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STATE OF CALIFORNIA
Energy Resources
Conservation and Development Commission

In the matter of: Application for Certification of the **PUENTE POWER PROJECT**	DOCKET NO. 15-AFC-01 **REPLY BRIEF OF INTERVENORS SIERRA CLUB LOS PADRES CHAPTER, ENVIRONMENTAL COALITION OF VENTURA COUNTY, AND ENVIRONMENTAL DEFENSE CENTER**

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Pursuant to the September 12, 2017 Committee Ruling, Sierra Club, Environmental Defense Center and Environmental Coalition of Ventura County ("Intervenors") respectfully submit the following Reply Brief regarding NRG's ("Applicant") Application for Certification for the Puente Power Project ("Project" or "Puente"), in tandem with Intervenors' separately filed Briefing on the California Independent System Operator Moorpark Sub-Area Local Capacity Alternative Study ("CAISO Study").[1]

INTRODUCTION

As a predominantly Latino community burdened with three power plants and a Superfund site on its coast, the residents of Oxnard have unfortunately borne a disproportionate share of the cost of fossil fuel energy generation. Decades ago, there were fewer options in siting energy facilities that depended on sea water intake to generate electricity. Now, however, there are clean and efficient options to meet our collective energy needs that do not require underprivileged and overburdened coastal communities like Oxnard to sacrifice their right to access and enjoy clean beaches, clean water and clean air. The CAISO Study, addressed in Intervenors' Briefing on CAISO Study ("CAISO Brief"), presents the California Energy Commission ("CEC") with an array of feasible and clean energy options sufficient to meet local capacity and reliability.

To protect its citizens' health and environment from further harm, the City of Oxnard adopted express provisions in its General Plan and Local Coastal Plan to prioritize preservation

[1] Intervenors' Briefing on the CAISO Study addresses the feasibility of the Study's alternative scenarios. The relationship between the CAISO Study and the override findings needed to approve the proposed project is more fully addressed in Intervenors' Reply Brief.

and restoration of its coastal resources, and prohibit new energy facilities, like Puente, from blighting its coastline and destroying its vanishing wetlands and rare wildlife. A set forth in Intervenors' Opening Brief and herein, the evidence presented by respected local biologists and coastal scientists, the California Coastal Commission, the California Department of Fish and Wildlife, and the City of Oxnard, unequivocally demonstrates that the Project will have significant and unavoidable impacts to biological resources and local air quality, is riddled with land use conflicts, increases coastal hazards and results in significant impacts to Oxnard's environmental justice community. As a result, the Project unlawfully violates numerous local, state and federal laws, ordinances and regulations ("LORS").

As described herein, the CEC cannot approve the Project under the California Environmental Quality Act ("CEQA") given the evidence in the record that shows there are feasible alternatives that would substantially lessen or avoid the Project's impacts.[2] Moreover, the Applicant has not produced sufficient evidence to support the findings necessary for the CEC to issue a certificate for approval in accordance with the Warren-Alquist Act.[3] Nor does the evidence support the extraordinary use of the CEC's authority to 'override' the Project's LORS. The Project must also be rejected in light of its failure to incorporate the CCC's conformity provisions.[4]

The only benefit achieved by approving Puente and committing Oxnard to another 40 years of industrialized coastal development will be bestowed on NRG's stockholders. The residents of Oxnard and the south coast have spoken out clearly and loudly against this Project.

[2] Pub. Res. Code § 21002.
[3] Pub. Res. Code § 25523 (Hereinafter "Warren Alquist Act").
[4] Pub. Res. Code § 25523(b).

The evidence speaks for itself. California does not need another coastal power plant, but it does need to give Oxnard back a cleaner, unpolluted future. The CEC must deny this Project.

ARGUMENT

I. THE APPLICANT HAS FAILED TO MEET ITS BURDEN OF PROOF AS REQUIRED UNDER THE WARREN-ALQUIST ACT.

For the CEC to issue a certificate to construct the proposed Project, it must make several findings under Warren-Alquist Act Section 25523. Each of those findings must be supported by substantial evidence in the record. It is the Applicant who bears the burden of providing sufficient evidence necessary to support each of the findings and conclusions required for certification of the Project. 20 C.C.R. §1723.5.

Instead of focusing efforts on providing credible evidence to prove the Project can meet the minimum criteria required by Section 25523, the Applicant has focused on keeping evidence out of the record by filing an onslaught of baseless motions to exclude relevant evidence – a desperate strategy invoked to mask the Project's significant impacts on the environment and the community. To date, the Applicant has filed at least ten motions to exclude credible, relevant evidence - such as expert testimony addressing whether Environmentally Sensitive Habitat Areas ("ESHA") exist on the Project site. Additionally, the Applicant has invested considerable effort to avoid, impede, and challenge an accurate assessment of the Project site's wetlands and special status species, and even went as far as trying to sell an "alternative" definition of the Project site, downsized solely for purposes of its Biological Resources Survey Report and Opening Brief. Despite these efforts, the evidence proves that the Project will have significant, unmitigated impacts to Biological Resources, Land Use, Air Quality, Environmental Justice and Coastal

Hazards. Accordingly, as explained in Intervenors Opening Brief and herein, the evidence does not support a finding that the Project is consistent with LORS pursuant to Section 25523(d).

In addition, when a proposed project is located in the coastal zone, like Puente, the CEC must make the finding identified in Section 25523(b), which requires that the CCC prepare a Report for the Energy Commission pursuant to the Coastal Act (Pub. Res. Code § 30413(d)) detailing its recommendations regarding the Project's compliance with the Coastal Act and certified LCP. The CEC must adopt those specific provision specified in the CCC's 30413(d) Report unless it finds that a provision would either be infeasible or would cause greater adverse effect on the environment. Pub. Res. Code § 25523(b). As addressed herein in Section V, the evidence demonstrates that the record is devoid of evidence to support this finding. The record and the briefs demonstrate that the Applicant has not, and cannot, meet the evidentiary burden required to ignore the CCC's recommendations and approve this Project.

II. THE LACK OF A COMPLETE AND STABLE PROJECT DESCRIPTION VIOLATES CEQA AND CORRUPTS THE ENTIRE ENVIRONMENTAL REVIEW PROCESS.

A. CEQA Mandates that the Project Description Encompass the "Whole of the Action."

The Applicant and Staff's refusal to use CEQA's definition of a project illegally truncates the environmental analysis and fatally corrupts their conclusions. The Project Description establishes the foundation by which the environmental analysis is constructed. One of the most egregious and consequential failings of this environmental review process is the confounding use of a fast and loose definition of the "Project" that is everchanging, intentionally down-sized, and never accurate. The intent is clear. Excluding over half of the area of the Project site truncates

the environmental analysis and ensures that the full impacts of the entire Project are never disclosed to the public or the Commission - a strategy the applicant and staff have zealously embraced, in particular, for analyzing the Project's impacts to Biological Resources.

Despite the Applicant's hubris, the only relevant definition of the Project for purposes of environmental review required by CEQA is the definition adopted in CEQA. CEQA defines "project" as "*the whole of an action*, which has a potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment…" CEQA Guidelines § 15378(a) (emphasis added). Contrary to the Applicant's misguided assertions in its Opening Brief, CEQA's definition of a Project is not the "broadest" definition, it is the *only* definition. A complete and accurate project description is essential to ensure full disclosure of all potential environmental impacts. "A curtailed or distorted project description may stultify" the disclosure objectives of CEQA. *County of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185, 192-193 ("*County of Inyo*"). The courts have consistently struck down EIRs that ignored CEQA's definition of a Project and omitted project components from CEQA's environmental review of the project. *Friends of the Eel River v. Sonoma County Water Agency* (2003) 108 Cal.App.4th 859 (the court found that an EIR was invalid because it omitted a meaningful discussion of the conditions in the northern part of the proposed water supply system); *Riverwatch v. Olivenhain Municipal Water District* (2009) 170 Cal.App.4th 1186 ("*Riverwatch*") (an EIR was found to be deficient because it omitted an analysis of impacts from construction of an asphalt road and concrete loading pad associated with a landfill and recycling collection center, as well as impacts of trucking water to the landfill); *Santiago County Water District v. County of Orange* (1981) 118 Cal.App.3d 818 (EIR for mining operation found

inadequate because the project description omitted construction of water delivery facilities that were an integral part of the project).

The environmental review in this case is similarly deficient because the Staff, Applicant, and FSA changed the definition of "Project" in order to narrow the area studied for biological resources to just the "3-acre parcel" on the Project site. Here, defining the Project site as just the portion of the Project confined to the "3-acre parcel" omits several critical Project components and several acres, including:

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

The CEQA definition of the Project site encompasses all of these components and the area on the ground underlying each component, which far exceeds the 3-acre portion. The Applicant admits that the Biological Resources Survey Report defined the Project site as a 3-acre

[5] Although the MGS Units are addressed in some contexts, they are not addressed in others. *See* comments below regarding the unstable Project Description.

area and did not include the full Project area.[6] This admission is reiterated in the CEC Staff's opening brief.[7] Although the Applicant admits that the Project site does refer to the "whole of the action" under review by the CEC, and includes components outside the "3-acre parcel," it inexplicably states that ***for the purpose of the Biological Survey Report and its Opening Brief, it has re-defined the "Project Site" to only include the 3-acre parcel***.[8] Staff similarly promotes a truncated definition of Project for purposes of analyzing biological resources in its Opening Brief: "In the Final Staff Assessment and oral testimony, Staff defined the Puente project site as "approximately 3 acres of the northern portion of the existing MGS property."[9] By nothing more sophisticated than a sleight-of-hand, the Applicant and Staff attempt to replace the CEQA definition of the Project site with the "3-acre parcel" in order to short shrift analyses of the Project's significant impacts to biological resources. The only "confusion" with respect to the definition of the Project site is that which the Applicant and Staff have intentionally attempted to manufacture. The law is crystal clear; CEQA's definition of the Project site is the only relevant definition and serves as the foundation by which the environmental analysis must be constructed.

As discussed below in Section III, the FSA fails to properly apprise the CEC and public regarding the full array and intensity of impacts that would result should the Project be approved. *See Riverwatch*, 170 Cal.App.4th at 1201 ("[i]f a final EIR does not 'adequately apprise all interested parties of the true scope of the project for intelligent weighing of the environmental consequences of the project,' informed decisionmaking cannot occur under CEQA and the

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[6] *Applicant's Opening Brief on All Topics Except the CAISO Special Study* ("Applicant's Opening Brief") at 21-22 (September 1, 2017) (TN 221024). For example, the Applicant stated that: "There was also discussion during the evidentiary hearings on July 27, 2017 related to the geographic scope of the Biological Study Area, or BSA, for purposes of the Biological Resources Survey Report, and whether or not it encompassed the entirety of the Project Area. *The short answer is that it did not.*" (Emphasis added.)
[7] *Staff's Opening Brief* ("Staff Opening Brief") at 14 (September 1, 2017) (TN 220999).
[8] Applicant's Opening Brief at 20-21;
[9] Staff Opening Brief at 14.

final EIR is inadequate as a matter of law," quoting *City of Santee v. County of San Diego* (1989) 214 Cal.App.3d 1438, 1454-1455).

Accordingly, the environmental review of the Project, and all the conclusions and statements in Staff and Applicant's briefs about the "Project site," are corrupted by relying on an illegal definition of the Project site that does not include the "whole of the action" as required by CEQA. Accordingly, the analysis of biological resources based on this same illegal definition of the Project site is wholly deficient for failing to disclose and analyze the impacts from the entire Project as defined by CEQA.

B. The Lack of an Accurate and Stable Project Description Compromised the Foundation of the Project's Environmental Analysis.

