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STATE OF CALIFORNIA

ENERGY RESOURCES

CONSERVATION AND DEVELOPMENT COMMISSION

In the Matter of: APPLICATION FOR CERTIFICATION FOR THE PUENTE POWER PROJECT	Docket No. 15-AFC-01 APPLICANT'S REPLY BRIEF ON ALL TOPICS EXCEPT THE CAISO SPECIAL STUDY

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I. INTRODUCTION

NRG Energy Center Oxnard LLC ("NRG" or "Applicant") proposed the Puente Power Project ("Project" or "Puente") to address an identified need for additional electricity in the Moorpark Sub-Area, specifically to prevent voltage collapse following the loss of transmission lines importing power into the sub-area. The California Independent System Operator ("CAISO") currently projects a deficiency of 264 MW in this sub-area in 2022. Southern California Edison ("SCE") awarded the Project a contract through an all-source solicitation in which all preferred resources technologies were invited to participate. After a thorough administrative process commencing in November 2014 and concluding in May 2016, the California Public Utilities Commission ("CPUC") approved the Project contract. In December 2016, the CPUC affirmed its approval on rehearing.

The Project has been the subject of an extremely rigorous environmental and permitting analysis by Applicant, California Energy Commission ("CEC") Staff and Committee, other federal, state, and local agencies, intervenors, and the public. This process has spanned nearly two and a half years, and the Project may well be the most thoroughly studied thermal power plant to ever undergo review by the CEC. Some of the factors that have contributed to a robust review of the Project are the following:

- In addition to the City of Oxnard, where the Project is located, there are multiple intervenors, many of which have extensive experience with the CEC certification process, including Environmental Defense Center ("EDC"), Sierra Club, Center for Biological Diversity ("CBD"), and California Environmental Justice Alliance ("CEJA"). Most of the intervenors are represented by experienced counsel, and have also retained numerous experts in areas such as biological resources, coastal hazards, and project alternatives.
- The CEC has received extensive input from other agencies, including the Ventura County Air Pollution Control District ("VCAPCD"), California Coastal Commission ("CCC"), Coastal Conservancy, California Department of Fish and Wildlife ("CDFW"), and United States Geological Service ("USGS").

- Perhaps the most notable example of additional agency involvement is the input provided by CAISO, which conducted an unprecedented study of non-combustion alternatives to the Project ("CAISO Study"), adding approximately four months to the review schedule and an additional evidentiary hearing focused on the CAISO Study and additional evidence developed by the parties in response thereto.
- In addition to the CAISO Study, the Committee requested additional analysis and evidence from the parties after the close of the evidentiary record in the areas of biological resources, coastal hazards, project alternatives, and facility closure. The Committee added several months to the review process and multiple days of additional evidentiary hearings to accommodate this additional analysis and evidence.
- The Committee has been very accommodating of requests to extend review and comment periods applicable to key documents produced by the agencies such as the Preliminary Determination of Compliance from the VCAPCD and the Preliminary Staff Assessment from CEC Staff.
- CEC Staff and the Committee have held many workshops and hearings in the local community to ensure that residents are able to be involved in the CEC process and provide input on the Project.

As a result of this extensive, and in many cases unique, analysis of the Project, a robust evidentiary record has been created which makes clear that the Project as proposed is the superior option for providing clean and cost-effective electric reliability to the Moorpark Sub-Area. The Project will result in important environmental and reliability benefits, including allowing for the retirement of aging generating units consistent with the State Water Resources Control Board's Once-Through Cooling Policy ("OTC" Policy"). Certification of the Project by the CEC will help ensure a reliable, more nimble supply of electrical energy.

Despite this extended analysis and the stringent Conditions of Certification ("COC") proposed for the Project, some intervenors continue to oppose the Project's certification. Intervenors' opening briefs largely assert the same claims that they have raised—and that have

been addressed—throughout these proceedings. To the extent that new arguments are raised, they are refuted by the evidentiary record and lack legal merit. In sum, intervenors' opening briefs raise no issues that would prevent the CEC from making the findings necessary to certify the Project.

II. THE EVIDENTIARY RECORD IS NOT LIMITED TO THE FSA

Intervenors devote substantial portions of their briefs arguing that the CEC's review of the Project should be limited to the environmental analysis contained in the Final Staff Assessment ("FSA"), Parts 1 and 2, Cal. Energy Comm'n, Ex. Nos. 2000, 2001, TN# 214712, TN# 214713. *See, e.g.*, Opening Brief of Center for Biological Diversity, TN# 221009, at 6-7 ("Opening Brief-CBD"). Intervenors are wrong. The CEC may refer to all evidence in the record, including the FSA, written and oral testimony, and technical reports and memoranda, in reviewing and rendering a decision on the Project. *See, e.g.* Cal. Pub. Res Code § 21080.5(d)(3). Intervenors' imaginary constraints do not limit the scope of information upon which the CEC may base its decision on the Project.

Kirkorowicz v. Cal. Coastal Comm'n, 83 Cal. App. 4th 980 (2000), also involving a certified regulatory program, is instructive. There, landowners challenged a CCC decision denying a Coastal Development Permit for a horse farm as inconsistent with the applicable Local Coastal Program ("LCP"). *Id*. at 983. The reviewing court noted that it may "look to the 'whole' administrative record and consider all relevant evidence" in determining whether substantial evidence supported the CCC's determination. *Id*. at 986; *see also W.M. Barr & Co. v. S. Coast Air Quality Mgmt. Dist.*, 207 Cal. App. 4th 406, 432 (2012) (also applying "whole record" substantial evidence standard to review of a certified regulatory program determination).[1] Likewise, the CEC here may look to all of the evidence in the record as it prepares its findings of fact and law on the Project.[2]

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[1] While Intervenor EDC argues that a reviewing court would be required to weigh the evidence on both sides of the CEC's decision, Intervenors' EDC, Sierra Club, Envt. Coalition Opening Brief, TN# 221023, at 4 ("Opening Brief-EDC"), EDC fails to include the legal standard for substantial evidence, which confirms that an agency's decision will be upheld if supported by "enough relevant information and reasonable inferences . . . that a fair argument can be made to support a conclusion, even though other conclusions might also be reached." Cal. Code Regs. tit.

Intervenors rely almost exclusively on cases involving non-certified regulatory programs in arguing that the FSA omits information required by the California Environmental Quality Act ("CEQA"). Opening Brief-EDC at 3-4; Opening Brief-CBD at 4-7. Neither EDC nor CBD, however, acknowledge the specific standards applicable to agencies operating under a certified regulatory program, like the CEC. California Public Resources Code Section 21080.5(d)(3) states that a certified regulatory program's environmental document must include only "a description of the proposed activity with alternatives to the activity, and mitigation measures to minimize any significant adverse effect on the environment of the activity." The FSA more than meets this standard, as well as any other substantive standards applicable to environmental impact reports, devoting well over a thousand pages to a detailed review of the Project, its potential environmental impacts, and alternatives and mitigation measures to reduce or avoid potentially significant effects.

Intervenor CBD also takes issue with the FSA's reference to other documents in the record or appendices, erroneously suggesting that all environmental analysis must be contained in one single document. Opening Brief-CBD at 6. CBD ignores that CEQA allows an agency to summarize and rely on information in technical reports, which do not need to be reproduced in an environmental analysis document. *See* Cal. Code Regs. tit. 14, § 15148 (technical reports "should be cited but not included"); *Mount Shasta Bioregional Ecology Ctr. v. Cnty. of Siskiyou*, 210 Cal. App. 4th 184, 219 (2010) (EIR may contain a summary of information in a technical

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14, § 15384(a). Substantial evidence includes facts, reasonable assumptions based on facts, and expert opinion supported by facts; it does ***not*** include argument, speculation, unsubstantiated opinion or narrative, or evidence that is not credible. Cal. Pub. Res. Code §§ 21080(e), 21082.2(c); Cal. Code Regs. tit. 14, §§ 15064(f)(5)-(6), 15384; s*ee also Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova*, 40 Cal. 4th 412, 435 (2007) ("In reviewing for substantial evidence, the reviewing court 'may not set aside an agency's approval of an [environmental impact report ("EIR")] on the ground that an opposite conclusion would have been equally or more reasonable,' for on factual questions, [the court's] task 'is not to weigh conflicting evidence and determine who has the better argument.'")

[2] Case law is clear that by referencing a particular report or study in findings of fact, the CEC will incorporate that part of the report into the findings. *McMillan v. Am. Gen. Fin. Corp.*, 60 Cal. App. 3d 175, 183 (1976) ("[R]eference to portions of a report in administrative findings incorporates that part of said report into the findings."); *Towards Responsibility in Planning v. City Council*, 200 Cal. App. 3d 671, 684 (1988) ("It is difficult to take seriously an argument which posits there is no evidence to support a finding" where the findings refer to studies and reports in the record).

report); *Whalers Village Club v. Cal. Coastal Comm'n*, 173 Cal. App. 3d 240, 261 (1985) ("Opinion evidence of experts in environmental planning or ecological sciences is a permissible basis for decision.").

III. INTERVENORS' CRITICISMS OF THE ENVIRONMENTAL ANALYSIS OF THE PROJECT LACK MERIT

A. The Environmental Baseline Appropriately Excludes Demolition of Mandalay Generating Station ("MGS") Units 1 and 2

Intervenors claim that CEC Staff erred by assuming that MGS Units 1 and 2 will be removed only if the proposed Project is approved. *See, e.g.*, Opening Brief-CBD at 22-23; Opening Brief-EDC at 7-8. To the contrary, CEC Staff appropriately analyzed the Project and alternatives against existing physical conditions, which include the continued operation of MGS Units 1 and 2, and no current plans for the demolition and removal of MGS Units 1 and 2 outside the context of the Project.[3] This approach complies with CEQA Guidelines Section 15125(a), which confirms that in evaluating a project's potentially significant impacts on the environment, a lead agency "should normally limit its examination to changes in the existing physical conditions in the affected area as they exist . . . at the time environmental analysis is commenced." Cal. Code Regs., tit. 14, § 15125(a); *see also Envtl. Planning and Info. Council v. Cnty. of El Dorado*, 131 Cal. App. 3d 350 (1982) (CEQA documents must focus on impacts to the existing environment, not hypothetical situations); *Save Our Peninsula Comm. v. Monterey Cnty. Bd. of Supervisors*, 87 Cal. App. 4th 99, 121 (2001) ("[T]he impacts of the project must be measured against the 'real conditions on the ground'") (quoting *City of Carmel-by-the-Sea v. Bd. of Supervisors*, 183 Cal. App. 3d 229, 246 (1986)). An agency's determination of environmental "baseline" conditions is reviewed under the deferential substantial evidence standard. *Cmtys. for*

[3] CBD also alleges that Applicant's biological surveys "failed to mention the presence of peregrine falcons" and therefore failed to provide an accurate baseline. As discussed in Section III.E.1.c, *infra* the 2015 AFC surveys occurred prior to the falcons nesting on MGS Unit 1. Further, as explained in Applicant's Opening Brief, the smaller survey area, known as the BSA, was specifically designed to address the March 10 Orders and was fully disclosed in both the Draft Biological Resources Survey Methodology, which was made available for public comment, and the Final Biological Resources Survey Methodology. Applicant's Opening Brief on all Topics Except the CAISO Special Study, TN# 221024, at 20-22 ("Opening Brief-Applicant").

a Better Envt. v. S. Coast Air Quality Mgmt. Dist., 48 Cal. 4th 310, 328 (2010). Here, substantial evidence supports the CEC's baseline determination.

If the Project is approved and developed, MGS Units 1 and 2 would be decommissioned and demolished to existing grade after Puente is completed and commissioned. FSA Part 1 at 3-6; Project Enhancement and Refinement, Demolition of Mandalay Generating Station Units 1 and 2, TN# 206698 (Nov. 19, 2015). No such demolition is planned if the Project is not approved at its proposed location within the MGS property. Thus, "[t]he future timeline or approximate schedule for alternative uses of the MGS site in the absence of the Energy Commission's licensing of the Puente Power Project is unknown." FSA Part 1 at 4.2 -135.

While the City of Oxnard claims that it may require removal of MGS Units 1 and 2 through a nuisance action, such claims are speculative and should not be considered in the baseline determination. *See* FSA Part 1 at 4.2-135 ("It is also unknown at what point future circumstances would cause the city to take action on a nuisance determination, and how and when that would result in unused power plant facilities being removed according to a schedule."). The OTC Policy does not require that power plant owners demolish and remove existing power plants that are decommissioned to achieve compliance with the OTC Policy. *See* Carlsbad Energy Center Project (07-AFC-06), Final Decision, 9-5 (June 20, 2012), at 8.1-26 to 8.1-27. Furthermore, there are no provisions in the Oxnard Municipal Code that would specifically authorize the City to force decommissioning or demolition of MGS Units 1 and 2.

The only apparent avenue for the City to pursue a forced demolition would be through a legal challenge claiming the existing units are a nuisance pursuant to Chapter 7 of the Oxnard Municipal Code. Appendix A to this brief sets forth an analysis of the likelihood of success of such an action and concludes that the City would face serious impediments in any attempt to force demolition of MGS Units 1 and 2. Therefore, there is no evidence in the record to suggest that MGS Units 1 and 2 would be removed within any specific timeframe, if at all, if the Project is not approved. Accordingly, MGS Units 1 and 2 are appropriately considered part of the existing environmental setting and baseline.

Moreover, the baseline depends on the ***existing*** environmental setting, not a potential future scenario. Cal. Code Regs. tit. 14, § 15125(a); *see also Citizens for East Shore Parks v. Cal. State Lands Comm'n.*, 202 Cal. App. 4th 549, 562-563 (2011) (proper baseline for analysis of environmental impacts is "what [is] actually happening," not what might happen or should be happening). While MGS Units 1 and 2 may be demolished and removed in the future, their demolition is merely speculative if the Project is not approved at the proposed location. Therefore, cases upholding the use of a future-conditions baseline in the face of known, rapidly changing environmental conditions, i.e., *Neighbors for Smart Rail v. Exposition Metro Line Construction Authority*, 54 Cal. 4th 439 (2013), do not apply.

Finally, Intervenor CEJA's claim that the demolition of MGS Units 1 and 2 should be considered "mitigation" lacks merit. California Environmental Justice Alliance Opening Brief re: Environmental Justice, TN# 221006, at 15-20 ("Opening Brief-CEJA"). CEJA relies on *Lotus v. Department of Transportation*, 223 Cal. App. 4th 645 (2014), but *Lotus* is distinguishable. There, the project proponent incorporated proposed mitigation measures into its description of the project and then concluded that any potential impacts from the project would be less than significant. *Id.* at 655. The Court of Appeal held that "[s]imply stating that there will be no significant impacts because the project incorporates 'special construction techniques' is not adequate or permissible" because the EIR did not disclose the significance of impacts before and after implementation of the proposed measures. *Id*. at 657. Here, on the other hand, the demolition of MGS Units 1 and 2 is not "mitigation" for any significant impacts, and is simply part of the proposed Project design.

Even if the demolition were considered to be mitigation, case law subsequent to *Lotus* confirms that "[a]ny mischaracterization is significant . . . only if it precludes or obfuscates required disclosure of the project's environmental impacts and analysis of potential mitigation measures." *Mission Bay Alliance v. Office of Cmty. Inv. & Infrastructure*, 6 Cal. App. 5th 160, 185 (2016). Intervenors point to no evidence of confusion or obfuscation, as none exists in light of the FSA's detailed discussion of potential impacts with and without removal of MGS Units 1 and 2. *See, e.g.*, FSA Part 1 at 1-6 (air quality impacts from demolition and removal of the

outfall), 1-13 to 1-14 (visual impacts with and without removal of MGS Units 1 and 2), 3-6 to 3-8 (decommissioning and demolition activities), 3-25 to 3-26 (same).

B. The FSA Analyzed the Whole of the Proposed Project

Intervenors mistakenly claim that the FSA failed to analyze the Project as a whole and improperly excluded ancillary development and Project components from environmental review. *See* Opening Brief-EDC at 5-7. To the contrary, the FSA and analyses prepared by Applicant fully described and analyzed the environmental impacts of all components of the Project, including the demolition of MGS Units 1 and 2 and the existing ocean outfall, construction of ancillary pipelines, relocation of gas lines, and other ancillary development. FSA Part 1 at 3-1 to 3-2 (overview), 3-6 to 3-8 (decommissioning and demolition), 3-8 to 3-9 (upgrades to existing infrastructure), 3-9 to 3-10 (new power plant), 3-10 (gas compressor and gas line). EDC's claims that these components have been excluded from maps in the FSA also lack merit.[4] Opening Brief-EDC at 4-6. For example, Figure 1 depicts the entire MGS property and depicts all proposed construction, laydown, and parking areas. FSA Part 1 at Figure 1. A detailed plot plan of the power plant is provided in Figure 4, schematics for gas and water lines are shown in Figure 7, the Project's proposed wastewater system is shown in Figure 9, and a detailed grading plan is provided in Figure 10. *Id*. at Figures 4, 7, 9, 10. This level of detail far exceeds that required by CEQA. *See* Cal. Code Regs. tit. 14, § 15124.

C. Air Quality

As explained in Applicant's Opening Brief, with citations to supporting evidence, the Project would not cause any significant air quality impacts. Opening Brief-Applicant at 11-17; FSA Part 1 at 1-5; Applicant's Opening Testimony, Ex. No. 1101, TN# 215441, Expert Declaration of Gary Rubenstein Regarding Air Quality and Public Health and Specified Areas in Other Disciplines; Applicant's Rebuttal Testimony, Ex. No. 1121, TN# 215553, Expert Declaration of Gary Rubenstein in Response to Opening Testimony of CBD Witness Bill Powers ("Applicant's Rebuttal Test. – Rubenstein Powers Rebuttal Decl."); Final Determination of

[4] EDC's claims that portions of the Project were excluded from the Biological Resources Survey Report are addressed in Section III.E, below.

Compliance, Ventura Cty. Air Pollution Control Dist., Ex. Nos. 2007-2021, TN# 214005-1 to TN# 215005-15, and all exhibits referenced in the foregoing.

1. The FSA's air quality impacts and mitigation analyses are proper

Intervenors rely on *San Joaquin Raptor Rescue Center v. Cnty. of Merced*, 149 Cal. App. 4th 645 (2007), to argue that the FSA fails to properly analyze and mitigate the Project's air quality impacts.[5] Opening Brief-EDC at 27; Opening Brief-CBD at 39-40; City of Oxnard's Opening Brief, TN# 221010, at 63 ("Opening Brief-City of Oxnard"). In *San Joaquin Raptor*, applicants sought to secure a permit that would allow for the expansion of a mining operation. 149 Cal. App. 4th at 650. The mine's EIR included various analyses using either the maximum level of operations that would be allowed under the new permit (550,000 tons extracted per year) or projected actual annual average production following receipt of the new permit (260,000 tons extracted per year). *Id.* at 650-53. But the court found that the applicant was required to analyze the impacts of maximum permitted production in the EIR. *Id.* at 660 ("[I]t was necessary in this case for the EIR to include some analysis of impacts that would result from peak levels of production."). The court also recognized that in some instances, additional analyses of projected actual use are proper. *Id.* at 665 ("[I]t was not improper in this instance for the EIR to consider an estimated annual production of 260,000 tons, as one aspect of the analysis" of traffic impacts). No part of the opinion indicates, as intervenors imply, that mitigation must be calculated based on full permitted—as opposed to actual projected—operations. *See generally id.*

Here, the FSA provides a detailed analysis of the air quality impacts of full permitted operations (24.5% capacity factor). FSA Part 1 at 4.1-1 to 4.1-48. The FSA also provides an analysis of the air quality impacts of projected actual operations (11% actual projected use). *Id.* at 4.1-48 to 4.1-51. In accordance with CEQA, actual projected air quality impacts are fully mitigated by the proposed COCs contained in the FSA. *Id.* at 4.1-51, Air Quality Table 30.

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[5] EDC also cites *County of Inyo v. City of Los Angeles*, 71 Cal. App. 3d 185, 198 (1977), to argue that an agency may not, under CEQA, "analyze a curtailed version of a project in some sections of the document but not others." Opening Brief-EDC at 27. *County of Inyo* is irrelevant because the FSA analyzes the impacts of full permitted Project operations throughout. *See, e.g.*, FSA Part 1 at 4.1-1 to 4.1-48 (analyzing the air quality impacts of full permitted Project operations.)

While intervenors argue that mitigating actual projected impacts rather than maximum permitted impacts is improper under CEQA, they fail to cite a single regulation or case supporting this assertion. *See, e.g.* Opening Brief-EDC at 27-29; Opening Brief-CBD at 39-43; Opening Brief-City of Oxnard at 63-65 (CBD and EDC cite *San Joaquin Raptor,* discussed immediately above, a case that does not support their argument).

Intervenor CBD further argues that the use of the 24.5% capacity factor to analyze permitted worst case impacts coupled with the 11% projected actual use factor used to calculate required mitigation "leaves readers confused, if not affirmatively misled," about the air quality impacts of the Project, and claims this constitutes a violation of CEQA Guidelines Section 15151, requiring good faith disclosure of environmental impacts. Opening Brief-CBD at 40. It is reasonable to calculate CEQA mitigation based on projected actual use to correlate the level of mitigation with the expected impacts. As repeatedly explained in the FSA, air quality impacts analyses are based consistently on the full permitted 24.5 percent capacity factor of 2,150 hours of operation. FSA Part 1 at 4.1-75 (responding to a comment from the City of Oxnard), 4.1-83 (responding to a comment from EDC), 4.1-84, 4.1-87 to 4.1-88. Thus, the record is clear that the Project's potential air quality impacts are based on the 24.5% capacity factor, which constitutes a good faith disclosure of potential impacts.

