of two Commissioners, holds a site visit and informational hearing, during which the proposed project and process is explained to the public, and initial public comment is taken. Then, a 180-day discovery period begins during which all parties may ask questions of another party. After the discovery period ends, Staff drafts a Preliminary Staff Assessment which by regulations is subject to a 30-day comment period (§1742(c).) In this case, the comment period was extended to 90 days to allow for the parties to review the entire document before commenting. (Ex. 2000, pg. 2-3.) During the comment period, Staff held a workshop in the City of Oxnard, lasting over 12 hours. All parties and members of the public provided Staff with comments on the preliminary assessment. The process is open and transparent to the public and extensive public outreach has been conducted during the proceeding. (See Environmental Justice Section below.)

B. The Final Staff Assessment is Not the Decisional Document.

The FSA is not the decisional document in the Commission's siting process. Unlike other CEQA processes, in the Energy Commission's certified regulatory program, the FSA serves as Staff's testimony, which is presented during evidentiary hearings. (Ex. 2000, pg. 1-2.) California Code of Regulations, section 1742(b) states:

> The staff shall prepare a preliminary and final environmental assessment of the proposed site and related facilities. Staff's final assessment is the staff's independent report that describes and analyzes the significant environmental effects of a project, the completeness of the applicant's proposed mitigation measures, and the need for, and feasibility of, additional or alternative mitigation measures. The assessment also evaluates the safety and reliability of a project. In developing its assessment, staff may rely on information submitted by parties, other public agencies, members of the public, and experts in the field, as well as any other information obtained through staff's independent research and investigation. (Cal. Code Regs., tit. 20, §1742(b).)

Because the Commission is the lead agency under CEQA, the FSA is also prepared in accordance with CEQA. (Ex. 2000, pg. 2-3.) In the Puente FSA, Staff analyzed twenty-one technical areas in a document that spanned over 1,400 pages. Staff provided an independent assessment of the project's engineering design, evaluated its potential effects on the environment and on public health and safety, considered environmental justice populations, and determined whether the project is in conformance with all applicable LORS. (Ex. 2000, pg. 1-1.) Specifically, each of the 21 technical area assessments included a discussion of applicable LORS; the regional and site-specific setting; the project's potential direct, indirect, and cumulative impacts; mitigation measures; closure requirements; conclusions and recommendations; and conditions of certification for demolition, construction and operation. (Ex. 2000, pg. 2-2.) In addition, all CEQA and LORS-related comments were responded to in the FSA.

For most local agencies, the Final EIR is the last document produced and reviewed by the public before a decision is made by the local council or board. However, during the Commission's siting process, all parties are allowed to file testimony, and in this case, rebuttal and supplemental testimony, and legal briefs. Members of the public are

encouraged to provide comments. Staff also held an FSA workshop to further discuss with the Oxnard community the changes made in the FSA in response to Intervenor and public comment. And, in this case, three sets of hearings have been held in Oxnard.

The findings of the Committee regarding environmental impacts and LORS compliance are found in the Presiding Member's Proposed Decision (PMPD), the contents of which are prescribed in the Commission's regulations, and which must be available for a 30-day public comment period. (Cal. Code Regs., tit. 20, §1745.5.) Following a public hearing, most likely during a monthly business meeting, the full Commission will make a final decision on the Puente Power Project proposal. (Ex. 2000, pg.1-2.)

C. The Project Description is Accurate, Consistent and Complete.

Intervenors Sierra Club Los Padres Chapter, Environmental Coalition of Ventura County, and Environmental Defense Center (Sierra Club) and California Environmental Justice Alliance (CEJA) assert in their Opening Briefs that the Project Description as depicted in the FSA "fails to provide an accurate and consistent Project Description" (Sierra Club Opening Brief, pg.4) and is "incorrect and deceptive to the public" (CEJA Opening Brief, pg. 15). Both of these assertions are incorrect.

Sierra Club referenced a list of project components stating that "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." (Sierra Club Opening Brief, pgs. 5-6.) While technically correct that all of the components are not on one single map, all of the components are listed on several maps in the FSA; the reason being that the Figures break down various technical components of the project for the sake of clarity. Using multiple Figures also helps where individual project components are small relative to the figure scale. Below is a list of components cited by Sierra Club, along with the FSA Project Description Figure in which the component actually appears (See Ex, 2000, beginning with pg. 3-1):

- The decommissioning and demolition of MGS Units 1 and 2 (**Figures 2 and 5**)
- 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) **(Figure 7)**
- Potential relocation of existing gas lines serving MGS 1, 2 and 3 **(Figure 1)**
- New water lines. new gas metering station and use of existing gas metering station (AFC 2-39) **(Figure 7**)
- New gas compressor enclosure (AFC 2-39; FSA 3-10) **(Figure 4 and 7)**
- Construction of new 550-foot long ammonia line (AFC 2-24) **(Figure 7)**
- 5.7 acres of construction lay down area, offices and parking (AFC 2-25) **(Figure 1)**
- Remodeled warehouse **(Figure 1)**
- Re-use of 3 retention basins (FSA 3-9) **(Figures 7 and 9**)
- Removal of the outfall structure (.09 acres) (Biological Resources Survey Report 1-3) **(Figure 5)**
- Demolition access roads (Biological Resources Survey Report Figure 1) **(Figure 5)**
- Outfall access road (1.18 acres) (Biological Resources Survey Report 1-3) **(Figure 5)**
- Transmission lines **(Figure 4)**
- Edison Canal generating station intake **(Figure 7)**

The Project Description has changed since the project was proposed in the Application for Certification. Based on agency and public comment, Applicant included the demolition of MGS Units 1 and 2 (Ex. 1064), and removal of the outfall (Ex. 1090). Both of these modifications were designed to be responsive to concerns raised and were thoroughly analyzed in the FSA. Without these project modifications, impacts to visual resources would be significant, specifically at KOP 3 (Ex. 2000, pg. 4.14-9), and access to the public beach and restoration of degraded coastal areas would be impeded (*Id*. at 4.14-23 and 4.7-15).

## III. Land Use

Staff responds to Intervenor City of Oxnard and other Intervenors' conclusions regarding the sufficiency of Staff's land use analysis below.

A. <u>The City Incorrectly States that the Public Utility/Energy Facility and Height Overlay District Are In Effect and Applicable to the Project</u>.

The City states that the Public Utility/Energy Facility and Height Overlay District land use designations contained in the City of Oxnard's 2030 General Plan apply to the project site. (City Opening Brief, pg. 9.) The City argues this interpretation is reasonable

because it resolves any ambiguity in the General Plan without "render[ing] the General Plan's height standards for the Public Utility/Energy Facility designation surplusage." (*Id.* at pg. 10, citing *Dyna-Med, Inc. v. Fair Employment and Housing Commission*.) The City contends incorrectly that if the Public Utility/Energy Facility land use designation is in effect, it must be true that the Height Overlay District is in effect as well, regardless of language in the General Plan suggesting otherwise. As Staff stated in its Opening Brief, neither the Public Utility/Energy Facility nor the Height Overlay District land use designations apply to the project because none of the new land use designations contained in the General Plan are in effect in the Coastal Zone. (Staff's Opening Brief, pgs. 8-9.) To be effective, the land use designations contained in the General Plan must be certified by the Coastal Commission, which has not yet occurred.

Additionally, the court in *Dyna-Med, Inc. v. Fair Employment and Housing Commission*, in applying principles of statutory interpretation to the interpretation of local planning documents, stated, "Statutes are to be given a reasonable and commonsense interpretation consistent with the apparent legislative purpose and intent . . . ." ((1987) 43 Cal.3d 1379, 1392 [743 P.2d 1323; 241 Cal.Rptr. 67].) The General Plan repeatedly states, "The Oxnard LCP land use designations are included for reference purposes and land use changes in the Coastal Zone indicate legislative intent but are not effective until and unless certified by the California Coastal Commission." (Ex. 2022, pgs. 1-5, 3-5, 3-14; Ex. 3020 [text box on the City's Land Use Map]; see also Staff's Opening Brief, pg. 9.) As previously noted, the California Coastal Commission has not certified the 2030 General Plan. The City's interpretation that both the Public Utility/Energy Facility and Height Overlay District land use designations are applicable is contrary to the plain language of the General Plan, and unreasonable and contrary to commonsense.

B. <u>The City Incorrectly Concludes That Inconsistency With Land Use Policies Creates Significant Impacts.</u>

Citing to *Pocket Protectors v. City of Sacramento*, the City states, "Inconsistency with land use goals and policies that were enacted to protect the environment creates a significant impact under [the California Environmental Quality Act (CEQA)] and provides evidence of other significant environmental impacts." (City Opening Brief, pgs. 4-5.) The

City misrepresents the finding in that case. The appellate court did not find that inconsistency with land use policies is, in and of itself, evidence of significant impacts under CEQA. Instead, the court found that, "if substantial evidence supports a fair argument that the proposed project conflicts with the policies of [local land use development guidelines], this constitutes fair grounds for requiring an [environmental impact report (EIR)]." (*Pocket Protectors v. City of Sacramento* (2004) 124 Cal.App.4th 903, 930 [124 Cal.Rptr.3d 791].) This finding merely echoes CEQA Guidelines, which state, "If there is substantial evidence, in light of the whole record before a lead agency, that a project may have a significant effect on the environment, the agency shall prepare a draft EIR." (Cal. Code Regs., tit. 14, section 15064(a)(1).) Contrary to the City's claim, inconsistencies with land use policies do not necessitate a finding of significant impacts.