CEQA requires that a project description must be "accurate, *stable* and finite." CEQA Guidelines §15124, emphasis added, citing *County of Inyo*, 71 Cal.App.3d at 199. The description of the Project in this case varies widely, making it impossible to ascertain the Project's true impacts. In this case, as detailed in Intervenors' Opening Brief, the Applicant and CEC Staff's use of an artificial Project Description for the sole purpose of analyzing and disclosing impacts to biological resources resulted in significant portions of the Project being excluded from surveys for special status species and habitat, and obstructing the CCC's review of the entire Project site.[10]

[10] *Intervenors' EDC, Sierra Club, Envt. Coalition Opening Brief* ("Intervenors Opening Brief") at 13-14 (September 1, 2017) (TN 221023): "When the CCC's biologist Dr. Engel originally evaluated the Project for the 30413(d) Report she only reviewed the on-the-ground conditions of the 2-acre jurisdictional wetland on site, and based the rest of her analysis on the PSA, the AFC, and information in the docket. [TN 215607, Ex.4030.] Moreover, when Dr. Engel testified on July 27, 2017, regarding the dune ESHA mistakenly mapped as ice plant mats, she said she only evaluated and walked along the 3-acre site and the BSA, unaware that the Project site extended northwest and included the demolition access road. [*Id*. at 3]. As a result, she did not evaluate the ice plant

Moreover, not one figure or map in the entire record accurately depicts the boundary and development footprint of the Project as required by CEQA. CEQA Guidelines § 15124(a). Nor, as described in Intervenors' Opening Brief, does there exist an accurate and consistent description of the acreage of the Project site and how much habitat will be graded and disturbed.[11] In fact, the FSA contains conflicting descriptions of how much of the Project site will be disturbed and graded. The Project Description section of the FSA maintains that only 4.6 acres will be graded, while the Biological Resources section describes a total of 10.74 acres that will be graded and/or disturbed.[12] To add to the confusion, neither of these descriptions of affected acreages are consistent with the FSA's Project Description Figure 1 depicting the Site Plan, although this figure clearly identifies several Project components that lie outside the 3-acre portion of the Project site.

The Applicant acknowledges that the Project Description fluctuates. Although the Applicant admits that "[i]n its broadest sense, the term 'Project' refers to the 'whole of the action' under review by the CEC" and thus the Project Site "might refer to all of the areas directly affected by the whole of the action," the Applicant has chosen to limit the Project Site to 3 acres and exclude all other "directly affected" Project areas.[13] The Applicant then refers to the rest of the Project site as the "Project Area." Nowhere does the Applicant present any legal basis

maps that extended along the northeastern border along the demolition access road, which may also have been incorrectly mapped."

[11] The FSA does reveal that the "laydown areas along with construction worker parking areas for this Project would occupy approximately 5.7 acres in the MGS site location which would be used for construction laydown, offices and parking" and that only 0.9 of those acres is currently paved. [FSA at 3-16.] The remaining 4.6 acres would be graded and surfaced with 4 inches of crushed rock. *Id*. However, this description of the Project's parking and laydown acreage is inconsistent with the much smaller areas depicted just for parking and laydown areas in FSA Project Description Figure 1. FSA at 3-25.

[12] California Energy Commission, *Final Staff Assessment,* ("FSA") at 4.2-25 (December 8, 2016) (TN 214712).

[13] Applicant's Opening Brief at p. 20.

for constraining the Project site in this manner, or for differentiating between the "Project Site" and "Project Area." These differing descriptions render the environmental review deficient.

These inconsistencies make it impossible for the public or decision makers to "intelligently weigh" the environmental consequences of the proposed action. *Riverwatch*, 170 Cal.App.4th at 1201. As such, the Project Description does not comply with the requirements of CEQA and has unlawfully corrupted the environmental review.

III. THE EVIDENCE IN THE RECORD UNEQUIVOCALLY DEMONSTRATES THAT THE PROJECT WILL HAVE SIGNIFICANT, UNDISCLOSED AND UNMITIGATED IMPACTS PROHIBITED BY CEQA.

A. The Project Will Significantly Impact Oxnard's Rare Coastal Wetlands and Protected ESHA.

Because the project is in the coastal zone, areas that meet the definition of ESHA are protected under the Coastal Act and the City of Oxnard's certified Local Coastal Plan ("LCP"). To assist the Commission in determining where ESHA exist, the Committee directed the parties to address "whether any Environmentally Sensitive Habitat Areas (ESHA) exist on or near the proposed project construction, Units 1 and 2 demolition or outfall removal areas." The parties were further requested to "[e]xplain the criteria for determining ESHA existence, the facts that support or refute their existence, and any constraints that the existence of ESHA creates upon the proposed project activities."[14]

As discussed in our Opening Brief,[15] there is substantial evidence that ESHA exists on, as well as near, the Project site. Not only does the City's LCP identify the presence of ESHA, but

[14] Energy Commission Hearing Office, *Hearing Office Memo to Parties re Committee Identified Issues for Briefing* at 1 (August 9, 2017) (TN 220614).
[15] Intervenors' Opening Brief at 14-25.

evidence presented during the hearings and in comments on the FSA demonstrate the existence of ESHA.

Yet, neither the Applicant nor Staff acknowledge the ESHA that is identified in the City's LCP. In addition, the Applicant erroneously argues that ESHA is not protected unless it appears on a map in a certified LCP. The Coastal Act, however, protects ESHA wherever it exists, regardless of whether it has been previously mapped.

Both the Applicant and CEC Staff also downplay the presence of ESHA by improperly constraining the definition of the Project site. The Biological Resources Survey Report excluded significant portions of the Project site, thus excluding ESHA, such as coastal dunes and habitat that supports the Silvery legless lizard and the Globose dune beetle. Even to the extent the Survey Report revealed ESHA, such as raptor foraging habitat, the Applicant and CEC Staff fail to acknowledge such habitat as warranting protection under the Coastal Act and LCP. Instead, they place undue reliance on the fact that the CCC did not amend its 30413(d) report and thus assert that the CCC agrees that ESHA does not exist in these areas. When in fact, the 30413(d) report did not address the entire Project site, and the CCC's request to allow time to reconsider its report in light of new information from the Survey Report was denied.[16] Accordingly, it is false for the Staff to allege that the CCC reviewed the new information and determined that ESHA does not exist on the Project site. On the contrary, the CCC staff's July 21, 2017, letter confirmed that the new information identifies even more habitat that meets the definition of ESHA on the Project site and in its vicinity, and that this habitat must be protected and buffered from the Project's development.

[16] *See*, Intervenors Opening Brief at 12.

Finally, the measures proposed to mitigate impacts to ESHA are inadequate. Some of the measures are illegal because they allow disturbance and relocation of ESHA in violation of the Coastal Act. Other measures are inadequate to fully protect ESHA. Finally, impacts to wetlands cannot be mitigated; instead, they must be avoided.

1. ESHA is Mapped Onsite and In the Adjacent Area.

Contrary to the assertions made by the applicant and Staff, ESHA *is* in fact identified on the City's LCP maps for the Project site. As noted in Intervenors' Opening Brief, Map No. 7 in the City's Coastal Land Use Plan ("CLUP") characterizes much of the Project site as ESHA. *See* Oxnard CLUP, Map No. 7 Sensitive Habitats. Although Map 7 does not reflect the boundaries of the Project site, it does show that a substantial portion of the area west of Harbor Boulevard, between Doris Avenue and Teal Club Road (if a line were drawn extending these roads to the beach) where the Project is located, is shaded to indicate the location of Sensitive Habitats. This is also confirmed by the CLUP's description of a chain of coastal dune habitat, identified as an example of sensitive habitats or ESHA,[17] that extend from the Santa Clara River mouth to Fifth Street. Oxnard CLUP, III-8. However, both the FSA and the Applicant misinterpreted the CLUP's habitat maps and in error assumed that CLUP Maps 2.3 and 2.4, adopted during an amendment, replaced Map No. 7 Sensitive Habitats. According to the CLUP's Resolution 12,143, Nos. 3 and 9, these amended maps, Figures 2.3 and 2.4, are supposed to be *added* to Sensitive Habitats Map No. 7, and do not replace it.

[17] Even the Applicant acknowledges that the Oxnard LCP refers to and treats "habitat areas", "sensitive habitats". "sensitive habitat areas" and "environmentally sensitive habitat" as ESHA. Applicant's Opening Brief on all Topics Except the CAISO Special Study, TN221024, at 36.

Furthermore, the same types of species and habitats described in the CLUP as ESHA and mapped on the Project site are the same types of species and habitat that have been identified on and surrounding the Project site. For example, the CLUP identifies four examples of known ESHA that occur in the Oxnard coastal zone: wetlands, sand dunes, riparian areas, and McGrath Lake.[18] The CLUP also discloses five endangered species known to occur in these habitats, which notably includes the Peregrine falcon,[19] whose presence was confirmed on the Project site in the Biological Survey Report - a remarkable discovery given that the Peregrine falcon was *not* one of the species targeted by the surveys.[20] As detailed in Intervenors' Opening Brief, substantial evidence in the record submitted by the CCC and expert biologist Lawrence Hunt confirmed the presence of three of these same ESHAs – wetlands, riparian areas, and sand dunes – on and surrounding the Project site.[21] The Applicant has provided no legal authority or evidence to rebut the fact that ESHA is mapped on a substantial portion of the Project site, and in much of the area surrounding the Project site.

2. ESHA Must Be Designated and Protected Where It Exists, Regardless of Its Status on Prior Maps.

Not only is ESHA mapped onsite, but to the extent additional ESHA is identified subsequent to the preparation of such maps, it is entitled to the same protection under the Coastal

[18] City of Oxnard, Planning & Environmental Services, *Coastal Land Use Plan* ("Ex. 4024") at Section III-7 (February 1982) (TN 215436-7).
[19] Since the CLUP was adopted the Peregrine falcon was delisted and is now protected as a California Fully Protected Species.
[20] Ex. 4024 at III-7-10.
[21] California Coastal Commission, *California Coastal Commission 30413(d) Report – Final Approved Report* ("Ex. 3009") at 17 (September 15, 2016) (TN 213667); According to the CCC's 30413(d) Report, "due to the rarity, sensitivity to disturbance, and presence of special status, many of the coastal dune, scrub and riparian habitats surrounding the MGS site meet the Coastal Act and LCP definitions of ESHA, and thus require special protection." *See also* Letter from California Coastal Commission to Janea Scott, Commissioner and Presiding Member for Puente Power Project AFC Committee, ("Ex. 4043") regarding new information on the proposed NRG Energy Center Oxnard, LLC Puente Power Project (Application for Certification No. 15-AFC-01) at 2-3 (July 21, 2017) (TN 2200302).

Act and Oxnard's certified LCP. Neither the Coastal Act or the LCP distinguish between "mapped" and "unmapped" ESHA. Instead, ESHA is defined in the Act as "*any area* in which plant or animal life or their habitats are either rare or especially valuable because of their special nature or role in an ecosystem and which could be easily disturbed or degraded by human activities." Pub. Res. Code § 30107.5, emphasis added. ESHA "shall be protected against any significant disruption of habitat values, and only uses dependent on those resources shall be allowed within those areas." Pub. Res. Code § 30240(a). The City's LCP includes these same definitions and protections. Oxnard CLUP at III-7.

The Applicant asserts that "the determinative factor is whether or not the certified LCP designates the area as an ESHA" and argues that the "process for designating additional ESHA is through a formal amendment to the LCP and certification by the CCC."[22] The Coastal Act, however, does not say anything about "mapped" ESHA, or protections that are contingent upon an area being mapped in a certified LCP. Similarly, the LCP, which the Applicant concedes controls how ESHA is designated, contains no language that restricts or limits the designation and protection of ESHA to "mapped" ESHA. In fact, the City's LCP clearly states that the purpose of the Habitat Areas section of the CZO is to "**protect and where possible restore Oxnard's environmentally sensitive habitat areas which include, *but are not limited to***: wetlands, estuaries, streams, riparian habitats, lakes and portions of open coastal waters." Oxnard LCP, CZO Sec. 37-3.1.1, *emphasis added*. The plain language of Oxnard's LCP acknowledges the designation of ESHA other than the examples listed in the LCP, and does not limit ESHA to areas that already appear on a map.

[22] Applicant's Opening Brief at 32-33.

While ESHA can certainly be identified on a map in an LCP, the ultimate decision on whether ESHA exists occurs during the permitting process, when a specific project is proposed in a specific location. At that time both CEQA and Coastal Act review require identification of ESHA that may exist and may be disrupted by the proposed development. *Banning Ranch Conservancy v. City of Newport Beach*, (2017) 2 Cal.5th 918 (EIR found deficient for failing to discuss potential ESHA on project site) ("*Banning Ranch Conservancy*"); *LT-WR, LLC v. California Coastal Commission* (2007) 152 Cal.App.4th 770 (as modified June 21, 2007) ("*LT-WR*") (project review must include analysis regarding potential presence of ESHA).

As noted in *LT-WR,* the duty to designate and protect ESHA is ongoing and is not limited to previously approved maps in the certified LCP. *LT-WR*, 152 Cal.App.4th at 792-793. In *LT-WR,* the Applicant argued that the CCC did not have the legal authority to designate ESHA that was not identified in the County's approved Land Use Plan ("LUP"). The court held that Section 30240 of the Coastal Act protects ESHA "*without any limitation as to time*." *Id*. at 793, emphasis in original. In that case, although the County's LUP did not designate ESHA on the project site, the CCC correctly identified ESHA via staff research and a site visit. *Id*. at 794. The ruling concluded that substantial evidence supported the determination that ESHA existed on the project site that met the definition of ESHA in the approved LUP even though ESHA was not mapped on the Project site.