2. Applicant's use of Emission Reduction Credits is proper

The City argues that Applicant's use of Emission Reduction Credits to offset NO_x emissions is improper. Opening Brief-City of Oxnard at 64-65. However, as explained in Applicant's Opening Brief, the use of offsets is specifically permitted by VCAPCD rules. *See, e.g.*, Rule 26.2.B, Ventura Cnty. Air Pollution Control Dist.[6]; Opening Brief-Applicant at 13. In addition, the emission offset program was designed to encourage early reductions occurring prior to the construction and operation of the Project, because early reductions that occur prior to the construction and operation of the project for which the offsets are used, because earlier

[6] *Available at* http://www.vcapcd.org/ Rulebook/Reg2/Rule%2026.2.pdf.

reductions in emissions are always preferable; Opening Brief-Applicant at 13; Applicant's Rebuttal Test. – Rubenstein Powers Rebuttal Decl., at 10.

D. Greenhouse Gas Emissions

As explained in Applicant's Opening Brief, the Project's greenhouse gas ("GHG") emissions will not result in significant adverse direct, indirect or cumulative effects. Opening Brief-Applicant at 16-17.

1. The Project satisfies CEQA's requirements for greenhouse gas emissions analysis

a. The CEQA Guidelines expressly permit qualitative analyses of greenhouse gas emissions

Intervenors argue that CEC Staff failed to substantiate the FSA's conclusion that the Project will not result in significant GHG emissions because it will improve the efficiency of the electrical grid and reduce system-wide GHG emissions. Opening Brief-CBD at 25-26. This argument falls flat.

The record establishes that the Project will not have a significant impact as a result of GHG emissions and will actually reduce emissions. The Project will replace less efficient existing facilities, and would emit approximately 0.484 metric tonnes of carbon per gross megawatt hour (MTCO2/MWh). FSA Part 1 at 4.1-140, 4.1-153; Applicant's Rebuttal Test. – Rubenstein Powers Rebuttal Decl., at 6. The average performance of Big Creek-Ventura peaking duty facilities is 0.613 MTCO2/MWh, with a range of 0.560 to 1.818 MTCO2/MWh. *Id.* Exact baseline grid-wide GHG emissions are impossible to precisely quantify based on historical data, due to significant variability in electricity demand, the availability of hydroelectric power, weather, gas prices and other conditions that cannot be controlled and will never be replicated. *Id.* at 4.1-158. However, this information is not necessary to evaluate the Project's impacts because the record is clear that the Project would displace less-efficient generation resources and CEC Staff appropriately concluded, based on substantial evidence, that the addition of the Project would contribute to a reduction in statewide GHG emissions. *Id.* at 4.1-127; Applicant's Rebuttal Test. – Rubenstein Powers Rebuttal Decl., at 2-3, 5.

CBD argues that there is insufficient evidence to support the assumption that the Project will be dispatched in a manner that ensures GHG emissions are reduced.[7] Opening Brief-CBD at 32 ("The FSA's core assumption—that Puente will always represent the cheapest, and therefore most efficient, source available whenever it is dispatched—is not supported by substantial evidence."). CBD presents a number of versions of this argument, all of which lack merit:

- ***Puente will be dispatched when it is most efficient.*** CBD asserts that the FSA does not provide quantitative data to show that Puente will be more efficient than the combined cycle units it is likely to displace. Opening Brief–CBD at 38-39. This statement demonstrates a misunderstanding of Puente's role. As explicitly disclosed in the FSA, "[w]hile Puente is less thermally efficient than the natural gas-fired combined cycles . . . Puente could be off line until moments before being needed . . . and reach full load within approximately 10 minutes." FSA Part 1 at 4.1-152. Because resources have varying response times, the most thermally efficient unit *at full load* may not be the lowest emitting in every situation. *Id.* at 4.1-150 ("[A] less efficient (*e.g.*, at full output) plant may actually combust less fuel during a duty cycle than a plant with a lower heat rate, and thus produce fewer GHG emissions."). In response to a comment from CBD, the FSA further explained that "Puente reduces GHG emissions regardless of the relative efficiencies of Puente and other gas-fired resources in the system" because "Puente would be dispatched whenever the (expected) duty cycle constitutes a less expensive (*i.e.*, most efficient/less emitting) alternative than the dispatch of other facilities." *Id.* at 4.1-162; *see also* CEC Staff-Bemis, Tr. Feb. 7, at 126:20-22.
- ***Local reliability needs require local generation.*** CBD argues that Puente will typically be dispatched "out of merit order" for reliability reasons and will

[7] As explained in the FSA, the entity responsible for balancing a region's electrical load and generation will "dispatch" or call on the operation of generation facilities. FSA Part 1 at 4.1-127. The "dispatch order" is generally dictated by the facility's electricity production cost, efficiency, location or contractual obligations. FSA Part 1 at 4.1-127 & n.14.

therefore increase net GHG emissions. Opening Brief-CBD at 33. However, when there are reliability concerns in the Moorpark sub-area, local resources will be required to meet demand. This fact does not alter CEC Staff's conclusion that Puente will reduce system-wide GHG emissions. CEC Staff-Bemis, Tr. Feb. 7, at 127:7 to 123:11.

- ***Puente will not displace renewables.*** CBD argues that Puente may crowd out or displace renewables and preferred resources in the future. Opening Brief – CBD at 35. However, as explained in the FSA, renewable generation resources are dispatched before natural-gas fired generation. FSA Part 1 at 4.1-162; *see also* CEC Staff – Vidaver, Tr. Feb. 7, at 123:16 to 123:20.

CBD suggests that the FSA is deficient merely because certain aspects of the analysis are not precisely quantified. See Opening Brief-CBD at 25-26. Although the FSA quantifies the estimated GHG emissions from the Project and provides a detailed quantitative analysis (see, e.g., FSA Part 1 at 4.1-153 (describing GHG efficiency metrics of the Project); Applicant's Rebuttal Test. – Rubenstein Powers Rebuttal Decl., at 6), it is reasonable and appropriate for some aspects of the analysis to be based on performance standards and qualitative discussion. The CEQA Guidelines are clear that "[a] lead agency shall have discretion to determine, in the context of a particular project, whether to: . . . (2) Rely on a ***qualitative*** analysis or performance based standards." Cal. Code Regs. tit. 14, § 15064.4 (emphasis added). Public agencies are afforded considerable discretion to establish significance thresholds for GHG emissions. *Mission Bay Alliance v. Office of Cmty. Inv. & Infrastructure*, 6 Cal. App. 5th 160, 206 (2016) ("CEQA grants agencies discretion to develop their own thresholds of significance") (quoting *Save Cuyama Valley v. Cnty. of Santa Barbara* 213 Cal. App. 4th 1059, 1068 (2013)); *Lotus v. Dep't of Transp.*, 223 Cal. App. 4th 645, 655 & n.7 (2014) ("The standard of significance applicable in any instance is a matter of discretion exercised by the public agency 'depending on the nature of the area affected.'"). Therefore, the CEC is permitted to rely upon performance standards and qualitative thresholds when evaluating the Project's GHG emissions.

CBD asserts that although the AB 32 Scoping Plan is mentioned, no specific "regulations or requirements," as required by CEQA, are referred to for establishing GHG emissions standards. Opening Brief-CBD at 25. Not so. The FSA provides a detailed list of specific requirements included under AB 32. FSA at 4.1-132 to 4.1-143.

CBD also alleges that the FSA "fails to articulate an adequate and consistent baseline for analysis of GHG emissions." Opening Brief-CBD at 26. Intervenors rely on *San Joaquin Raptor* to argue that more precise quantification of the baseline is required. *Id.* at 26. In *San Joaquin Raptor*, a baseline articulated in an EIR was found to be insufficient because it failed to establish existing conditions in its description of the environmental setting. 149 Cal. App. 4th at 658 ("The real problem, however, is that the EIR does not clearly identify baseline assumptions regarding mine operations in its description of the environmental setting."). Here, on the other hand, the baseline environmental conditions used to evaluate impacts to system GHG emissions are clearly described in the FSA: "The baseline used in assessing the project's GHG emissions is the existing Western grid-wide generation system and its operation in the course of meeting electricity demand subject to reliability constraints." FSA Part 1 at 4.1-158; *see also* CEC Staff-Bemis, Tr. Feb. 7, at 120:12-16; CEC Staff-Vidaver, Tr. Feb. 7, at 120:17-21. This is an appropriate baseline, given the global nature of impacts related to climate change and the interconnected nature of the electrical grid. FSA Part 1 at 4.1-131 to 4.1-136.

CBD also claims the FSA does not disclose existing baseline emissions from MGS Units 1 and 2. Opening Brief-CBD at 29. The FSA in fact expressly discloses emissions performance for both units. "Puente would be more efficient than MGS Units 1 and 2, with an estimated GHG emissions performance of approximately 0.509 MTCO2E/MWh compared to calculated actual annual GHG emissions performance for MGS that ranged from 0.656 to 0.724 MTCO2E/MWh from 2008 to 2013 (CEC 2014a)." FSA Part 1 at 4.1-139.

CBD generally alleges that the FSA's project description is insufficient due to "inconsistent assumptions" regarding the Project's "anticipated capacity factor." Opening Brief-CBD at 29-31. CBD again relies on *San Joaquin Raptor* to support this allegation. *Id.* In *San Joaquin Raptor*, the court found the project description downplayed the increased level of

operations that would be allowed under the new permit by conducting all analyses based on actual projected—rather than full permitted—operations. *San Joaquin Raptor*, 149 Cal. App. 4th at 657. Here, the FSA repeatedly discloses the full permitted level of operations and evaluates all impacts at this level. *See, e.g.*, FSA Part 1 at 4.1-2, 4.1-26, 4.1-75, 4.1-81 to 4.1-84, 4.1-87, 4.1-89, 4.1-113, 4.1-139, 4.1-152, 4.1-156.

2. The Project is consistent with the Avenal precedent decision

CBD argues that the Project will conflict with "the Avenal precedent decision" (to which CBD's brief does not cite) by increasing the overall system heat rate for natural gas plants. Opening Brief-CBD at 36. The Avenal decision requires that any new natural gas-fired power plant certified by CEC "must:

- not increase the overall system heat rate for natural gas plants;
- not interfere with generation from existing renewables or with the integration of new renewable generation; and
- taking into account the two preceding factors, reduce system-wide GHG emissions."[8]

CBD claims that while the projected heat rate for the Project is lower than the state average for peaker facilities, it is higher than the state average for combined-cycle facilities. Opening Brief-CBD at 37. Based on this assertion, CBD's expert Mr. Powers concludes that the Project will "drive upward the average heat rate of gas-fired generation in California and the WECC." *Id.* at 37. But regardless of the average system heat rate, the Project will displace higher heat rate facilities, thereby reducing the overall system heat rate. FSA Part 1 at 4.1-166; *see also id.* at 4.1-153, Greenhouse Gas Table 4 (demonstrating that Puente would have the lowest heat rate of any peaking duty facility in the Big Creek Ventura Local Capacity Area); CEC Staff-Bemis, Tr. Feb. 7, at 130:20-133:11. Mr. Powers' opposing conclusion is based on an analysis of a partial data set that includes only a subset of natural-gas power plants in the system and the mistaken assumption that the Project would be dispatched ahead of lower heat rate

[8] Avenal Energy Project (08-AFC-1), Final Decision, 114 (December 23, 2009), *available at* http://www.energy.ca.gov/2009publications/CEC-800-2009-006/CEC-800-2009-006-CMF.PDF.

facilities. Applicant's Rebuttal Test. – Rubenstein Powers Rebuttal Decl., at 4-5. Rather, the critical question is whether the Project's operation will reduce GHG emissions from California's integrated electrical grid, which the FSA and Applicant's expert testimony demonstrate it will. FSA Appendix AIR-1 ("Because the project would displace less-efficient generation resources, the addition of Puente would contribute to a reduction in California GHG emissions and the average GHG emission rate."); Applicant's Rebuttal Test. – Rubenstein Powers Rebuttal Decl., at 5 ("the answer is that the Project will reduce GHG emissions from electricity production in California").

Mr. Powers and CBD also assert that the Project will displace renewables but the record shows the opposite. "The fact is that CAISO, the CPUC, and California's electric utilities continue to see a role for quick start/high ramp rate units to support the integration of increasing amounts of intermittent renewable generation." Applicant's Rebuttal Test. – Rubenstein Powers Rebuttal Decl. at 6; *see also* FSA at 1-3, 3-2.

E. Biological Resources

1. The Project's biological surveys and related analyses provide substantial evidence that the Project will not result in adverse biological resource impacts

a. The Applicant conducted multiple protocol-level surveys, independent biological observations were made by multiple agencies, and intervenors' biologists were permitted on the Project Area during the CEC's Informational Hearing and Site Visit

Intervenors continue to assert alleged minor defects in the biological surveys conducted for the Project. *See, e.g.*, Opening Brief-CBD at 44, Opening Brief-EDC at 12-22. These claims were addressed in detail in Applicant's Opening Brief. *See* Opening Brief-Applicant at 17-31. As discussed therein, all areas potentially affected by the entirety of the Project (referred to herein as the "Project Area[9]") have been subjected to multiple biological surveys by Applicant

[9] The terms "Project Site" and "Project Area" are used pursuant to the definitions assigned to them in Applicant's Opening Brief. Specifically, the "Project Site" includes the approximately 3-acre (1.21-hectare) site on which the proposed Project will be constructed in the northern portion of the MGS property. The broader area potentially affected by the whole of the Project is referred to herein as the "Project Area." Opening Brief-Applicant at 20-21.

under the oversight of multiple state agencies, confirming that the Project will not adversely impact biological resources. *Id*. at 18-30.

Specifically, Applicant conducted extensive biological surveys in 2015. *See, e.g.*, Application for Certification ("AFC") Section 4.2, Biological Resources, Ex. No 1008, TN# 204219-9; AFC Appendix D, Biological Resources, Ex. No. 1028, TN# 204220-4; Project Enhancement – Outfall Removal and Beach Restoration, Ex. No. 1090, TN# 213802, at 3-3. Applicant conducted additional protocol-level biological surveys in April, May, and June 2017, including surveys for nine special status species that intervenors specifically requested. Applicant's Reply to Intervenors' Joint Motion, TN# 216775, at 2-3; Responses to Comments on Proposed Biological Resources Survey Methodology and Final Biological Survey Methodology, Ex. No. 1144, TN# 216937, at Attachment C ("Final Biological Resources Survey Methodology"), at 2. The results of the supplemental biological resources surveys were provided in Applicant's Biological Resources Survey Report. *See generally* Expert Declaration of Julie Love in Response to March 10, 2017 Committee Orders, Ex. No. 1148, TN# 219898, at Attachment B – Biological Resources Survey Report ("Biological Resources Survey Report"). For more detailed descriptions of the biological surveys conducted by Applicant and overseen by California agencies, *see* Opening Brief-Applicant at 17-20.

Contrary to intervenors' claims, Applicant was not the only party to survey the Project Area. *See* Opening Brief-EDC at 12 (alleging that "the applicant's biologists were the only biologists allowed to conduct surveys on the Project site"). Other biologists unaffiliated with Applicant visited the Project Area on numerous occasions. The CEC conducted an Informational Hearing and Site Visit during which intervenors and any of their biologists were invited to visit the Project Area. Transcript of 04/28/2017 Committee Conference, TN# 217520, at 25:12 to 25:15. During 2015, 2016, and 2017 representatives of various state agencies, including CEC, CCC and CDFW, visited the Project Areas to conduct biological surveys and make observations regarding biological resources. Biological Resources Supplemental Testimony of Carol Watson and John Hilliard, Ex. No. 2026, TN# 220168, at 7 ("CEC Bio Supp. Test."). CCC biologist Dr. Jonna Engel visited the Project Area for the purpose of evaluating biological resources in

November 2015. CCC 30413(d) Report, Ex. No. 3009, TN# 213667, at Attachment C, 1-2 ("CCC 30413(d) Report"). CEC Staff also visited the Project Area multiple times throughout 2015 and 2016. FSA Part 1 at 4.2-1 to 4.2-2, 4.2-9, 4.2-20, 4.2-58, 4.2-76. In addition, the 2017 surveys were conducted under the oversight of the CCC and CEC biologists with coordination and assistance from the CDFW. Transcript of 04/28/2017 Committee Conference, TN# 217520, at 23:2 to 23:9. Dr. Engel of the CCC again visited the Project Area during this period. *Id.*

The record evidence contradicts intervenors' unsubstantiated allegations that Applicant performed only reconnaissance level surveys and prevented intervenor biologists from visiting the MGS property at any point in time. *See* Opening Brief-EDC at 12; Transcript of 04/28/2017 Committee Conference, TN# 217520, at 25:12 to 25:15 (explaining that there was a site visit during which intervenors and any of their consultants and experts were free to visit the site). Rather, the record shows that more than sufficient biological resources surveys have been conducted that fully evaluate the potential for special-status species on the Project Area. *See* Opening Brief-Applicant at 18-30.

b. The Biological Survey Area for the supplemental surveys was specifically designed to comply with the March 10 Orders

Intervenors continue to take issue with the survey area for the supplemental biological resources surveys conducted in 2017. Opening Brief-EDC at 13; Opening Brief-CBD at 44. Intervenors attempt to mischaracterize the Biological Survey Area ("BSA"), which was defined for purposes of the 2017 supplemental survey and which is smaller relative to that which was analyzed for the AFC and its refinements, as "undisputed evidence" that the "entire Project site has not been adequately surveyed." Opening Brief-EDC at 13. They argue without citation that limiting the supplemental surveys to the Project Site (as defined in the additional survey methodology) "resulted in much confusion" and "ignored many other project components." *Id.*; Opening Brief-CBD at 44.

As explained in Applicant's Opening Brief, the BSA as defined for purposes of the 2017 supplemental surveys, was specifically designed to address the March 10 Orders and was fully disclosed in both the Draft Biological Resources Survey Methodology, which was made

available for public comment, and the Final Biological Resources Survey Methodology. Opening Brief-Applicant at 21-22; Final Biological Resources Survey Methodology at 3-4. Given the target species and the survey methodologies employed, it was unnecessary to conduct supplemental, focused surveys in certain portions of the Project Area (*e.g.*, paved areas or open water). Final Biological Resources Survey Methodology at 4. As a result, the BSA for the 2017 the supplemental surveys was appropriately more limited than the area surveyed by Applicant to support the AFC and subsequent refinements thereto, which included the entire Project Area.

To the extent that intervenors are now arguing that the broader Project Area was not adequately surveyed, that claim also fails. *See* Opening Brief-EDC at 13. The extensive surveys conducted in 2015 and 2016 by Applicant and CEC Staff, described above, covered all relevant portions of the Project Area and constitute substantial evidence upon which the CEC may make a finding that the Project will not adversely impact biological resources.

c. There is no evidence to indicate that NRG employees observed nesting raptors prior to the initial biological surveys

Intervenors assert that NRG employees knew that raptor nests existed at the MGS Unit 1 tower "for several years," implying that initial biological resources surveys conducted by the Applicant attempted to conceal the existence of these birds. Opening Brief-EDC at 12. But nothing in the record suggests that the falcons' presence should have been disclosed in the AFC. In June 2017, MGS staff reported that two peregrine falcons had nested on MGS Unit 1 "for the previous 2 years." (i.e., June 2015). Biological Resources Survey Report at 3-10; *id.* at Figure 4. The biological surveys conducted pursuant to and submitted with the AFC, however, were conducted between January and March of 2015, and the AFC itself was submitted in April of 2015. *See generally* AFC, Section 4.2 Biological Resources, TN# 204219-9. Thus, the AFC surveys occurred prior to the falcons nesting on MGS Unit 1.

2. The Project will not adversely impact ESHA

There is no Environmentally Sensitive Habitat Area ("ESHA") present on the MGS property or any property on which development will occur as a result of the Project, or within 100 feet of the Project Site. Opening Brief-Applicant at 31-47. Nevertheless, intervenors

continue to assert that portions of the approximately three-acre Project Site and surrounding areas within the MGS property boundaries constitute ESHA.[10] *See* Opening Brief-EDC at 15-22; Opening Brief-CBD at 44-45. For each of the reasons discussed below, intervenors' contentions fail. Intervenors fail to recognize that ESHA cannot be designated without an amendment to the Oxnard Coastal Land Use Plan ("CLUP") and approval of that amendment by the CCC.

a. The City's LCP does not identify the Project Site or any adjacent area within the MGS property as ESHA

The City's LCP does not designate the Project Site or any adjacent portion of the MGS property as ESHA. *See* CLUP at Map 7; City Council of the City of Oxnard Resolution No. 12,143, adopted May 14, 2002, LCP Amendment – Northshore at Mandalay ("Oxnard Resolution 12,143") at Exhibit 2.3 – Sensitive Habitats Map Amendment, Exhibit 2.4 – Coastal Access Map Amendment. The City cannot unilaterally declare these properties ESHA. To allow such a result would disregard California Coastal Act ("Coastal Act") provisions mandating state and public involvement in issues concerning the coastal zone. If the City wishes to identify parts of the MGS property as ESHA, it instead must amend its LCP and obtain CCC certification. Opening Brief-Applicant at 32-34. The City has not done so.