Moreover, "State law does not require perfect conformity between a proposed project and the applicable general plan . . . ." (*Friends of Lagoon Valley v. City of Vacaville* (2007) 154 Cal.App.4th 807, 817 [65 Cal.Rptr.3d 251, 259].) California courts have recognized that "it is nearly, if not absolutely impossible for a project to be in perfect conformity with each and every policy set forth in the applicable plan . . . ." (*San Francisco Tomorrow v. City and County of San Francisco* (2002) 229 Cal.App.4th 498, 514 [176 Cal.Rptr.3d 430, 442].)[1] Instead of perfection, courts will consider whether a project "is compatible with the objectives, policies, general land uses, and programs specified in the applicable plan." (Gov. Code, § 66473.5; *supra*, *Friends of Lagoon Valley*, pg. 817.) Therefore, potential inconsistencies of the Puente project with specific land use policies may be overcome with evidence of the project's broader consistency with the City's planning documents and the Coastal Act.

C. <u>The City Incorrectly Concludes That Coastal Zoning Ordinance Processes for A Variance Apply to General Plan Policies.</u>

The City incorrectly states that "[t]he General Plan does not define the standard that the City Council would use to allow development over the height limit." (City Opening Brief,

[1] See also *Sierra Club v. County of Napa* (2004) 121 Cal.App.4th 1490, 1510-151; *Sequoyah Hills Homeowners Assn. v. City of Oakland* (1993) 23 Cal.App.4th 704, 719 [29 Cal.Rptr.2d 182], citing *Greenebaum v. City of Los Angeles* (1984) 153 Cal.App.3d 391 [200 Cal. Rptr. 237].)

pg. 11.) As stated in Staff's Opening Brief, the General Plan allows for an exceedance of the Height Overlay District's six story limitation with payment of "an impact fee and/or equivalent mitigation" and environmental review which includes shade and shadow and local wind impact analyses. (Staff's Opening Brief, pg. 8.) The City speculates that the City Council would likely apply variance procedures contained in the City's Coastal Zoning Ordinance. (City Opening Brief, pg. 11.) However, under section 17-57 of the Coastal Zoning Ordinance, "a variance may be made whenever a property owner seeks adjustment to the development standards of *this chapter* . . . ." (Oxnard Municipal Code §17-57(B)(6); emphasis added.) As explicitly stated, the variance procedure contained in Chapter 17 of the City's Coastal Zoning Ordinance applies only to policies and standards therein. Therefore, it is not appropriate to apply the variance procedure of the Coastal Zoning Ordinance to permit an exceedance of a General Plan policy.

D. <u>The City Cannot Assume That MGS Units 1 and 2 Would be Deemed a Nuisance By City Council.</u>

The City and other Intervenors argue that Mandalay Generating Station (MGS) Units 1 and 2 "constitute a nuisance in violation of the City's code" and "[t]he City is empowered to require removal of these abandoned structures." (City Opening Brief, pg. 32; see also Sierra Club Opening Brief, pgs. 7-8; CBD Opening Brief, pgs. 22-23.) Oxnard Municipal Code section 7-151 states:

> Any person or entity owning, leasing, occupying, or having charge or possession of any real property maintained in such a manner that any of the following conditions are found to exist thereon shall be guilty of creating a nuisance in violation of this code . . . (A) Buildings or structures that are abandoned . . . .

The City's argument rests on their claim that MGS Units 1 and 2 will be "abandoned" whether or not Puente is built and will, therefore, constitute a nuisance. However, the determination of whether a building or structure is "abandoned" requires discretionary action by the City Council.

Abandonment is defined as "the 'voluntary giving up of a thing by the owner because he no longer desires to possess it or to assert any right or dominion over it and is entirely indifferent as to what may become of it or as to who may thereafter possess it.'" (*Martin*

*v. Cassidy* (1957) 149 Cal.App.2d 106, 110 [307 P.2d 981, 984], citing 1 Cal.Jur.2d § 2, pg. 2.) Importantly, it is "a question of intention, to be determined only upon an investigation of all the facts and circumstances . . . ." (*Id.* at pg. 111.) Because a determination of abandonment is not merely a ministerial act, neither the City nor the Commission can conclude with certainty that the City Council will find MGS Units 1 and 2 to be abandoned under the law and, therefore, a nuisance. Without certainty that the units will be deemed a nuisance, it cannot be assumed that MGS Units 1 and 2 will be demolished regardless of whether or not Puente is built.

E. Sierra Club misrepresents the Coastal Land Use Plan's Identification of Sensitive Habitat Areas.

Sierra Club misstates the extent of potential environmentally sensitive habitat areas (ESHA) mapped by the City's Coastal Land Use Plan (CLUP). Sierra Club argues that the Sensitive Habitats Map 7 in the Oxnard CLUP shows "examples of ESHA that are mapped on the Project site." (Sierra Club Opening Brief, pg. 15.) This misrepresents the information illustrated in the Sensitive Habitats Map 7, as well as Coastal Access Land Use Amendment Map 2, Coastal Access Map Amendment Exhibit 2.4 and Coastal Land Use Map Amendment Exhibit 2.5. (Ex. 4024.)

As quoted by Sierra Club, the Coastal Commission reported that areas "surrounding the MGS site meet the Coastal Act and LCP definitions of ESHA." (Sierra Club Opening Brief, pg. 15; Ex. 3009, pg. 17.) Sensitive Habitats Map 7 illustrates CLUP-defined sensitive habitats within the Oxnard Coastal Zone boundary line, but with insufficient detail to illustrate the proposed project's location in relation to mapped sensitive habitat areas. (*Id.*) Coastal Access Land Use Amendment Map 2 and Coastal Land Use Map Amendment Exhibit 2.5 clearly show the boundary of energy facility zones in relation to resource protection zones. (Ex. 2024.) The maps show a Coastal Resource Protection (RP) subzone partially bordering the southern portion of a Coastal Energy Facility (EC) subzone, which aligns with the Coastal Commission's report regarding location of potential ESHA surrounding the MGS site.

These maps do not, however, support the conclusion that ESHA is present on the project site, as Sierra Club claims. The Coastal Commission clearly states that the proposed project site does not meet the definition of ESHA. (Ex. 3009, pg. 13, footnote 3.) In support of that conclusion, Coastal Access Land Use Amendment Map 2 shows an EC subzone specifically labeled as “Southern California Edison”—and, therefore, identifiable as the broad project area—but does not show resource protection areas or sensitive habitats on or within that labelled subzone. No resource protection areas are zoned in the proposed location of the 3-acre project site.

## IV. Biological Resources

A. Applicant’s Comments on Conditions of Certification.

In its Opening Brief, Applicant provided comments on Conditions of Certification BIO-7, 9, and 10 (Applicant’s Opening Brief, pgs. 53-54.) For Condition of Certification BIO-7, Staff previously agreed with the changes proposed. (Ex. 2006, Staff’s Rebuttal Testimony, pg. 3.) No new changes are proposed to BIO-7, and the changes were reproduced by Applicant in Opening Briefs for the convenience of the Committee.

1. Staff Proposes Minor Changes to Condition of Certification BIO-9.

In its Opening Brief, Applicant has proposed changes to Condition of Certification BIO-9. (Applicant’s Opening Brief, pgs. 53-54.) Although several of the changes have already been reviewed and accepted, Staff does not agree that all of the changes are appropriate. Staff intends that mitigation occur through a mitigation bank, and therefore, has reviewed Applicant’s proposed changes through this perspective. Staff notes that Applicant proposes a cap of $500,000 on the dollar amount to be expended in pursuit of mitigation of wetlands converted onsite. None of the parties have provided substantial evidence in the record to support this cap. Given the costs of prime land location in southern California, Staff’s position is that a mitigation acquisition cap is inappropriate in this case.

Similarly, Applicant has proposed to delete portions of BIO-9 (CI through C VII.) This proposed rejection of condition language would weaken environmental protections, and

its purpose is also unsubstantiated in the record. Therefore, Staff opposes this change and has proposed the condition of certification as follows, using **bold underlined** to denote new text and ~~strikethrough~~ to denote deleted portions. Previously agreed-upon changes are included, but not depicted in a special font.

**WETLAND IMPACT MITIGATION PLAN**

**BIO-9** The project owner shall fully mitigate for permanent impacts to on-site wetlands at a 4:1 ratio. The project owner shall provide funds to acquire mitigation land at an existing, or soon to be established, salt marsh, palustrine or estuary habitat restoration project or mitigation bank, or help fund an established**, or soon to be established,** salt marsh, palustrine or estuary habitat restoration project or mitigation bank as close to the site of impact as possible to fully mitigate impacts to Coastal Commission wetlands.