Similarly, in *Bolsa Chica Land Trust v. Superior Court* (1999) 71 Cal.App.4th 493 ("*Bolsa Chica*"), the CCC identified ESHA on the site of proposed development, despite the fact that the County had not identified the area as ESHA either in its LCP or in the context of its project approval. The court upheld the CCC's determination and held that the ESHA must be protected from the threat of development. In doing so, the court pointed out that "a literal reading

of the statute protects *the area* of an ESHA from uses which threaten the habitat values which exist in the ESHA." *Id.* at 507, emphasis in original. As demonstrated by this case, ESHA must be protected under the Coastal Act, whether or not it has been previously identified.

The Applicant cites *Douda v. California Coastal Commission* (2008) 159 Cal.App.4th 1181 for the proposition that a permitting authority may not deviate from an LCP when designating ESHA.[23] In that case, however, the court agreed with the holding in *LT-WR* and held that changed circumstances may warrant deviation from a certified LCP. *Id.* at 1195. In addition, the court held that Coastal Act Section 30240 is *not* temporally constrained, and ESHA must be protected whether it is designated or not. *Id.* at 1197.

Moreover, the CEC must apply the City's LCP provisions in conformance with the resource management standards and policies of the Coastal Act. *McAllister v. California Coastal Commission* (2008) 169 Cal.App.4th 912, 930 ("*McAllister"*). In *McAllister*, the Coastal Commission determined that a residential development was proposed in an area that met the definition of ESHA; notably, the County – which had a certified LCP – had not made such determination. The court noted that the County's LCP must be interpreted to comply with the strict ESHA protections set forth in Coastal Act Section 30240. As such, the court upheld the ESHA determination.[24] Similarly, Oxnard's LCP must be implemented in full accordance with Coastal Act Section 30240. This interpretation is consistent with the LCP's priorities for competing use of coastal resources and determination that "preservation of sensitive habitat areas and coastal resources and the provision of coastal access are the highest priority."[25]

[23] Applicant's Opening Brief at 33.
[24] The court also overturned the Commission's decision to approve the project, despite its impacts to ESHA, on the grounds that such impacts could be mitigated. The court relied on *Bolsa Chica* to point out that ESHA must be protected where it exists, and cannot be disturbed and then recreated somewhere else. *McAllister,* 169 Cal. App. 4th at 932-933.
[25] Ex. 4024 at I-2.

The Applicant's reliance on *Sec. Nat'l Guar., Inc. v. Cal. Coastal Comm.* (2008) 159 Cal.App.4th 402 ("*Sec. Nat'l Guar., Inc.*") is misplaced. In that case, the court held that the CCC overstepped its authority when considering an appeal of a CDP. On appeal, the standard of review for the CCC is whether the project conforms to the certified LCP. In *Sec. Nat'l Guard., Inc.,* the CCC denied the CDP on the grounds that the Project would harm ESHA, even though the LCP specifically expressly stated that *no ESHA* existed on the Project site. The court ruled that the CCC did not invoke the correct standard of review and exceeded its authority by going against the express language in the certified LCP. *Id.* at 422-423. In this case, however, the Oxnard LCP does not make any such statement. Instead, the Oxnard LCP is devoid of any determination that no ESHA exists on the Project site, and contemplates that ESHA determinations will be made on a project-by-project basis, based on the definition of ESHA. Moreover, the Oxnard LCP does not limit ESHA determinations to designations on maps contained within the plan.

CEC Staff, however, completely ignore the City's LCP and erroneously assert that only the CCC can designate ESHA. *See* Staff's Opening Brief at 14, citing *Banning Ranch Conservancy* 2, Cal.5th at 940. In that case, however, the City's LCP *excluded* Banning Ranch from its scope; accordingly, the CCC retained original permit jurisdiction. Where a City or County has a certified LCP, as in this case, the local agency has original permit jurisdiction, with some decisions being appealable to the Coastal Commission. Pub. Res. Code § 30519(a).

In this case, the CCC counsel has opined that the City's LCP is controlling:

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

jurisdiction of the City and the Coastal Commission, so it need not be incorporated into the LCP to take effect."[26]

Accordingly, both the Coastal Act and LCP protect ESHA where it exists. Because this Project is in the coastal zone, the CEC must allow the CCC to participate in the siting proceedings and review the project for compatibility with coastal resources. Coastal Act, Pub. Res. Code § 30413(d); Warren-Alquist Act, Pub. Res. Code § 25523(b). The CCC prepares a Report for the Energy Commission pursuant to the Coastal Act (Pub. Res. Code § 30413(d)(1)-(7)) detailing its recommendations regarding the Project's compliance with the Coastal Act and certified LCP. In the 30413(d) Report for the Puente Project, the CCC reviewed the LCP and analyzed whether the Project site contained ESHA. However, Intervenors' Opening Brief detailed how the presentation of a misleading Project Description and delayed focused biological surveys deprived the CCC of an adequate opportunity to conduct and complete evaluation of the Project's consistency with the Coastal Act.[27] As a result the CCC's 30413(d) Report is not based on a complete analysis of the Project site's biological resources and its analysis of ESHA on the Project site is incomplete. In order to provide guidance to the CEC and address the new information from the Biological Survey Report, the CCC's Executive Director, Jack Ainsworth, submitted a letter dated July 21, 2017 on behalf of the CCC staff.[28] In the 30413(d) report and the July 21, 2017 letter, the CCC points out that areas that "meet the Coastal Commission and LCP definitions of . . . ESHA" (not areas that are mapped as ESHA) require protection.[29] The CEC must identify and protect ESHA based on the City's LCP and General Plan maps and

[26] Letter from California Coastal Commission to Shawn Pittard, Project Manager, Siting, Transmission and Environmental Protection (STEP) Division, California Energy Commission, ("Ex. 2005") regarding the City of Oxnard General Plan Amendment PZ 16-620-01 at 2 (November 29, 2016) (TN 214574).
[27] Intervenors Opening Brief at 13-14.
[28] Ex. 4043.
[29] TN 213667, *California Coastal Commission 30413(d) Report – Final Approved Report*. Ex.3009, at 18

policies, and the evidence presented during the CEC administrative process regarding the proposed Project.

3. The Project Site Includes Protected ESHA.

In addition to the identification of ESHA in the City's LCP, Intervenors' Opening Brief detailed the substantial evidence regarding the presence of ESHA on the Project site that was submitted during the CEC's environmental review process in comments on the PSA and FSA, during evidentiary hearings, and during the additional surveys ordered by the CEC.[30] The evidence documented ESHA on the Project site based on the presence of habitat for: (1) Peregrine falcon foraging; (2) coastal dunes; (3) Globose dune beetle; and, (4) Silvery legless lizard.[31]

Evidence supporting the designation of the Project site as ESHA was submitted by several sources during the process, including the Applicant, Intervenors, expert biologist Lawrence Hunt, and the CCC. [32]

As discussed above, the Project site includes the *entire area* that supports the Project, which must include all of its components. The Biological Survey Report, however, limited its biological surveys to a much smaller portion of the proposed Project site defined as the Biological Survey Area ("BSA"). As a result, several areas and components of the Project site were improperly excluded from *any* biological surveys adequate to detect the sensitive species

[30] Intervenors Opening Brief at 14-18.
[31] *Id*.
[32] Ex. 4038, Lawrence Hunt Supplemental Testimony TN220216, at 10-11 and 14; Biological Resources Survey Report at 3-10 and D-5, TN219898, Ex.1148, describing peregrine falcon nesting and foraging with the project disturbance footprint, and Figure 4 showing globose dune beetles found on the project's outfall access road; Report of Conversation Puente Power Plant Project with Dr. Jonna Engel, California Coastal Commission (TN 217575); see also 7-27-17 Hearing Transcript, Dr. Engel at 265-267.

ordered by the CEC's March 10, 2017 Order,[33] including: (1) a large portion of the unpaved demolition access roads on the northwestern border that run adjacent to ESHA and are set to be graded and covered with 4 inches of gravel (Survey Report Figure 1); (2) the demolition areas where two nests for protected raptors were observed (Survey Report Figure 1); (3) the gas, ammonia, and water pipelines (FSA Project Description Figure 7); and (4) the unpaved half-acre "Craft Trailer and Fabrication Shop Area" (FSA Project Description Figure 1).

The additional surveys were necessary to comply with CEQA in light of the fact that the original "reconnaissance surveys" conducted by the Applicant were not sufficient to detect several rare species known to be present near the Project site.[34] These special status species include: Ventura marsh milk vetch, Globose dune beetle, Two-striped garter snake, California legless lizard, and Blaineville's horned lizard.[35] Even though the Applicant's surveys were improperly limited and violated the Committee's Order because they did not survey the entire proposed Project site, they nevertheless confirmed the presence of the Globose dune beetle, California horned lark, Peregrine falcon, and Great horned owl on the Project site.[36] Additional evidence from the California Department of Fish and Wildlife's California Natural Diversity Database and photographs submitted in the record also confirm the presence of one legless lizard

[33] CEC Hearing Officer, *Committee Orders for Additional Evidence and Briefing Following Evidentiary Hearings* ("CEC March 10, 2017 Order") (March 10, 2017) (TN 216505).
[34] 7-27-17 Hearing Transcript, Lawrence Hunt at 265-267. *See also* 2-09-17 Hearing Transcript, Julie Love at 365-367, "[W]e did not conduct any focus surveys for individual special status species." *See also* 02-09-17 Hearing Transcript, Carol Watson at 464, there is no need for focused surveys; CEC Staff, Biological Resources Supplemental Testimony of Carol Watson and John Hilliard, TN 220168, ex. 2026 at 3 – 4, Biological Resources Table 3 documents a "high" likelihood of finding Globose dune beetle and Silvery legless lizard on the Project site due to suitable habitat conditions; *See also* FSA at 4.2-22, and 2-09-17 Hearing Transcript, Lawrence Hunt at 31 – 32 states that reconnaissance surveys are "not sufficient to detect these four special-status" wildlife species.
[35] CEC March 10, 2017 Order.
[36] Ex. 1148 at ES-2, 4-1 and 4-2.

just a few feet from the Project's demolition access road and another one just west of the Project site's outfall.[37] This evidence was corroborated by Lawrence Hunt and the CCC ecologist.[38]

The CCC ecologist also determined during a site visit in May of 2017, that dune habitat surrounding the north and west sides of the Project site, and encroaching onto the Project site on the western side, was erroneously mapped by the Applicant and Staff as ice plant mats in the FSA, and is in fact a continuation of the dune habitat previously identified in the CCC's 30413(d) Report and meets the definition of ESHA. [39] In reviewing the new information from the Survey Report, the CCC ecologist also noted the presence of Globose dune beetle, Peregrine falcon, California horned lark, Great horned owl, Red-tailed hawk, and American kestrel on the Project site. She also noted that evidence of predation by the Peregrine falcon was detected on the Project site. "Taken together, these observations indicate that the project site and surrounding coastal dune habitats provide resting and foraging habitat for protected birds and raptors."[40] The CCC staff also reiterated the agency's recommendation for a minimum 100-foot buffer from "areas that meet the Coastal Act and LCP definitions of ESHA."[41] Finally, and importantly, the CCC staff explained that this new information provided "additional evidence" that was not

[37] *Intervenors' EDC, Sierra Club and Environmental Coalition of Ventura County Submission of Additional Evidence of Rare Species* ("Ex. 4039") at 1 (May 12, 2017) (TN 217571) and *Lawrence Hunt Supplemental Testimony* ("Ex. 4038") at 7 July 14, 2017 (TN 220216).
[38] 7-27-17 Hearing Transcript, Dr. Engel at 274 states, "Yes, so we observed the dockets record of EDC that reported -- so EDC reported two observations of silvery legless lizards, I saw the pictures, I saw the photograph with the Mandalay generating station behind the hand with the silvery legless lizards. I recognized that species. The species has previously been reported at multiple -- multiple occasions in the project vicinity not on the project vicinity. And based on these prior observations of recorded in the CNDDB database and my site visit on May 10th, I identified -- I determined that the sandy substrate along the border and in the buffer of the proposed project footprint would be suitable with the high likelihood of supporting silvery legless lizards." *See also*, 7-27-17 Hearing Transcript, Lawrence Hunt, at 154, corroborates the credibility of Mr. Trautwein's discovery of Silvery legless lizards near the Project site.
[39] California Coastal Commission, *California Coastal Commission Staff Comments on Biological Resources Survey Methodology* ("Ex. 4041") (April 7, 2017) (TN 216908); Ex. 3009. *See also*, 7/27/17 Hearing Transcript, Dr. Engel at 267.
[40] Ex. 4043 at 2.
[41] *Id.* at 3.