The City's CCC-certified LCP governs land use matters in the coastal zone, where the Project is located. The LCP is comprised of three items: (i) the Oxnard CLUP, (ii) special coastal zoning regulations (the Coastal Zoning Ordinance) that are codified in Chapter 17 of the City's Municipal Code, and (iii) those portions of the 2030 General Plan that have been certified by the CCC for incorporation in the LCP. Oxnard Mun. Code § 16-1 ("The area within the coastal zone . . . shall be governed by chapter 17 of the code."); 2030 General Plan: Goals &

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[10] EDC also alleges that the FSA fails to disclose the presence of wetlands, riparian areas, and sand dunes on the Project Site. Opening Brief-EDC at 15. In fact, the FSA repeatedly discloses the 2.03 acre wetland allegedly located on the Project Site (FSA Part 1 at 1-4, 4.2-1, 4.2-2, 4.2-6, 4.2-17, 4.2-26, 4.2-28, 4.2-33, 4.2-39, 4.2-60, 4.2-62, 4.2-65, 4.2-116, 4.2-120, 4.2-127, 4.2-153, and 4.2-155 to 4.2-157) as well as riparian areas (FSA Part 1 at 4.2-3, 4.2-7 to 4.2-12, 4.2-22, 4.2-28, 4.2-49, 4.4-84, 4.4-106, 4.11-90) and sand dunes (FSA Part 1 at 1-6, 1-9, 3-3, 4.2-1, 4.2-5, 4.2-6, 4.2-8, to 4.2-10, 4.2-13 to 4.2-18, 4.2-20 to 4.2-22, 4.2-26, 4.2-28 to 4.2-31, 4.2-34 to 4.2-39, 4.2-41, 4.2-44, 4.2-51, 4.2-60 to 4.2-63, 4.2-79, 4.2-97 to 4.2-99, 4.2-129, 4.2-149, 4.2-152, 4.2-155, 4.4-5, 4.4-14, 4.4-20, 4.4-23, 4.4-67, 4.4-68, 4.4-70, 4.4-84, [and many more instances]) located nearby.

Policies, City of Oxnard, Cal., October 11, 2011, at 1-5, 3-4, 3-39 ("2030 General Plan"); Applicant's Opening Testimony, Ex. No. 1101, TN# 215441, Expert Declaration of Mr. Tim Murphy Regarding Land Use and Agriculture, at 3 ("Applicant's Opening Test. – Murphy Decl."); *see also* FSA Part 1 at 4.7-10.

As with other land use matters in the coastal zone, the LCP controls ESHA designations. When a certified LCP is in place, ESHA can only be designated or identified in accordance with the language of the LCP or through an amendment to the LCP. Opening Brief-Applicant at 33 - 34; *Douda v. Cal. Coastal Comm'n*, 159 Cal. App. 4th 1181, 1192 (2008), *as modified on denial of reh'g* (Mar. 4, 2008) ("Once a local coastal program is certified, the issuing agency has no choice but to issue a coastal development permit as long as the proposed development is in conformity with the local coastal program. ***In other words, an issuing agency cannot deviate from a certified local coastal program and designate an additional environmentally sensitive habitat area.")*** (emphasis added).

Here, the existing LCP does not designate the Project Site or any adjacent area within the MGS property as ESHA. Nor does the LCP allow the City to identify previously undesignated lands as ESHA based on an ad hoc determination that those properties satisfy the definition of ESHA in the LCP or the Coastal Act. The City is prohibited from creating new ESHA, *ex post*, simply as a means of preventing development from occurring. Rather, the proper mechanism by which the City may designate an area as ESHA is to modify its LCP and obtain CCC certification.[11] To permit the City to bypass the LCP-amendment process would eviscerate the Coastal Act's procedural protections. *Citizens of Goleta Valley v. Bd. of Supervisors*, 52 Cal. 3d 553, 571-72 (1990) (highlighting the Coastal Act's procedural requirements, such as public participation, hearings, and CCC involvement and certification, necessary for a local jurisdiction to adopt a LCP and noting that "[a]mendment must undergo the same rigorous public scrutiny as the original documents"). Because the City's certified LCP does not identify the Project Site or

[11] That the City has undertaken LCP amendments in relation to other development projects for the purpose of identifying new ESHA demonstrates its understanding of the limitations of its LCP. Opening Brief-Applicant at 34-35.

any adjacent area of the MGS property as ESHA, those properties do not constitute ESHA at this time.

Intervenors raise two arguments in hopes of overcoming the clear legal authorities discussed above requiring a LCP amendment to identify previously-undesignated properties as ESHA. Both arguments lack merit.

First, intervenors inexplicably claim that the Project Site contains ESHA based on CLUP Map No. 7, mapping "sensitive habitats." Opening Brief-EDC at 11, 15, 19. While CLUP Map No. 7 is a rough, low resolution depiction, it is clear that the Project Site is not covered by its marked "sensitive habitat" areas. CLUP at III-9. The Project Site is located to the south of McGrath Lake. FSA at 4.14-2 to 4.14-3. McGrath Lake is marked as a "sensitive habitat" in Map No. 7. CLUP at III-9 to III-10. However, the area south of McGrath Lake, *i.e.*, the Project Site, is not marked as a "sensitive habitat," meaning that the Project Site does not have ESHA status under the CLUP. *Id*. The FSA's conclusion that the CLUP "shows portions of the McGrath parcel mitigation area to the north of the project as resource protection areas, but does not characterize the project site as an ESHA" was not "made in error" as intervenors claim. FSA at 4.2-8, Opening Brief-EDC at 11.

Second, intervenors rely heavily on *Banning Ranch Conservancy v. City of Newport Beach*, 2 Cal. 5th 918 (2017) to argue that "an EIR must identify and discuss which areas qualify as ESHA." Opening Brief-EDC at 9. However, there are numerous significant distinctions between the circumstances present in the *Banning Ranch* case, and those present here, and *Banning Ranch* remains inapplicable.

As an initial matter, the FSA expressly addresses potential ESHA impacts and discloses all ESHA areas identified by the CCC within a 1-mile radius of the Project Site. *See* FSA Part 1 at 4.2-8 ("Environmentally Sensitive Habitat"). Thus, the FSA's full disclosure of ESHA contrasts starkly with the EIR in *Banning Ranch*, which made no attempt to evaluate ESHA issues. *Banning Ranch Conservancy*, 2 Cal. 5th at 937 ("[T]he City's EIR omitted *any* analysis of the Coastal Act's ESHA requirements . . . . As a result, the EIR did not meaningfully address feasible alternatives or mitigation measures." (emphasis in original)).

Banning Ranch is further distinguishable because the property at issue in that case was not covered by a certified LCP. 2 Cal. 5th at 927. As explained above, once an LCP is certified, an issuing agency cannot designate ESHA not identified in the LCP without amending the LCP. *Douda*, 159 Cal. App. 4th at 1192. Unlike the proposed Project, which is subject to a certified LCP and does not require any approvals from the CCC, the project at issue in *Banning Ranch* "would require a permit from the [CCC], which would determine whether [the project site] contained ESHA." *Banning Ranch Conservancy*, 2 Cal. 5th at 930. Because the CCC had not previously made any determination regarding ESHA at the *Banning Ranch* site, that EIR was required to identify potential ESHA in order to integrate the requirements of CEQA and the Coastal Act. *Id*. at 936. In contrast, the CCC has previously addressed ESHA in and around the Project Site through certification of the City's LCP, and the FSA provides a full disclosure of potential impacts to designated ESHA. CLUP at III-7 to III-13; FSA Part 1 at 4.2-8.

Intervenors also argue that ESHA "must still be designated if the area meets the criteria for ESHA designation in the Oxnard CLUP." Opening Brief-EDC at 11 (citing *LT-WR, L.L.C. v. Cal. Coastal Comm'n*, 151 Cal. App. 4th 427 (2007), *as modified* June 21, 2007). Not so.

In *LT-WR*, the court found an exception to the general rule, which prohibits *ad hoc* ESHA designations without an LCP amendment, due to the wording of the CLUP at issue. Regarding ESHA designations, the CLUP in *LT-WR* indicated as follows: "Designate the following areas as [ESHA]: (a) those shown on the sensitive environmental resources map (Figure 6), and (b) any undesignated areas which meet the criteria and which are identified through the biotic review process or other means . . . ." *Id.* at 434. Therefore, the court determined that the CCC had properly identified previously-undesignated ESHA in accordance with the CLUP because the CLUP explicitly allowed such supplemental designation during the biotic review process. *Id.*

Unlike the CLUP in *LT-WR*, the Oxnard CLUP contains no wording analogous to subsection (b) above that would permit new ESHA designations absent an amendment to the City's LCP. *See generally* CLUP. Thus, the prohibition articulated in *Douda* against designating previously-undesignated ESHA during the permitting process applies, and the *LT-WR* exception does not apply. *See generally id.* at Section 3.2.2 ("Habitat Areas").

b. The Project Site does not meet the Coastal Act definition of ESHA

Intervenors assert that the CCC 30413(d) Report recommendations "apply to all habitat that meets the CCC and LCP definitions of ESHA and wetlands," suggesting that the CCC recognizes—or should recognize—ESHA on the Project Site that is not designated in the CLUP. *See* Opening Brief-EDC at 14 (citing CCC 30413(d) Report at 10-22). But the CCC 30413(d) Report actually states that "the project site does not meet the definition of an environmentally sensitive habitat area (ESHA) under Section 30107.5 of the Coastal Act." CCC 30413(d) Report at 13. Therefore, the CCC recognizes that the Project Site does not meet the definition of potential ESHA (let alone qualify as designated ESHA). Furthermore, as explained in Applicant's Opening Brief, only the most liberal definition of "wetland" could possibly describe any portion of the Project Site, and in light of recent regulatory changes affected subsequent to the CCC wetlands determination, the Project Site no longer satisfies even the most lenient one-parameter test. Opening Brief-Applicant at 49-51.

c. CCC staff confirmed that "new information" does not alter the CCC's ESHA determinations

Intervenors allege that a letter submitted by CCC staff on July 21, 2017 demonstrates that the Coastal Commission has had insufficient time to review new information regarding potential ESHA. Opening Brief-EDC at 14; Opening Brief-CBD at 44-45. While intervenors now surmise that the CCC 30413(d) Report may have reached different ESHA conclusions had it been prepared after the supplemental surveys in 2017, Opening Brief-EDC at 13-14, the record refutes this claim. CCC staff confirmed that "***the new information and analyses . . . reinforce the previous conclusions and recommendations contained in the Coastal Commission's September 9, 2016 report*** on the Project, submitted to the CEC pursuant to Section 30413(d) of the Coastal Act." CCC – Comments on Puente Project New Information, Ex. No. 4043, TN# 220302, at 1 (emphasis added). Intervenors inexplicably ignore the evidence in the record that does not support their arguments.

CEC Staff also testified on June 27, 2017 that new information generated by Applicant's focused surveys and intervenors' additional submissions had not altered CEC Staff's conclusion

that there is no ESHA on the Project Site. CEC Staff-Watson, Tr. July 27, at 99:12 to 99:16. Moreover, CCC biologist Dr. Jonna Engel testified that the CCC has no plans to supplement its 30413(d) Report, and therefore, no determination of an ESHA has been made on the Project Site, nor is any such determination anticipated. CCC Staff-Engel, Tr. July 27, at 280:21 to 281:5.

d. Intervenors' claims that specific parts of the MGS property constitute ESHA lack merit

Intervenors allege that various habitat on the Project Site meet the definition of ESHA. As explained in Applicant's Opening Brief, the overwhelming majority of evidence in the record indicates that no portion of the Project Site meets the definition of ESHA. Opening Brief-Applicant at 37-42. Additionally, in the context of a jurisdiction governed by a certified LCP, ESHA not identified in the LCP can only be designated by the City and the CCC through a formal amendment to the LCP. Opening Brief-Applicant at 33-35. Furthermore, even if areas improperly identified by intervenors as meeting the definition of ESHA were to be designated as such, applicable requirements would not necessarily preclude development of the Project as proposed. *Id.* at 43-48.

EDC claims that its expert, Lawrence Hunt, identified potential ESHA that could be affected by the Project. Opening Brief-EDC at 14-19. Applying the overly broad definition of ESHA employed by Mr. Hunt would render most of the MGS property ESHA, including paved areas and the existing MGS Unit 1. Opening Brief-Applicant at 42; *see also* Applicant-Love, Tr. July 27, at 95:3-7 ("I would not characterize any of these areas identified by Mr. Hunt or any part of the BSA as an ESHA for several reasons. Those areas are low quality. They have wildlife barriers. They're fragmented, and they are also degraded."). To qualify as ESHA, an area or species must be "easily disturbed or degraded by human activities." Cal. Pub. Res. Code § 30107.5.[12] Any habitat or species present on or near the MGS property has withstood the

[12] EDC also cites to *Bolsa Chica Land Tr. v. Superior Court*, 71 Cal. App. 4th 493, 507 (1999), to argue that the fact that a habitat is degraded is not a factor in determining whether that area should be designated an ESHA. In *Bolsa Chica*, a eucalyptus grove was deteriorating due to the gradually increasing salinity of the soil in a coastal wetland area, and the court held that the degraded nature of the grove did not alter its ESHA status. *Id.* at 505, 508. To be designated an ESHA, an area must be "easily disturbed or degraded by human activities." Cal. Pub. Res. Code § 30107.5. In *Bolsa Chica*, an undeveloped area was still ESHA because, despite its degraded

ongoing operations of a power plant for the past 50 years. Therefore, (1) development of the Project, which is a far less intensive and impactful use than the existing MGS facility, would not be expected to impact remaining habitats and species, and (2) such habitats are demonstrably robust, and therefore unlikely to be easily degraded.

Responses to intervenors' specific claims of ESHAs are provided below.

- **Ice plant mats are not ESHA.** Intervenors allege that ice plant mats to the north of the Project Site are dune habitat that "meets the definition of ESHA." Opening Brief-EDC at 17. As CEC Staff explained, while "Dr. Engel expressed her opinion that the ice plant mats . . . comprise dune habitat, and correspondingly would qualify as ESHA," Dr. Engel was clear "that she was not making 'any conclusion of an ESHA determination,' and noted the Coastal Commission made no official determination that ESHA occurs on the perimeter of the site." Opening Brief-CEC Staff at 18.
- **Peregrine foraging habitat is widespread in the area and does not constitute ESHA.** Intervenors allege that peregrine falcon foraging habitat in the vicinity of the Project Site meets the definition of ESHA. Opening Brief-CBD at 45; Opening Brief-EDC at 16, 20. As CEC Staff acknowledge and Applicant's expert Ms. Love explains, such foraging habitat is widespread in the area. Opening Brief-CEC Staff at 16; Applicant-Love, Tr. July 27, at 94:6 to 94:11 ("Foraging habitat is widespread in the area, and the habitats within the BSA are not unique."). Peregrine falcon do not necessarily forage immediately adjacent to their nesting sites; rather they often travel up to 15 miles away to hunt.[13] In addition, any habitat remaining on and around the MGS facility has withstood the

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status, the eucalyptus grove would be easily disturbed or further degraded by human activity. *Id.* at 506. In the current case, whatever habitat remains on the Project Site has survived heavy industrial human activity for decades, and is therefore demonstrably not "easily disturbed or degraded by human activities."

[13] U.S. Forest Service, "Falco perigrinus," *available at* https://www.fs.fed.us/database/feis/animals/bird/fape/all.html.

operations of a power plant for the past 50 years and is therefore not easily disturbed or degraded by human activity.

- **Globose dune beetle were not detected on the Project Site.** Intervenors take issue with the survey methodology Applicant employed to detect the globose dune beetle, which was not detected on the Project Site. Opening Brief-EDC at 17-18. The survey methodology was made available for public comment and updated to include specific suggestions for detecting the globose dune beetle. Responses to Comments on Proposed Biological Survey Methodology and Final Biological Resources Survey Methodology, TN# 216937, at 1, 3, 13-20. Supplemental biological surveys effectively detected globose dune beetles in the northern and western Project Site buffer, the Outfall Area, and the Access Road and buffer area during both transect surveys and pitfall trapping, but no globose dune beetles were observed within the Project Site, Laydown Area, or buffer area. Biological Resources Survey Report at 2.
- **Evidence does not support the possibility of "Silvery legless lizard ESHA" on the Project Site.** Intervenors allege that there is "high potential" for silvery legless lizard ESHA on the Project Site. Opening Brief-EDC at 18-19. The record does not support this assertion. As explained in Applicant's Opening Brief, the testimony provided by EDC witness Brian Trautwein regarding his purported discovery of two silvery legless lizards in the vicinity of the MGS property is not credible. Opening Brief-Applicant at 27-30. Further, as explained in the FSA, legless lizards occur in sand dunes, loose soil, and leaf litter, and the highly compacted soil of the Project Site is not suitable habitat for this species. FSA Part 1 at 4.2-22.
- **Ventura marsh milkvetch and riparian, wetland, and mulefat scrub areas to the north of the Project Site are not designated ESHA.** Intervenors argue that two areas north of the Project Site, one containing Ventura marsh milkvetch and another overlapping parcel containing riparian, wetland, and mulefat scrub areas,

require a 100-foot buffer for protection. Opening Brief–EDC at 20-21, 25. It is not exactly clear what areas north of the Project Site intervenors are referring to. The LCP does not designate either the Ventura marsh milkvetch area or the riparian, wetland, or mulefat areas to the north of the Project Site as ESHA. Opening Brief-CEC Staff at 17-18; Opening Brief-Applicant at 33-35. It is true that certain properties located north of the Project Site and outside the boundaries of the MGS property are designated as ESHA. However, these areas are more than 100 feet from the Project Site, even though as explained in Applicant's Opening Brief, the 100-foot buffer does not necessarily apply to all ESHA, unless the area is also designated as a Resource Protection Area. Opening Brief-Applicant at 45.

- **Critical habitat supporting western snowy plover is protected by a 100-foot buffer.** EDC asserts that there is critical habitat for the western snowy plover beyond the western border of the outfall access road, and that critical habitat meets the definition of ESHA and therefore requires a 100-foot buffer. Opening Brief-EDC at 22. This area is not mapped as ESHA in the Oxnard LCP, and therefore no buffer is required. Nevertheless, COC BIO-7 provides for a 100-foot buffer around plover breeding grounds ***and*** ESHA that support plover. Opening Brief-Applicant at 53, Attachment A. Therefore, EDC's concerns regarding plover protection are fully addressed.

e. Conditions of Certification are sufficient to protect species and habitats

The required COCs "assume presence of special-status species, and include sufficient mitigation to reduce impacts to species to below the level of significance." Opening Brief-CEC Staff at 16; CEC Staff-Watson, Tr. July 27, at 97:16 to 97:22. Nonetheless, intervenors make a series of arguments regarding the sufficiency of the COCs, which are addressed here.

- **Scope of COCs.** EDC argues that BIO-7 has been "improperly narrowed." Opening Brief-EDC at 23. As explained in Applicant's Opening Brief, CEC Staff

agreed with Applicant's proposed clarifications to BIO-7 to apply the 100-foot buffer to the McGrath Lake ESHA and coastal dune ESHA that supports western snowy plover and California least tern breeding. Applicant's Comments on the Proposed Conditions of Certification in the Final Staff Assessment for the Puente Power Project, Ex. No. 1098, TN# 215352, at 5 ("Applicant Comments on Proposed COCs"); Staff's Rebuttal Testimony and Responses to Hearing Officer's Requests for Information, Ex. No. 2006, TN# 215571, at 3 ("Staff Rebuttal Test."). No buffer is required for the other areas that intervenors identify as ESHA, including all areas on the MGS property, because those areas do not constitute ESHA, and the 100-foot buffer does not necessarily apply to all ESHA in any event.

- **Peregrine falcon mitigation.** EDC claims that "the FSA . . . fails to mitigate significant impacts to peregrine falcons and peregrine falcon ESHA." Opening Brief-EDC at 23. As stated in CEC-Staff's Opening Brief, "no direct impacts would occur to Peregrine falcon with implementation of condition of certification Bio-8," which requires pre-construction nest surveys and monitoring of active nests by a biologist, and limits maximum construction noise levels. Opening Brief-CEC Staff at 16. Moreover, "only the [CCC] can designate ESHA," and there is no such "Peregrine falcon ESHA" as intervenors state. *Id.* at 14-19. Finally, "[r]eplacement of wetland habitat required in BIO-9 is considered replacement of foraging habitat for the Peregrine falcon." *Id*. at 21. Accordingly, potential impacts to peregrine falcon have been adequately mitigated to a less than significant level.[14]
- **Globose dune beetle mitigation.** Intervenors take issue with various COCs designed to protect the globose dune beetle. Opening Brief-EDC at 24. As intervenors acknowledge, three different COCs address potential impacts to this

[14] CBD's suggestion that a Natural Communities Conservation Plan may be required (Opening Brief-CBD at 16) is immaterial because no take of peregrine falcon is expected to occur.

species: BIO-2, BIO-7, and BIO-10. *Id.* These COCs reduce potential impacts to below the level of significance. Opening Brief-CEC Staff at 16. While there may be other methods of mitigating potential impacts, the CEC is not required to mitigate impacts in the precise manner requested by intervenors when the CEC's selected measures adequately mitigate potential impacts. *Save Our Peninsula Comm. v. Monterey Cnty. Bd. of Supervisors*, 87 Cal. App. 4th 99, 120 (2001) (agency may choose between conflicting opinions or methodologies).