Mitigation shall occur using an established wetland restoration program or mitigation bank, with preference given to programs within the same watershed as the project (Santa Clara-Calleguas), or any other wetland restoration program approved by the CPM. The project owner shall provide the CPM a Wetland Compensation Plan (Plan). The Plan shall include:

a) Available information from the wetland restoration program manager pertaining to existing physical, biological and hydrological conditions at the mitigation sites(s), including vegetation present, hydrologic regime of the site(s), known or expected fauna at the site(s), including any known or expected listed sensitive species, known or suspected contaminants that may be present at the site(s), and an analysis of existing ecological functions and values at the sites(s). The **wetland program restoration manager or equivalent** review shall also identify any known site constraints that may limit successful creation or restoration efforts.

b) A description of legal interests at the mitigation sites(s), and any landowner approval that the project owner may need to use the proposed site(s) for wetland creation or restoration.

c) Proposed goals, objectives and performance criteria for the proposed mitigation site(s) that identify specific creation or restoration measures to be implemented, including proposed habitat types to be created or restored, grading and planting plans, the timing of the mitigation measures, and monitoring that will be implemented to establish baseline conditions and to determine whether the sites are meeting performance criteria. Monitoring shall be for at least 5 years and final monitoring for success shall take place after at least 3 years with no remediation or maintenance other than weeding. The plan shall also identify contingency measures that the ~~project owner~~ **restoration program manager** will

implement should any of the mitigation sites not meet performance criteria.

These goals, objectives, and performance criteria shall include:

I. Creation or restoration of habitat types that will support wetland-dependent species.

II. Created or restored areas shall be provided a buffer of a size adequate to ensure protection of wetland functions and values, and at least 100 feet wide, as measured from the nearest upland edge of the transition area. The plan may propose a lesser buffer width if the mitigation area is sited within existing wetland areas that are protected by a buffer meeting these criteria.

III. Measures to be implemented if soil or groundwater contamination is found at the site(s).

IV. A planting program that includes initial and ongoing removal of invasive or non-native species and identifies the vegetation species to be planted, local sources of those plants or seeds, measures needed to protect any existing native wetland vegetation species, timing of planting, plans for irrigation if needed to establish plants, and locations of plants. The plan shall also identify soil sources and amendments to be used.

V. Formal sampling design to assess performance criteria and shall identify the means by which success will be assessed. Where statistical tests are used, the plan shall include a requirement for a statistical power analysis to demonstrate that there will be sufficient replication to enable a robust test with beta equal to alpha.

VI. Topographic drawings for the final mitigation site(s) and construction drawings, schedules, and a description of equipment to be used in the project.

VII. "As-built" plans and annual monitoring reports for no less than five years or until the sites meet performance criteria.

VIII. Identify legal mechanism(s) proposed to ensure permanent protection of the mitigation site(s) – e.g., conservation easements, deed restrictions, or other methods.

**Verification:** At least 90 days prior to the start of project construction, the project owner shall submit to the CPM for approval the wetland restoration program or mitigation bank the project owner wishes to participate in. At least 60 days prior to the start of project construction, the project owner shall provide funding to support an existing, or soon to be established, salt marsh palustrine or estuary habitat restoration

project **or mitigation bank**. At least 90 days prior to the start of project construction, the project owner shall submit to the CPM a Restoration Management Plan or similar plan (used by the ~~land manager, or to be used by the land manager or~~ restoration program manager) that discusses the details of the wetland restoration program or mitigation bank.

No less than 30 days prior to the start of project construction, the project owner shall provide a written verification to the CPM that the funding has been paid in full to the ~~land manager~~ **restoration program manager** or mitigation bank approved by the CPM. The project owner shall provide evidence that payment from the funding can be used only to assist in coastal wetland restoration to mitigate the project's effects for the loss of Coastal Commission wetlands.

Thereafter, within 30 days after each anniversary date of the commencement of project operation, the project owner shall ~~obtain~~ **request** an annual report from the ~~land manager or~~ restoration program manager administering the restoration program(s) **or mitigation bank**. The annual reports will document how payments from the endowment required hereunder were used and applied to provide wetland habitat restoration/enhancement at approved locations and shall describe how implementation of the mitigation conformed to the above goals, objectives, and performance criteria. The project owner shall provide copies of such reports to the CPM within 30 days of receipt. This verification shall be provided annually ~~for the operating life of the restoration program or the project, whichever is sooner~~ **until performance criteria are achieved**.

If after five years, the restoration has not achieved the success criteria, the project owner shall submit within 90 days (of the fifth year anniversary) a revised or supplemental plan to compensate for those portions of the original plan which did not meet the approved ~~success~~ **performance** criteria.

2. Staff Proposes Changes to Condition of Certification BIO-10.

Applicant has proposed several changes to the outfall removal impacts and avoidance plan in Condition of Certification BIO-10. (Applicant's Opening Brief, pgs. 53-54.) Although minor, Applicant has proposed adding the words "publically accessible" to the condition as a bookend on how far the translocation efforts would range. Staff acknowledges that the McGrath parcel to the northeast outside the fence line is private and should not be disrupted as part of the translocation plan or biotic surveys. Staff's primary intent is to capture the lands buffering the outfall structure and the associated access road, while not interrupting or disturbing lands that western snowy plover or least tern may utilize for nesting. Therefore, Staff's recommended condition language has been slightly changed to reflect this. Other, minor proposed changes have been

incorporated as follows using **bold underlined** to denote new text and ~~strikethrough~~ to denote deleted portions. Previously agreed-upon changes are included but not depicted in a special font.

## OUTFALL REMOVAL IMPACTS AVOIDANCE PLAN

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

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

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

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

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

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

6. Protective silt fencing shall be erected around patches of sand dune mats, and inspected daily by the Designated Biologist or Biological Monitor, to ensure that no animals are entrapped, and that the fencing is in good repair. Fencing repairs shall occur within 1 business day of detection of damage.

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

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

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

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

B. For the globose dune beetle, the Translocation Plan shall describe the undertaking of a combination of pitfall traps and pedestrian transect surveys, to occur no more than seven days before the onset of any ground disturbing activity at the outfall structure. Surveys for the globose dune beetle shall be timed to occur before raking for the silvery legless lizard, which would significantly disrupt any potential dune beetle habitat. All suitable habitat at the outfall and associated access road shall be subject to surveys and capture of globose dune beetles. The Translocation Plan shall outline husbandry methods, such as keeping beetles in sterile containers with sand and leaf litter, during identification and translocation efforts. The project owner shall translocate globose dune beetles and unidentified beetles of the *Coelus* genera to suitable dune habitat immediately north or south of the ocean outfall. A Final Report will be prepared as per #8A, above.

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

B. Staff Considered the Migratory Bird Treaty Act in its Testimony.

Without any citation, CBD states in its Opening Brief that "[t]he FSA and other Staff submissions have not done enough to analyze impacts, considered avoidance or offsets to species covered under the Migratory Bird Treaty Act (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." (CBD Opening Brief, pg. 20.)

CBD's statement is both incorrect and unsupported by substantial evidence of what constitutes "enough" analysis in this case. The MBTA is clearly listed as an applicable federal law in the LORS table in the Final Staff Assessment, as well as analyzed throughout the Biological Resources section. (See Ex. 2000, pgs. 4.3-3; 4.3-15, 4.3-49, 4.3-51.) Moreover, Staff discussed potential impacts to birds during construction of the proposed project and demolition of MGS Units 1 and 2. (See Ex. 2000, pgs. 4.3-35-4.3-

38, and 4.3-40-4.2-41.) In its analysis, Staff concluded that the proposed project would be in compliance with the MBTA. (Ex. 2000, pg. 4.3-49.) Staff developed Conditions of Certification BIO-1, BIO-2, and BIO-4 to ensure that qualified biologists are on site during construction and are required to conduct pre-construction surveys. Condition of Certification BIO-8 provides for preconstruction nest surveys, protective buffers, and monitoring if nests are found. Condition of Certification BIO-5 requires the Project Owner to implement a Worker Environmental Awareness Program (WEAP) to educate workers about compliance with environmental regulations, including Fish and Game Code. (Ex. 2000, pg. 4.2-49.) Conditions are drafted to protect both common as well as protected bird species, as these are both covered under the MBTA.

Although the peregrine falcon and great horned owl were not explicitly listed in the FSA, Table 3 (Ex. 2000, pgs. 4.3-18 to 4.3-20), Staff testified that the table was not meant to be exhaustive (7/27/17 RT, pgs. 25, 256.) Still, Staff's recommended Conditions of Certification would ensure that all impacts to birds covered under MBTA would be avoided or mitigated to below the level of significance. (7/27/17 RT, pgs. 258-259.)