contained in the agency's 30413(d) report, and determined that the observations of Silvery legless lizard, Globose dune beetle, Peregrine falcon, and California horned lark "provide additional evidence that the project area provides habitat for sensitive species."[42] The CCC comments also disclosed that habitats that support raptor species and foraging constitute ESHA.[43] The CCC pointed out that "in several past actions, the Coastal Commission has identified tree stands, burrows and raptor foraging habitat as ESHA."[44]

The CCC requested that the Project schedule be modified to allow time for the Commission to reconsider its 30413(d) report in light of the new information, but the request was denied.[45] Hence, it is disingenuous for the Staff and Applicant to now dispatch the CCC's comments on the new biological resources information on the grounds that the 30413(d) report was not modified, when the CCC was not afforded an opportunity to do so.[46] In fact, the CCC *did* request additional time so the agency could hold a hearing "to review the new information resulting from the biological surveys and formulate any new or modified recommendations necessary to protect coastal resources, which would then be available to the Commission at the evidentiary hearing."[47] Specifically, the CCC noted that new information could result in new recommendations that were not included in the 30413(d) report.[48] The fact that the CCC did not have an opportunity to formally reconsider the 30413(d) report does not negate the CCC ecologist's determination that the new information revealed the presence of habitats that meet the definition of ESHA on and near the Project site. At a minimum, the CCC's letter must be given

[42] *Id.*
[43] *Id.*
[44] *Id.*
[45] Ex. 4041.
[46] *See* CEC Staff's Opening Brief at 15, stating that the CCC has no plans to supplement the 30413(d) report; Applicant's Opening Brief at 39-40, noting that the CCC did not alter its 30413(d) report.
[47] CCC Comments on Staff's Proposed Schedule at 1-2.
[48] *Id.* at 1.

due deference pursuant to the Commission's regulations pursuant to CCR, tit. 20, §1744(e) and considered when determining the presence of ESHA on the Project site.

Despite this plethora of evidence, CEC Staff argue that there is *no* ESHA on the Project site. Although CEC Staff note that the Applicant's biologist, Ms. Love, observed Peregrine falcons resting or perching on the site, because they were "sedentary" and Ms. Love did not personally observe them foraging, that meant that they simply do not forage.[49] This leap of logic is mind-boggling and runs counter to evidence presented by the CCC and the Applicant. The Survey Report, the CCC, and Mr. Hunt concluded that Peregrine falcons use the Project site and surrounding dune area as resting and foraging habitat.[50]

The Applicant simply ignores the evidence, including the CCC's comments and Mr. Hunt's testimony, and only relies on its own paid expert to conclude that no ESHA exists on the Project site. In part, this opinion is based on the Applicant's unfounded legal conclusion that ESHA can only be designated if it is mapped in the LCP. The fallacy of this conclusion was addressed above in Section III.A.

The Applicant's Opening Brief also attempts to discredit Mr. Hunt's testimony because Mr. Hunt had not conducted surveys on the Applicant's property.[51] This challenge is baseless and does little more than expose the Applicant's double standard for weighing evidence. On one hand, the Applicant dismisses Mr. Hunt's opinion that species present outside the property boundary are also likely to be present on the Project site. Then, on the other hand, the Applicant relies on testimony from its own biologist, Ms. Love, that concludes the offsite alternatives are

[49] Staff's Opening Brief at 15-16. *See also* Staff's Opening Brief at 21-22, wherein the Staff states incorrectly that "there was not any evidence of the Peregrine falcon foraging on the project site." In fact, there was plenty of evidence, including the presence of falcons and prey material.
[50] Ex. 4041 at 2.
[51] The Applicant's challenge to Mr. Hunt testimony is even more disingenuous given that the Applicant *prohibited* Mr. Hunt from participating in the supplemental surveys, or accompanying the resources agencies on a site visit.

not environmentally superior to the Project site because, in her opinion, those sites feature wetlands and special-status species – despite the fact that *she never visited either site, lacks any prior history studying the area* and *only conducted a "desktop analysis*" based on reviewing reports of special status species near the sites, but were never reported as present on the sites.[52] Notably, the FSA contradicts Ms. Love's testimony, and reports that the California Natural Diversity Database, relied upon by Ms. Love, "revealed no documented occurrences of listed species on or near the this site [*Del Norte*]"[53] and concluded that this alternative site would have less than significant impacts to biological resources and would lessen the Project's potentially significant impacts to biological resources.[54] The FSA further notes that, unlike the Project site, the Del Norte alternative site is entirely surrounded by development and agriculture.[55] Moreover, Ms. Love's testimony about the presence of wetlands on the two offsite alternatives was, surprisingly, made in the absence of any wetland delineation, and based on the CCC's one-parameter test.[56] In contrast, Ms. Love uses a different standard when asked to assess the biological resources on the Project site and refuses to apply the same one parameter test to acknowledge the presence of the 2.03-acre wetland identified on the Project site by a wetland delineation and the CCC. The credibility of Ms. Love's testimony is remarkably inconsistent and suffers considerably in this light.

The Applicant's Opening Brief further attacks the evidence by stating that "Mr. Hunt's threshold for determining that an area constitutes ESHA is so low that it is meaningless"[57] and

[52] 2-09-17 Hearing Transcript, Julie Love at 99-104, states that she only conducted a "desktop analysis" of alternative sites.
[53] FSA at 4.2-151.
[54] *Id.*
[55] *Id.*
[56] 2-09-17 Hearing Transcript, Julie Love at 153, 157-158 and 377, states she used the one-parameter wetland definition to assess potential for wetlands at offsite alternatives.
[57] Applicant's Opening Brief at 42.

cites as its only support an accusation that Mr. Hunt identifies paved areas as ESHA on page 14 of his Supplemental Testimony – yet, no such opinion designating a paved area as ESHA exists here.

The Applicant also provides a tortured analysis to conclude that photographs of Silvery legless lizards do not constitute credible evidence, and that – despite such evidence – there is a "very strong indication that this species is not present on or in the immediate vicinity of the Project Site."[58] On the contrary, photographs *do* constitute credible evidence, and were authenticated by the person who took the photographs in a sworn statement, and again under oath while being subjected to a forty-five minute interrogation by Applicant's counsel. Despite his best efforts, Mr. Carroll's inquisition yielded nothing other than the same facts Mr. Trautwein discussed in his sworn declaration, documenting where and when he took the photographs of the legless lizards. Mr. Hunt's testimony corroborated the likelihood that silvery legless lizards occur in the Project area.[59] There is no justification for the Commission to ignore this empirical evidence.

Nevertheless, the Applicant and the CEC Staff do acknowledge that some sensitive species - including the Globose dune beetle, California horned lark, Peregrine falcon, and great horned owl - were observed on and near the Project site.[60]

[58] *Id*. at 30.
[59] 7-27-17 Hearing Transcript, Lawrence Hunt, at 143, 147 and 154.
[60] Ex. 1128: Figure 4, p. 3-9- 3-10 , 4-2, and Appendix D; Ex. 2026 at 7-8; 7-27-17 Hearing Transcript, Carol Watson, at 100.

4. Jurisdictional Wetlands on the Project Site Have Been Confirmed by the CCC.

The CCC confirmed in the 30413(d) Report that the Project site contains a 2.03-acre wetland that meets the Coastal Act and LCP definition of a wetland,[61] and the FSA and CEC Staff support this designation.[62] It is well documented that Applicant disagrees with this designation; however, the CCC's designation is not only given deference, but, under the Warren-Alquist Act and Coastal Act 30413(d), must be accepted. Interestingly, the Applicant makes the argument here, that changed circumstances and new information occurring after the CCC issued the 30413(d) Report warrant a new determination after arguing the opposite for ESHA. However, the CCC ecologist did review the changed wetland plant status and disagreed with the Applicant. In the CCC Staff July 21, 2017 letter, the CCC ecologist reviewed all of the new information and recommended that "the CCC's wetland determination continue to apply to the project site . . ."[63] Accordingly, the Applicant has no basis to ignore this evidence and falsely conclude that the 2.03-acre wetland does not exist and will not be impacted.

5. Substantial Evidence Clearly Demonstrates that ESHA on the Project Site Will Be Significantly Impacted.

The Project site contains ESHA for several rare or especially valuable habitats as defined in Coastal Act Section 30107.5 and the LCP. These areas are protected from direct disturbance (i.e., from development within the ESHA), as well as indirect disturbance. Pub. Res. Code § 30240(a) and (b) and CLUP Policy 6(d).

[61] Ex. 4041 at 3-4; Ex. 3009 at 13.
[62] FSA at 4.2-33. *See also* Ex. 3009; CEC Staff Opening Brief.
[63] Ex. 4041 at 4.

As detailed in Intervenors' Opening Brief, the proposed Project's construction and operation activities would directly disturb and eviscerate ESHA on the Project site, such as: rare coastal dunes, foraging habitat for raptors such as the Peregrine falcon, and habitat for Silvery legless lizard and Globose dune beetle. [64] The Project would also cause indirect impacts to ESHA that exists within the buffer areas, including habitat for Peregrine falcons, Globose dune beetle, Silvery legless lizard, coastal dunes, Ventura Marsh Milk-vetch, and Western Snowy Plover Critical Habitat.[65]

Contrary to the Applicant's bizarre analysis, neither the Coastal Act or the LCP allows for development of the Project "within, adjacent to, or within 100 feet" of protected ESHA. In fact, Coastal Act Section 30240(a) strictly protects ESHA and "only uses dependent on those resources shall be allowed within those areas." Moreover, to clear up any doubt, the Oxnard LCP establishes priorities for competing uses in the coastal zone and explicitly prioritizes "preservation of sensitive habitat areas" above energy facilities. Oxnard CLUP I-2. Furthermore, the CCC's 30413(d) Report interpreted Oxnard CLUP Policy 6 to require a buffer of 100 feet between new development and wetlands and ESHA.[66] The CCC 30413(d) Report included a specific provision that requires the CEC to modify COC BIO-7 accordingly, and to "require the NRG to submit a revised project plan showing that all project-related development is at least 100 feet from wetlands and ESHA."[67] Figure 1 below, excerpted from the Supplemental Testimony of Mr. Hunt shows the extent a 100-buffer between the Project's development and the dune ESHA would constrain the Project's development footprint on the 3-acre portion of the Project

[64] *See* Intervenors' Opening Brief at 22-27.
[65] *Id*.
[66] Ex. 4041 at 17.
[67] *Id*. at 18.

site. When the 100-foot buffer is also applied around the 2.03-acre wetland, much of the Project's development on the 3-acre portion of the Project site appear to be infeasible. [68]

Figure 1. Interior edge of dune ESHA (white line) and 100-foot buffer established around ESHA (yellow line) in relation to the proposed 3 acre portion of the Project site (blue line) on MGS site. Excerpted Figure 1, Ex. ___, Supplemental Testimony of Lawrence Hunt.

In sum, substantial evidence in the record proves that the Project will impact ESHA in violation of the Coastal Act and Oxnard LCP.

6. The Project's Impacts to Wetlands on and Surrounding the Project Site Are Significant and Prohibited by the Coastal Act and LCP.

The Applicant baldly asserts that "the designation of a one-parameter wetland on the Project Site does not impose constraints on development of the Project as proposed."[69] The

[68] 7-27-17 Hearing Transcript, Lawrence Hunt at 148-149, 291; Ex. 4038 at 13.
[69] Applicant's Opening Brief at 52.

Applicant could not be more wrong. The Coastal Act only allows energy development within wetlands *if* there is no feasible environmentally less damaging alternative and then, only if feasible mitigation measures minimize adverse environmental effects. Pub. Res. Code § 30233(a). CLUP Policy 52 provides further protection of wetlands and states that "energy-related development is not an allowable use within coastal resource areas and sensitive habitats, including wetlands as defined in the LCP."[70] As addressed above in Section III.A.4., the CCC determined that a 2.03-acre wetland exists onsite as defined in the LCP and the Coastal Act. The 2.03-acre wetland on the Project site would be completely destroyed by the proposed Project.[71] In order to comply with the LCP and Coastal Act, the CCC recommended that the Project be relocated to another site that would avoid the direct impacts and fill of coastal wetlands.[72] There is substantial evidence in the record that proves there are feasible alternatives available that avoid this impact.[73] The disturbance of wetlands is only permissible when the loss of wetlands are unavoidable and allowable. Since the LCP prohibits energy related development in wetlands, and since there are feasible environmentally less damaging alternatives, the Project's impacts to wetlands are significant and cannot be mitigated by COC BIO-9 without also creating a significant land use impact.