- **Dune ESHA mitigation.** Intervenors claim that impacts to dune ESHA are not sufficiently mitigated. Opening Brief-EDC at 25. To the contrary, the CCC and CEC Staff have addressed potential dune ESHA and made recommendations to ensure the COCs protect these areas. The CCC "considered that areas of coastal dune, scrub and riparian habitat surrounding the MGS site may qualify as [ESHA] . . . . [CEC] Staff made appropriate changes in response to [CCC] recommendations to modify proposed conditions of certification to mitigate potential impacts to Biological Resources." Opening Brief-CEC Staff at 7 (citations omitted). These recommended changes have been incorporated into the COCs. Opening Brief-Applicant at Attachment A. Additionally, removal of the Outfall area is expected to expand and restore beach habitat and have a beneficial impact on the entire system in the Project vicinity. FSA Part 1 at 4.2-30.
- **Legless lizard mitigation.** Erroneously referring to "legless lizard ESHA on site," intervenors claim that a 100-foot buffer is required around legless lizard habitat. Opening Brief-EDC at 25. No such buffer is required for three reasons. First, as explained above, there is no ESHA on the Project Site. Opening Brief-CEC Staff at 14. Second, as described in Section III.E.2.d, *supra*, the legless lizard discoveries upon which intervenors rely are not credible. Third, the 100-foot buffer called for in the LCP does not necessarily apply to all ESHA in any event.

- **Snowy plover mitigation.** EDC argues that western snowy plover could be impacted by noise associated with construction. Opening Brief-EDC at 26. The record clearly demonstrates that plover are unlikely to be affected by any noise impacts. According to the FSA, "noise levels over 100 decibels may not disturb western snowy plover (USFWS 2011), and, more recently, the Energy Commission declined 60 decibels as too low a disturbance threshold to use for avian species (CEC 2014)." FSA Part 1 at 4.2-35. The FSA projects noise levels associated with construction and operation of the Project will be 47 to 64 decibels. *Id*. at 4.2-36. Implementation of conditions NOISE-6 through NOISE-8 and BIO-8 will ensure that noise impacts do not adversely affect nesting birds, including plover. *Id*. at 4.2-51.

  With respect to EDC's more general criticisms regarding plover protection, COC BIO-7 provides for a 100-foot buffer around plover breeding grounds ***and*** ESHA that support plover. Opening Brief-Applicant at 53, Attachment A.

  In addition, intervenors are simply wrong that BIO-10 does not require "avoidance" for plover if found within 500 feet of construction work. Opening Brief-EDC at 26. COC BIO-10 explicitly states that if special-status species (including plover) are "found onsite or within 500 feet of the site, all individuals of these species shall be avoided or relocated." *See* Opening Brief-CEC Staff at 22. While the translocation plan in BIO-10 #8A and #8B do not specifically address plover, the requirement to avoid plover still applies.

- **Wetland mitigation.** EDC argues that impacts to wetlands are not properly mitigated. Opening Brief-EDC at 26-27. Specifically, EDC argues that the 4:1 mitigation and replacement of affected wetlands, as recommended by the CCC and adopted by Applicant, is unacceptable because the loss of wetlands is not "unavoidable." *Id*. at 26. As a preliminary matter, the designation of a 2.03-acre portion of the Project Site as a "wetland" results from a rigid application of the CCC "one-parameter" test that does not take into consideration the actual

conditions of the Project Site. Opening Brief-Applicant at 48-52. Nevertheless, even if this area was accurately characterized as a wetland, potential impacts have been addressed by COC BIO-9. *Id*. at 52-54. As discussed in CEC Staff's Opening Brief, because the feasibility of alternatives that would avoid filling the alleged wetlands area is uncertain, Staff developed mitigation for filling wetlands as required by the Coastal Act. Opening Brief-CEC Staff at 21. This mitigation, reflected in BIO-9, reflects the expert recommendation of the CCC, the agency tasked with implementing the Coastal Act. *Id*. Intervenors' claims that BIO-9 is insufficient lack merit.

3. The Project will not adversely impact state or federally-listed species

Intervenors claim that the Project will result in "take" of species protected under the federal Endangered Species Act ("ESA"), California Endangered Species Act ("CESA"), and the Migratory Bird Treaty Act ("MBTA").[15] Intervenors ignore substantial evidence in the record demonstrating that the Project is unlikely to significantly impact species of concern.[16] Where potential impacts have been identified, CEC Staff has identified strict COCs to ensure that impacts are prevented or minimized to the extent feasible. With implementation of these COCs, no "take" of protected species will occur.

a. Federal Endangered Species Act

Intervenors allege that the Project will result in "take" of individual California least terns and western snowy plover in contravention of the ESA. *See* Opening Brief-CBD at 13. Intervenors further allege that "impacts to individual birds, including impacts from 'take' due to

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[15] EDC also falsely alleges that following initial surveys, the FSA concluded, "in error, that the Project site did not contain any rare or sensitive species." Opening Brief-EDC at 15. In fact, the FSA discloses all rare and special-status species observed near the Project Site, including woolly seablite (4.2-1), Ventura marsh milkvetch (4.2-8), tidewater goby (4.2-9), western snowy plover (4.2-9), and southwestern willow flycatcher (4.2-9).

[16] CBD specifically alleges that hypothetical dune erosion may affect avian species. However, as discussed in Section III.F.2.b, *infra*, there is absolutely no evidence to support intervenors' assertion that the erosion of dunes due to infrastructure at the Project Site will interfere with dune growth in front of the Project Site.

harassment as defined under the Federal ESA have not been considered." *Id.* To the contrary, numerous COCs specifically address and mitigate potential impacts to protected birds.

As discussed in the FSA, "[c]onstruction and operation of the proposed project would not result in any adverse impacts to federally-listed species or their critical habitat." FSA Part 1 at 4.2-46. Nevertheless, CEC Staff imposed a dozen COCs—including BIO-1 through BIO-10 and NOISE-6 through NOISE-8—that ensure the protection of protected species. *See, e.g.*, *id*. at 4.2-54 ("[W]ith implementation of Conditions of Certification BIO-1 through BIO-10, all impacts would be reduced or mitigated to below significance, and no significant impacts to critical habitat would occur."). Most relevant here, BIO-7.3 requires that all construction activities maintain a 100-feet buffer from off-site dune ESHA that support western snowy plover and California least tern breeding. Opening Brief-Applicant, Appendix A, at 3. Additionally, COCs BIO-8 and BIO-10 require that (1) all vegetation in the construction area shall be removed prior to March 1 (the beginning of the bird nesting season) to avoid conflicts with nesting birds during nesting season; (2) preconstruction surveys for the tern and plover, along with other unlisted species, be conducted in all publically accessible areas within 500 feet of the project site; and (3) demolition activities associated with the ocean outfall removal not be conducted during breeding season (generally March 1 to August 30). *Id.* at Attachment A, at 7; FSA Part 1 at 4.2.74 to 4.2-76. And under BIO-10.2, if special-status species are found onsite or within 500 feet of the site, all individuals will be avoided or relocated. These COCs ensure that individual birds will not be subject to harassment from construction activities.

Intervenors further claim that removal of the outfall would require federal approvals due to alleged impacts to listed species.[17] Opening Brief-CBD at 13. To the contrary, substantial evidence in the record demonstrates that removal of the outfall will not result in adverse impacts

[17] Intervenor CBD claims that the Applicant cannot rely on Nationwide Permit 7 for removal of the outfall structure because "a nationwide permit cannot be relied upon for a project that will impact listed species." Opening Brief-CBD at 14. As described above, COCs BIO-1 through BIO-10 ensure that the removal of the outfall will ***not*** result in adverse impacts to listed species. CBD's argument is a red herring.

to listed species. For example, BIO-10,[18] which requires the preparation and implementation of an Outfall Removal Impacts Avoidance Plan, ensures that any special-status species present on the outfall removal area will be avoided or relocated and provides strict limitations for when ground-disturbing activities may occur. *See* Opening Brief-CEC Staff at 22-24. In addition, removal of the outfall will result in long-term ***beneficial*** impacts by removing potential impacts to nesting California least tern and western snowy plover.[19] FSA Part 1 at 4.2-30, 4.2-54; *see also* Ventura Audubon Society Comments: Nesting Habitat Impacts (Aug. 26, 2015), TN# 205848. Because impacts to special-status species will be avoided with implementation of these measures, no incidental take permit or biological opinion is required.

Intervenors also allege that the Project would harm western snowy plover and Ventura March milk-vetch critical habitat in violation of the ESA. Opening Brief-EDC at 42. Intervenors' claims are based on their incorrect assumption that plover or milk-vetch occur on the Project Site. To the contrary, no plover or milk-vetch were observed on the Project Site during the focused avian surveys or focused botanical transect surveys. Applicant-Love, Tr. July 27, at 92:25 to 93:6. Therefore, there is no evidence that any impacts to plover or milk-vetch would occur.

b. California Endangered Species Act

Intervenors allege that the Project may "take" several species protected under CESA, including the California least tern, western snowy plover, and tidewater goby. Opening Brief-CBD at 10. As described in Section III.E.2.e, *supra*, COCs BIO-1 through BIO-10 ensure that

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[18] Intervenor CBD alleges, with no evidence, that COC BIO-10 does not protect against "harm and harassment" of individual birds. Opening Brief-CBD at 15. CBD ignores that BIO-10 includes numerous requirements that apply outside of the nesting season, including pre-construction surveys, daily biological monitoring, and soft-start requirements for heavy equipment. CBD also ignores other applicable COCs, such as BIO-4, which authorizes the Designated Biologist to halt all activities in any area "when determined that there would be an unpermitted adverse impact to any special-status biological resources." FSA Part 1 at 4.2-68; *see also Id.* at 4.2-66 to 4.2-67 (COC BIO-1, requiring retention of a designated biologist to monitor construction-related ground disturbance activities), 4.2-74 to 4.2-75 (COC BIO-8, requiring pre-construction surveys and biological monitoring during nesting season). Notably, CBD does not offer any additional measures that it believes are missing from BIO-10 or any other COCs.

[19] Intervenor CBD ignores this beneficial impact when arguing that the Project will adversely impact sand dune habitat. *See* Opening Brief-CBD at 15.

no "take" of California least tern or western snowy plover will occur. Likewise, as discussed at length in Applicant's Opening Brief, the Project will not adversely affect tidewater goby, because they are not likely to occur on or near the Project Area. *See* Opening Brief-Applicant at 30-31; CEC Staff-Watson, Tr. Feb. 9, at 494:17 to 494:19, 505:10 to 505:16 ("[T]he USFWS does not believe that the tidewater goby occurs in the Edison Canal because it is not suitable habitat.").

Intervenors also claim that the Project may "take" peregrine falcons, which are fully protected under California law, by "removing foraging habitat and possibly impacting an active nest." Opening Brief-CBD at 16; Opening Brief-EDC at 42. The peregrine falcon is not federally or state-listed, but is considered Fully Protected under CESA. Biological Resources Survey Report at 3-9. As intervenors acknowledge, "take' under CESA is defined to prohibit killing, or attempting to kill, endangered, threatened, or candidate species." Opening Brief-CBD at 13 & n.9 (citing Cal. Fish & Game Code § 86). This definition does not encompass indirect harm or harassment. Indeed, CESA does not prohibit "indirect harm to a state-listed endangered or threatened species resulting from habitat modification." 78 Cal. Att'y Gen. Op. No. 137, 138 (May 15, 1995), 1995 WL 296726. Therefore, even if foraging habitat—which is widespread in the Project vicinity—is affected, no "take" would occur under CESA. *See* Applicant-Love, Tr. July 27, at 94:6 to 94:11; *see also* EDC-Hunt, Tr. July 27, at 247-248 (admitting that falcons' foraging radii extend approximately ten miles).

c. Migratory Bird Treaty Act

Intervenors allege, without any citation or support, that the Project may impact birds protected by the MBTA, including peregrine falcon and great horned owl. Opening Brief-CBD at 20; Opening Brief-EDC at 43. Again, intervenors ignore substantial evidence in the record confirming that, with implementation of proposed COCs, no adverse impacts to MBTA-protected species will occur. For example, "Conditions of Certification BIO-1, BIO- 2, and BIO-4 ensure qualified biologists are available during construction and to conduct pre-construction surveys. BIO-8 provides for pre-construction nest surveys, protective buffers, and monitoring if nests are found. BIO-8 prohibits explosive demolition of MGS Units 1 and 2 and the stack

during nesting season." FSA Part 1 at 4.2-47 (determining that the Project will comply with the MBTA); *see also id*. at 4.2-51 ("LORS specific to avian species (ESA and MBTA) are maintained through implementation of conditions NOISE-6 through NOISE-8 and BIO-8, ensuring that noise impacts do not adversely affect nesting birds.").

Intervenors' claims that new evidence shows that peregrine falcons and great horned owls are likely to be impacted by the Project are misplaced. *See* Opening Brief-CBD at 20; Opening Brief-EDC at 43. The same COCs that apply to other MBTA-protected species, discussed above, will also apply to peregrine falcons and great horned owls, and will ensure that no adverse impacts to these species occur.

d. Intervenors' claims of public trust impacts are unsupported and legally infirm

Intervenors' claims that the Project would result in adverse public trust impacts are incorrect. CEQA does not require an analysis of public trust impacts, and the CDFW—the relevant agency explicitly tasked with preserving the public trust—has not raised any concerns about public trust resources. In any event, substantial evidence demonstrates that the Project will result in a net ***benefit*** to public trust resources by removing the existing outfall. *See, e.g.*, FSA Part 1 at 4.2-30, 4.2-54.

Intervenor CBD cites to California Fish & Game Code Section 711.7, which confirms that "fish and wildlife resources are held in trust for the people of the state by and through [CDFW]." Opening Brief-CBD at 16. In its role as a trustee and as a responsible agency for this Project, CDFW reviewed and provided comments on the Preliminary Staff Assessment and engaged in ongoing consultation with the CEC to ensure that all appropriate conditions have been imposed on the Project. *See, e.g.*, FSA Part 1 at 4.2-1 (noting "ongoing communications with the responsible agencies," including CDFW); *id.* at 4.2-31 ("Energy Commission staff has coordinated its environmental review with CDFW such that the conditions of certification contained in this section of the FSA would satisfy Fish and Game Code sections 1600 et seq. and take the place of terms and conditions that, but for the Commission's exclusive authority, would have been included in a CDFW 1600 permit."); *id.* at 4.2-61 to 4.1-63 (responses to CDFW

comments on the Preliminary Staff Assessment). Through this process, CDFW has fulfilled its public trust duties. Nothing more is required.

F. Coastal Hazards

As explained in Applicant's Opening Brief, the Project will not result in a significant impact to coastal or geological resources and it is resistant to coastal and seismic hazards, as a result of the Project's design and the protection afforded by the substantial beach and dunes fronting the MGS property that includes the Project Site. Opening Brief-Applicant at 54-77.[20] CEC Staff agrees that risks due to flooding are low, and other potential coastal hazard impacts are less than significant or can be mitigated to less than significant by the COCs. Opening Brief-CEC Staff at 3-4.

1. Riverine flooding was properly addressed by Applicant and CEC Staff

The City of Oxnard raises concerns regarding potential riverine flooding on the Project Site, based largely on a flood event that occurred in 1969. Opening Brief-City of Oxnard at 36. As explained in Applicant's Opening Brief, a berm was engineered and built in the early 1970s to ensure the MGS facility would be protected against future flood events. Opening Brief-Applicant at 71. Nevertheless, the City takes issue with CEC Staff's determination that mitigation measures "to protect against water levels equivalent to the 500-year [flood] event" were unnecessary. Opening Brief-City of Oxnard at 42-43. The City ignores that the Project has been designed to manage flood events in excess of a 500-year storm without any impact to operations. Opening Brief-Applicant at 75; *see also* Applicant's March 28, 2017 CEC Workshop Presentation, Ex. No. 1142, TN# 216784, at 2. Further, the existing berm, which ranges in elevation from 17 to 20 feet above sea level, has been effective for the last four decades; since its construction, the MGS facility has not flooded, including during multiple storms approaching or equaling the intensity of the 1969 floods. Opening Brief-Applicant at 71.

[20] EDC argues that the Project would be vulnerable to shutting down during severe weather events. Opening Brief-EDC at 32-33. This is based on a faulty assumption that the Project is vulnerable to flooding. As explained in Applicant's Opening Brief, there is no link between hypothetical flooding and impacts to Puente operations. Opening Brief-Applicant at 75.

The City further alleges that "[n]either staff nor the applicant conducted any independent analysis of the risk of river flooding." Opening Brief-City of Oxnard at 37. This assertion is simply incorrect. *See, e.g*. Opening Brief-Applicant at 73 (explaining why riverine flooding does not pose a significant risk to the Project); Applicant's Opening Testimony, Ex. No. 1101, TN# 215441, Expert Declaration of Phillip Mineart, at 4; ("If the Santa Clara River were to overtop its banks, flood waters would need to flow overland 2 to 3 miles before reaching the MGS property, and would be expected to be shallow."); Applicant-Mineart, Tr. Jul. 26, at 241:20 to 242:7 (explaining that Applicant's riverine flood modeling, along with FEMA modeling, showed that the outlet from McGrath Lake to the ocean works in conjunction with the large berm that protects the Project Site to further reduce the chance of riverine flooding); *see also* Expert Declaration of Phillip Mineart in Response to Supplemental Testimony of Dr. Revell, Ex. No 1150, TN# 220215 at 8 (description of hydrodynamic river modeling of 500 year flood); AFC Section 4.15, Water Resources, Ex. No. 1021, TN# 204219-22, at 13 (noting that Applicant's analysis evaluated "the potential combined effects of SLR and other sources of flooding that may occur simultaneously," including "riverine inundation"); AFC Appendix N, Ex. No. 1042, TN# 204220-14, at 4-5 (same); Applicant's Responses to City of Oxnard Data Requests, Set 2 (47-67), Ex. No. 1059, TN# 206310, at 47-5 (same).

The City also claims that because additional analyses could have been performed, "Staff's conclusion that the site is not at risk from the impact of a 100-year flood cannot be supported." Opening Brief-City of Oxnard at 40-41. This argument was previously raised at the July 26, 2017 hearing, and the Hearing Officer dismissed it outright: "Well, ultimately it's up to the Committee as to when we've studied enough and made all the reasonable assumptions." CEC-Kramer, Tr. Jul. 26, at 301:16 to 301:18.

2. Intervenors' criticisms of the CoSMoS model lack merit

As explained in Applicant's Opening Brief, the CoSMoS 3.0 model developed by the USGS is the best available modeling tool for coastal hazard assessment and presents substantial advantages over other models employed by intervenors. Opening Brief-Applicant at 56-66; *see also* Opening Brief-CEC Staff at 3-4 (CoSMoS is "the best available science for modeling

coastal floods"); FSA Part 1 at 4.11-133 ("[T]he CoSMoS 3.0 tool is a reasonable method of analyzing future hazards that also includes potential effects of climate change."). CoSMoS 3.0 accounts for all potential variables that could pose a flood risk to the Project Site. *See, e.g.*, Opening Brief-Applicant at 57-58; Staff Supp. Test. at 15. Substantial evidence supports CEC Staff's selection of the CoSMoS model, and this choice of methodology is entitled to deference. *N. Coast Rivers Alliance v. Marin Mun. Water Dist.*, 216 Cal. App. 4th 614, 642 (2013).

Nevertheless, Intervenors present a number of arguments criticizing the CoSMoS model, all of which lack merit.[21]

a. CoSMoS was chosen as the best available model and is not directly comparable to the FEMA maps or the TNC Model

Intervenors criticize CEC Staff's use of the CoSMoS 3.0 model to assess coastal hazards, and instead favor reliance on the Ventura County Resilience Study, initially prepared for the Nature Conservancy (referred to here as the "TNC Model" for consistency with Applicant's Opening Brief, but referred to alternately as "Coastal Resilience" or the "Coastal Conservancy model" by the City). Opening Brief-City of Oxnard at 39-42. This criticism is unfounded. Opening Brief-Applicant at 55-56. CEC Staff "reviewed three coastal hazard maps that were developed using dynamic modeling: Coastal Resilience (by The Nature Conservancy (TNC)), Federal Insurance Rate Maps (FIRM, by FEMA), and the Coastal Storm Modeling System (CoSMoS 3.0, by USGS)." FSA Part 1 at 4.11-128. CEC Staff thoroughly evaluated all three models and chose CoSMoS 3.0 because the "USGS tool focuses on the assessment phase. . . . Staff's position is the CoSMoS 3.0 tool is a reasonable method of analyzing future hazards that

[21] EDC also argues that the FSA "fails as an informational document by not providing data underlying CoSMoS assumptions." Opening Brief-EDC at 32. To support this, EDC cites to CEQA Guidelines, Cal. Code Regs. tit. 14, § 15003, which includes a general overview of the purpose of an EIR and makes no reference to any specific disclosure requirements, and *Madera Oversight Coal., Inc. v. Cnty. of Madera*, 199 Cal. App. 4th 48, 102-105 (2011) *disapproved of by Neighbors for Smart Rail v. Exposition Metro Line Const. Auth.*, 57 Cal. 4th 439, (2013), which, as EDC explains, rejects an EIR for failure to fully disclose uncertainties relating to a project's water supply. It is unclear how either of these authorities could support EDC's argument. Regardless, CoSMoS is the best available model and the assumptions and results of the CoSMoS analysis were properly disclosed. Opening Brief-Applicant at 56-66.

also includes potential effects of climate change." *Id*. at 4.11-133; Opening Brief-Applicant at 55-56.