C. Staff Coordinated With Wildlife Agencies.

Contrary to Intervenor CBD's unsupported statement that Staff did not confer with the Department of Fish and Wildlife (CBD Opening Brief, pg.18) Staff's requirement and practice as the lead agency is to coordinate with responsible agencies throughout the proceeding. The Puente proceeding was no exception. (Ex. 2000, pg. 4.3-1.) Although it often provides contact references in the FSA, Staff is not under any legal obligation to inform the public when it contacts a sister agency to discuss a proposed power plant. (See, Ex. 2000, pgs. 4.3-80 to 4.3-87.) Under the Commission's regulations, Staff and non-party governmental agencies can discuss the pending application without notice to the public. (Cal. Code Regs., tit. 20, §1711.) Throughout the Puente project review process, Staff conferred with the California Department of Fish and Wildlife (CDFW) at least 19 times since September 2016, verbally, via email, and in a teleconference. Staff coordinated with Dr. Jonna Engle from the California Coastal Commission in writing and in person on site visits. In addition, Staff conferred with U.S. Fish and Wildlife Service (USFWS) in writing and by telephone. (See discussion below.)

D. USFWS Has Not Recommended Agency Consultation.

In its Opening Brief, CBD states that “Staff’s assumptions that the project will comply with both the CWA [Clean Water Act] and the ESA [Endangered Species Act], based on a nationwide permit, is erroneous”. (CBD Opening Brief, pg. 14.) On the contrary, Staff made no assumptions regarding project compliance, but based its testimony on the results of clear and consistent interagency coordination. Staff coordinated with the USFWS to determine the level of permitting necessary for federally listed birds occurring near the project site, specifically including the least tern and western snowy plover. Staff accomplished this through emails and phone calls throughout the duration of the project. On March 28, 2016, Staff emailed USFWS a portion of the analysis documenting indirect demolition noise impacts of the project on western snowy plover and least tern, inviting USFWS feedback with respect to potential adverse impacts. In an email on April 4, 2017, Chris Dellith, USFWS, agreed that as project-related demolition activities would occur outside of breeding season, no impacts to either of these species would be expected. No direct impacts to the species would occur, as no loss of habitat would occur under the proposed project.

USFWS filed a comment letter on the Preliminary Staff Assessment stating that a Section 10(a)(1)(b) Incidental Take Permit may be necessary. (U.S. Fish and Wildlife Service's Comments on Preliminary Staff Assessment, Aug. 18, 2016.) The letter was written before the outfall structure was slated for removal, and so no federal nexus for consultation was available.

However, with further coordination, including a telephone call in September, 2016 to discuss the USFWS comment letter, it became clear that these concerns had been resolved, due to the receipt of the outfall removal plan. (See Ex. 1090.) Staff addressed USFWS’s comments on the PSA in the FSA. (Ex. 2000, pgs. 4.3-52 to 4.3-54.) No further letters from USFWS have been received since publication of the FSA or subsequent Staff filings. Other known potential impacts associated with removal of the outfall structure are temporary and provide a net conservation benefit; no take is expected. (Ex. 2000, pg. 4.3-30). Therefore, because no take is expected, no

Endangered Species Act permit is necessary, and Nationwide Permit 7 authorizes removal of the outfall structure. (Ex.1094, pg. 80-3). No further agency consultation—formal or informal—has been recommended by the USFWS, as no take of western snowy plover or least tern is expected.

## V. Coastal Hazards

In their Opening Briefs, CDB, the City of Oxnard and the Sierra Club make arguments to support their positions that coastal hazards exist and were not adequately addressed by Staff and other parties. Staff disagrees and responds as follows.

### A. The CoSMoS Model Is The Best Available Science.

In general, Intervenors argue that the U.S. Geological Survey's (USGS) CoSMoS Model is not appropriate for use at the proposed Puente site. (CDB Opening Brief, pg. 43; City Opening Brief, pgs. 38-51; Sierra Club Opening Brief, pg. 29.) In "Committee Orders For Additional Evidence and Briefing" (March 10 Orders), the Committee ordered Staff to "conduct a noticed workshop to discuss and identify the best approach or approaches to supplement the assessment of coastal flooding risk for the Puente Power Plant through 2050." The March 10 Order provided Staff direction following the public workshop: "After identifying the best approach or approaches for assessing coastal flooding risk, Energy Commission Staff shall conduct an analysis using that approach or approaches, taking into consideration the effects of potential dune erosion, beach erosion, and change in beach angle." (March 10 Orders, pg. 2.) Staff explicitly followed the Committee order and chose the model it determined, based on consultation with USGS and other information presented at the workshop, to be the best science to supplement the assessment of coastal flooding at the Puente site. As Staff testified: "CoSMoS has been extensively tested, calibrated, and validated with local historic data on waves, water levels, and coastal change." (7/26/17 RT, pg. 219.) The fact that the model does not support the Intervenors' position does not diminish the credibility of USGS or the quality and accuracy of the model.

One of Staff's standard assumptions is that a natural gas-fired power plant is expected to operate for approximately 30 years. As stated in the FSA: "The actual useful life [of a

power plant] depends on need, location, maintenance investments, partial load cycling operation, efficiency, functional obsolescence, the addition of renewable sources of generation to the system, and frequency of starts and stops. For these reasons, the proposed 30 years of commercial operation is a reasonable timeframe for analysis." (Ex. 2000, pgs. 47-48, 123-124.). At the evidentiary hearing staff also pointed out that given the current state of science related to sea level rise, projection of rates beyond 30 years is highly speculative and use of the rates for periods of time greater than this could produce highly variable results in the modeling. (2/10/17 RT, pg. 286.) As stated above, the Committee ordered Staff to hold a public workshop to assess coastal flooding risk for the proposed Puente site through 2050, which would be 30 years from when the project is expected to be on line, if built. Therefore, Staff's assessment of coastal flooding risks for 30 years is appropriate.

1. The CoSMoS Model is Applicable to Evaluate Coastal Flooding at the Proposed Puente Site.

After conducting the public workshop on coastal flooding modeling, Staff concluded that recently released CoSMoS 3.0 Phase 2 model, which is consistent with the state guidance for sea-level rise, is the best available science to evaluate coastal flooding. (Ex. 2025 at 2-5.)

City of Oxnard and CBD assert that because CoSMoS assumes the Puente site is undeveloped, it fails to accurately predict flood risk associated with sea level rise at the site. In addition, they argue that once the Puente project is developed if the project is approved, the dune system would erode and "not offer protection." (CBD Opening Brief, pg. 43; City Opening Brief, pg. 51.)

The Intervenors are correct that CoSMoS assumes that the proposed site is undeveloped; however, that does not reduce the accuracy of the model's predictions. The CoSMoS-COAST results, assuming "no nourishment," show that the long-term shoreline at the Puente and Mandalay sites would change very little from the present-day position. (Ex. 2025, pg. 23.) This is reasonable given the relatively short timeframe of 30 years, the shoreline's orientation to seasonal ocean swells, and the abundant

storage of existing sediment provided by the Santa Clara Estuary. (Ex. 2000, pg. 4.11-43.) As a result, neither the Puente site nor the Mandalay site is shown to flood due to the 100-year storm. (Ex. 2025, pg. 22.) CoSMoS does not show flooding at the adjacent Mandalay site; therefore, if Puente is developed, it also would not flood. Furthermore, the Mandalay site has been developed for decades, but the dune system has not eroded and the beach has widened during that time. The long-term shoreline change by 2050 does not show dune erosion in front of Mandalay, where CoSMoS applies the "hold the line"[2] assumption. The Mandalay site would not flood from a 100-year storm, despite the narrower dune protection. Therefore, the Puente site, which has wider dunes, would not flood during the same storm, with or without the "hold the line" assumption.

City of Oxnard asserts that photographic evidence exists of actual coastal flooding at several locations in close proximity to the Puente site. They state this demonstrates that there are “serious shortcomings in how CoSMoS maps these results against the shoreline to show actual flood risk.” (City Opening Brief, pg. 48.) However, the City chose to cherry-pick locations near the project site that have very different topographic characteristics than the proposed site, including Oxnard Shores and Pierpont Beach, which are residential areas where native sand dunes were completely removed and paved streets essentially channeled water further inland. (Ex. 3068, pg. 6-16.) Photographs that provide both accurate geospatial data and clearly attributable flood sources are very difficult to obtain and most photographs, such as those provided by the City, cannot be used to accurately validate models. (7/26/17 RT, pgs.176-177.) Therefore, CoSMoS is still the best available science to evaluate coastal flooding. (Ex. 2025, pg. 2-5.)

2. The Coastal Conservancy Model is Not Appropriate to Evaluate Coastal Flooding.

Although the Committee’s March 10 Order does not reopen the subtopic of riverine flooding, and it was stated as such at the evidentiary hearing (7/26/17 RT, pg. 49), the

[2] “Hold the line” places a limit that is not erodible to represent existing infrastructure, such as a road, wall, or building.