There are also jurisdictional wetlands and ESHA in the 100-foot buffer north of the Project site that would be impacted; however, the COCs do not adequately mitigate impacts to these habitats because they do not require a 100-foot buffer from wetlands or ESHA of this type.[74] As a result of this significant weakening of COC BIO-7 #13 suggested by the applicant

[70] Ex. 3009 at 13.
[71] FSA at 4.2-33.
[72] Ex. 3009 at 14; Ex. 4041 at 5.
[73] See, Intervenors' Brief on CAISO Study.
[74] For instance, just north of the northern MGS fence line and adjacent to the demolition access road, wetlands and ESHA, including mulefat scrub, exist and are being restored on the McGrath parcel. NRG Oxnard Energy Center,

and approved by Staff[75], impacts to the wetlands within 100 feet of the 3.26-acre gas turbine construction area and the demolition access road (which is approximately ten feet from the mulefat scrub wetlands) will not be mitigated through application of a100-foot buffer. This failure to provide an adequate buffer for wetlands violates the CCC's recommendation in the 30413(d) Report, Coastal Act Section 30233, CLUP 6, and the Warren-Alquist Act.

7. The Proposed Mitigation Measures are Improper and Inadequate.

As a discussed above, the habitat located on and surrounding the Project site meets the Coastal Act and Oxnard LCP definition of ESHA. Accordingly, the CCC's 30413(d) Report requires that all ESHA must be avoided and buffered from all new development by a minimum of 100 feet, and if feasible, more.[76] As proposed, the Project's proposed mitigation measures do not comply with these mandatory requirements to protect ESHA, which were recommended in the CCC's 30413(d) Report and July 21, 2017, letter to protect coastal resources. No explanation or evidence has been provided by Staff or the Applicant to explain why the CCC's 30413(d) recommendations have been ignored.

For example, COC BIO-7 is routinely relied upon in the FSA to mitigate impacts to special-status species and ESHA. However, BIO-7 has since been revised and limited by the Applicant and the CEC staff to now only apply to "McGrath Lake ESHA and coastal dune ESHA that supports western snowy plover and California least tern breeding." According to testimony by Mr. Hunt, "[T]his revision ignores buffers associated with any designation of

LLC, *4.2 Biological Resources in Application for Certification Cover Letter* ("Ex. 1008") at Figure 4.2-2 (April 15, 2015) (TN No. 204219-9).

[75] Ex. 3009 at 18; Applicant's Opening Brief at 53.

[76] Ex. 3009 at 17-18.

ESHA within the Project area and buffers, including wetlands, and is inconsistent with Local Coastal Plan and CCC recommendations for 100-foot buffers around all ESHA."[77]

Moreover, none of the analysis in Staff's Supplemental Testimony addresses the impact of this revision on the Project's biological resources. Even before it was revised, BIO-7 still did not require that the entire Project avoid ESHA, and it only required construction activities, instead of all new development, to maintain a 100-foot buffer from ESHA. This limitation would allow a plethora of other activities (such as demolition, operation, grading, and development/improvement and use of access roads) to impact ESHA. There is simply no analysis or evidence in the record to support the Applicant and Staff's conclusion that all of the Project's impacts to biological resources will be mitigated to a level below significance.

Furthermore, the loss of Peregrine falcon foraging habitat, which was documented and confirmed on the entire Project in the Biological Survey Report and by the CCC, cannot be mitigated by COC BIO-9. COC BIO-9 requires the replacement of wetland habitat as a means, in part, of mitigating impacts to Peregrine falcons. Peregrine falcon foraging habitat, however, constitutes ESHA, which must be protected *in situ*. Once ESHA is identified, the Coastal Act requires that it must be "protected against any significant disruption . . . and only uses dependent on those resources shall be allowed within those areas." Pub. Res. Code § 30240(a); *see also Sierra Club v. California Coastal Com.* (1993) 12 Cal.App.4th 602, 611 ("development in ESHA areas themselves is limited to uses dependent on those resources); *Bolsa Chica Land Trust*, 71 Cal.App.4th at 507 ("a literal reading of the statute protects *the area* of an ESHA from uses which threaten the habitat values which exist in the ESHA" (emphasis in original)). The Coastal

[77] Ex. 4038 at 16.

Act forbids disturbance of ESHA in one area and re-creation elsewhere. *Id.* Therefore, the Applicant cannot destroy the peregrine foraging habitat and attempt to replace it elsewhere.

Even if it were allowed, there is no evidence in the record to support a finding that creating off-site wetland habitat would reduce the significant impacts to Peregrine falcon resulting from the destruction of their foraging habitat and nest located onsite. In fact, Mr. Hunt provided expert testimony that concluded it would not.[78]

Both the Applicant and CEC Staff rely on proposed changes to COC BIO-9 that require the Applicant to mitigate impacts to on-site wetlands at a 4:1 ratio.[79] In doing so, they assert that they are simply following the CCC's recommendation. In fact, however, the CCC noted in its 30413(d) report that Coastal Act Section 30233 and City of Oxnard LCP Policy 52 *prohibit* filling wetlands. The CCC report points out that Policy 52 does not allow energy-related development within coastal resource areas and sensitive habitats, including wetlands. Additionally, the report states that Coastal Act Section 30233 does not allow energy facilities in wetlands if there are less environmentally damaging alternatives. The CCC report determined that there were "several less environmentally damaging alternatives which would avoid the need for wetland fill altogether;" therefore, the CCC position is that the wetland must be avoided, not mitigated at a 4:1 ratio.[80]

Similarly, COC BIO-10, setting forth the Translocation Plan for the Outfall area, cannot be extended to mitigate the Project's impacts to ESHA areas on the "Project site and access road" by removing Silvery legless lizards and Globose dune beetles from their protected habitats. ESHA is habitat that supports rare and special status species. It cannot be disturbed or destroyed,

[78] 7/27/17 Hearing Transcript. Lawrence Hunt at 263.
[79] TN 220999, *Staff's Opening Brief* at p. 21; TN 221024, *Applicant's Opening Brief* at pp. 53-54.
[80] Ex. 3009 at 16.

nor can it be developed by removing the special status species that triggered the ESHA determination and relocating it elsewhere. *Bolsa Chica Land Trust*, 71 Cal.App.4th at 507.

Finally, the FSA erroneously relies on COC BIO-1 through BIO-10 to support a conclusion that the Project would not have an adverse impact on species or their critical habitats; however, as discussed above, these COCs were revised to only avoid and buffer McGrath Lake ESHA and coastal dune ESHA that supports western snowy plover and California least tern *breeding* habitat, but not all critical habitat that constitutes ESHA.[81] As a result, the Project would not only violate the Coastal Act and City of Oxnard LCP, but it could also potentially cause take of endangered species in violation of Section 9, and destroy or adversely modify critical habitat in violation of Section 7(a)(2). *Gifford Pinchot Task Force v. United States Fish & Wildlife Serv.*, (9th Cir. 2004) 378 F.3d 1059, 1069-74.

In sum, the mitigation measures proposed are either infeasible or inadequate. ESHA cannot be removed or disturbed and recreated or replaced elsewhere. Wetlands cannot be filled for energy-related development within the City of Oxnard. Even under the Coastal Act, wetlands cannot be filled for energy projects if there are less environmentally damaging alternatives. The CCC has determined that such alternatives exist, and therefore the proposed Project would unlawfully fill protected wetlands. Finally, many of the proposed mitigation measures are too limited in their scope and thus inadequate to avoid or substantially lessen Project impacts as required by CEQA.[82]

[81] *Id*.
[82] Pub. Res. Code § 15126.4(a).

B. The FSA Failed to Identify and Mitigate the Project's Air Quality Impacts.

The Applicant argues that the operational emissions of the Project will not result in significant air quality impacts.[83] The Applicant claims, falsely, that it is appropriate for Staff to base the project's CEQA mitigation on speculation, rather than on the level of operation authorized by the Project's permit. This argument is entirely specious and contrary to law. The Applicant has applied for a permit allowing the Project to run 2,150 hours per year.[84] The Air Quality Impacts analysis in the FSA is based on this permit limit.[85] However, the FSA fails to properly mitigate these impacts and instead improperly chooses to require mitigation only up to 964 hours of operation each year.[86] By using different hours of operation as the basis for the air quality impact analysis and for air quality mitigation, the FSA fails to comply with CEQA regulations, fails to mitigate the reasonably foreseeable impacts of the project, and by misleading the public and decision makers, fails to serve as an informational document under CEQA.

There is no authority under CEQA for using a different basis for evaluating impacts and proposing mitigation of those impacts. To the contrary, CEQA requires agencies to evaluate the entirety of the proposed action, not a part of it.[87] In this case, the proposed action is legally defined by the Project's worst-case emissions: the number of hours the Project is allowed to operate under its permit.[88] As the FSA makes clear, operation at 2,150 hours per year is legally

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[83] Applicant's Opening Brief at 12.
[84] Ex. 2000 at 4.1-2.
[85] *Id.* at 4.1-39.
[86] *Id.* at 4.1-50.
[87] *See San Joaquin Raptor Rescue Center v. County of Merced* (2007) 149 Cal.App.4th 645, 655-56 (EIR was required to evaluate the impacts of mine production based on its requested permit limit); *See also City of Redlands v. County of San Bernardino* (2002) 96 Cal.App.4th 398, 409 (evaluation of project impacts "must necessarily include a consideration of the larger project, i.e., the future development permitted by the amendment").
[88] *See, e.g.* Ex. 2000 at 4.1-29, Air Quality Table 21a. Under federal law, calculations of worst-case emissions must be based on the maximum potential to emit, defined the "maximum capacity of a stationary source to emit a pollutant under its physical and operational design." 40 C.F.R. §51.165(a)(1)(iii). The air permit authority is required to assume the plant will operate at its maximum capacity every hour of the year, unless its run time is limited by a federally enforceable permit limitation.

permitted to occur and the resulting emissions are a reasonably foreseeable impact of the project under CEQA.[89] If the Applicant wished Project mitigation to be based off of 964 hours of operation per year, then the proper course of action is to request a permit limit at that level. The Applicant did not do so – presumably to preserve the possibility of operating the Project up to 2,150 hours per year. The FSA also tellingly did not propose a condition of certification limiting operations to the level of mitigated impacts.

Because the FSA bases air quality mitigation on this lower estimate of run time, it fails to adequately mitigate a situation when the Project runs more than 964 hours of the year, as it would be legally permitted to do under its air quality permit and Condition of Certification AQ-48. The FSA bases the required mitigation off of project impacts that are roughly half as high as the emissions calculated in the impact analysis.[90] Contrary to the Applicant's assertions, the FSA air quality mitigation invents its own standard for mitigation and fails to mitigate the project's reasonably foreseeable impacts. The FSA violates CEQA and cannot support certification of the Project.

C. The FSA's Reliance on the Flawed CoSMoS Model Discounts the Risk of Serious Coastal Flooding at the Project Site.

In its Opening Brief, the Applicant argues that the FSA was correct to rely on the CoSMoS model of coastal flooding, further claiming that the alternative Coastal Resilience Model is "overly conservative."[91] These arguments do not withstand scrutiny. The evidence demonstrates that CoSMoS does not reliably model future flooding, especially after accounting

[89] *See, e.g.* Ex. 2000 at 4.1-29, Air Quality Table 21a.
[90] Ex. 2000 at 4.1-40, Air Quality Table 21a (estimating maximum worst-case annual emissions from Puente of 10.69 tons PM, 5.91 tons SOX, and 32.95 tons NOX) to Ex. 2000 at 4.1-50, Air Quality Table 21a (estimating "Reasonable Worst Case Emissions" from Puente of 4.7 tons PM, 0.9 tons SOX, and 18.7 tons NOX).
[91] Applicant's Opening Brief at 58.

for the disruptive forces of climate change. By relying on the CoSMoS model, CEC staff hide their heads in the (rapidly eroding) sand, ignoring the potentially devastating consequences of coastal flooding at the Project site and violating CEQA's information standards. The CEC should find – consistent with the conclusions of its sister agencies the CCC and the Coastal Conservancy – that flood risk to the project site is significant.