Over the City's objections, CEC Staff found the TNC Model was inadequate and overly conservative. The model's projections, for example, "assume that the coast would erode based on maximum stormwave events with unlimited duration" and that "eroded sediment is completely removed from the system." CEC Staff-Taylor, Tr. Jul. 27, at 219:21 to 219:25. The City complains that CEC Staff refused to use the TNC Model even "as a worst case scenario" and failed to "acknowledge [the model's] findings with respect to ocean flooding." Opening Brief-City of Oxnard at 46. Yet this is just another example of the City overlooking record evidence contradicting their unsupported assertions. FSA Part 1 at 4.11-128 (confirming that CEC Staff used the TNC Model); 4.11-129 ("The map by TNC shows almost complete flooding of the MGS property with only slightly over two inches of sea level rise. These discrepancies stem from the differing characteristics of each tool."); 4.11-130 ("TNC focuses on the evaluation of the extreme events during maximum storm-induced [tide water levels] when hazards are most severe."); 4.11-132, Appendix SW-1, Table 3 (providing a side-by-side comparison of the three tools); 4.11-133 ("Staff also considers the other two tools (FEMA and TNC) in the context of their intended functions.").

The City also attempts to discredit the CoSMoS model by comparing its results to those of the FEMA maps and TNC Model. Opening Brief-City of Oxnard at 46-48. But this is an apples-to-oranges comparison, because these tools use different metrics, and their outputs cannot be directly compared. Opening Brief-Applicant at 61-62; FSA Part 1 at 4.11-132 ("These three tools use very different assumptions . . . which result in considerable differences between the mapped results."). The most notable difference between the models, for example, is that CoSMoS 3.0 displays dynamic wave setup (*i.e.*, areas hit by "no kidding flooding," where water is present for at least two minutes), USGS-O'Neill, Tr. Jul. 26, at 190:1 to 190:8; City of Oxnard-Revell, Tr. Jul. 26, at 158:2 to 158:11, whereas the FEMA maps and TNC Model, in contrast, show maximum wave run-up (*i.e.*, the "maximum wetted extent" of the waves, meaning

that the mapped areas are "not necessarily flooded"). USGS-O'Neill, Tr. Jul. 26, at 121:18 to 121:21; City of Oxnard-Revell, Tr. Jul. 26, at 158:2 to 158:11.[22]

b. CoSMoS properly accounts for potential dune erosion at the Project Site

Intervenors argue that the CoSMoS 3.0 model fails to account for how the developed Project could hinder dune migration. Opening Brief-City of Oxnard at 51-52; Opening Brief-EDC at 32; Opening Brief-CBD at 43. Intervenors therefore protest that the dunes will migrate into the Project and erode, resulting in increased flood risk. Opening Brief-City of Oxnard at 51-52; Opening Brief-EDC at 32; Opening Brief-CBD at 43. Although intervenors are correct that Project infrastructure could prevent the dunes from migrating landward *past* the Project Site, their claim ignores other key facts in the record showing that dunes will *continue to front* the Project Site.

First, the dunes that protect the Project Site are tall, ancient, and stable, and most importantly, have been growing and moving seaward. Applicant-Mineart, Tr. Jul. 26, at 207:5 to 207:14, 208:24 to 209:1. Dunes lost due to erosion at the Project Site boundary, therefore, are replaced by new dunes calving towards the sea. Moreover, no evidence of historic dune erosion exists. *Id.* at 201:21 to 201:22. And even if the dunes were to erode, given the large quantities of sand coming onto the beach, the dunes have the ability to recover. *Id.* at 208:11 to 208:13. Because the dunes are extending seaward, any dune loss at the Project Site has no impact on the Project Site's flood risk.

Second, the CoSMoS 3.0 model is extremely conservative in regard to dune growth. The model, in fact, assumes that no dune nourishment or growth will take place. USGS-O'Neill, Tr.

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[22] Similarly, the City's claim that USGS "admitted that the CoSMoS results have not been validated against historic storms in the vicinity of the Puente site" is misplaced. Opening Brief-City of Oxnard at 50. The CoSMoS 3.0 model underwent extensive validation. USGS-Erikson, Tr. Jul. 26, at 102:1 to 103:22, 112:1 to 112:7; Staff's Supplemental Testimony Filed in Response to the Committee's March 10, 2017 Order for the Puente Power Project, Ex. No. 2025, TN# 218274, at 2 ("All model components of CoSMoS 3.0 Phase 2 have been extensively tested, calibrated, and validated with local, historic data on waves, water levels, and coastal change."). The City's record citations also are misleading. The City refers to Dr. Erikson's testimony stating that USGS did not have site-specific flood-depth data for several storms. But Dr. Revell, the City's expert, then admitted that such data does not exist. USGS-Erikson, Tr. Jul. 26, at 126:5 to 127:20.

Jul. 26, at 148:9 to 148:13. CEC Staff also applied this conservative approach in its analysis. CEC Staff-Taylor, Tr. Jul. 26, at 149:12 to 149:18. This assumption actually overstates dune loss. *Id.* at 149:22 to 149:24. As stated in the foregoing paragraph, however, actual conditions on the beach in front of the Project Site contradict the assumption. That the beach in front of the Project Site has been growing and is projected to continue to accrete for several decades, notwithstanding sea level rise, further supports the conclusion that the dunes fronting the Project Site will continue to expand in the future. Applicant-Mineart, Tr. Jul. 26, at 203:21 to 203:25, 205:22 to 206:6, 208:21 to 209:4.

Third, accounting for dynamic dune fields and assuming no dune recharge, "[a]ll the phases of CoSMoS' results actually show no significant risk of flooding to the project site for the 100-year storm event or for decades thereafter." USGS-Erikson, Tr. Jul. 26, at 113:2 to 113:7. Specifically in regard to dune erosion, CoSMoS modeling demonstrates that the dunes fronting the Project will remain unaffected at year 2050 under 100-year storm conditions unless *five meters* of sea level rise occurs. *Id.* at 106:7 to 106:23, 108:10 to 108:17. Even the extremely conservative TNC Model relied upon by the City projects a maximum of only 2.16 meters of sea level rise by the year 2100. Technical Memorandum Mandalay Generating Station Modeling Support, Ex. No. 3063, TN# 219169, at 9. Given the infinitesimal odds of 5 meters of sea level rise occurring by year 2050, or even by 2100, the odds are equally miniscule that the dunes protecting the Project Site will erode during the Project's lifetime.

As is evident from the foregoing, there is absolutely no evidence to support intervenors' assertion that the erosion of dunes due to infrastructure at the Project Site will interfere with dune growth in front of the Project Site. Rather, the record proves that even under the most extreme conditions, the existing dunes will continue to defend the Project Site.

c. The CoSMoS model evaluated the combined impact from ocean and riverine flooding

The City further argues that the CoSMoS model did not assess combined ocean and river flooding. Opening Brief-City of Oxnard at 40-41. The City's contention is inaccurate. *See, e.g.*, Opening Brief-Applicant at 57-58; Staff Supp. Test. at 15. Using the CoSMoS 3.0 model, CEC

Staff evaluated all potential variables that could pose a flood risk to the project site and determined that the likelihood of floodwaters reaching the site is low. AFC Section 4.15, Water Resources, Ex. No. 1021, TN# 204219-22, at 4-5, 13; FSA Part 1 at 4.11-35 to 4.11-36; *see also* Section III.F.1 *supra* (containing numerous citations regarding Applicant's analysis of the combined effects of ocean and riverine flooding); Recently published technical document for CoSMoS 3.0 (Coastal Storm Modeling System), Version 3, TN# 216610, at 20-32 (providing technical details regarding CoSMoS 3.0 riverine flooding modeling).

3. Photographs of "flooding" submitted by intervenors are inapplicable and unreliable

Intervenors continue to assert that outcomes projected by CoSMoS 3.0, the most sophisticated coastal hazard modeling system in existence today, are controverted by unverified photographs supposedly taken during a storm event in December 2015. Opening Brief-EDC at 29-31; Opening Brief-City of Oxnard at 48-51. The primary photograph in question shows calm water on a road in Oxnard Shores, likely an inch or two deep based on the fact that the tires of the only vehicle in the photograph are fully visible; the source of the water is unknown. Opening Brief-EDC at 31. But intervenors photographs are unreliable and irrelevant and only show that Oxnard Shores has poor drainage.

First, as explained in Applicant's Opening Brief, the proffered photographs are unreliable and unverified. Opening Brief-Applicant at 61-62; USGS-O'Neill, Tr. Jul. 26, at 176:16 to 176:22 ("USGS takes issue with many of the photographs relied on by Dr. Revell because, although USGS relies on some photo evidence for groundtruthing of CoSMoS 3.0, USGS rejects many photos that do not meet their rigorous scientific standards, especially those photos taken by citizen scientists.").

Second, the photographs are irrelevant, because they prove nothing about the viability of the CoSMoS 3.0 model. The CoSMoS 3.0 model is not intended to map every area that gets wet; rather, the CoSMoS model maps "flooding, no-kidding flooding, not intermittent wetting," so it maps areas where water is present for at least two minutes. USGS-O'Neill, Tr. Jul. 26, at 190:1 to 190:8; Opening Brief-Applicant at 61. So photographs demonstrating that a particular area

was at one point wet, such as the photograph described above and the Pierpont Beach photograph depicting a wave washing up very high on the beach, do not prove that the area should have been mapped by the CoSMoS 3.0 model.

4. Dr. Revell's claim that wave run-up will inundate the dunes is an "extreme assumption" based on a flawed model

Intervenors attempt to discredit Mr. Mineart's assessment of sea level rise and wave run-up. Opening Brief-City of Oxnard at 54-55. Relying on Dr. Revell's testimony, intervenors assert that had Mr. Mineart assumed a variable rather than flat shoreline slope, he would have found that wave run-up would reach well above the height of the dunes. *Id.* As USGS has pointed out, however, Dr. Revell's assumption that "run-up will go all the way through the dune for a complete dune blowout is . . . an extreme assumption." USGS-O'Neill, Tr. Jul. 26, at 174:11 to 174:13. As Mr. Mineart explains, Dr. Revell's conclusions are flawed in part because he "underestimated the stability of the dunes" protecting the Project Site. Applicant-Mineart, Tr. Feb. 10, at 204:11 to 204:21; Opening Brief-Applicant at 69-70.

Intervenors argue that a site specific coastal hazards analysis for the Project is required. Opening Brief-City of Oxnard at 55-57. This criticism is unfounded, because the CoSMoS 3.0 model does in fact provide site-specific data. Opening Brief-Applicant at 63. No additional analysis is required. Expert Declaration of Phillip Mineart in Response to Supplemental Testimony of Dr. Revell, Ex. No 1150, TN# 220215, at 4 (confirming that CEC Staff and USGS used CoSMoS 3.0's site-specific data to conduct a site-specific analysis); CEC Staff-Taylor, Tr. Jul. 26, at 217:19 to 218:6 ("The size of the site is large enough that the resolution of the [CoSMoS 3.0] model is appropriate for the site.").

G. Land Use

1. Overview

The Project is consistent with all applicable land use LORS. For properties within the City of Oxnard's coastal zone, such as the MGS property, the LCP governs land use matters. *See, e.g., Douda v. Cal. Coastal Comm'n*, 159 Cal. App. 4th 1181, 1192 (2008), *as modified on denial of reh'g* (Mar. 4, 2008). The LCP is comprised of three items: (i) the Oxnard CLUP,

(ii) special coastal zoning regulations (the Coastal Zoning Ordinance) that are codified in Chapter 17 of the City's Municipal Code, and (iii) those portions of the 2030 General Plan that have been certified by the CCC for incorporation in the LCP. Oxnard Mun. Code § 16-1 ("The area within the coastal zone . . . shall be governed by chapter 17 of the code."); 2030 General Plan: Goals & Policies, City of Oxnard, Cal., October 11, 2011, at 1-5, 3-4, 3-39 ("2030 General Plan"); Applicant's Opening Test. – Murphy Decl., at 3; *see also* FSA Part 1 at 4.7-10. The record demonstrates that the Project is in accordance with all LCP requirements. *See* Opening Brief-Applicant at Sections V.E and VI.

2. Local Land Use Policies: General Plan Policy ICS-17.1, CLUP Policy 52, CLUP Policy 6

Intervenors argue that the Project is inconsistent with three local land use policies and related California Public Resources Code provisions, along with the LORS discussed in Section IV. As explained below, however, intervenors' contentions are misplaced. The record demonstrates that the Project complies with all land use regulations and policies.

Intervenors first challenge the Project's compliance with Policy ICS-17.1 from the 2030 General Plan. Opening Brief-City of Oxnard at 7-8; Opening Brief-EDC at 40. That policy provides that the City must "[e]nsure that public and private, replacement . . . electric generation . . . facilities are built in accordance with [CCC] Sea Level Rise Policy Guidance, California Public Utilities Commission and/or [CEC] policies and regulations." FSA Part 1 at 4.7-10. Intervenors claim that the Project is inconsistent with the warning in the Sea Level Rise Policy Guidance ("CCC Guidance") to avoid the perpetuation of development in areas at risk of coastal flooding and hazards. Opening Brief-City of Oxnard at 7; Opening Brief-EDC at 40. But this position is untenable. As the FSA states, Policy ICS-17.1 is a directive to the City itself that must be implemented via a LCP amendment. FSA Part 1 at 4.7-10. Policy ICS-17.1 does not mandate any action on the part of the Applicant. *Id.* That the CCC Guidance does not create any independent legal requirements, is only advisory in nature, and is designed to guide local planning decisions, not project design or construction, further supports the conclusion

in the FSA.[23] In fact, the CCC Guidance states, specifically in regard to the language on which intervenors rely, that it merely "present[s] measures local governments and coastal planners should consider including in their LCPs."[24] Moreover, even if the CCC Guidance created independent legal obligations applicable to the Project, the Project satisfies them because it is not in an area at significant risk from coastal hazards. *See* Section III.F *supra*; Opening Brief-Applicant at 54-83, 122-24; Opening Brief-CEC Staff at 3-4.

Intervenors next allege that the Project is inconsistent with CLUP Policy 52. Opening Brief-City of Oxnard at 13-15; Opening Brief-EDC at 40-41. Policy 52 provides:

> Industrial and energy-related development shall not be located in coastal resource areas, including sensitive habitats, recreational areas and archeological sites. All development adjacent to these resource areas or agricultural areas shall be designed to mitigate any adverse impacts. All new industrial development shall be designed and screened to minimize aesthetic impacts. Screening shall be primarily vegetative.

CLUP at III-42. Similarly, intervenors assert that the Project violates California Public Resources Code Section 30231, 30233, and 30240. *See, e.g.*, Opening Brief-EDC at 41-42. Sections 30231 and 30233 allow for the filling of wetlands for new energy facilities but only (i) "where there is no feasible less environmentally damaging alternative," and (ii) "where feasible mitigation measures have been provided." Section 30240 provides for the protection of ESHA from "significant disruption" by on-site and adjacent development. The record establishes that the Project is consistent with each of the three requirements contained in Policy 52, as well as Sections 30231, 30233, and 30240.

First, the Project will not be located in any sensitive habitats, recreational areas, or archeological sites. Opening Brief-Applicant at 43, 79 105, 124-25; Applicant's Opening Testimony, Ex. No. 1101, TN# 215441, Expert Declaration of Mark Hale Regarding Cultural

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[23] Cal. Coastal Comm'n, *Sea Level Rise Policy Guidance: Interpretive Guidelines for Addressing Sea Level Rise in Local Coastal Programs and Coastal Development Permits* 14 (Aug. 12, 2015), *available at* https://documents.coastal.ca.gov/assets/slr/guidance/August2015/0_Full_Adopted_Sea_Level_Rise_Policy_Guidance.pdf.

[24] *Id.* at 126, 133.

Resources – Archaeology, at 2-4. No portion of the Project Area constitutes ESHA or wetlands, Section III.E.2 *supra*; Opening Brief-Applicant at 31-53, and the Project, by removing the ocean outfall, will promote recreation in its vicinity. Opening Brief-Applicant at 77-79, 124-125. *Second*, the Project will be set back from any adjacent resource or agricultural area, thereby avoiding any significant impact to those areas. *Id.* at 80; FSA Part 1 at 4.2-54 to 4.2-55. *Third*, Applicant and CEC Staff submitted evidence showing that the Project is designed to "minimize aesthetic impacts" as it offers several improvements over baseline conditions in regard to visual resources and does not significantly impact those resources. FSA Part 1 at 4.14-1, 4.14-18 to 4.14-19; Applicant-Kling, Tr. Feb. 9, at 213:16 to 216:1; Applicant's Opening Testimony, Ex. No. 1101, TN# 215441, Expert Declaration of Louise Kling Regarding Visual Resources, at 3 ("Applicant's Opening Test. – Kling Decl.")

Even if a wetland were present in the Project Area, however, the Project remains a permissible use, as it satisfies the requirements of California Public Resources Code § 30233. The CCC 30413(d) Report identifies a 2.03-acre wetland in the Project Area. *Id.* at 13. As stated above, the record does not support the CCC 30413(d) Report's wetland determination. Section III.E.2.b, *supra*; Opening Brief-Applicant at 48-53.[25] Yet, the CCC 30413(d) Report concludes that, even if the wetland exists, the Project may be developed if the CEC finds that no feasible alternative exists that is less environmentally damaging than the Project and that adequate mitigation measures have been adopted "to minimize adverse environmental effects." CCC 30413(d) Report at 16; Opening Brief-CEC Staff at 5-7; Cal. Pub. Res. Code § 30233(a). In this case, intervenors have failed to provide evidence necessary for this Committee to find that a feasible alternative exists that would involve less environmental harm. To the contrary, the record establishes that all of the proposed alternatives are infeasible and will result in greater damage to environmental resources. *See* Section III.J, *infra*; Opening Brief-Applicant at 90-103. And as both CEC Staff and the CCC have acknowledged, Applicant's agreement to COC BIO-9,

[25] Contrary to the City's assertion, Applicant's expert, Ms. Julie Love, did not concede that a two-acre wetland existed on the MGS property. Applicant-Love, Tr. Jul. 27, at 95:8 to 95:11 ("We still maintain that the two-acre wooly seablite scrub and ice plant vegetation community onsite is not a wetland . . . .").

which requires habitat compensation at a 4:1 ratio, minimizes any adverse environmental effects that may result from the filling of the alleged 2.03-acre wetland in the Project Area. CEC Staff-Watson, Tr. July 27, at 306:13 to 308:7; CCC 30413(d) Report at 16. Thus, the Project complies with CLUP Policy 52 and California Public Resources Code Sections 30231, 30233, and 30240.[26]

Finally, intervenors challenge the Project's consistency with CLUP Policy 6. *See, e.g.*, Opening Brief-City of Oxnard at 15-16. Intervenors claim that the Project conflicts with the policy's requirement that "development adjacent to wetlands or resource protection areas shall be sited and designed to mitigate any adverse impacts" to those areas and that a 100-foot buffer (or a 50-foot buffer if the applicant can show that the larger buffer is unnecessary) shall be provided adjacent to all resource protection areas. Opening Brief-City of Oxnard at 15-16; Opening Brief-EDC at 40. As discussed above and in detail in Applicant's Opening Brief, Policy 6 does not impose any obligations on the Project, because the Project is not adjacent to any "wetlands" or "resource protection areas." Section III.E.2, *supra*; Applicant's Opening Brief at 43-47 (identifying the distinction between "resource protection areas," which has one meaning in the CLUP, and "ESHA," which has another). Even if Policy 6 applied, the Project is consistent with it. Applicant's Opening Brief at 47-48. And although Policy 6 does not mandate the incorporation a buffer when development is adjacent to ESHA, COC BIO-7 requires one nonetheless, providing protection to such areas beyond that required by law. Applicant's Opening Brief at 43-47.

H. Traffic and Transportation

Intervenors raise no arguments questioning the Project's less than significant impact on local traffic and transportation resources. *See* Opening Brief-Applicant at 83-86. Given the lack of dispute on the intervenors' part on this topic, the Committee may adopt the findings suggested

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[26] Because the Project is consistent with Policy 52, intervenors' argument that the Project violates the City's Coastal Zoning Ordinance is moot. *See* Opening Brief-EDC at 41 (arguing that because the Project fails to comply with Policy 52, it also fails to comply with the provision of the Coastal Zoning Ordinance requiring electric generating facilities to be consistent with the policy).

by Applicant in its opening brief: The Project will not have a significant impact on local traffic and transportation, including air traffic. *Id.*

Aviation impacts are addressed in greater detail in Section III.J, Alternatives.

I. Environmental Justice

1. The Project will not result in significant environmental justice impacts

Intervenors continue to allege that the Project will result in significant adverse environmental justice impacts. *See* Opening Brief-CEJA at 1-14, 22-23; Opening Brief-CBD at 47-48; Opening Brief-City of Oxnard at 59-63. But while the opening briefs of Applicant and CEC Staff set forth applicable environmental justice laws, with which the Project is consistent, intervenors describe merely what they believe environmental justice laws should be.

In the Hearing Officer Memo to Parties re Committee Identified Issues for Briefing, TN# 220614, this Committee specifically requested that the parties "[a]ddress the legal requirements of federal and state environmental justice laws, and the application of those laws to this proceeding." *Id.* at 2. Both Applicant and CEC Staff articulated the current state of the law concerning environmental justice: No federal or state laws regulate the CEC's environmental justice analysis. Opening Brief-Applicant at 86-88; Opening Brief-CEC Staff at 24. Nonetheless, a California Natural Resources Agency policy requires that all of its departments and commissions, including the CEC, "consider environmental justice in their decision-making process if their actions have an impact on the environment."[27] Opening Brief-Applicant at 87; Opening Brief-CEC Staff at 27. To comply with this policy in light of the dearth of mandatory practices, CEC Staff conducted its environmental justice analysis by following federal guidance and state policies on or related to the topic. Opening Brief-CEC Staff at 25-27.

