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In re:
Application for Certification for the:
Alamitos Energy Center Docket No. 13-AFC-01

INTERVENOR LOS CERRITOS WETLANDS LAND TRUST BRIEF on PART ONE of FINAL STAFF ASSESSMENT

Threshold issues

The Trust continues to oppose the bifurcation of the process into Part 1 and Part 2 on the grounds that a final air quality degradation analysis is critical to several other subject areas in the FSA. Further, we strongly oppose the Committee's decision to shift the burden of proof to the public by failing to provide information and analysis needed to evaluate demolition impacts by requiring non-profit intervenors to move to reopen the record to address the impact of emissions on subject areas arbitrarily addressed prior to the completion of the FDOC or FSA.

Also, the Trust hereby again requests a reconsideration of the Committee's ruling on the issue of the treatment of the demolition, taking into account evidence of the intent of the MOU between the Applicant and the City of Long Beach, as presented to the City Council, requiring demolition of AGS in coordination with the construction of AEC, as well as the Air District permit requirements for shutdown and decommissioning planning. The Committee's ruling on this matter did not include reconsideration of the evidence submitted by the Trust on these points.

And the Ruling contradicts a previous legal opinion of the Energy Commission that demolition of existing power plants should be treated as part of an application for a "replacement" power plant – as is the case here. The rationale by the Energy Commission's attorney in the South Bay Power Plant case is applicable here. In fact, in that circumstance, the replacement power plant was a different owner and on a different property from the demolition of the old power plant – yet the Commission's attorney found they were the same project. Here the demolition is by the same owner, on the same property, and linked through a Memorandum of Understanding with the City and requirements of the Air District permit.

Further, even assuming the demolition is a separate project from the proposed "replacement" power plant, the cumulative impacts analysis fails to identify any details of the demolition – despite the fact demolition is controlled by the Applicant and required in the MOU with the City and the Air District permit.

The Applicant has failed to offer any documentation of how and when demolition of the existing AGS will occur even though the Air District permit will require shut down and detailed plan for decommissioning. The shut down and decommissioning are not the mystery the Staff would have the Commission believe, and the Applicant should be required to submit information on the details of the demolition so that its impacts can be reviewed as part of and cumulative to the project.

The Trust has done its best to provide evidence on the generally known impacts of power plant demolition and has thus demonstrated that demolition is a long-term process with high potential for significant adverse impacts to the environment and the surrounding community. Further, several of the foreseeable adverse impacts will combine with similar impacts from operation of the proposed AEC, compounding the severity of the impacts. Without evidence to the contrary, it is reasonably foreseeable those adverse impacts will meet the CEQA "significance" threshold.

Finally, as described below, the FSA must include a broader analysis of Alternatives to the proposed project. CEQA mandates a discussion of alternatives that will minimize significant adverse impacts to the environment and identification of an "environmentally superior alternative" – and it is clear there will be significant cumulative impacts. Also, the PUC "loading order" is a LORS under the CEC's definition, and the California Public Utilities Commission (CPUC) has already enforced relevant State laws, regulations and standards as it pertains to this project. The CPUC approved 640 MW of gas-fired generation from this proposed plant, yet the application before this Commission is for 1040 MW. For this Commission to license a project that is inconsistent with the CPUC decision requires an "override" of LORS – and the record is void of any conceivable rationale for an overriding consideration.

Below is a summary brief on the issues relevant to Part One of the proceedings. We incorporate by reference the Trust's comments of the PSA, memos and communications on the Committee's Tentative Ruling on the issue of demolition of AGS being "part of the project and other documents in the record. Further, we reserve the right to modify the brief after consideration of a complete Final Staff Assessment.

1. The CEQA Analysis Has Been Impermissibly Piecemealed

For projects requiring Commission and CEC approval, pursuant to Public Resources Code, section 21080.5 and the California Code of Regulations, title 14, section 15251, subdivision (j), the CEC is permitted to conduct its own CEQA functionally equivalent review as a certified agency. "A certified program remains subject to other provisions in CEQA such as the policy of avoiding significant adverse effects on the environment where feasible." (CCR 14, Section 15250.)