The CoSMos model's most critical failings are in its ability to correctly model coastal dunes, which are cited as the main protection for the project. The Applicant claims that flooding should not occur at the Project site because it "is protected by tall, ancient and stable dunes."[92] Yet, ironically, the Applicant plans to build the Project on the dune, which will cause it to erode: As USGS, the developer of the CoSMoS model, explains, when buildings are constructed in the dunes, the dunes "would erode and not offer protection anymore."[93] Consistent with this assumption, the CoSMoS model assumes that when a site is developed and coastal are not able to retreat, they instead erode and disappear.[94] However, model runs intended to predict inundation of the site after the Project is built and the site is developed were based on the incorrect assumption the site remains *undeveloped*, and thus the dunes remain. The FSA thus relies on a model run off inputs that assume a protective barrier that will not exist. Additionally, the model only predicts erosion from a single storm.[95] This assumption is not accurate in a world characterized by climate change, where storms will become more frequent and more severe.[96]

The CoSMoS model's predictions about past flooding dramatically underestimate the observed reality. A model which does not accurately predict past events cannot reliably predict

[92] Applicant's Opening Brief at 67.
[93] 07/27/2017 Hearing Transcript at 8, ln. 19-20 (Dr. Li Erikson, USGS).
[94] 07/27/2017 Hearing Transcript at 8, ln. 11-14 (Dr. Li Erikson, USGS).
[95] Ex. 2025 at 13.
[96] 07/26/2017 Hearing Transcript at 237at ln. 20-23 (Chris Campbell, City of Oxnard).

future events. In its opening brief, the Applicant mischaracterizes testimony when it attempts to explain the failure of CoSMoS to accurately predict past flood events. The Applicant incorrectly states that Dr. Revell and the Coastal Resilience model are evaluating whether "the beach gets wet," but Dr. Revell subsequently clarified that by this statement he was referring to a situation in which the beach was completely submerged.[97] CoSMos should therefore have shown a completely submerged beach when modeling recent storms, but does not: for example, the model's projection for a 100-year storm event at Oxnard Shores, just one mile south of the Project site, show water levels that would only minimally submerge the seaward edge of the beach.[98] In reality, photos of a high tide, large wave event in 2015 show standing water well into the streets of this development.[99] In direct contrast, the Coastal Resilience model, which the FSA disregards, accurately reflects observed flood conditions at those locations.[100]

The Coastal Resilience model may be more conservative—but this conservatism is necessary. Given the increasingly unpredictable and severe weather we can expect due to human-induced climate change, it is entirely appropriate for the CEC to use a "worst-case" model to evaluate the resiliency of a $300 million dollar public investment. Because of the threat of increasingly extreme weather events as the climate changes, the Governor has called on all California state agencies to "take climate change into account in their planning and investment decisions" and to recognize the importance of proper planning to improve resiliency when serious storms invariably occur."[101] The FSA fails to meet this standard, and fails to

[97] 07/26/2017 Hearing Transcript at 261, ln. 9-14 (Dr. David Revell, City of Oxnard).
[98] Ex. 3068 at 10.
[99] *Id.*; 7/26/17 Hearing Transcript, 170, ln. 9-15 (Dr. David Revell, City of Oxnard).
[100] Ex. 3068 at 11.
[101] Exec. Order B-30-15.

acknowledge the serous risks of meeting local reliability need through a single power plant in a vulnerable location.

D. The FSA's Analysis of Impacts on Environmental Justice Communities Does Not Meet the Legal Standard.

The Applicant argues that because the FSA concludes the significant environmental impacts of the Project will be mitigated, there can be no significant impact on environmental justice communities, and the FSA complies with CEQA.[102] This logic misstates the legal standard that the CEC must apply. The FSA failed to consider whether any direct and cumulative impacts of the project will have disparate impacts on minority or low-income populations, and therefore the FSA does not support approval of the project.

As stated in the FSA itself, a proper evaluation of environmental justice impacts has two related, but independent components. The FSA must quantify the Project's "impacts on the environmental justice population living within a six-mile radius of the project site, and it must separately assess whether "any impacts would disproportionately affect an environmental justice population."[103] In other words, the FSA is required to consider whether Puente's impacts, regardless of whether or not these impacts rise to the level of "significant" under CEQA, would disproportionately affect an environmental justice community. The FSA fails to correctly apply this standard, and fails to assess whether the Project will burden environmental justice communities in the vicinity disproportionately, compared to all the communities who will benefit from the power plant. The FSA does not assess whether direct and cumulative impacts of the

[102] Applicant's Opening Brief at 88.
[103] Ex. 2000 at 4.5-1 (emphasis added).

project will have disparate impacts on minority or low-income populations, and therefore does not satisfy the CEC's legal obligations.

In fact, the FSA demonstrates that the Project will place many disproportionate impacts on the Oxnard community. For example, the Project will cause significant air quality impacts that have not been properly mitigated. The inadequate amount of mitigation that is required will be accomplished through emissions credits and offset programs.[104] The emissions credits for NOx are based on emissions reductions that occurred elsewhere in the air basin between 1992 and 1996.[105] Mitigation for PM 10 and SOx will be accomplished through the Carl Moyer Program, an air district grant program for clean engines. Neither of these efforts are guaranteed to improve the safety of the actual air filling the lungs of those who play, attend school, work or live near the Project. To provide a second example, the Applicant argues that there is no disproportionate impact on land use because removal of the outfall structure would marginally improve public access to the beach.[106] This development is cold comfort for a community eager to move past decades of shouldering the environmental burdens of the area. The Applicant's argument instead serves to emphasize the fact that the disproportionate impact of industrial facilities on Oxnard's beach continue for at least a generation, until long after the youth who have testified at committee hearings may hope to take their own children to the beach. Because the FSA fails to apply the full two-factor test of environmental justice impacts by not evaluating whether any Project impacts disproportionately burden environmental justice communities, as compared to other communities in the Moorpark area, the FSA's analysis is incomplete and it cannot support approval of the project.2116

[104] Ex. 2000 at 4.5-51.
[105] *See* Ex. 2013, FDOC Appendix E (TN#214005-7).
[106] Applicant's Opening Brief at 90.

E. The Project's Impacts to Land Use are Significant and Unmitigated.

CEQA dictates that a project results in significant environmental impacts if it would, among other things, "conflict with any applicable land use plan, policy, or regulation of an agency with jurisdiction, or that would normally have jurisdiction, over the project." Guidelines, Appendix G, Sections II, IX, XVI. As detailed below in Section V.I., the Project conflicts with numerous local, state and federal LORS.

IV. THE ONSITE ALTERNATIVES ARE NOT FEASIBLE AND WILL HAVE SIGNIFICANT IMPACTS TO BIOLOGICAL RESOURCES.

To date, complete and accurate information describing the environmental setting for the Project and the two onsite alternatives has not been disclosed.[107] Furthermore, the onsite alternatives were excluded from the Biological Survey Report and have never been adequately surveyed for special status species. Thus, the impact analysis and conclusions provided in the FSA regarding these two onsite alternatives are not based on sufficient evidence.

Moreover, both onsite alternatives suffer from the same constraints on development as the Project as a result of the surrounding coastal dune ESHA and wetlands identified by the CCC. For example, Mr. Hunt testified that constraints from wetlands and ESHA will significantly impede the development footprint on both of these onsite alternatives, as displayed in Figures 16 and 17 in the FSA.[108] Accordingly, there are no feasible onsite alternatives to the proposed Project.

[107] See Intervenors' Opening Brief at 8-18.
[108] Ex. 4038 at 14-17; 7-27-17 Hearing Transcript, Lawrence Hunt, at 290-295, states that 100-foot wetland and ESHA buffers would constrain onsite alternatives. *See* also, 7-27-17 Hearing Transcript, Carol Watson, at 303-304, CEC confirms the wetland buffer would constrain onsite reconfiguration alternative #2.

V. THE PROJECT VIOLATES NUMEROUS LOCAL, STATE, AND FEDERAL LORS.

Pursuant to the Warren-Alquist Act, the CEC must make findings that the proposed Project conforms to all LORS. Pub. Res. Code § 25523(d)(1). The CEC cannot certify a facility when it is inconsistent with any "applicable state, local, or regional standards, ordinances or laws 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." Pub. Res. Code § 25525. Neither may the CEC approve a project in conflict with applicable federal law or regulation. *Id*.

The Project's significant and unmitigated impacts to Oxnard's rare coastal resources, such as coastal dunes, wetlands, special-status plants and wildlife, and wetlands creates a significant obstacle to approval of this application. In addition to the deficient CEQA analysis, the Project's numerous impacts to the environment violate several local, state, and federal laws adopted to protect those resources for the public benefit. Accordingly, the CEC cannot make the necessary findings that the proposed Project conforms to all applicable LORS. Pub. Res. Code § 25523(d)(1).

A. <u>The Project Fails to Conform to the City's Land Use Regulations.</u>

When evaluating a LORS conflict with a local general plan policy, the California "courts accord great deference to a local governmental agency's determination of consistency with its own general plan, recognizing that 'the body which adopted the general plan policies in its

legislative capacity has unique competence to interpret those policies when applying them in its adjudicatory capacity. [Citations.]" *San Franciscans Upholding the Downtown Plan v. City & Cty. of San Francisco* (2002) 102 Cal. App. 4th 656, 677–78. As such, the City of Oxnard's consistency determination must be given due deference. See also, CCR, tit. 20, §1744(e). The City has determined that the Project violates its General Plan and LCP.

1. The Project Conflicts with Oxnard's General Plan Safety and Hazard Policies.

The FSA, Staff, City, and Intervenors agree that the Project conflicts with Safety and Hazard ("SH") Policy 3.5, which prohibits siting of power plants of 50 MW or more in areas where "the City has documented that the location of such facilities is threatened by seismic hazards, wildfire, flooding, or coast hazards."[109] Substantial evidence in the record documents that flooding and other coastal hazards threaten the Project site.[110] Instead of providing evidence or modifying the Project to comply with this policy, the Applicant argues that it does not apply.[111] However, the CCC's Counsel submitted a letter on behalf of the CCC that addressed this issue and concluded that Policy SH 3.5 did apply to the Project.[112] As the agency with ultimate jurisdiction over protecting coastal resources, the CCC's interpretation must be given due deference. CCR, tit. 20, §1744(e).

The Project similarly conflicts with General Plan Policy ICS-17.1, which requires that new electrical generating facilities are "built in accordance with the Coastal Commission's Sea Level

[109] Ex.3002, Exhibit A at 6.
[110] Ex. 3000, CO-4 at 11-12; Ex. 3002, Exhibit A at 4.
[111] Applicant's Opening Brief at 110.
[112]

Policy Guidance."[113] CCC Guidance calls for "avoid[ing] the expansion or perpetuation of existing structures in at-risk locations."[114] In seeking to perpetuate use of the Project site for electric generation, the Project directly conflicts with Policy ICS-17.1.

2. The Project is Inconsistent with Oxnard's LCP.

Oxnard's LCP established definitive priorities for competing use of coastal resources and determined that "preservation of sensitive habitat areas and coastal resources and the provision of coastal access are the highest priority." CLUP I-2. When LCP policies overlap or conflict, "the most protective of coastal resources shall prevail." *Id*. As discussed above, the City's determination of consistency with its LCP must be accorded due deference. CCR, tit. 20, §1744(e). Additionally, pursuant to the authority granted to it by the Coastal Act and Warren-Alquist Act, the CCC determines whether the Project conforms to the Coastal Act and LCP.[115] Coastal Act §30413(d); Warren-Alquist Act § 25523(b). The CCC's determination of consistency and recommended provisions to attain conformity must be incorporated by the CEC in order to approve the application. *Id*. Yet, discussed herein, only a scant few of the CCC's recommendations to bring the Project into conformity with the Coastal Act and LCP have been incorporated, and, remarkably, the Applicant is pushing to reject even more.[116] However, the CCC's recommendations may *only* be rejected by the CEC if there is substantial evidence to support that the provision would either: (1) be infeasible; or (2) cause greater adverse effect on the environment. Pub. Res. Code § 25523(b). Disputing the CCC's consistency determination

[113] Exhibit 3002, Exhibit A at 5.
[114] Ex. 3023 at 39, 133.
[115] Ex. 3009 at 6.
[116] Applicant's Opening Brief at 106.

and arguing that its recommended provisions are *unnecessary* does not provide a legal basis under §25523(b) to simply dispatch them. The Project is inconsistent with several Coastal Act and LCP policies protecting wetlands and sensitive habitat areas that are not protected and buffered from the Project's development as required by the CCC's recommendations in the Project's 30413(d) report.

a. Wetlands and ESHA Are Not Protected and Buffered from the Project's Development as Required by CLUP Policy 6.