City provided a flood risk analysis prepared by cbec for the State Coastal Conservancy (cbec model) that showed that flooding from the Santa Clara River would inundate the Mandalay site at a depth of up to four feet for a 100-year flood event, which the City claims is evidence that the project site is subject to substantial flood risk under current conditions. (City Opening Brief, pg. 37.) Upon closer inspection, the Coastal Conservancy report shows that inundation at the project site under current conditions would range from 0.05 meters up to 1.0 meters or from 2 inches to 3.3 feet. (Ex. 3063, Figures 5 and 6.) Applicant testified that the power plant can operate with flood levels of less than 15 feet, which is about 1.5 feet of flood water on the site. The Coastal Conservancy study fails to provide the flood depth information needed to determine that flooding would be deep enough to cause a shutdown of plant operations. (7/26/17 RT, pgs. 216-217.) The inability to distinguish between flooding that is 2 inches deep and flooding that is 3.3 feet deep cannot provide sufficient evidence of substantial flood risk.

The City incorrectly asserts that the cbec model is the only evidence of the combined effects of coastal and river flooding under current and future conditions over the next 30 years. (City Opening Brief, pg. 41.) The City implies that the Coastal Conservancy does not support the CoSMoS model, when in fact CoSMoS was funded by and continues to be supported by the Coastal Conservancy. (Ex. 2030, pg. 2.) Both CoSMoS and the cbec models assess the potential flood risks for the project site under combined coastal and river flood conditions, but these models are significantly different.

First, each model's assumptions regarding the rate of discharge from the Santa Clara River represent two completely different situations. The cbec model assumes that the 100-year coastal storm event occurs simultaneous with the 100-year riverine event. (7/26/17 RT, pg. 230.) Instead, CoSMoS estimates the most likely river discharge rates based on prevailing atmospheric conditions during the 100-year coastal storm event. (Ex. 2025, pg. 13.) USGS estimates that for the Santa Clara River, discharge rates are on the order of a 10-year event. (7/26/17 RT, pg. 137.) The City asserts that CoSMoS fails to include a comprehensive analysis of river flooding because it does not model the 100-year river event. (City Opening Brief, pg. 40.) This is an unreasonable assumption because the likelihood of two 100-year events occurring simultaneously is very rare

statistically. (7/26/17 RT, pg. 245.) Flood risks should be based on the one percent annual chance event (100-year event) consistent with engineering standards for flood design. (Ex. 2000, pg. 4.11-128.)

Second, each model was designed for very different purposes. The CoSMoS model was developed to assess coastal hazards due to climate change and the cbec model was developed to assess flooding of the Santa Clara River. (Ex. 3063, pg. 2; 7/26/17 RT, pg. 95.) Although cbec states that the model was recently updated to evaluate potential flood risks to the Mandalay site under combined coastal and river flood conditions, it simply adjusted the oceanic water level to represent present-day and future conditions. Ocean water levels are assumed to be static for present-day and future conditions (7/26/17 RT, pg. 230), and water level elevations were provided at the recommendation of the City's expert witness, Dr. Revell. (Ex. 3063.) The Coastal Conservancy report presents various scenarios during the 100-year riverine flood event, and does not include any consideration for wave action, littoral transport, or sediment transport. (*Id*.) The cbec model does not simulate the complex interplay between and amongst the ocean, the river, and adjacent floodplains, and, therefore, does not substantively contribute to the discussion of coastal flooding.

3. The Coastal Resiliency Model is Too Conservative.

The City argues that the Coastal Resilience approach conforms to the FEMA flood risk guidelines and CoSMoS does not. (City Opening Brief, pgs. 47-48.) The City continues, stating that "when assessing dune erosion, CoSMoS also models only the erosion caused by a single 100-year storm. It does not take into account erosion from multiple storms that could occur, particularly during an El Nino year." (*Ibid*.) Maps produced by CoSMoS and FEMA do not represent the same type of coastal hazard. (7/26/17 RT, pg. 139.) The City is incorrect in stating that CoSMoS models only the erosion caused by a single 100-year storm. While CoSMoS assumes that the 100-year storm occurs once, its long-term shoreline change incorporates all winter storms occur during the 30-year timeframe based on global climate models. (Ex. 2025, pg. 13.)

While the Coastal Resilience model may follow the basic steps of FEMA Guidelines to estimate the beach erosion and recession associated with storm events, the use of a storm of unlimited duration is unreasonable and is not recommended by FEMA. The FEMA Final Draft Guidelines for Coastal Flood Hazard Analysis and Mapping for the Pacific Coast of the United States, states: "Unless there is site-specific information or guidance for using multiple storms, it is recommended that a single storm analysis be used." (Ex. 3062, pg. D.4.4-25.) No such verifiable information or guidance is in the record. In addition, the Coastal Resilience model also assumes that the dune system at the Puente and Mandalay sites would be entirely eroded. (7/26/17 RT, pgs. 255-257.) This assumption alone is unnecessarily extreme. When combined with other conservative assumptions, such as maximum storm wave events with unlimited duration, the overall result is a scenario that is unreasonable. (7/26/17 RT, pg. 220.) Flood risks should be based on the one percent annual chance event (100-year event) consistent with engineering standards for flood design. (Ex. 2000, pg. 4.11-128.)

B. <u>The Flood Risks at the Site are Low.</u>

Staff concluded that the flood risk at the Puente site is low, even when considering the effects of flows from the Santa Clara River during a simultaneous inland storm. (Ex. 2025, pg. 15.) The City contends that Staff did not conduct an independent analysis of riverine flooding because it relied on FEMA maps. (City Opening Brief, pg. 37.) However, FEMA maps are a currently accepted standard for engineering analysis in and around flood areas and they are appropriate to assess present flood risk from the Santa Clara River. The Coastal Commission's conclusion on riverine flood risk uses an overly conservative approach and the Coastal Conservancy comments were based on a study not originally intended to evaluate flood risk near the project site. (See Ex. 3058.)

The City states that in 1969, a flood damaged the power grid and MGS Units 1 and 2 so they were not able to generate power for several days. (City Opening Brief, pg. 36.) The City is citing a resident who, during the public comment period held on February 10, 2017, stated her recollection of an event in 1969. She stated, "But one of the things that interested me was the power plant was not operational for several weeks there because of the coastal flooding." (2/10/17 RT, pg. 125.) However, there is no evidence in the

record to support this statement that the power plant was not operational or coastal flooding caused damage. (*Id.*) Anecdotal public comment is not substantial evidence to support a finding.

The City also claims that Staff did not conduct an "independent assessment of inundation risk to the facility, such as wave runup or overtopping." (City Opening Brief, pg. 42.) First, inundation is different from wave runup or overtopping. Staff's assessment was based on information from Applicant that standing water (inundation) at 15 feet, NAVD 88 would stop operations. Second, Applicant did not indicate whether any other wave condition or water condition, such as wave runup or overtopping, would stop operations. (7/26/17 RT, pg. 267.) As stated above, the Coastal Conservancy study does not provide enough information for Staff to conclude that flooding would be deep enough to cause shutdown of operations. (7/26/17 RT 216-217.) Staff maintains that CoSMoS is the best available science for modeling floods and provides flood-depth information needed to determine if the power plant can operate. Additional modeling is unnecessary. (7/26/17 RT, pg. 221.)

## VI. Environmental Justice

CEJA misstates facts and relies on its desired outcomes, not citations to relevant law, in concluding that the FSA failed to adequately identify environmental justice impacts. Staff responds to CEJA and other Invervenors' conclusions regarding the sufficiency of Staff's environmental justice analysis below.

### A. CEJA incorrectly claims that the Public Utilities Commission concluded that Oxnard is a "disproportionally burdened, environmental justice community."

Without citation, CEJA states that the "final decision by [California Public Utilities] Commissioner Peterman confirmed" and "the [California Public Utilities Commission (CPUC)] record shows that Oxnard is a disproportionally burdened, environmental justice community." (CEJA Opening Brief, pg. 2.) This is inaccurate. In fact, the CPUC decision merely notes that CEJA has claimed Oxnard to be disproportionately affected. (CPUC Decision 16-05-050, May 26, 2016, pg. 16, quoting CEJA's Opening Brief to the CPUC.) While the CPUC decision acknowledged CEJA's argument, CPUC concluded

that an environmental justice evaluation was not required for their proceeding and deferred consideration of environmental justice matters to the subsequent California Energy Commission proceeding.

> A major CEJA contention is that Pub. Util. Code § 399.13 mandates environmental justice review in our review of this contract . . . . Section 399.13(a)(7) states in pertinent part that in both "soliciting and procuring renewable energy . . . , each electrical corporation shall give preference to renewable energy projects that provide environmental and economic benefits to disadvantaged communities." However, as CEJA itself notes, this section is on its face only applicable to Commission review of renewable procurement. . . . Environmental justice issues are also applicable within the CEC's CEQA review. The CEC will more fully develop the environmental justice and siting issues in CEC Docket 15-AFC-01 (Application for Certification of Puente Project by NRG).

(*Id*. at pgs. 17-18.) CEJA's claim that the CPUC found that Oxnard is a "disproportionately burdened, environmental justice community" is, therefore, not accurate.