Intervenors, in contrast, completely ignore the first part of the Committee's request. Rather than identify and describe the state of the law in regard to environmental justice, intervenors, utterly devoid of legal support or citations, merely proclaim what they believe the

[27] Cal. Nat. Res. Agency, *Environmental Justice Policy*, http://baydeltaconservationplan.com/Libraries/Dynamic_Document_Library/Environmental_Justice_Policy_-_California_Natural_Resources_Agency.sflb.ashx (last visited Aug. 30, 2017).

law should be. Opening Brief-EDC at 33-34; Opening Brief-City of Oxnard at 59-62; Opening Brief-CEJA at 22-25; Opening Brief-CBD at 47-48; FFIERCE Opening Brief, TN# 221026, at 1-5 ("Opening Brief-FFIERCE"). Intervenors claim that CEC Staff should have compared the Project's non-significant impacts to environmental justice communities to those suffered by non-environmental justice communities. *See, e.g.*, Opening Brief-City of Oxnard at 59-60. Intervenors then apply these fabricated "laws" to the facts of this case, and allege that the Project's environmental justice analysis of the Project fails to meet intervenors' inventive "laws." *See, e.g.*, Opening Brief-City of Oxnard at 60.

Applying recognized legal standards for assessing environmental justice impacts confirms that the Project will not result in a significant impact to environmental justice communities. To find that the Project will cause a significant environmental justice effect, this Committee must first conclude that the Project will result in a significant environmental impact. Applicant has established that the Project will not produce such an impact. *See generally* Opening Brief-Applicant at 17-107; Sections III.C-F, *supra*. *A fortiori*, no significant adverse effect to an environmental justice community will occur. Even if the Committee finds that the Project does in fact cause a significant environmental impact, there is no evidence to suggest that environmental justice communities will bear a disproportionate amount of the harm associated with such an impact.[28]

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[28] Intervenors also allege that the approval of the Project could constitute discrimination in violation of state law. CEJA cites *Darensburg v. Metropolitan Transportation Comm'n.*, 636 F.3d 511 (9th Cir. 2011), claiming that it demonstrates that an environmental justice analysis must consider the impact of environmental justice communities in comparison to non-environmental justice communities. Opening Brief-CEJA at 8-14. *Darensburg* simply does not intimate what CEJA suggests. *Darensburg* says that a plaintiff relying on a statistical measure to prove a disparate impact to a protected class must show that the measure "take[s] into account the correct population base and its racial makeup." *Id.* at 519-20. And in fact, the plaintiff in *Darensburg* was unable to make a showing of disparate impact. CEJA also says that the CEC's actions must comply with anti-discrimination laws. CEJA raised the exact same claim before the CPUC, which rejected it. *See* D.16-12-030 at 7-8 (explaining that CEJA failed to demonstrate how these statutes apply to energy procurement proceedings and did not "explain or establish how the Puente contract would constitute discrimination within the meaning of" CEJA's quoted Government code provisions). Intervenors' discrimination claims ignore that (i) the Committee and CEC Staff have analyzed the Project's socioeconomic impacts in detail, (ii) the public has participated in this proceeding for nearly three years, including at many formal hearings, and (iii) CEJA has not shown that a protected class will suffer a "disproportionate adverse impact" as

2. CEC Staff's public health analysis confirms that the Project will not have a significant air quality or public health impacts

Intervenor CEJA continues to assert that CEC Staff improperly evaluated the Project's potential air quality impacts vis-a-vis environmental justice communities. Opening Brief-CEJA at 23-25. As described in detail in Applicant's Opening Brief at pages 15-16, CEC Staff appropriately analyzed potential air quality impacts on environmental justice communities and concluded that, with mitigation, there would be no "adverse impact to members of the public, off-site nonresidential workers, recreational users or any environmental justice community." FSA Part 1 at 4.1-63. The Project will not cause any disproportionate, significant air quality impacts on environmental justice communities. *Id.* at 4.1-90.

CEJA also alleges that the Project would have adverse public health impacts. Opening Brief-CEJA at 25-28. CEC Staff thoroughly evaluated the Project's potential public health impacts, including impacts to the health of individuals residing and working within a six-mile radius of the Project Site, and sensitive receptors, *i.e.*, "the subpopulations which are more sensitive to the effects of toxic substance exposure," such as "infants, the aged, and people with specific illnesses." FSA Part 1 at 4.9-4; CEC Staff-Chu, Tr. Feb. 7, at 101:5 to 102:1, 115:24 to 116:5. Populations of sensitive receptors include daycare centers, nursing homes, schools, hospitals, colleges, and sports arenas. CEC Staff-Chu, Tr. Feb. 7, at 101:6 to 101:14; *see* FSA Part 1 at 4.9-4 (identifying 628 daycare centers, 6 nursing homes, 90 schools, 1 hospital, 6 colleges, and 1 arena as sensitive receptor populations within a six-mile radius of the Project). CEC Staff concluded that the Project will not result in a significant public health impact. FSA Part 1 at 4.9-1, 4.9-32.

Despite this detailed analysis, intervenors argue that CEC Staff's public health analysis was incomplete. *First*, intervenors claim that the analysis failed to account for two groups of receptors located near the Project: students at a nearby school and farm workers. *See, e.g.*, Opening Brief-CBD at 47; Opening Brief-CEJA at 26-27; Opening Brief-FFIERCE at 2. But the

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a result of the Project. *See id.* at 519 (setting forth the *prima facie* case necessary to establish a disparate impact claim).

analysis *did* consider both of those groups. FSA Part 1 at 4.9-4 (evaluating impacts to sensitive receptors, including school populations, and stating that farm workers "are considered and evaluated as off-site workers"). FFIERCE alleges specifically that the AFC did not identify students at two schools located within a six-mile radius of the Project as sensitive receptor populations. Opening Brief-FFIERCE at 2. FFIERCE is wrong—the AFC does identify those institutions. AFC Section 4.9, Public Health, Ex. No. 1015, TN# 204219-16, at Figure 4.9-1. In any event, any oversight is immaterial. Together, the AFC and FSA analyzed over 700 sensitive receptor locations, including several located closer to the Project Site than the two schools FFIERCE mentions, and concluded that no significant health impact would result. FSA Part 1 at 4.9-1, 4.9-4. Nothing in the record suggests that students at the two schools would suffer impacts from the Project different from those endured by other sensitive receptors.

Second, intervenors contend that the CEC Staff's assumed exposure durations for farm workers and students were flawed. Opening Brief-CBD at 47-48; Opening Brief-CEJA at 27; Opening Brief-FFIERCE at 2-3. CEC Staff assumed working populations, including farm workers and students, were exposed to emissions during 8-hour work days, five days per week, 49 weeks per year, for 40 years. CEC Staff-Chu, Tr. Feb. 7, at 115:24 to 116:7. Intervenors allege that farm workers and students are present for more than 8 hours per day, so CEC Staff's analysis understates impacts to those populations. Opening Brief-CEJA at 25-27; *see also* Opening Brief-CBD at 47. But this distinction is entirely inconsequential because of the overly conservative nature of CEC Staff's "screening-level risk assessment." The assessment is "designed to overestimate public health impacts from exposure to project emissions," FSA Part 1 at 4.9-9, and it demonstrated that an individual standing continuously at the MGS property's eastern boundary (*i.e.*, where emission concentrations will be highest) for 70 years would not be exposed to a significant health risk. Applicant-Rubenstein, Tr. Feb. 8, at 163:12 to 165:6; CEC Staff-Chu, Tr. Feb. 7, at 100:25 to 102:13; FSA Part 1 at 4.9-9; s*ee also* CEC Staff-Chu, Tr. Feb. 7, at 102:14 to 110:22; CEC Staff-Layton, Tr. Feb. 10, at 315:3 to 315:7 (noting that air quality standards also adequately protect sensitive receptors, including individuals with asthma, because they "are designed as if you're chained naked to a fence post for 70 years while breast feeding

and drinking the water"). Since there is no significant health impact to that hypothetical individual, there can be no significant health impact to farm workers and students situated farther from the Project Site, even if they may be present for more than 8 hours per day.

Third, intervenors take issue with CEC Staff's statement that the analysis considered only the "incremental effects" of the Project to argue that CEC Staff did not account for the underlying conditions of the communities surrounding the Project. *See, e.g.*, Opening Brief-CEJA at 26. Intervenors ignore that this statement reflects the reality of any cumulative impact analysis. CEC Staff's cumulative impact analysis asked whether the incremental effect of the Project, "when viewed in connection with the effects of past projects, the effects of other projects, and the effects of probable future projects" would result in a significant impact to public health. FSA Part 1 at 4.9-26. Therefore, it was necessary for CEC Staff to identify baseline conditions and the impact the Project and other future projects would have on those conditions. *See, e.g.*, *id.* (concluding that implementation of the Project, when coupled with existing conditions, would result in a total cancer risk of 5.06 in one million at the point of maximum impact (*i.e.*, the Project's eastern boundary)); CEC Staff-Chu, Tr. Feb. 7, at 107:15 to 110:8; FSA Part 1 at 4.9-5 to 4.9-7. This is common practice, not evidence of error.

Finally, intervenors declare that CEC Staff's analysis did not consider data on pesticide use or exposure. *See, e.g.,* Opening Brief-CEJA at 27. But CEC Staff did evaluate the quantities of pesticides used in census tracts surrounding the Project Site to assess the potential pesticide exposure in each area. FSA Part 1 at 4.9-27; CEC Staff-Chu, Tr. Feb. 7, at 101:20 to 101:23, 106:4 to 107:11. CEC Staff also recognized that pesticide use is regulated and monitored by other state agencies. FSA Part 1 at 4.9-27; CEC Staff-Chu, Tr. Feb. 7, at 106:19 to 106:24.

Intervenors' claims regarding the Project's public health analysis are misplaced. The record establishes that the Project will not cause a significant impact to public health, environmental justice, or socioeconomics in general.

3. The Project will improve coastal access

CEJA alleges that CEC Staff failed to analyze the Project's impacts on access to parks or recreational uses. Opening Brief-CEJA at 28. As described in Applicant's Opening Brief,

however, the Project includes demolition and removal of the existing ocean outfall structure, which will greatly improve access and recreation along the beach fronting the Project location. Opening Brief-Applicant at 77-78.

J. Alternatives

As described in detail in Applicant's Opening Brief, the CEC's alternatives analysis fully complies with CEQA and confirms that the Project represents the environmentally superior alternative. Opening Brief-Applicant at 90-103. Intervenors' arguments to the contrary have already been addressed in the FSA or testimony; no new issues are raised. Nevertheless, intervenors' specific claims are addressed below.

1. CEC Staff analyzed a "reasonable range" of alternatives

Intervenors continue to argue that the CEC has failed to analyze a reasonable range of alternatives. Opening Brief-City of Oxnard at 18; Opening Brief-CBD at 21. These rehashed claims were largely addressed in Applicant's Opening Brief at pages 90-103. As described therein, under CEQA, a lead agency must consider a "reasonable range" of alternatives to a project, or to the project's location, "which would feasibly attain most of the basic objectives of the project but would avoid or substantially lessen any of the significant effects of the project." Cal. Code Regs. tit. 14, § 15126.6(a); *see also id.*, § 13053.5(a). As discussed in Applicant's Opening Brief, the CEC considered dozens of possible alternatives—including eight alternative sites, other potential brownfield sites, alternatives suggested by the City, retrofit alternatives, and alternative technologies—and completed a full detailed analysis of five alternatives. There is little doubt that this extremely robust alternatives assessment clears the bar for what constitutes a reasonable range of alternatives under CEQA.[29] *See* Cal. Code Regs. tit. 14, § 15126.6(a) (agency need not consider "every conceivable alternative"); *Village Laguna of Laguna Beach, Inc. v. Bd. of Supervisors*, 134 Cal. App. 3d 1022, 1029 (1992) (agency not required to analyze "every conceivable variation" of an alternative). In addition, the CEC has the discretion to

[29] Intervenors claim that the Project's objectives "improperly narrowed the range of alternatives for analysis." Opening Brief-CBD at 21; *see also* Opening Brief-CEJA at 20. As discussed in the Applicant's Opening Brief, CEC Staff broadly interpreted the project objectives to foster a robust analysis of potential alternatives. Opening Brief-Applicant at 91-92.

determine how many alternatives constitute a reasonable range. Cal. Code Regs. tit. 14, § 15126.6(a). Further, "[t]he statutory requirements for consideration of alternatives must be judged against a rule of reason." *Citizens of Goleta Valley v. Bd. of Supervisors*, 52 Cal. 3d 553, 565 (1990) (quoting *Foundation for San Francisco's Architectural Heritage v. City and Cnty. of San Francisco*, 106 Cal. App. 3d 893, 910 (1980)). The CEC's analysis more than meets these standards.

2. The Ormond Beach and Del Norte/Fifth Street sites would result in adverse aviation impacts and are not feasible alternatives

Intervenors claim that the Ormond Beach and Del Norte/Fifth Street sites are "feasible" and would have fewer significant impacts than the proposed Project location. Opening Brief-City of Oxnard at 25-31. Intervenors ignore substantial evidence in the record confirming that the Ormond Beach and Del Norte/Fifth Street sites would result in adverse aviation impacts that would not occur at the proposed Project location. *See, e.g.,* Opening Brief-Applicant at 96-99; See, e.g., Applicant's Rebuttal Testimony, Ex. No. 1121, TN# 215553, Expert Declaration of Gary Rubenstein Regarding Alternative Sites – Aviation Hazards, at 3; Naval Base Ventura County Comments re: Preliminary Staff Assessment, TN# 213650; Staff Supp. Test. at 29-38; Expert Declaration of Gary Rubenstein in Response to March 10, 2017 Committee Orders, Ex. No. 1147, TN# 218887, at 6; FSA Part 1 at 4.2-2; CEC Staff-Fong, Tr. Jul. 27, at 27:9 to 35:3, 63:19 to 64:13, 64:21 to 65:12, 71:9-11; Applicant-Rubenstein, Tr. July 27, at 24:3 to 25:7.

Intervenors claim that the analysis of air traffic impacts was flawed and that air traffic impacts at the Ormond Beach and Del Norte/Fifth Street alternative sites will be no greater than those at the proposed Project location. *See* Opening Brief-City of Oxnard at 27-31; Opening Brief-EDC at 34-37. Intervenors ignore that pilots are sometimes required to overfly the alternative sites, occasionally at altitudes as low as 500 feet. CEC Staff-Fong, Tr. Jul. 27, at 26:5 to 26:18, 32:12 to 33:25 (noting that "military operations regularly overfly" the Ormond Beach site and that aircraft "commonly overfly" the Del Norte site at low altitudes); Department of the Navy, Naval Base Ventura County, Comments on 15-AFC-01 Puente Power Plant Final Staff Assessment, Ex. No. 1140, TN# 215583, at 1-2. In contrast, pilots are not required to overfly the

proposed Project Site. CEC Staff-Fong, Tr. Jul. 27, at 64:21 to 65:12. This distinction in the rate of overflight is critical and supports the conclusion of Applicant and CEC Staff that the alternative sites present greater impacts to air transportation. *See id*. at 31:19-25 ("Incorporating the turbine designs at the alternative sites in any configuration would still result in significant and unmitigable impacts to aviation. While it is true that the critical velocity of the thermal plume would occur on a lower height during operation of a smaller turbine, the plumes would be still high enough to pose a significant and unmitigable impact.").[30]

Intervenors also repeat prior criticisms that the "Spillane Approach" used to assess aviation hazards is overly conservative. Opening Brief-City of Oxnard at 29-30. Intervenors fail to acknowledge that the CEC Staff also utilized the MITRE Exhaust-Plume-Analyzer, developed under contract with the FAA, which yielded comparable results to the Spillane Approach. CEC-Staff-Hughes, Tr. July 27, at 28:1 to 29:2, 31:1-9. Intervenors' preferred methodology is less conservative and would "not capture the range of conditions including those that would be unsafe for types of aircraft that operate in the county." *Id*. at 29:11-20. In any event, the CEC Staff's choice of methodology is entitled to deference. *North Coast Rivers Alliance v. Marin Municipal Water Dis.t* 216 Cal. App. 4th 614, 642 (2013).

The City also incorrectly claims that locating a power plant on the Ormond Beach site would "avoid Puente's numerous land use inconsistencies, as well as impacts from filling coastal wetlands, impacts to sensitive habitats and special status species, and construction-related transportation impacts." Opening Brief-City of Oxnard at 25-26. As described in detail in the

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[30] Intervenor EDC claims that the aviation impacts at the alternative sites could be avoided by placing turbines farther apart at those sites. Opening Brief-EDC at 36-37. EDC relies on a statement by Mr. Gary Rubenstein during the July 27, 2017 hearing, which EDC characterizes as confirming that turbines could be configured at the Del Norte/Fifth Street site to prevent the thermal plumes from merging. *Id*. EDC misstates Mr. Rubenstein's testimony—Mr. Rubenstein actually testified that "if money was no object and space was no object," then some turbines could be removed "in theory," noting "I'm not convinced that would be sound engineering." Applicant-Rubenstein, Tr. July 27, 74:15-21. Intervenors cite to no other evidence that the turbines could be configured in their desired manner. In any event, Intervenors' hypothesizing is of no consequence, as even a single turbine would result in a plume that would exceed the critical velocity at 512 feet, posing a significant and unavoidable threat to air traffic, which fly over the Del Norte/Fifth Street site at low altitudes. CEC Staff-Fong, Tr. Jul. 27, at 26:5 to 26:18, 32:12 to 33:25.

Applicant's Opening Brief, none of these alleged "impacts" are significant impacts that require mitigation or alternatives. Opening Brief-Applicant at 17-54 (biological resources), 77-84 (land use), 84-86 (transportation); *see also* Cal. Code Regs. tit. 14, § 15126.6(f) ("alternatives shall be limited to ones that would avoid or substantially lessen any of the ***significant effects*** of the project.") (emphasis added).

The City also contends that the Applicant should have conducted a "detailed site analysis" of the Ormond Beach site. Opening Brief-City of Oxnard at 26. The City ignores that CEQA does not require analysis of alternatives at the same level of detail as a proposed project. Cal. Code Regs. tit. 14, § 15126.6(d). All that is required is "sufficient information about each alternative to allow meaningful evaluation, analysis, and comparison with the proposed project." *Id*. "The discussion of alternatives need not be exhaustive. . . ." *Sierra Club v. City of Orange,* 163 Cal. App. 4th 523, 548 (2008).

The City's criticisms of the CEC's analysis of the Del Norte/Fifth Street site also lack merit. Opening Brief-City of Oxnard at 26-27. The CEC was justified in considering the ownership of the Del Norte/Fifth Street site in determining whether developing on the site would be feasible. Cal. Code Regs. tit. 14, § 15126(f)(1). Further, while the City claims that the FSA's characterization of noise impacts on the Del Norte/Fifth Street site as "greater than Puente" is "conclusory," the City offers no evidence refuting CEC Staff's conclusion. *See* FSA Part 1 at 4.2-64.

3. A reduced-project alternative would not meet Project objectives

Intervenors assert that CEC failed to adequately analyze an alternative consisting of one or more smaller gas turbines. Opening Brief-City of Oxnard at 24-25; Opening Brief-EDC at 37. The City's raised a nearly identical argument in comments on the PSA, to which CEC Staff responded in the FSA:

> The suggested alternative to construct and operate a series of smaller natural gas-fired plants (e.g., five 50-MW power plants) to provide emergency power along the Goleta to Moorpark service area is highly speculative. No potential sites are identified, and infrastructure connections are unknown. It is reasonable to assume that five 50-MW power plants and associated linears would require a greater total acreage for development and potentially greater environmental impacts compared to a site with pre-existing linears that could accommodate one power plant with a

> generating capacity similar to Puente. A proposal for developing a series of sites would require a broad planning effort and involve multiple local jurisdictions. The feasibility of locating a series of smaller power plants near existing 220-kV lines or multiple substations in the Moorpark Sub-Area is unknown; therefore, potential impacts on the grid are undetermined. Other related feasibility issues include the improbability of gaining site control of multiple sites and a multi-year project schedule delay.

FSA Part 1 at 4.2-133. In short, a reduced-project alternative is "highly speculative," and would be unlikely to meet Project objectives or be constructed in a reasonable amount of time. Therefore, the alternative was appropriately excluded from in-depth review. "[T]he law does not require indepth review of alternatives which cannot be realistically considered and successfully accomplished." *Citizens of Goleta Valley v. Bd. of Supervisors*, 52 Cal. 3d 553, 575 (1990).

Intervenors also allege that CEC Staff should have considered a smaller gas-fired plant in conjunction with additional preferred resource procurement. Opening Brief-City of Oxnard at 24-25. As discussed in Section III.I.4, CEC Staff considered preferred resource alternatives and determined that reliance on preferred resources would not meet the need for additional generation in the Moorpark Sub-Area.[31] *See also* FSA Part 1 at 4.2-132 (noting that "[t]he need for 215 to 290 MWs in the Moorpark Sub-Area presumes the deployment of unidentified preferred resources, including distributed solar.").