CLUP Policy 6(d) provides that "new development adjacent to wetlands or resource protection areas shall be sited and designed to mitigate any adverse impacts to the wetlands or resource" and requires a 100-foot buffer to protect those resources. The CCC's 30413(d) report concluded that "LCP Policy 6 requires a minimum 100-foot buffer between new development and resource protection areas, including ESHA and wetlands."[117] As a result of the Project's potential impacts to wetlands and ESHA, and to ensure consistency with CLUP Policy 6, the 30413(d) report recommended a specific provision that required BIO-7 be modified to "require that NRG design P3 such that all project-related development is at least 100 feet, and further from nearby areas that meet the Coastal Commission and LCP definitions of wetlands or ESHA." The provision also "require[s] that NRG submit a revised project plan showing that all project -related development is at least 100 feet from wetlands and ESHA."[118]

Not surprisingly, the Applicant has failed to submit a revised Project plan and disputes the CCC's recommendation and consistency determination. The Applicant argues further that

[117] Ex. 3009 at 17.
[118] Ex. 3009 at 18.

CLUP Policy 6 and Coastal Act § 30240 allow development of the Project within and adjacent to ESHA and do not preclude its development as proposed.[119] Applicant's argument is based on a convoluted reading of the LCP and Coastal Act that lack any legal support. Applicant asserts that CLUP Policy 6(d) only applies to "resource protection areas" which do not include ESHA; however, the LCP provides that a resource protection area applie[s] only to sensitive habitat areas." CLUP, II-5. The CCC's consistency determination was clear and its required revision to COC BIO-7 must be followed.

As addressed above in Section III, the Project will eliminate the 2-acre jurisdictional wetland and disturb ESHA onsite, and also indirectly impact nearby wetlands and ESHA located within the 100-foot buffer of the Project's development footprint. Although the Applicant and Staff rely upon on COC BIO-7 to mitigate impacts to ESHA and wetlands, they suggest a revision that would allow development in and within 100 feet of all ESHA and wetlands *except* for "McGrath Lake ESHA and coastal dune ESHA that supports western snowy plover and California least tern breeding."[120] Testimony by Mr. Hunt confirms, "[T]his revision ignores buffers associated with any designation of ESHA within the Project area and buffers, including wetlands, and is inconsistent with Local Coastal Plan and CCC recommendations for 100-foot buffers around all ESHA."[121]

Moreover, none of the analysis in Staff's Supplemental Testimony addresses the impact of this revision on the Project's biological resources. Even before it was revised, COC BIO-7 still did not require that the entire Project avoid ESHA, and it only required construction activities, instead of all new development, to maintain a 100-foot buffer from ESHA. This

[119] Applicant's Opening Brief at 43.
[120] *Id*.
[121] Ex. 4038 at 16.

limitation would allow a plethora of other activities (such as demolition, operation, grading, and development/improvement and use of access roads) to impact ESHA. The Project violates CLUP Policy 6 and fails to incorporate the CCC's recommendation in the 30413(d) report in violation of the Warren -Alquist Act. Pub. Res. Code §25523(b).

b. The Project Sites Development Within Coastal Resource Areas and Sensitive Habitats, Including Wetlands, in Violation of CLUP Policy 52.

CLUP Policy 52 prohibits industrial and energy related development in coastal resource areas and sensitive habitats. Although the CLUP does not define "coastal resource areas," the City agrees with the CCC's determination that, "[u]nder City of Oxnard LCP Policy 52, energy-related development is not an allowable use within coastal resource areas and sensitive habitats, including wetlands as defined in the LCP."[122] The City of Oxnard LCP prioritizes the protection and restoration of wetlands and ESHA above industrial and energy uses in its coastal zone. CLUP. I-2; CZO §37-3.1.1-3.1.2.

In addition, Coastal Act Section 30231 mandates the protection of wetlands, and where feasible, their restoration. Although construction of a new energy facility in a wetland is an allowable use under the Coastal Act, it is only permissible "where there is no feasible less environmentally damaging alternative *and* feasible mitigation measures have been provided to minimize adverse environmental effects." Coastal Act § 30233(a), *emphasis added*.

As addressed above, the CCC concluded that the Project site contains a two-acre jurisdictional wetland that meets the definition of wetland in the LCP, and that this wetland

[122] Ex. 3009 at 13. *See also*, Ex. 3019 at 2 and Ex. 3009 at 13.

would be eliminated by the Project. Additionally, the evidence detailed above and in Intervenors' Opening Brief documents that the entire Project site is constrained by habitat that meets the definition of ESHA as defined by the LCP due to the presence of Peregrine falcon and other raptor foraging, resting and nesting habitat; dune habitat; and habitat that supports the Globose dune beetle and Silvery legless lizard. In order to comply with Policy 52, the CCC's 30413(d) report recommended that the Project be relocated to an alternative site that does not result in the direct impact to wetlands and ESHA.

As explained in Section IV, substantial evidence reveals that the two onsite alternatives are not feasible either, due to impacts to wetlands and ESHA. However, Intervenors' CAISO Brief establishes that a feasible alternative to the Project does exist that would avoid these significant impacts. As a result, the Project as proposed is not consistent with CLUP Policy 52 and cannot be found in conformance with this policy as long as it is located on this site.

c. The Project Does Not Conform to the CZO Coastal Energy Facilities Sub-Zone.

Most of the proposed site for the Puente Project is zoned as within the Coastal Energy Facilities sub-zone ("EC") under the Oxnard CZO. The EC sub-zone is intended to "provide areas that allow for siting, construction, modification, and maintenance of power generating facilities and electrical substations consistent with Policies 52, 54, 55 and 56 of the Oxnard coastal land use plan." [CITE] Because the Project is not consistent with CLUP 52, the Project does not comply with the EC sub-zone designation. This finding is consistent with the LCP's stated prioritization of preserving sensitive habitat areas and coastal resources over burdening its coast with a fourth energy facility.

In sum, the Project's conflicts with the City of Oxnard's General Plan and LCP are significant and have not been meaningfully addressed or mitigated in compliance with CEQA or the Warren-Alquist Act.

B. The Project Violates State Law.

1. The Project Violates Coastal Act Policies Protecting Wetlands and ESHA.

The above section identifies the Project's numerous inconsistencies with the Coastal Act that were also identified by the CCC in its 30413(d) Report and subsequent July 2017 letter. Unfortunately, the 30413(d) reports recommendations have largely been ignored. These include:

- The filling of wetlands on the Project site is prohibited and violates Coastal Act Sections 30233(a) and 30231. The 30413(d) report recommended that the Project be relocated to an alternative site that does not result in the direct impact to wetlands.[123] There are feasible, less damaging alternatives available offsite that would avoid filling wetlands.[124]

- The Project's development in ESHA onsite (detailed in Intervenors' Opening Brief and above in Section III) violates Coastal Act § 30240(a), which prohibits development in ESHA other than uses dependent on that ESHA. As described

[123] Ex. 3009 at 14.
[124] The FSA concludes that the Del Norte site would have fewer impacts to biological resources than the Project site. FSA at 4.2-151; *see also* Intervenors' CAISO Brief.

above, there are multiple types of ESHA that are not protected from the Project's development. As a result of the Project's potential impacts to ESHA, and to ensure consistency with the Coastal Act, the 30413(d) report recommended that COC BIO-7 be modified to "require that NRG design P3 such that all project-related development is at least 100 feet, and further from nearby areas that meet the Coastal Commission and LCP definitions of wetlands or ESHA." The provision also "require[s] that NRG submit a revised project plan showing that all project -related development is at least 100 feet from wetlands and ESHA."[125] Not only have these provisions not been incorporated into COC BIO-7, but the Applicant and Staff suggest revisions to weaken COC BIO-7 even further. As a result, the Project does not conform to Coastal Act Section 30240.

- The Project's impacts to ESHA and wetlands surrounding the Project site (described in Section III) violate Coastal Act Sections 30240(b) and 30231. The CCC determined that a 100-foot buffer or more, if feasible, is necessary to protect ESHA and wetlands from adjacent development.[126] As provided above, COC BIO-7 does not require a 100-foot buffer from all ESHA and wetlands impacted by the Project. There are multiple types of ESHA surrounding the Project site that are not protected from the Project's development and impacts. The CCC's recommendation to modify COC BIO-7 and bring the Project into conformance with these provisions of the Coastal Act have not been incorporated; thus, the Project's inconsistencies remain.

[125] Ex. 3009 at 18.
[126] *Id*.

2. The Project Would Harm a Fully Protected Species, in Violation of the Fish and Game Code.

The FSA erroneously concludes that the Project is consistent with the California Fish and Game Code because there are no Fully Protected Species in the Project vicinity. The Peregrine falcon, however, is designated a Fully Protected Species. California Fish and Game Code § 3511(b)(1). As addressed in Section A, the Peregrine falcon has been observed nesting, resting, and foraging on the Project site and in the vicinity; however, this information is not disclosed in the FSA. Demolition, construction, and operation of the Project would result in unmitigated impacts to the Peregrine falcon, its nest, and its foraging habitat. The FSA has provided no analysis or evidence to support its consistency conclusion.

C. <u>The Project Conflicts with Federal Law.</u>

1. The Project Would Harm Western Snowy Plover and Milk-vetch Critical Habitat in Violation of the Endangered Species Act.

The Endangered Species Act ("ESA") designates and protects threatened and endangered plant and animal species, and their critical habitat. 16 U.S.C. § 1531 et seq., § 1536 (a)(2). As discussed above in Sections I.A and D, the Project site is surrounded by designated western snowy plover critical habitat and Milk-vetch critical habitat that would be subject to direct and indirect impacts from the Project. The FSA erroneously relies on COC BIO-1 through BIO-10 to support a conclusion that the Project would not have an adverse impact on these species or their critical habitat; however, as discussed above, Bio-7 was revised to only avoid and buffer

McGrath Lake ESHA and coastal dune ESHA that supports western snowy plover and California least tern breeding habitat, but not all critical habitat that constitutes ESHA. As a result, the Project could potentially cause take of endangered species in violation of Section 9, and destroy or adversely modify critical habitat in violation of Section 7(a)(2). *Gifford Pinchot Task Force v. United States Fish & Wildlife Serv.,* (9th Cir. 2004) 378 F.3d 1059, 1069-74.

2. The Project Would Harm the Peregrine Falcon and Great Horned Owl in Violation of the Migratory Bird Treaty Act.

The FSA concludes that the Project is consistent with the Migratory Bird Treaty Act ("MBTA") but fails to disclose the presence of at least two birds that are protected under the Act, the Peregrine falcon and Great horned owl. The MBTA prohibits the take of designated species or their habitat. The FSA fails to provide any analysis or discussion as to how the Project is consistent with the MBTA when the Project will have significant, unmitigated impacts (described in Section III) to species under its protection. As such, the FSA is deficient and fails to disclose the Project's inconsistency with federal law.

In conclusion, the Project is inconsistent with multiple local, state, and federal laws, regulations, standards, and plans.

VI. THE PROJECT CANNOT BE APPROVED WITHOUT ADOPTING THE CCC'S SPECIFIED PROVISIONS IN THE 30413(D) REPORT.

The Warren-Alquist Act requires that the CEC's decision must include the specific provisions specified in the report submitted by the CCC pursuant to Coastal Act Section 30413(d) *unless* it has substantial evidence to make a specific finding that "the adoption of the

provisions in the report would result in greater adverse impact on the environment or that the provisions proposed in the report would not be feasible." Pub. Res. Code 25523(b). The CCC's specific provisions adopted to protect and buffer coastal wetlands and ESHA from the Project's development, provided on pages 14, 16, and 18 of the 30413(d) report, have not been incorporated and the record is devoid of any evidence that would excuse the CEC from doing so. As such, any decision that is issued without making these required findings violates Section 25523(b).

Moreover, the Warren-Alquist Act's "override" provisions in Pub. Res. Code Section 25525 only apply to the required LORS findings in Section 25523(d), as explicitly stated in that provision. Thus, they have no bearing on Section 25523(b), nor allow the CEC to issue a decision without making the required Section 25523(b) findings. Accordingly, the record requires that the CCC's provisions must be fully incorporated or else the certificate for approval cannot issue for this Project.

VII. THE RECORD LACKS THE EVIDENCE NECESSARY TO OVERRIDE THE PROJECT'S SIGNIFICANT IMPACTS AND INCONSISTENCIES WITH LORS.

As demonstrated above, the environmental review of the Project suffers from numerous deficiencies under CEQA. Nevertheless, it is clear that the Project will result in significant, unmitigated impacts to Biological Resources, Land Use, Air Quality, Environmental Justice, and Coastal Hazards. Not surprisingly, a Project riddled with this many impacts is also inconsistent with multiple local, state, and federal laws adopted to protect the environment and community from these very same impacts. Thus, the CEC cannot make the required LORS consistency

finding pursuant to Pub. Res. Code Section 25523(d)(1). Accordingly, the CEC would have to "override" the LORS conflicts under Pub. Res. Code Section 25525.