Furthermore, CEJA relies on CalEnviroScreen in concluding Oxnard is "disproportionally burdened," but CalEnviroScreen does not illustrate disproportionate impacts. (CEJA Opening Brief, pg. 3.) As clarified at the Evidentiary Hearings in February, CEJA mistakenly equates "disproportionally burdened" communities with "disadvantaged" communities. (2/8/17 RT, pgs. 253-254.)

Federal and state anti-discrimination laws are aimed at addressing potentially disproportionate impacts on protected communities. For that reason, Staff includes in its environmental justice analysis a review of whether any impacts would disproportionately affect an identified environmental justice population. (Ex. 2000, pg. 4.5-1.) CalEnviroScreen, on the other hand, is a tool used to identify census tracts as "disadvantaged," or those census tracts having a CalEnviroScreen score at or above the 75th percentile. (Ex. 2000, pg. 4.5-5.) CalEnviroScreen is a measure of factors that affect the potential for pollution impacts in a community, but does not provide sufficient information to determine a potential disproportionate impact on an identified environmental justice community. To determine disproportionality, Staff compares environmental justice communities and non-environmental justice communities within

the project's six mile area of impact. (Ex. 2000, pg. 4.5-3.). Staff concluded in its evaluation of the proposed project that there are no disproportionate impacts to environmental justice communities. (*Id*. at pg. 4.5-1.)

B. CEJA incorrectly claims that Puente will "impose additional burdens" on the City of Oxnard population.

CEJA states, "Adding [Puente] to the cumulative effects of existing pollution sources would impose additional burdens on an already heavily disadvantaged and vulnerable population. (CEJA Opening Brief, pg. 3.) The phrase "additional burdens" implies that project impacts would contribute to or further existing impacts in the project area. However, there is no analysis on the record to support this statement. CalEnviroscreen cannot be used to support CEJA's statement, because "[t]he score does not provide quantitative information of cumulative impacts for specific sites or projects." (Ex. 2000, pg. 4.5-6; 2/10/17 RT, pg. 318.) Staff's analysis, which does not solely rely on CalEnviroScreen, concludes that the construction and operation of Puente would not cause significant direct, indirect, or cumulative environmental justice impacts. (Ex. 2000, pg. 4.5-1.) CEJA's claim regarding cumulative impacts on an environmental justice community is unsubstantiated.

C. CEJA incorrectly states that CalEnviroScreen includes information about pollution exposure.

CEJA states that CalEnviroScreen "provides information about pollution exposure." This is incorrect. CalEnviroScreen does not take into account exposure or pathways of exposure. In fact, the California Environmental Protection Agency's CalEnviroScreen 3.0 Update to the California Communities Environmental Health Screening Tool Report plainly states, "[no] data are available statewide that provide direct information on exposures . . . ." Instead, CalEnviroScreen relies on data as indicators of potential exposures regarding pollution. (2/8/17 RT, pg. 253.) CEJA overstates the utility of CalEnviroScreen, which does not provide quantitative information or a measure of health risk. (Ex. 2000, pg. 4.5-6.)

D. CEJA claims that Staff was required to compare potential impacts to the Moorpark sub-area.

CEJA repeatedly claims the appropriate methodology to determine whether a project would have a disproportionate impact on an environmental justice community is to compare potential impacts on the environmental justice community to non-environmental justice communities in the "Moorpark sub-area" (CEJA Opening Brief, pgs. 4, 7, 13, 21, 22, 24, 25, 27, 28.) CEJA concludes that Staff's environmental justice analysis fails by only comparing potential impacts between communities within six miles of the proposed project. (*Ibid*.)

To support its argument, CEJA relies on *Darensburg v. Metropolitan Transportation Commission*, in which the court considers whether a plaintiff has proven that a facially neutral practice causes a disproportionate adverse impact on a protected class. ((9th Cir. 2011) 636 F.3d 511, 519.) The court held that the plaintiff was unable to establish the necessary burden of proof because they had not provided statistical evidence demonstrating impacts on minorities compared to the broader population base of transit users. (*Id*. at 522.)

CEJA misconstrues the case in applying it to the Puente proceeding, forcing an analogy between two disparate sets of facts and imagining requirements not stated in law. CEJA ignores federal and California law relied on by the court, and selectively pulls language from the case to create a three-part mandatory test for environmental justice analyses. (CEJA Opening Brief, pg. 8.) Without appropriate citation to law, CEJA has not presented an applicable test for the sufficiency of an environmental analysis.

CEJA also quotes *Darensburg* regarding the need for comparative analysis necessary to establish a disproportionate impact: "'the appropriate inquiry is into the impact on the total group to which the policy or decision applies,'" and "plaintiffs . . . had to present information about the specific projects' impacts." (*Supra*, *Darensburg*, pg. 520; CEJA Opening Brief, pg. 13.) CEJA argues the population of the Moorpark sub-area is the appropriate population base, because it is the area in which new generation is needed.

(CEJA Opening Brief, pg. 13.) This is clearly not in line with the court's holding, as it does not reflect the proposed project's potential impact area.

Staff provides a project-specific analysis within the geographic area that could be affected directly or indirectly by project impacts. (Ex. 2000, pgs. 1-1 to 1-2.) The geographic extent of the proposed project's potential impacts do not exceed a six-mile radius from the project site, based on the Staff's conservative determination of the maximum distance where air quality impacts are expected to occur, within a margin of safety. (Ex. 2000, pgs. 4.1-56 and 4.1-86.) To consider impacts beyond the six-mile radius would be inappropriate; it would not provide an accurate comparison of potential impacts relevant to the proposed project.

Furthermore, CEJA offers no clarity on what constitutes the extent of the Moorpark sub-area to which project impacts are to be compared. The Moorpark sub-area—or more accurately, the Moorpark Local Capacity Sub-area—is the name of a regional transmission interconnection network; it does not correlate to geographic city and county boundaries. (Ex. 9000, pg. 5, Figure 2-1.) Specific cities may be described as within the Moorpark Local Capacity Sub-Area, in that they are served by the interconnection network, but the network does not correspond to defined populations or communities for the purpose of an environmental assessment. (*Ibid*.) CEJA's demand that an environmental justice analysis be conducted in comparison to the Moorpark sub-area cannot be fulfilled.

E. Intervenors' Concerns Regarding Public Health and Air Quality Impacts On Students and Farmworkers in the Environmental Justice Community Are Addressed In Staff's Analysis.

CEJA and Fighting for Informed Environmentally Responsible Clean Energy (FFIERCE) raise concerns regarding pollution exposure to school-age Oxnard youth and farmworkers, sometimes one in the same, within identified environmental justice communities. (CEJA Opening Brief, pg. 26; FFIERCE Opening Brief pg. 2.) At the Evidentiary Hearings in February, Staff clarified how the public health and air quality analyses took these communities into consideration. Ambient air quality standards are designed to protect the young, the old, and those with preexisting health conditions,

such as asthma, and assume an exposure time of 70 years for a resident. (2/10/17 RT, pg. 315.) The modeling is a conservative estimate of potential impacts from pollutants. (*Id*. at pgs. 315, 317.) Because the air quality modeling did not show any significant impacts for sensitive receptors in the residential population, the conclusion follows that there are no significant impacts to people, including students or workers, who come in and out of the community. (*Id*.)

F. FFIERCE's Concerns Regarding Public Outreach Ignore Evidence On The Record and Are Late Comments On An Ongoing Process.

FFIERCE raised concerns regarding outreach efforts to facilitate the inclusion of community members. (FFIERCE Opening Brief, pg. 3.) Staff clearly outlined the steps that had been taken leading up to the Evidentiary Hearing in February regarding outreach efforts. Before Applicant even submitted a complete application, Staff and the Public Advisor's Office coordinated to contact local elected officials, Native American tribal groups, and community groups, including farm worker associations. (2/8/17 RT, pg. 214.) Staff also contacted surrounding property owners as well as surrounding political jurisdictions, school districts, state and federal agencies, and local libraries. (*Ibid*.) After the application was filed, notices were docketed and mailed out to the contact list in English and Spanish. (*Id*. at pgs. 214-215.) Additionally, the Public Advisor's Office made a presentation regarding the siting process at the Oxnard City Council meeting, and site visits, informational hearings, and environmental scoping meetings were held in Oxnard. (*Id*. at pg. 215.) After the Preliminary Staff Assessment was completed, the Executive Summary was translated into Spanish, and Staff held a public workshop to inform and engage the community, with simultaneous Spanish interpretation services available. (*Id*. at pgs. 215-216.) Similarly, after responding to public and party comments, Staff published its Final Staff Assessment with additional sections translated into Spanish and with audio interpretation available at the subsequent workshop. (*Id*. at pg. 216.) A claim now, at the close of the proceedings, that the outreach and translation services fall short is a meritless and late comment on a process that has continued and advanced throughout these proceedings.

## VII. Air Quality

At the August 12, 2017, Prehearing Conference, the Committee requested that Staff and the Applicant explain and justify the difference between Staff's use of an eleven percent capacity factor in evaluating the adequacy of CEQA mitigation for air quality impacts, compared to the permitted twenty-four percent capacity factor. (8/12/17 RT, pg. 93.)