4. Preferred resources would not satisfy the project objectives

Intervenors allege that CEC Staff should have considered a preferred resources alternative in greater detail. Opening Brief-City of Oxnard at 21-24. As described in the Applicant's Opening Brief, CEC Staff adequately analyzed the use of preferred resources in lieu of the Project, and determined that reliance on preferred resources would not meet project objectives or local reliability needs.[32] Opening Brief-Applicant at 90-91, 102-03; *see also* D.16-

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[31] Intervenors' claims concerning the Moorpark area's existing need (*e.g.*, Opening Brief-City of Oxnard at 24) are addressed in detail in Applicant's Brief on All Topics Related to the CAISO Special Study, filed concurrently herewith.

[32] Intervenor City of Oxnard claims, without any legal citation, that the CEC cannot rely on the CPUC's procurement decision, as doing so would "abdicate [the CEC's] responsibility to independently assess the feasibility of any project alternative." Opening Brief-City of Oxnard at 23. To the contrary, the CEC may base its findings on any evidence in the CEC's record, including documents prepared by other agencies. *See Sierra Club v. Cal. Coastal Comm'n*, 19 Cal. App. 4th 547, 557-58 (1993) (upholding CCC's alternatives findings based on analysis in

12-030 at 30 ("Because there were insufficient cost-effective preferred resource offers to meet the identified need in the Moorpark Sub-Area, selection of the Puente Project is reasonable."). In all, the analyses of preferred resources conducted by CEC Staff, Applicant, the CAISO, and the CPUC constitute the most robust evaluation of preferred resources ever conducted in a CEC power plant siting proceeding. Additional information about preferred resources is provided in Applicant's Brief on All Topics Related to the CAISO Special Study, filed concurrently herewith.

5. The Mission Rock site is not a feasible alternative location

The City of Oxnard argues that CEC Staff improperly excluded an alternative at the Mission Rock site from detailed analysis in the FSA. Opening Brief-City of Oxnard at 19-21. At the City's request, CEC Staff did consider the Mission Rock site, and concluded that it would not be a feasible alternative because another entity, Mission Rock Energy Center, LLC, has site control and has proposed its own power plant at the site. FSA Part 1 at 4.2-131. Such a conclusion is expressly allowed under CEQA, which provides that an agency should consider "whether the proponent can reasonably acquire, control or otherwise have access to the alternative site" in determining whether an alternative site is feasible. Cal. Code Regs. tit. 14, § 15126.6(f)(1); *see also* Cal. Pub. Res. Code § 21061.1 (a feasible alternative is one that can be "accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, social, and technological factors"). Intervenors provide no evidence that the Mission Rock site would be available as an alternative site.

Moreover, the City's characterization of the Mission Rock site lacks evidentiary foundation. The City claims that the Mission Rock site "is of adequate size and location to accommodate the proposed project," citing FSA Part 1 at 4.2-26. Opening Brief-City at 20. Page 4.2-26 does not include such a statement. The City cannot simply make up "facts" out of thin air.

EIR that was part of administrative record referenced by the CCC). Additional information on the CPUC process, Project need, and preferred resources is provided in Applicant's Brief on All Topics Related to the CAISO Special Study, filed concurrently herewith.

6. The alternatives analysis appropriately addressed the potential demolition of MGS Units 1 and 2

Intervenors claim that the CEC Staff improperly assumed that demolition of MGS Units 1 and 2 would occur only if the Applicant constructs the proposed Project at the MGS facility, which assumption unfairly "prejudiced" the alternatives analysis by inflating the relative benefit of constructing a power plant at the MGS property. Opening Brief-City of Oxnard at 31-32; Opening Brief-CBD at 21-23; Opening Brief-EDC at 35; Opening Brief-CEJA at 19. As discussed in Section III.A, above, the CEC Staff's assumptions regarding the continued existence of MGS Units 1 and 2 in the absence of Project approval are appropriate. As described in the FSA's response to the City of Oxnard's comment on this topic, "the future timeline or approximate schedule for alternative uses of the MGS site in the absence of the Energy Commission's licensing of the Puente Power Project is unknown." FSA Part 1 at 4.2-135. Further, the City's claims that it may require removal of MGS Units 1 and 2 are speculative. "It is also unknown at what point future circumstances would cause the city to take action on a nuisance determination, and how and when that would result in unused power plant facilities being removed according to a schedule." *Id*. Therefore, CEC Staff appropriately assumed that MGS Units 1 and 2 would only be removed if the Project is approved at the proposed location, and that removal of MGS Units 1 and 2 would not occur if the Project is approved at an alternate site.

7. Given the lack of feasible alternatives, the CEC may decline to incorporate certain of the recommendations of the CCC

The Warren-Alquist Act requires that for a project located in the coastal zone, the CEC adopt the recommendations contained in the CCC's 30413(d) Report unless it finds "that the adoption of the provisions specified in the report would result in greater adverse effects on the environment or . . . would not be feasible." Cal. Pub. Res. Code § 25523(b). The 30413(d) Report recommends relocating the Project to an inland site due to coastal hazards and biological resources, and recommends alternative measures for addressing these concerns in the event that it is not feasible to relocate the Project to an inland location. CCC 30413(d) Report at 14, 37. Evidence demonstrates that the Project will not be at significant risk of coastal hazards and will

not result in a significant environmental impact to biological resources. Opening Brief-Applicant at 17-77; Sections III.E-F, *supra*. Furthermore, because all of the analyzed alternatives, including alternative inland sites, are environmentally inferior and/or infeasible, the CEC is not mandated to follow CCC's recommendations to relocate the Project.

IV. LORS COMPLIANCE

A. Overview

The record demonstrates that the Project as proposed, with implementation of the COCs recommended by CEC Staff, is consistent with all applicable LORS. Opening Brief-Applicant at 107; Opening Brief-CEC Staff at 13. To certify the Project, the CEC must determine whether it complies with applicable local, regional, state, and federal LORS. Cal. Pub. Res. Code § 25523(d). An *applicable* LORS is one that would regulate the proposed Project *but for* the CEC's exclusive jurisdiction. Cal. Code Regs. tit. 20, § 1744(b). Said another way, if another agency or local jurisdiction could not enforce a LORS on the Project outside of this proceeding, then the CEC may not require that the Project comply with the LORS in this proceeding. *Id.*

Both the CEC and the governmental authority responsible for enforcing the applicable LORS must evaluate whether the Project achieves LORS compliance. Cal. Code Regs. tit. 20, § 1714.5, 1744(d). In assessing LORS compliance, the CEC gives "due deference" to, but need not accept, the responsible agency's compliance determination. *Id.*, § 1714.5. If the CEC finds that the Project does not conform with all applicable LORS, then it may not certify the Project unless it decides that an "override" is necessary. Cal. Pub. Res. Code § 25525. As stated in Applicant's Brief on All Topics Related to the CAISO Special Study, filed concurrently herewith, an "override" is not needed in this case, since the Project complies with all applicable LORS.[33]

Because the Project will be located in the coastal zone, the City's LCP is the source of many applicable land use LORS. The LCP governs land use matters in the coastal zone and is

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[33] CBD asserts that the Project is not required by public convenience and necessity. This issue is addressed in Applicant's Brief on All Topics Related to the CAISO Special Study, filed concurrently herewith.

comprised of the CLUP, Coastal Zoning Ordinance, and those portions of the 2030 General Plan that have been certified by the CCC. 2030 General Plan at 1-5; Applicant's Opening Test. – Murphy Decl., at 2. In the case of conflict, the CLUP and Coastal Zoning Ordinance take precedence over the 2030 General Plan. Oxnard CLUP at III-1; Oxnard Mun. Code § 17-5(M).

Applicant and CEC Staff agree that the Project complies with all applicable LORS, including all policies from the City's 2030 General Plan and LCP that apply to the Project, and thus an override is not needed. *See* Section III.G *supra*; Opening Brief-Applicant at 77-83, 107-24; Opening Brief-CEC Staff at 13 ("Staff concludes that Puente is consistent with all applicable [LORS]."). This section addresses two 2030 General Plan policies: Policy SH-3.5 and the Height Overlay District ("HOD"). The record establishes that neither policy is an applicable LORS, because the City could not enforce the policies independent of this proceeding. *See* Cal. Code Regs. tit. 20, § 1744(b). But even if the policies apply, the Project is consistent with them.

B. Policy SH-3.5 does not apply to the Project, but regardless, the Project is consistent with the policy

Contrary to intervenors' contentions, Policy SH-3.5 does not apply to the Project. Policy SH-3.5, adopted by the City on June 7, 2016, but not yet incorporated into the City's LCP, would prohibit the development of electric generating facilities with a capacity of 50 megawatts or more in all areas that the City has determined are subject to coastal and other environmental hazards as a result of sea level rise. Intervenors claim that the Project, an electric generating facility of more than 50 megawatts capacity, is exposed to coastal flooding and thus may not be built pursuant to Policy SH-3.5. Opening Brief-EDC at 39-40; Opening Brief-City of Oxnard at 6-7. As stated in Applicant's Opening Brief, however, intervenors' argument fails.

By asserting that Policy SH-3.5 applies to the Project, intervenors ignore the text of the Coastal Act, requiring CCC certification of LCP amendments before they become effective or applicable in the coastal zone. Policy SH-3.5 is an amendment to the City's LCP. Cal. Pub. Res. Code § 30514(e); 70 Cal. Att'y Gen. Op. No. 220 (Sept. 10, 1987), 1987 WL 247254, at 6 (defining an "amendment" to a LCP to include an action that prohibits the use of a parcel of land that is designated in the LCP as a permitted use of the parcel); Opening Brief-Applicant at 110.

Until certified by the CCC, a LCP amendment like Policy SH-3.5 remains ineffective in the coastal zone. Cal. Pub. Res. Code § 30514(a) ("[LCPs] may be amended by the appropriate local government, but no such amendment shall take effect until it has been certified by the [CCC]."). Numerous legal precedents corroborate Section 30514's certification requirement. *Headlands Reserve, LLC v. Ctr. for Nat. Lands Mgmt.*, 523 F. Supp. 2d 1113, 1120 & n.2 (C.D. Cal. 2007) ("In order for . . . an amendment to an existing LCP to take effect, the LCP must be certified by the CCC."); *City of Malibu v. Cal. Coastal Comm'n*, 206 Cal. App. 4th 549, 555 (2012) (noting that a local government may "amend its [LCP], subject to [CCC] certification"); 70 Cal. Att'y Gen. Op. No. 220 (Sept. 10, 1987), 1987 WL 247254, at 5 ("[T]he effectiveness of . . . an amendment is made to depend upon certification by the [CCC]."). Intervenors' conclusion, therefore, is unsupported by law and contradicts the clear text of the City's 2030 General Plan. *See, e.g.*, Opening Brief-Applicant at 111-12 (citing several pages of the 2030 General Plan that provide that changes to the LCP are ineffective until certified by the CCC). Because the CCC has not certified Policy SH-3.5, it is not applicable in the coastal zone or to the Project. the City may not enforce the policy outside of this proceeding. *See* Section IV.A *supra*; Cal. Code Regs. tit. 20, § 1744(b). Policy SH-3.5, therefore, is not an applicable LORS.

Any reliance by intervenors on a letter from CCC counsel Ms. Louise Warren is misplaced. Ms. Warren declared that Policy SH-3.5 applies immediately, even though it has not been certified by the CCC, because Policy SH-3.5

> affects development that does not require a coastal development permit because it is under the exclusive permitting jurisdiction of the [CEC]. Thus, this portion of the General Plan only affects development that by statute is outside of the permitting jurisdiction of the City and the [CCC], so it need not be incorporated into the LCP to take effect."

See Letter from Louise Warren, Deputy Chief Counsel, CCC, to Shawn Pittard, Project Manager, CEC re: City of Oxnard General Plan Amendment PZ 16-620-01 (Nov. 28, 2016), Ex. No. 2005, TN# 214574 ("CCC Counsel Letter").

The CCC Counsel Letter contravenes the text of the California Public Resources Code, related regulations, and sound public policy. As stated in Applicant's Opening Brief, the Committee should not rely on the CCC Counsel Letter, because:

1. It disregards the unambiguous legal precedents discussed above requiring CCC certification before a LCP amendment is effective in the coastal zone and fabricates an exception to that rule that is wholly uncorroborated by the Coastal Act;
2. The CCC Counsel Letter does not modify the CCC's formal opinion on this issue, contained in the CCC 30413(d) Report, that Policy SH-3.5 is inapplicable to the Project since it has not been certified by the CCC;
3. The CCC Counsel Letter completely ignores the statutory definition of an *applicable* LORS (*i.e.*, a LORS that would regulate the proposed Project *but for* the CEC's exclusive jurisdiction, Cal. Pub. Res. Code § 25523(d); Cal. Code Regs. tit. 20, § 1744(b)); instead, the CCC Counsel Letter takes the exact opposite approach and eviscerates the clear statutory text (*i.e.*, Policy SH-3.5 applies *because* no other agency is capable of enforcing it); but because no agency may enforce Policy SH-3.5 in the coastal zone, it is not an *applicable* LORS;
4. Policy SH-3.5 amounts to a proposed policy, and any interpretation of it by this Committee ultimately could be inconsistent with its final form adopted, modified, or rejected by the CCC (presuming that it is actually submitted to the CCC at some point, a result which itself may never occur); and
5. Assuming that the "exclusive jurisdiction" exception manufactured in the CCC Counsel Letter actually exists, Policy SH-3.5 does not satisfy the requirements of the exception, because the policy affects development that is outside the bounds of the CEC's jurisdictional authority.

Opening Brief-Applicant at 112-16. None of the intervenors explain how the CCC Counsel Letter overcomes these gross inadequacies. *See, e.g.*, Opening Brief-City of Oxnard at 6-7;

Opening Brief-EDC at 39. And given the inconsistency between the CCC Counsel Letter and the legal authorities noted above, this Committee should not consider it. Policy SH-3.5 is inapplicable in the coastal zone and to the Project.

The law, as detailed above, provides absolute support for this Committee to determine that Policy SH-3.5 is not an applicable LORS since the CCC has not certified it. But even assuming that Policy SH-3.5 applies, the Project would comply with it. As CEC Staff stated in its Opening Brief, because the Project is not located in an area at significant risk of coastal flooding, or any of the various hazards Policy SH-3.5 is meant to alleviate, the Project is consistent with the policy. Opening Brief-CEC Staff at 3-4. Applicant concurs with CEC Staff's conclusion, and the record supports it. *See* Section III.F *supra*; Opening Brief-Applicant at 54-77.

C. The LCP and 2030 General Plan do not contain height restrictions applicable to the Project

The Project is not subject to any express height restrictions, including the restriction set forth in the Height Overlay District ("HOD") from the 2030 General Plan. Even if the HOD applied, however, the Project is consistent with it.

As stated by both Applicant and CEC Staff, there are no express height limitations that apply to the Project. The Coastal Zoning Ordinance prescribes no height restriction for the EC subzone, in which the Project will be located, or a general height limit applicable to all development in the coastal zone. *See* Opening Brief-Applicant at 117-21; Opening Brief-CEC Staff at 7-8. The City's LCP, comprised of the Coastal Zoning Ordinance and the CLUP, therefore, does not contain a height restriction.

The 2030 General Plan, similarly, does not regulate the Project's height. Intervenors contend that the HOD in the 2030 General Plan, which includes a six-story height limit, applies to the Project. Opening Brief-City of Oxnard at 8-12. But the HOD is inapplicable to the Project for numerous reasons:

- Like Policy SH-3.5, the HOD is an amendment to the City's LCP that has not been certified by the CCC. It is not effective in the coastal zone until such

certification occurs. Section IV.B, *infra*. Opening Brief-Applicant at 119; Opening Brief-CEC Staff at 8-10.

- The 2030 General Plan indicates that the HOD applies only to the "*non*-Coastal Zone." 2030 General Plan at 3-18; Opening Brief-Applicant at 119-20. The City attempts to create an ambiguity in the 2030 General Plan, alleging that the Public Utility/Energy Facility designation, which covers the Project Site, occurs only in the coastal zone. Opening Brief-City of Oxnard at 9 (denoting that the Public Utility/Energy Facility designation occurs outside of the coastal zone). But a review of the 2030 General Plan shows that assertion to be false. 2030 General Plan at 3-3, Figure 3-1. The City also contends that if any ambiguity exists regarding the applicability of the HOD, it is entitled to resolve that ambiguity as it sees fit. In this case, there is no ambiguity: the 2030 General Plan unequivocally provides that the HOD does not apply in the coastal zone. *Id.* at 3-18 to 3-19; Opening Brief-Applicant at 119-20. The City may not ignore the plain meaning of its planning documents.
- The City also claims that its interpretation of the General Plan is reasonable because it (1) avoids a reading that would render the HOD surplusage and (2) ensures that the Public Utility/Energy Facility areas have no height restriction whatsoever. Opening Brief-City of Oxnard at 10. But the HOD is not surplusage even under the interpretation proffered by Applicant and CEC Staff; it simply cannot apply in the coastal zone until certified by the CCC. And Public Utility/Energy Facility areas are subject to height restrictions: outside of the coastal zone, the HOD applies; in the coastal zone, as discussed below, the Coastal Act limits Project height.
- The HOD, a 2030 General Plan policy, is inconsistent with the LCP, and the LCP supersedes policies or regulations in the 2030 General Plan when a conflict exists between the two documents. Opening Brief-Applicant at 118-20.

Since there are no express height restrictions applicable to the Project, CEC Staff correctly posits that the Coastal Act requires that the Project "protect views . . . and be visually compatible with the character of the surrounding area. Cal. Pub. Res. Code § 32051; Opening Brief-CEC Staff at 10-11. Evidence submitted by both Applicant, CEC Staff, and the CCC establishes that the Project complies with the Coastal Act's mandate. FSA Part 1 at 4.7-11, 4.7-19, 4.14-1; Applicant's Opening Test. – Kling Decl. at 2-3; *see generally* CCC 30413(d) Report. The City also complains about the lack of analysis in the FSA regarding the "marginal increase in impacts associated with the stack exceeding six stories." Opening Brief-City of Oxnard at 12. But the FSA analyzed the "Overall Visual Change" resulting from the construction of the Project and determined that the Project would have no significant impact on visual resources. FSA Part 1 at 4.5-16, 4.14-22 to 4.14-23; *see also* Applicant-Kling, Tr. Feb. 9, at 213:16 to 214:2; Applicant's Opening Test. – Kling Decl., at 2-3; Applicant-Kling, Tr. Feb. 9, at 214:24 to 215:4 ("[A]lthough the Project will incrementally alter the views, it would not significantly change the visual character or quality of those views.").

Even assuming that the HOD applies to the Project, however, the Project complies with it. Project components that exceed the six story (72 foot) limit imposed by the HOD may be erected above that height, because they satisfy the exception in Section 16-303 of the City's Municipal Code. Section 16-303 applies to all development in the City. Oxnard Mun. Code § 16-303 (appearing in Article IV of Chapter 16, entitled "Standards for All Zones"). It provides that parts of the Project may exceed applicable height limitations so long as those parts are: (i) "roof structures for the housing of . . . equipment required to operate and maintain" the Project or "towers, flagpoles, chimneys, smokestacks, or similar structures related to buildings and uses in . . . industrial zones," (ii) necessary to the Project's industrial uses, and (iii) not erected with the "purpose of providing additional floor space." *Id.* The Project's stack, selective catalytic reduction enclosure, and combustion turbine generator enclosure, each of which will surpass six stories, satisfy this exception. *See* Opening Brief-Applicant at 121-22. Applicant may also seek an exception by application as another mechanism for Applicant to construct the Project beyond six stories in height. 2030 General Plan at 3-18; Opening Brief-CEC Staff at 11.

Applicant and CEC Staff agree that the CEC may grant the exception, since the Project will not significantly impact visual resources. Opening Brief-CEC Staff at 11. As stated in the foregoing paragraph, because the Project protects coastal views, the Committee, acting in place of the City, is capable of granting such an application in this case.

V. PROPOSED CONDITIONS REGARDING FACILITY CLOSURE ARE ADEQUATE

Both CEC Staff and Applicant agree that COC COM-15 "is sufficient to ensure closure of the facility" at the end of its useful life. CEC Staff-Root, Tr. Jul. 26, at 319:7 to 319:25; Applicant-Piantka, Tr. Jul. 26, at 317:7 to 317:14. Thus, a COC requiring Applicant to acquire a financial assurance mechanism is unnecessary. CEC Staff-Root, Tr. Jul. 26, at 319:7 to 319:10; Applicant-Piantka, Tr. Jul. 26, at 317:7 to 319:8.

In reaching these conclusions, CEC Staff and Applicant concur that:

- COM-15 permits Project infrastructure to remain onsite after the Project's useful life ends, if the remaining structures continue to serve a beneficial purpose. If such a purpose does not exist, however, Applicant must return the site to grade. CEC Staff-Root, Tr. Jul. 26, at 322:10 to 322:18, 323:4 to 323:17; Applicant-Piantka, Tr. Jul. 26, at 323:20 to 324:4.
- In the event the CEC imposes a condition mandating that Applicant obtain a financial assurance mechanism to guarantee that adequate funds are available for closure of the Project, the CEC should not specify the exact mechanism that Applicant must procure. Rather, the CEC should draft the condition such that the parties possess flexibility to choose the mechanism that best fits their needs at the time the mechanism is funded. CEC Staff-Root, Tr. Jul. 26, at 320:6 to 320:13; Applicant-Piantka, Tr. Jul. 26, at 317:7 to 317:21, 324:4 to 324:9; Staff's Supplemental Testimony Filed in Response to the Committee's March 10, 2017 Order for the Puente Power Project, Ex. No. 2025, TN# 218274, at 89-90.