Historically, the CEC has used the LORS override sparingly, deeming this authority "to be 'an extraordinary measure which . . . must be done in as limited a manner as possible.'"[127] In order to utilize its override authority under Pub. Res. Code Section 25525, the CEC must make two separate findings, supported by substantial evidence: (1) that the Project is "required for public convenience and necessity"; and (2) that there are not "more prudent and feasible means of achieving such public convenience and necessity." Pub. Res. Code § 25525; Siting Regs. §§ 1752(k), 1755(b). A LORS override determination must be "made based on the totality of the evidence of record, including environmental impacts, consumer benefits, electric system reliability, and the policies of the Warren-Alquist Act intended to ensure that the State has an adequate and reliable supply of electricity."[128] The CEC must identify the factors that it evaluated, explain how the evidence supports its findings, and describe how each factor was weighed in reaching its override decision.[129] However, in this case, the evidence in the record does not support an override for the Project because the public benefits provided by the non-compliant LORS significantly outweigh the minimal electricity reliability benefits of the Project, which could otherwise be achieved with more prudent and feasible alternatives.

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[127] California Energy Commission, *Eastshore Energy Center; Application for Certification (06-AFC-6) City of Hayward; Final Commission Decision* ("Eastshore Final Decision") at 453.; *citing to* California Energy Commission, *Final Commission Decision; Metcalf Energy Center*, Publication No. P800-01-023, Docket No. 99-AFC-3 at 469 (September 2001). *See also* California Energy Commission, *Final Commission Decision; Chula Vista Energy Upgrade Project*, Docket No. 07-AFC-4 (June 2009)(The CEC declined to override the City's Zoning Ordinance or its General Plan.).
[128] Eastshore Final Decision at 452.
[129] *Id.*

A. The Project Is Not Required for Public Convenience and Necessity.

The California Supreme Court established that "[t]he meaning [of public convenience and necessity] must be ascertained by reference to the context, and to the objects and purposes of the statute in which it is found." *San Diego & Coronado Ferry Company v. Railroad Commission* (1930) 210 Cal. 504, 512. California courts have defined "public convenience and necessity" to mean "a public matter, without which the public is inconvenienced to the extent of being handicapped in the practice of business or wholesome pleasure or both, and without which the people of the community are denied, to their detriment, that which is enjoyed by others similarly situated." *Luxor Cab Co. v. Cahill* (1971) 21 Cal. App. 3d 551, 557-558.

"Public convenience and necessity" under Section 25525 is also used in a similar context under Public Utilities Code Section 1001,[130] which requires every public utility to obtain a certificate of public convenience and necessity before beginning construction of any "line, plant, or system, or of any extension thereof."[131] Pub. Utilities Code § 1001. To determine whether the proposed construction is required for "public convenience and necessity," the Public Utilities Commission must consider the following factors: community; historical and aesthetic values; recreational and park areas; and influence on the environment. Pub. Utilities Code § 1002(a)(1)-(4). These four factors provide additional guidance for interpreting the phrase under Section 25525.[132]

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[130] "[N]umerous decisions address the phrase "public convenience and necessity" under similar statutes. *Building Material & Construction Teamsters' Union v. Farrell* (1986) 41 Cal.3d 651, 665 ("It is well settled that statutes should be construed in harmony with other statutes on the same general subject. (internal citations omitted.) This rule applies even when interpreting provisions in different codes." (internal citations omitted.).)

[131] "No railroad corporation … shall begin the construction of a street railroad, or of a line, plant, or system, or of any extension thereof, without having first obtained from the commission a certificate that the present or future public convenience and necessity require or will require such construction." Pub. Util. Code § 1001.

[132] Eastshore Final Decision at 452.

Here, the evidence in the record does not support that "the stated goals and policies of the Warren-Alquist Act"[133] outweigh the substantial public benefits conferred by the non-conforming LORS. Upon balancing the nominal electricity reliability benefits of the Project with the host of competing and beneficial purposes of the LORS, the CEC must conclude that the proposed Project is not required for "public convenience and necessity."

1. The Applicant's Inaccurate and Unsubstantiated Allegations that the Project Provides Public Benefit Do Not Demonstrate that the Facility is Required for "Public Convenience and Necessity."

The legislative policy of the Warren-Alquist Act is "that electrical energy is essential to health, safety and welfare of the people of the state [of California], and it is the responsibility of the state government … to ensure that a reliable supply of energy is maintained."[134] In its Opening Brief, the Applicant argues that "the Project offers several substantial economic, environmental, and electricity reliability"[135] benefits, including to "provide electricity when it is most needed, during peak demand periods," to "prevent voltage collapse by maintaining reliable electric service and meeting the Moorpark sub-area's Local Capacity Requirements (LCR) need," and to facilitate "the integration of variable renewable energy resources." [136]

However, the evidence does not support that Applicant's stated array of purported electricity and reliability benefits of the proposed Project are "necessary." The basis for the Project's procurement is solely to meet local capacity need in the event of the loss of multiple

[133] *Id.* (Is it more important and/or beneficial to the public to positively affect the supply of electricity or is the public interest best served by declining to override and thus avoid hindering the purposes of the LORS in question?)
[134] 74 AB 1575 (1973).
[135] Applicant's Opening Brief at 124.
[136] Applicant's Opening Brief at 125-26.

transmission lines that deliver power to the Moorpark area.[137] There is no other need for the Project. Thus, while Applicant asserts the Project is needed "during peak demand periods," there is no need for the Project during a 1-in-10 peak demand day where there are no major outages in the transmission system serving the Moorpark area or even during a 1-in-10 peak demand day when there is also a single major outage in the transmission system.[138] Rather, *a reliability need is only triggered when all three Moopark-Pardee lines are out of service during a period of high demand*.[139] The Project is also not necessary to integrate renewables. As Mr. Caldwell testified, flexibility to integrate renewables can come from anywhere in the Western electricity grid, with "every comprehensive study" concluding that flexibility needs "over at least a fifteen year planning horizon can be met with existing resources."[140] To the extent additional resources would be helpful in integrating renewables, it is to address over-generation, which California is increasingly experiencing during spring days when solar production is high and demand is low. Energy storage can address this concern by charging during periods of over-generation and discharging in early evening as the sun sets. Conventional gas-fired generation like the Project lack this capability. Accordingly, the only potential reliability benefit of the proposed Project is to contribute toward meeting the local capacity need identified by CAISO. As set forth in Intervenors' concurrently filed CAISO Brief, this need can be feasibly met with preferred resources or a combination of preferred resources and reactive power.

[137] *See* Intervenors' Opening Brief at 32.
[138] Ex. 4000, Testimony of Matthew Vespa, p. 8 (providing screenshot of Appendix D of CAISO 2016-2016 TPP showing no resource deficiency in the event of a Category B (single) contingency).
[139] *See* Intervenors' CAISO Brief § II.E.
[140] Exh. 3047, Testimony of James Caldwell, p. 2.

2. Electricity Benefits Offered by the Proposed Project Are Dwarfed By the Public Benefits Conferred By the LORS With Which The Project is Inconsistent.

Local, state, and federal LORS have "presumably been put in place to effectuate some form or degree of public benefit."[141] In weighing the purposes of LORS against the stated goals and policies of the Warren-Alquist Act, the CEC must determine, "based on the unique fact situation … which of the competing public purposes is paramount."[142] Given the present factual situation, "the public interest is best served by declining to override and thus avoid hindering the purposes of the LORS in question."[143]

The LORS with which the Project conflicts confer significant public benefits, particularly to the "park poor" community of Oxnard,[144] by preserving wetlands and sensitive habitat areas in coastal zones, and protecting endangered species. Any electricity/reliability benefits provided by the proposed Project are substantially outweighed by the public need for the protections afforded under these LORS. In Section II of the Intervenors' Opening Brief and in the Section VI. above, Intervenors discuss in detail the specific LORS non-conformances, and the necessity of compliance with these LORS. Intervenors hereby refer to and incorporate the legal authority and reasoning set forth in these sections to support its argument below.

In addition, Intervenors emphasize that the proposed Project significantly conflicts with the City of Oxnard's General Plan and LCP policies. The City's LCP promotes a healthy environment for its residents by limiting exposure to hazards along Oxnard's coast, preventing land use inconsistencies, and minimizing impacts to sensitive biological resources. Even with

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[141] Eastshore Final Decision at 455.
[142] *Id.*
[143] *Id.*
[144] *Testimony of Strela Cervas on Behalf of the California Environmental Justice Alliance* ("Ex. 6000") at 9-10 (TN 215443).

these policies in place, the City already hosts six gas-fired power units, which serve the entire Moorpark sub-area.[145] Now, "Puente threatens to prolong a legacy of environmental injustice that has burdened Oxnard residents for decades."[146] The CEC's approval of an override would serve only to further depress and alienate a community already unjustly overburdened from shouldering more than their fair share of power plants. The evidence does not support such a conclusion.

Moreover, a determination by the CEC to exercise its override authority would improperly supplant the City's interpretation of its planning regulations with the CEC's view, thus taking away the City's authority to make its own planning decisions. Ordinarily, California "courts accord great deference to a local governmental agency's determination of consistency with its own general plan, recognizing that 'the body which adopted the general plan policies in its legislative capacity has unique competence to interpret those policies when applying them in its adjudicatory capacity. [Citations.]" *San Franciscans Upholding the Downtown Plan v. City & Cty. of San Francisco* (2002) 102 Cal. App. 4th 656, 677–78. These same principles should be applied here to ensure that deference is given to the City's interpretation of its LORS, especially where neither the City nor its residents are in favor of the proposed Project. The CEC has provided no basis for concluding that the City improperly applied its LORS.

In addition, as set forth above, the approval of the Project would violate several state and federal laws and regulations that protect the California coast as well as endangered, threatened, and fully protected species. Collectively, these protections are critical to the community, state, and nation.

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[145] *Id.*
[146] *City of Oxnard's Opening Brief* at 34 (September 1, 2017) (TN 221010).

Therefore, where the purposes of LORS significantly outweigh the goals and policies of the Warren-Alquist Act, the CEC must find that the facility is not required for "public convenience and necessity."

B. There Are More Prudent and Feasible Means of Achieving Such Public Convenience and Necessity.

If the CEC properly determines that the Project is *not* required for public convenience and necessity, it must deny the application for certification. However, even if the CEC decides that the Project *is* required for public convenience and necessity, it still cannot approve the Project with an override because the evidence clearly shows there are more prudent and feasible means of achieving such public convenience and necessity. The record identifies alternatives to the proposed facility that would avoid the Project's significant environmental impacts, meet the energy demand, and would be consistent with the applicable LORS. Thus, a LORS override is inappropriate.

The CEC must interpret "prudent and feasible" under Section 25525 "in harmony with other statutes on the same general subject." *Building Material & Construction Teamsters' Union* (1986) 41 Cal. 3d. 648, 665. "Feasible" is defined under CEQA to mean, "capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, social, and technological factors." Pub. Res. Code § 21061.1.

Additionally, the Supreme Court examined the meaning of "feasible and prudent alternatives" in *Citizens to Preserve Overton Park* v. *Volpe* (1971) (hereinafter "*Overton*

Park") 401 U.S. 402.[147] *Overton Park* involved a federal statute that prohibited any project from utilizing public parkland unless "there is no feasible and prudent alternative to the use of such land…"[148] The Court established the "prudent and feasible alternative" determination required more than simply "balancing all relevant factors, with no greater weight to be given to any particular factor." *Id.* at 411-412. The Court stated that the purpose of a statute should "not to be lost unless there [are] truly unusual factors present in a particular case." *Id.* at 412-413. Within the context of the particular statute at issue, the Court determined that "parkland was to be given paramount importance" because "if Congress intended these factors [i.e. cost, directness of route, community disruption] to be on an equal footing with preservation of parkland there would have been no need for the statutes." *Id.* at 412.

Based on the aforementioned legal authority, the CEC must give controlling weight to the LORS' stated objectives and avoidance of LORS noncompliance when identifying the "more prudent and feasible alternatives" that exist here. As fully described in Intervenors' concurrently filed CAISO Brief, the record clearly establishes that deployment of the preferred resource and reactive power scenarios identified in the CAISO Study are more prudent and feasible alternatives to the proposed Project.

[147] The *Overton Park* case has been abrogated by *Califano v. Sanders*, 430 U.S. 99 (1977) and was superseded by the Administrative Dispute Resolution Act of 1996. Nevertheless, courts continue to rely on the standard set forth by the Court regarding the meaning of "prudent and feasible alternatives." *See Adler v. Lewis*, 675 F.2d 1085, 1093-1094 (9th Cir. 1982).
[148] *See* 23 U.S.C. § 138.

CONCLUSION

For the foregoing reasons, the Project must be denied.

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Respectfully submitted,

s/Alicia Roessler

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