The proposed Puente project is permitted for a maximum of 2,150 hours per year at full load operation of the combustion turbine. (Ex. 2000, pg. 4.1-26.) This is equivalent to an annual full load capacity factor of approximately twenty-four percent. (*Ibid*.) The applicant cannot determine the exact operating hours and duration for the Puente due to variable demand in the service area; however, this twenty-four percent represents the maximum permitted operation of Puente per year. (*Ibid*.) Staff used the total air emissions at 2,150 hours of operation and meteorological data to determine the worst case meteorological condition to calculate the maximum impacts.

However, in determining the appropriate air quality mitigation measures—in addition to those required by the Air District—Staff calculated an expected reasonable worst case of operations. Staff used the Quarterly Fuel and Energy Report (QFER) Data over five years (2011-2015) in the Big Creek Local Reliability Area, in which Puente would be sited and operate. (Ex. 2000, pg. 4.1-49 – 4.1-50.) Staff concluded that the equivalent of the proposed Puente project, if dispatched instead of MGS Units 1 and 2, would have operated at an average maximum capacity factor of about 7.86 percent from 2011 to 2015 and any two years' average during that time was below eleven percent. (*Ibid*.)

All projects within the associated Local Reliability Area have a capacity factor of less than eleven percent. (*Id*. at 4.1-51.) Based on review of recent data, Staff, therefore, recommended an estimated eleven percent annual capacity factor, equivalent to approximately 964 hours per year, for purposes of evaluating the adequacy of CEQA-required emission offsets. (Ex. 2000, pg. 4.1-50, 4.5-75.) Using the eleven percent annual capacity factor, as well as other conservative assumptions (e.g., worst case meteorological conditions or the continued operation MGS Unit 1 and Unit 3), Staff

recommended mitigation based on reasonable worst case operations for Puente. (*Ibid*.; 2/7/17 RT, pg. 92.)

This is approach is certainly adequate under CEQA, which requires review in light of what is "reasonably feasible." (Pub Resources Code, § 15151.) Staff's analysis is not mere speculation, but a detailed review of a feasible operating profile based on relevant historical records and use of simple cycle combustion turbines in the State. The emission offsets determined using the eleven percent capacity factor are consistent with measures used statewide to mitigate CEQA-related air quality impacts. (2/7/17 RT, pg. 90.)

As noted above, this eleven percent capacity factor was used to compute the amount of mitigation necessary to address expected impacts, but it was not used to model worst-case potential project impacts. Using 2,150 hours of operation/emission and five years of meteorological data from the Big Creek Local Reliability Area, which equates to approximately 43,800 hours, Staff determined "worst case, hourly, three-hour, eight-hour, daily and annual impacts" for purposes of conducting air quality modeling. (2/7/17 RT, pg. 92) Based on the modeling results, Staff concluded that Puente would not adversely impact ambient air quality standards. (Ex. 2000, pg. 4.1-165.)

## VIII. Alternatives

Intervenor City of Oxnard asserts that Staff's Alternatives analysis is "legally defective" and that "CEQA requires a broader range of Alternatives." (City Opening Brief, pgs. 17-18.) It is clear the City does not agree with Staff's conclusions, though the City does not in any way demonstrate that Staff's analysis was legally defective. Staff's screening of alternative sites was comprehensive, and its analysis included in-depth examinations of alternative sites and onsite reconfigurations, consideration of preferred resources, as well as discussions of synchronous condenser and clutch technologies. Moreover, the City is mistaken that CEQA requires a "broader range" of alternatives when in fact, the CEQA Guidelines state: "There is no ironclad rule governing the nature or scope of the alternatives to be discussed other than the rule of reason. (*Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553 *and Laurel Heights Improvement*

*Association v. Regents of the University of California* (1988) 47 Cal.3d 376)." (CEQA Guidelines, Cal. Code Regs., tit.14, §15126.6(a.)

CEQA Guidelines are clear that it is the lead agency, in this case the Energy Commission, which is responsible for selecting and examining a range of project alternatives for examination. (CEQA Guidelines §15126.6(a.) Furthermore, the Guidelines state that an Environmental Impact Report:

> shall describe a range of reasonable alternatives to the project, or to the location of the project, which would feasibly attain most of the basic objectives of the project but would avoid or substantially lessen any of the significant effects of the project, and evaluate the comparative merits of the alternatives. An EIR need not consider every conceivable alternative to a project. Rather it must consider a reasonable range of potentially feasible alternatives that will foster informed decisionmaking and public participation. (Cal. Code Regs., tit.14, §15126.6(a); emphasis added.)

Additionally, an environmental document is not required to consider alternatives that are infeasible. An EIR "is required to make an in-depth discussion of those alternatives identified as at least potentially feasible." (*Sierra Club v. County of Napa* (2004) 121 Cal.App.4th 1490, 1504, fn. 5.) "'Feasible' means capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, legal, social, and technological factors." (Cal. Code Regs., tit.14, § 15364.) Furthermore, an EIR should have identified any alternatives rejected as infeasible during the scoping process along with the reasons why those alternatives were found infeasible. (*Citizens of Goleta Valley v. Board of Supervisors*, (1990) 52 Cal.3d 553, 569.)

Staff meticulously followed the CEQA Guidelines in drafting its 163-page Alternatives section of the FSA. Staff included an entire subsection on the alternatives screened by Staff, but not carried forward for further consideration. The CEQA Guidelines instruct that:

> The key question and first step in analysis is whether any of the significant effects of the project would be avoided or substantially lessened by putting the project in another location. Only locations that would avoid or substantially lessen any of the significant effects of the project need be considered for inclusion in the EIR. (Guidelines, §15126.6(f)(2).)

Originally, Staff identified 85 presumed brownfields that were thought to meet the listed criteria, and described in detail the reasons not all of these sites were considered for a detailed analysis. (Ex. 2000, pgs. 4.2-21 to 4.2-24.) Furthermore, Staff analyzed Preferred Resources in the FSA, concluding:

> On May 26, 2016, the CPUC approved SCE's contract for a new 262-MW simple-cycle natural gas-fired facility at the project site. In approving the contract, the CPUC has effectively found that preferred resources, beyond those assumed to be developed in setting the LCR for the Moorpark sub-area, a share of which was procured by SCE in response to its RFO, could not feasibly and reliably be counted on to cost-effectively meet local reliability needs. (Ex. 2000, pg. 4.2-14.)

Staff also discussed clutch and synchronous condenser technologies, stating that "technical feasibility does not address the questions of need, function, or economics." (Ex. 2000, pg. 19.) Thus, the City's claim that Staff needed to provide a "broader range" of Alternatives than was provided is factually and legally incorrect.

At the August 27, 2015, Energy Commission Environmental Scoping Meeting and Informational Hearing held in Oxnard, City planning staff presented five alternative sites for Staff to consider in its evaluation of project alternatives for the proposed project. (TN 206301.) The City later added another site, which Staff aggregated into two sites, for a total of seven alternative sites. Staff comprehensively evaluated these sites and concluded that only two of the sites would be evaluated in detail, along with two reconfigurations of the Puente site and the no project alternative. (Ex. 2000, pgs. 4.2-24 to 4.2-29.)

A. Staff Analyzed Plume Impacts Using One or More Smaller Turbines

The City states without any supporting evidence that "Puente is much larger than necessary to satisfy the Moorpark area's existing need…" (City Opening Brief, pg. 24.) And, the City asserts that the "FSA improperly ignored an alternative of a smaller gas turbine." (*Id*.)

The City cites to *Preservation Action Council v. San Jose* to support its position that a reduced-size alternative must be considered. The court in *Preservation Action Council* agreed with the trial court that the City was in error because "[n]either the FEIR nor the administrative record contains any meaningful detail or independent analysis of the validity" of the developer's claim that the reduced-size alternative was infeasible, and the City Council made no specific finding validating that claim. (*Preservation Action Council v. City of San Jose* (2006) Cal.App.4th 1336, 1357.) However, in this proceeding, the facts are very different. As part of the March 10 Orders, the Committee requested an analysis of the use of one or more smaller (50-100 MW) turbines at the Del Norte/Fifth Street Off-site Alternative and the Ormond Beach Area Off-site Alternative. This analysis was designed to help determine whether it is feasible to reduce or eliminate the identified potential impacts to aviation at these alternative sites.

In response to this order, Traffic and Transportation and Air Quality staff evaluated the thermal plumes that would be generated by one or more smaller combustion turbine generator (CTG) designs at the alternative sites and determined the resulting impacts to aviation. Staff also evaluated whether the exhaust stacks of the smaller turbines would penetrate navigable airspace at the alternative sites and require the applicant to file a "Notice of Proposed Construction or Alteration" (Form 7460-1) with the Federal Aviation Administration (FAA), to initiate the FAA's obstruction hazard review of the structures. (Ex. 2025, pg. 29.)