The City disagrees with CEC Staff and Applicant for two reasons. *First*, the City contends that COM-15 should require the actual closure of the facility by a hard deadline of

2050. Opening Brief-City of Oxnard at 65-67. *Second*, the City argues that the CEC include a financial assurance mechanism—specifically, a surety bond— in a COC. *Id.* at 66-67.

The City's proposed COCs would destroy the flexibility that the closure conditions are designed to protect. As the FSA stated, "The Energy Commission cannot reasonably foresee all potential circumstances when a facility permanently closes. Therefore, the closure conditions . . . strive for the flexibility to address circumstances that may exist at some future time." FSA Part 2 at 7-9; CEC Staff-Root, Tr. Jul. 26, at 320:6 to 320:13 (recommending a COC "that allows for flexibility in the type of financial assurance that could be used"), 323:4 to 323:12 ("COM-15 is designed to assess the situation at the time of closure . . . So it is flexible."); Applicant-Piantka, Tr. Jul. 26, at 324:4 to 324:9 ("[I]t's unnecessary to drive this to a surety bond. . . . I think financial mechanisms is [sic] something for us to further discuss and propose as part of the closure process, closure planning."); Staff's Supplemental Testimony Filed in Response to the Committee's March 10, 2017 Order for the Puente Power Project, Ex. No. 2025, TN# 218274, at 89-90. This approach is optimal; it offers all stakeholders, including the public, maximum adaptability in an uncertain future. The City, moreover, ignores that the CEC has the authority to enforce COM-15, including its potential closure provisions. *See* FSA Part 2 at 7-20 (indicating that "upon an order compelling permanent closure," Applicant must begin the closure process contained in COM-15); Cal. Code Regs. tit. 20, § 1770(d) ("[S]taff . . . may modify the verification provisions as necessary to enforce the conditions of certification without requesting an amendment to the decision.").

VI. CONCLUSION

The evidence in the record of these proceedings demonstrates that the Project as proposed satisfies all applicable requirements, and that the CEC can make all of the findings necessary to certify the Project. The Project will not result in significant adverse environmental impacts, and will comply with all applicable LORS, including those specific to projects located in the coastal zone. Nothing in the intervenors' opening briefs call these conclusions into question.

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Respectfully submitted,

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APPENDIX A

Puente Power Project (15-AFC-01)

Appendix A: No Legal Basis To Force Demolition of Units 1 and 2

I. INTRODUCTION

The Oxnard Municipal Code provides no independent grounds that would specifically authorize the City to force decommissioning or demolishing Units 1 and 2. The likelihood of success of a nuisance action by the City is remote. Multiple courts have found that a nuisance claim cannot be based solely on an existing use being perceived as aesthetically unpleasant.

II. OXNARD CODE PROVISIONS FOR NUISANCE ABATEMENT

The Oxnard Municipal Code does not include any provisions that would specifically authorize the City to force decommissioning or demolition of Units 1 and 2. Therefore, the City's most likely avenue to pursue a forced demolition would be through a legal challenge claiming the existing units are a nuisance pursuant to Chapter 7 of the Oxnard Municipal Code.

Oxnard Municipal Code Chapter 7, Article IX, addresses "certain detrimental conditions of property." Specifically, Section 7-151 provides that "[a]ny person or entity owning, leasing, occupying, or having charge or possession of any real property maintained in such a manner that any of the following conditions are found to exist thereon shall be guilty of creating a nuisance in violation of this code." The conditions include, among other things, "[b]uildings or structures that are *abandoned, partially destroyed, or left in an unreasonable state of partial construction. . .* "; and "[p]roperty maintained *so out of harmony or conformity with the standards of surrounding property as to cause substantial diminution of the enjoyment, use, or values of such surrounding property*" (emphasis added).

If the City wishes to take action against a nuisance listed in Article IX, the City must: (1) deliver to the owner, lessor, occupant, or person in charge or possession of the property a written notice to abate the nuisance or attractive nuisance; or (2) mail a written notice to abate the nuisance to the owner and post a copy of the written notice to abate the nuisance on the property in a conspicuous place. Oxnard Municipal Code, § 7-154. The owner or person in charge must then either abate the nuisance or file an appeal within ten days of delivery of the notice, or, in the case of service by mail and posting, within 15 days from the day of mailing or posting such notice, whichever is later. *Id*. If an appeal is filed, the appeal must either dispute the notice or contend that abating the nuisance within the permitted time is "impossible or impractical." *Id.* If an appeal is filed, an appeal officer must conduct an appeal hearing and must make written findings of fact and conclusions of law. Oxnard Municipal Code, § 7-155. "All decisions by the appeal officer shall be final decisions of the administrative power of the city." *Id*. Since the decision of the appeal officer is the final decision of the City, such a decision could be challenged by a petition for writ of mandate in California Superior Court.

III. SUMMARY OF NUISANCE ABATEMENT LEGAL STANDARDS

California law recognizes three categories of nuisance: (1) nuisance per se; (2) public nuisance; and (3) private nuisance. Of these, the City could proceed under a theory of nuisance per se (pursuant to Article IX of the City's Municipal Code) or public nuisance (pursuant to Civil Code § 3480) to take action to require decommissioning.[1] This section describes the legal standards for bringing one of these nuisance actions. Section IV, below, applies these standards to the facts involving Units 1 and 2.

A. Nuisance Per Se

An action brought by the City pursuant to Article IX of the Oxnard Municipal Code would likely be under a "nuisance per se" theory. "[T]he legislature has the power to declare certain uses of property a nuisance and such use thereupon becomes a nuisance per se. . . Nuisances per se are so regarded because no proof is required, beyond the actual fact of their existence, to establish the nuisance." *City of Costa Mesa v. Soffer*, 11 Cal.App.4th 378, 382 (1992) (citations omitted).

A nuisance per se arises when a legislative body, in exercising its police power, expressly declares a particular object, substance, activity, or circumstance to be a nuisance. *Beck Dev. Co. v. Southern Pac. Transp. Co*., 44 Cal.App.4th 1160, 1206 - 1207 (1996). A nuisance per se can be declared by statute or ordinance. *See, e.g*., Gov. Code § 38771. A nuisance per se can also be declared by administrative or judicial procedures taken by a governmental agency. *Beck Dev. Co*., *supra*, 44 Cal.App.4th at 1207. If an activity is a nuisance per se, a court will not go beyond the legislative determination that the activity is a nuisance. For example, the court will not balance the equities between the parties. *City of Costa Mesa, supra*, 11 Cal.App.4th at 382. Finally, for a nuisance per se to exist, the statute in question must have been in effect at the time the nuisance occurred; that is, the statute cannot be applied retroactively. *Beck Dev. Co*., *supra*, 44 Cal.App.4th at 1207.

Nuisances per se vary depending on the specific ordinances of the municipality involved. However, common nuisances per se include the storage of wrecked, inoperable, or dismantled automobiles (*City of Costa Mesa, supra*, 11 Cal.App.4th 378); medical marijuana dispensaries (*City of Riverside v. Inland Empire Patients Health & Wellness Ctr., Inc*., 56 Cal.4th 729 (2013)); and violations of zoning codes (*Flahive v. City of Dana Point*, 72 Cal.App.4th 241 (1999) [conversion of garage into studio apartments without required permits and in violation of the municipal code was a nuisance per se]; *People ex rel. Dept. of Transportation v. Outdoor Media Group*, 13 Cal.App.4th 1067 (1993) [billboards erected without permits were violation of California Outdoor Advertising Act and constituted a nuisance per se]).

B. Public Nuisance

1. Overview of Standard for Public Nuisance

If an activity has not been declared to be a nuisance by law, a court may find it to be a public or private nuisance under Civil Code section 3479 if the activity: (1) is injurious to health; (2) is "indecent or offensive to the senses"; (3) obstructs the free use of property, "so as

[1] In contrast, a private nuisance claim must be brought by a private citizen, not a municipality.

to interfere with the comfortable enjoyment of life or property"; or (4) "unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway."

In determining whether a nuisance exists, courts generally use an objective standard. An activity or conduct that merely offends the aesthetic senses or produces only personal discomfort will not be enjoined as a nuisance. To be actionable under Civil Code section 3479, the interference with the enjoyment of property rights must be "substantial and unreasonable" and affect the sensibilities of a "normal" person. *Oliver v. AT&T Wireless Servs*., 76 Cal.App.4th 521, 533 (1999). In addition, if an activity is not a nuisance per se, courts will balance the harm suffered by the plaintiff against the utility of the defendant's conduct. *See Hellman v. La Cumbre Golf & Country Club*, 6 Cal.App.4th 1224, 1231 (1992); Restatement (Second) of Torts §§ 826–831 (1979). Courts consider all factors, including the nature of the activity, the extent and frequency of the harm caused by the activity, the effects of the activity on the owners' health and enjoyment of the property, the harm that would be caused by discontinuing the activity, the manner in which the activity is conducted, the location of the activity, and the nature of the surroundings. *See Hellman, supra*, 6 Cal.App.4th at 1231.

A public nuisance is defined as a nuisance "which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal." Civil Code § 3480. What constitutes a "considerable number of persons" is a fact-specific issue. *See Wade v. Campbell*, 200 Cal.App.2d 54, 59 (1962) (dairy farm was held to be a public nuisance when it affected 11 people owning property near the farm); *People v. Mason*, 124 Cal.App.3d 348, 354 (1981) (bar and restaurant that played loud amplified music, disturbing a rural neighborhood of about 33 homes, was found to be a public nuisance). In addition, violations of local planning codes in existence at the time of development have been found to constitute a public nuisance. *See, e.g., Golden Gate Water Ski Club v. County of Contra Costa*, 165 Cal.App.4th 249 (2008) (development over several decades without requesting land use and related permits violated county land use restrictions, as well as state and local health, planning, and building codes, including requirements for water, sewage, floodplain management, and land preservation).

Nothing which is done or maintained under the express authority of a statute can be deemed a nuisance. Civil Code § 3482. Thus, some courts have held that a plaintiff cannot obtain an injunction against a business that is operated in accordance with applicable zoning laws unless the methods used are unnecessary and injurious. Cal. Code Civ. Pro. § 731a; *Kornoff v. Kingsburg Cotton Oil Co*., 45 Cal.2d 265, 271 (1955) (holding that ginning mill, lawfully operated in properly zoned location, could not be abated under section 731a). The plaintiff has the burden of showing unnecessary and injurious methods of operation. *Christopher v. Jones*, 231 Cal.App.2d 408, 411 (1964).

2. Interference Must Be Substantial and Unreasonable

For an interference to rise to the level of nuisance, "the interference must be both *substantial* and *unreasonable*." *People ex rel. Gallo v. Acuna*, 14 Cal.4th 1090, 1105 (1997) (emphasis in original). Substantiality requires the proof of "significant harm," defined as a "real and appreciable invasion of the plaintiffs' interest," and "definitely offensive, seriously annoying or intolerable." *Id*. This is an objective measure. *Id*. The unreasonableness of an interference is

also objective and "represents a judgment reached by comparing the social utility of an activity against the gravity of the harm it inflicts." *Id.*

In general, courts recognize that "all people living in communities must endure some unwelcome situations, odors, air pollution, obstruction of free passage, insects, and other types of interference with the happiness of their lives." *County of San Diego v. Carlstrom*, 196 Cal.App.2d 485, 490 (1961). "However, when any member of the community so unreasonably conducts his affairs as to create excessive and unbearable odors; or smoke; or dust; or soot; or danger from explosive materials; or water pollution; or constantly raucous sounds seriously offensive to neighborhood nerves; such condition is a nuisance and will be subject of abatement." *Id*. at 490-91. For example, the court in *Carlstrom* found a public nuisance to exist where residential structures were maintained "in an extremely dilapidated and dangerous condition," resulting in vandalism and "a fire hazard extremely dangerous to the property of many neighbors in close proximity thereto." *Id*. at 489, 491.

Multiple courts have found, however, that a nuisance claim cannot be based solely on an existing use being perceived as aesthetically unpleasing by the plaintiff. For example, in *Oliver v. AT&T Wireless Services, supra*, 76 Cal.App.4th 521, a property owner sued his neighbor and a cell phone company for creating a nuisance when the neighbor contracted with the company to build a 130-foot cell tower on the neighbor's property. The plaintiff alleged that the tower was ugly, blocked his views, obstructed light access, and reduced his property value, diminishing the enjoyment of his property. *Id*. at 532-33. The court held that the alleged harms were not sufficient to support a nuisance claim, noting that there is no property interest in an unobstructed view or light access, so even if the cell tower was ugly and reduced the plaintiff's property value, it did not give rise to a nuisance claim. *Id*. at 535-36. Likewise, several other California appellate court decisions have ruled that the unpleasant appearance of neighboring property, in and of itself, does not rise to the level of a nuisance. S*ee People v. Oliver*, 86 Cal.App.2d 885, 887 (1948) ("the unsightly condition of the premises" alone will not render the property a nuisance); *Haehlen v. Wilson*, 11 Cal.App.2d 437, 441 (1936) ("ugly and untidy" wooden fence was not a nuisance).

3. Balancing Test for Nuisance Challenges

When determining whether or not to grant an injunction in nuisance cases, courts in equity will balance the hardship of the defendant with that of the plaintiff. *See Anderson v. Souza*, 38 Cal.2d 825 (1952) (balancing the utility of the defendant's conduct against the gravity of the harm caused). For example, courts often look at the public interest or necessity of a business undertaking when evaluating whether or not to enjoin a nuisance.

For example, despite the fact that the California Supreme Court has held that the operation of an airport constitutes a nuisance, (*see Baker v. Burbank-Glendale-Pasadena Airport Auth*., 39 Cal.3d 862, 873 (1985) ("[a]irport operations are the quintessential continuing nuisance")), the Court has said that "it would be contrary to the policy of this state to grant an injunction against flight operations in the vicinity of a public airport…and not alleged to be carried on in a matter inconsistent with the public interest in the continuation of such service." *Loma Portal Civic Club v. American Airlines*, 61 Cal.2d 582, 590 (1964).

Similarly, in *San Diego Gas & Electric Co. v. Superior Court*, 13 Cal.4th 893 (1996), a group of homeowners brought a private nuisance action against a utility company, alleging that

the company's power lines adjacent to their homes emitted high and unreasonably dangerous levels of electromagnetic radiation onto their property. The California Superior Court dismissed plaintiffs' claims, holding that the California Public Utilities Commission had sole authority to set policy related to the safety of utilities operations. The Court further reasoned that because the power lines provide a valuable public service —and that the harm associated with electromagnetic radiation was low — a nuisance claim would fail regardless of the Public Utility Commission's conclusion. *Id*. at 939.

4. Abating a Public Nuisance

Remedies against a public nuisance differ depending on the type of public nuisance being addressed. Generally, when the public nuisance involves substandard buildings, an offending property owner must be given a choice of repairing or demolishing a condemned building and must be given a reasonable time to do so. Health & Safety Code § 17980(c). When nuisance is found, courts narrowly apply injunctions to address the identified nuisance (e.g., noise, smell, dust, etc.). For example, in *Morton v. Superior Ct. of San Mateo County*, 124 Cal.App.2d 577, 578-89 (1954), the County of San Mateo brought suit against a rock quarry on public nuisance claims, arguing that the quarry was operating without a permit and was being operated in a manner that violated County ordinances by generating excessive dust and noise. The trial court enjoined operation of the quarry, but the court of appeal found that the injunction was too broad, as it did not give the quarry operator the option of correcting the manner of their operations. *Id*. at 581. The court stated:

> Injunctions against carrying on a legitimate and lawful business should go no further than is absolutely necessary to protect the lawful rights of the parties seeking such injunction. When a person is engaged in carrying on such business, he should not be absolutely prohibited from doing so, unless it appears that the carrying on of such business will necessarily produce the injury complained of. If it can be conducted in such a way as not to constitute a nuisance, then it should be permitted to be continued in that manner.

Id. at 582-83 (quoting *Chamberlain v. Douglas*, 48 N.Y.S. 710, 11 (1898)); *see also Anderson v. Souza, supra,* 38 Cal.2d at 840 (abatement of nuisance should be "directed and confined to the elimination of the nuisance" and "ought never to go beyond the necessities of the case").

Likewise, in *Eaton v. Klimm*, 217 Cal. 362, 366 (1933), the Board of Health of the City and County of San Francisco sought an order that an asphalt mixing plant was a nuisance and should be vacated and demolished. The plant was constructed in a rural area that later became developed with nearby homes. *Id*. at 365. The plant generated noise, dust, soot, and smoke, interfering with the use and enjoyment of those homes. *Id*. at 366. The court agreed that the plant constituted a public nuisance and the operation of the plant could be enjoined; however, there was no evidence that the structures themselves were causing a nuisance, so the structures did not have to be demolished. *Id*. at 373.

IV. BASED ON LEGAL STANDARDS, THE CITY MAY NOT FORCE NRG TO DEMOLISH UNITS 1 AND 2 THROUGH A NUISANCE ACTION

A. Nuisance Per Se

As described above, the City's Municipal Code states that "[b]uildings or structures that are abandoned, partially destroyed, or left in an unreasonable state of partial construction . . ."; and "[p]roperty maintained so out of harmony or conformity with the standards of surrounding property as to cause substantial diminution of the enjoyment, use, or values of such surrounding property" are nuisances per se.

Neither of these categories would apply to Units 1 and 2 once they are decommissioned. The Units would not be "abandoned, partially destroyed, or left in an unreasonable state of partial construction . . ." While the Oxnard Municipal Code does not define "abandoned," other municipalities have defined the term to apply only in fairly extreme cases.[2] Even if Units 1 and 2 are decommissioned and the Puente project is not approved or is approved at a different site, NRG would maintain the Units in a "mothball" state and would not allow the Units to fall into disrepair. Thus, Unit 1 or 2 would not be "abandoned" in any reasonable interpretation of the word.

Similarly, Units 1 and 2 would not be "maintained so out of harmony or conformity with the standards of surrounding property as to cause substantial diminution of the enjoyment, use, or values of such surrounding property." In contrast, the Mandalay Generating Station is an existing, permitted use that is functionally consistent with surrounding industrial uses.

Even assuming an inconsistency is found with nearby properties, the City would have to show the Units cause "substantial diminution of the enjoyment, use, or values of such surrounding property." Again, the Mandalay Generating Station is a long-standing, permitted use that is functionally consistent with surrounding industrial and agricultural land uses.

Lastly, there is no known example in California where an existing power plant was required to be demolished and removed based on a nuisance per se action brought by a local agency.

B. Public Nuisance

As noted above, if an activity has not been declared to be a nuisance by law, a court may find it to be a public nuisance under Civil Code section 3479 if the activity: (1) is injurious to health; (2) is "indecent or offensive to the senses"; (3) obstructs the free use of property, "so as to interfere with the comfortable enjoyment of life or property"; or (4) "unlawfully obstructs the

[2] For example, the City of Covina has defined "abandoned property" to mean "real property that is vacant and either: (1) the subject of a current notice of default or notice of trustee's sale or the subject of a tax assessor's lien sale; (2) the subject of a foreclosure sale where the title was retained by the beneficiary of a deed of trust involved in the foreclosure; or (3) has been transferred under a deed in lieu of foreclosure." Covina Municipal Code, § 8.42.020. Likewise, the City of Perris defines "abandoned" to mean "a property that is vacant and is: 1) under a current notice of default; 2) under a current notice of trustee's sale; 3) pending a tax assessor's lien sale; 4) any property that has been the subject of a foreclosure sale where the title was retained by the beneficiary of a deed of trust involved in the foreclosure; and 5) any property transferred under a deed in lieu of foreclosure/sale." Perris Municipal Code, § 19.87.020.

free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway."

Decommissioning Units 1 and 2 would not trigger these factors. With respect to the first and second factors, if Units 1 and 2 are decommissioned but not removed, the Units would be maintained in a "mothball" state, in compliance with any relevant standards and would not be allowed to fall into disrepair. Thus, it is unlikely that the Units would be injurious to health or be "offensive to the senses."

With respect to the third factor, decommissioned Units 1 and 2 would not cause a substantial and unreasonable interference with the comfortable enjoyment of life and property. Units 1 and 2, once decommissioned, would not result in any odors, smoke, dust, soot, or discharges, and would not produce loud noises. NRG would maintain the Units so that they do not deteriorate and cause a fire hazard or other danger to the public. Thus, the only theoretical basis for claiming an interference would be because of the aesthetic characteristics of the Units. However, as cited above, multiple courts have found that a nuisance claim cannot rest solely on an existing use being perceived as aesthetically unpleasing by the plaintiff.

The fourth factor does not apply, because the Units do not obstruct free passage or use.

V. CONCLUSIONS

The Oxnard Municipal Code provides no independent grounds authorizing the City to force demolition of Units 1 and 2. While it is possible that the City could attempt to force demolition of Units 1 and 2 through a nuisance action, the likelihood of success is remote. The Mandalay Generating Station is a long-standing, legally permitted use that is consistent with nearby industrial and agricultural uses. Assuming Units 1 and 2 are retired, they would be mothballed in a safe, orderly manner that would not be injurious to the public health and would not significantly interfere with other uses. Because a nuisance action is very fact-dependent, the City would be forced to litigate the issue with a low likelihood of success.

In sum, grounds for a public nuisance claim to compel removal of Units 1 and 2 are sorely lacking. The City's claims that it could compel removal are speculative at best and should not be considered in the Commission's decision on the Puente project.