Staff determined that with the use of either alternative CTG design (LM6000 or LMS100) plume impacts to aviation at the Del Norte/Fifth Street Off-site Alternative would be significant and unmitigable, as with the Puente design at this off-site location. (Ex. 2025 pg. 29.) Staff testified that impacts to aviation with use of either alternative CTG design at the Ormond Beach Area Off-site Alternative would be "significant [and] unmitigable based on information from Naval Base Ventura County." Military operations regularly fly over this site at low altitudes and the extent of the varied military operations at the site is much greater than Staff previously understood. Staff concluded that plumes at the site could endanger military aircraft and substantially disrupt military operations. (7/27/17 RT, pg. 26.)

Staff correctly did not consider the Mission Rock Site a feasible alternative to Puente. The City's position that the proposed Mission Rock Energy Center is somehow a superior alternative to the Puente project is pure speculation since an environmental analysis has not been completed. Factors that may be taken into account when addressing the feasibility of alternatives include "whether the proponent can reasonably acquire, control or otherwise have access to the alternative site." (CEQA Guidelines, §15126.6, subd. (f)(1)). Staff considered the status of the site's ownership and the proposal to the Energy Commission for the Mission Rock Energy Center and concluded, with reason, that the Mission Rock site is unlikely to provide a potentially feasible location for an alternative to the proposed project.

## IX. ISO Report

### A. Introduction

On May 1, 2017, during the California Independent System Operator (ISO) Board of Governors meeting, Intervenor City of Oxnard's witness, James Caldwell, offered public comments on behalf of the Center for Energy Efficiency and Renewable Technologies and the City of Oxnard. He requested that the ISO study the scenario described in the Caldwell Proposed Testimony as part of its 2017 Transmission Planning Process. (TN 217720, pp. 5-6.) Neither Staff nor the Applicant was in attendance at the ISO meeting to offer their perspectives. In the "Committee Order Granting Applicant's Motion to Exclude the Supplemental Testimony of James H. Caldwell and Accepting the California Independent System Operator's Offer to Conduct a Special Study" (June 9 Committee Order), the Committee accepted the ISO offer to conduct a special study and listed the issues that would be most helpful for the ISO to address:

1. The necessary resources are in place to meet the reliability need in the Moorpark subarea in 2021 with timely Once-Through Cooling (OTC) compliance;

2. The current OTC compliance deadline(s) for Ormond Beach Units 1 & 2 and Mandalay Units 1 & 2 of December 31, 2020 are not extended and the facilities retire;

3. Include presently existing generation, contracted generation, and preferred resources and storage the ISO expects to be on line to meet reliability needs in the Moorpark subarea by 2021; and

4. To the extent that it may be helpful in identifying the type and quantity of new preferred resources and storage that could be available by 2021, the ISO may choose to review and consider SCE's 2015 Preferred Resources Pilot RFO, 2016 Aliso Canyon Energy Storage RFO, and the 2016 Aliso Canyon Design, Build, and Transfer RFP. (June Committee Order, pgs. 4-5.)

The ISO Moorpark Sub-Area Local Capacity Study (ISO Study, Ex. 9000) was published on August 16, 2017, and developed three alternative resource scenarios to meet the Moorpark local capacity requirement (LCR) in the absence of Puente. (Ex. 9000, pgs. 1-2.) Each scenario included a base case of 135 MW of incremental distributed resources, "consisting of 80 MW of energy storage enabled demand response resources, 25 MW of incremental photovoltaic solar/energy storage hybrid resources, and approximately 30 MW of existing slow responding demand response resources coupled with incremental energy storage to enable to these resources to meet local contingencies." (Ex. 9000, pg.1.)

Under the Warren-Alquist Act, the Energy Commission's enabling statute, the Commission no longer conducts a "need" analysis. As stated, in part, "Before the California electricity industry was restructured, the regulated cost recovery framework for power plants justified requiring the commission to determine the need for new generation, and site only power plants for which need was established. Now that power plant owners are at risk to recover their investments, it is no longer appropriate to make this determination." (Pub. Resources Code, §25009.)

If the Commission determines that a proposed project does not conform with any applicable state, local or regional LORS, the Commission may not certify an application for a facility "unless the commission determines that the facility is required for public convenience and necessity and that there are not more prudent and feasible means of achieving public convenience and necessity. In making the determination, the commission shall consider the entire record of the proceeding, including, but not limited

to, the impacts of the facility on the environment, consumer benefits, and electric system reliability . . .” (Pub. Resources Code, §25525.)

B. The ISO Study does not determine the feasibility of preferred resources as an alternative to Puente.

The ISO Study was designed to consider primarily the technical feasibility of preferred resources as alternatives. Although cost figures for the three scenarios were also included, most of the parties testified that the cost of preferred resources has declined, making the Study cost estimates too high. Neil Millar, testifying on behalf of the ISO, said that they were “not trying to pick the best alternative….” (9/14/17 RT, pg. 88.) Mr. Millar further testified:

> First, the study does demonstrate that there are technologically feasible alternatives relying on preferred resources that could meet the need otherwise met by the proposed Puente Project. These alternatives meet the relevant mandatory planning standards the ISO considers in our studies of grid reliability. These preferred resource alternatives do offer various tradeoffs of other impacts and benefits. For example, environmental, economic, grid reliability, and other performance considerations. (9/14/17 RT, pg. 13.)

As stated above in the Alternatives section, in order for an alternative to a project to be feasible it must be “capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, legal, social, and technological factors.” (Cal. Code Regs., tit.14, § 15364.) Some of the Intervenors testified that they had not conducted a site-specific Moorpark analysis. (9/14/17 RT pg. 300.) Others had questions about potential load shedding and the impact on customers. The ISO Study demonstrated that the selected preferred alternatives are technically feasible, but did not demonstrate the timing, economic or environmental factors required because there is no actual defined alternative proposed. The ISO, Applicant, Intervenors, and SCE all testified that in order to evaluate the other feasibility factors, an actual project must be bid into the California Public Utilities Commission’s (CPUC) procurement process. (9/14/17 RT, pgs. 17, 89, 93-94, 192, 208, 229.)

1. Economic feasibility remains an issue.

The parties agreed that costs of preferred resources represented in the ISO Study were higher than costs actually are today. (9/14/17 RT, pgs. 15, 182, 185, 190.) However, an SCE witness stated that price declines may not be as significant as some of the parties commented. (9/14/17 RT, pg. 133.) Additionally, in reality, costs would not include just capital costs; however, the ISO Study only considered capital costs not lifecycle costs. (9/14/17 RT. Pg. 15.) Other costs for fuel, operation and maintenance and potential load shedding were also not factored in. (9/14/17 RT, pgs. 80, 119, 122, 219, 221.) The parties seem to agree that in order to determine economic feasibility, an actual project must be bid in the Request For Offers (RFO) process. As Mr. Millar testified "the only way to test the economic feasibility of the preferred resource options is to conduct an RFO specifically targeted to procuring those resources." (9/14/17 RT, pgs. 15-16.)

2. The timing of preferred resources is a potential issue.

The Puente Project is proposed to begin operations in 2020. Although the Intervenor's witnesses seemed optimistic that preferred resources could be on line to meet this date, SCE and NRG testified to obstacles that could make the date unrealistic. SCE testified that not all contracts come into fruition, citing potential issues with permitting, interconnection, market forces, performance, and significant costly upgrades needed that could preclude the developer from moving forward on a project. (9/14/17 RT, pgs. 146-150.)

Applicant testified that preferred resources would need to be on line by December 2020. Applicant's witness, Dawn Gleiter, testified:

> [G]iven the amount of time that it takes to conduct an expedited RFO, even an expedited RFO, enter into the contracts and have them approved by the PUC and deploy resources, I just quite frankly don't see how this is possible. (9/14/17 RT, pgs. 272-273.)

There are also potential issues with demand response programs. (9/14/17 RT, pg. 216.) Ms. Gleiter further testified that, based on her experience with demand response contracts, there can be issues with sufficient customer load, customer adoption,

participation, retention, and difficulty with obtaining demand response contracts for 20 years. (9/14/17 RT, pgs. 268-271, 301-302.)

The timing of obtaining site control and interconnection are issues that were raised during the evidentiary hearings. SCE witness, Randir Sekhon, was asked about the speed of the ACES RFO, to which he replied that it was built quickly because there was an existing site and interconnections. (9/14/17 RT, pg. 240.) Ms. Gleiter testified that NRG's "interconnection processes when we enter into the queue at minimum are 18 months and can be as long as four years...." (9/14/17 RT, pg. 345.)

3. Environmental impacts were not considered.

Because there is not an actual alternative proposed in the ISO Study, but instead three scenarios, an alternative located on a specific site was not considered. Thus, potential environmental impacts from an alternative were not analyzed.

C. Conclusion

The ISO Study was an exercise that demonstrated there are mixes of preferred resources that are technically feasible. In order to have relevance to the Energy Commission process, however, an alternative must be more than just technically feasible. It must be able to be accomplished in a successful manner within a reasonable period of time, which was not supported by testimony. In addition, economic feasibility was highly debated, and environmental impacts were not considered. Staff maintains its position stated in the Prehearing Conference Statement that these are issues best resolved through the California Public Utilities Commission's procurement process.

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Respectfully submitted,

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