In this case, the environmental review has failed to comply with prohibitions against "piecemealing" review.

CEQA applies to the "whole of an action" and the courts have come down hard on attempts to split up projects for the purpose of evading full CEQA review. The Guidelines are unambiguous on this point: "'Project' means the whole of an action, which has a potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment." (Cal. Admin. Code, tit. 14, §15378.)

Long ago, the California Supreme Court declared that CEQA mandates that "environmental consideration do not become submerged by chopping a large project into many little ones – each with minimal potential impact on the environmental – which cumulatively may have disastrous consequences." (*Bozung v. Local Agency Formation Com.* (1975) 13 Cal. 3d 263, 283-284.) In *Bozung*, the Court relied upon the language of CEQA Guidelines section 15069, "Where individual projects are, or a phased project is, to be undertaken and where the total undertaking comprises a project with significant environmental effect, the lead agency must prepare a single EIR for the ultimate project." (Cal. Admin. Code, tit. 14, § 15069.)

The principles laid out on *Bozung* have been relied upon in a long line of cases. (See *City of Antioch v. City Council* (1986) 187 Cal. App. 3d 1325, 1334; *City of Carmel-by-the-Sea v. Board of Supervisors* (1986) 183 Cal.App.3d 229; *Citizens Assn. for Sensible Development of Bishop Area v. County of Inyo* (1985) 172 Cal.App.3d 151.) The Commission has illegally permitted "chopping a large project into many little ones."

The impermissible attempt to piecemeal this project by failing to analyze demolition as part of the project, has resulted in just the type of analysis where "environmental consideration [] become submerged." The Trust has demonstrated through evidence in the record that the demolition of the existing plant would be a lengthy process involving many environmental impacts such as noise, emissions, dust and debris, greenhouse gas, and other impacts.[1] Staff has refused to analyze these impacts and in the FSA and on record in the first hearing, has taken the position that, because there are allegedly no significant impacts of the project, there is no need to actually analyze cumulative impacts. This conclusion is based upon a total failure to analyze demolition impacts as part of the project. Because it has only analyzed a piece of this project, and thus dismissed alternatives and failed to fully analyze cumulative impacts based upon an incomplete project description, CEQA has not been complied with.

[1] See: TN 214162 to 24135: Land Trust Opening Testimony and attachments

As staff suggested, once air quality impacts are included, the FSA Part One may need revision[2]. But, the Trust's request to leave the record open until the FSA was complete was denied and instead, the Committee has attempted to shift the burden of proof to the Trust as an intervenor by requiring the Trust to move to reopen the record and prove that emissions impacts will effect other subject areas.[3]

Closing the record when the issues are clearly unresolved and shifting the burden of thorough analyses from the staff to the public is clearly an arbitrary and capricious decision, and abuse of discretion under the Public Resources Code.

There are already specific examples on the record that emissions will impact air quality as well as most all other areas of concern. Yet the adequacy of the FSA is still unresolved. For example staff has testified that they were not aware of the potential cumulative impacts of PM10 emissions, and whether those emissions would be cumulatively significant when combined with the dust and potential air borne hazardous material particles during demolition of the AGS Units 1 through 6.[4] This example highlights the broader inadequacy of the FSA: without some description of how and when demolition of AGS will occur, the Trust and the public cannot provide meaningful comment and the Staff's analysis is deficient.

Further, staff has testified that the demolition of the AGS Units 1 through 6 would be "temporary" and consequently the impacts from operation of the proposed AEC would not be "cumulatively considerable."[5]

However, it is reasonably foreseeable that construction and operation of the proposed AEC will be followed by demolition of AGS and several other nearby projects. And it is reasonably foreseeable from the record that the operation of the proposed AEC will be cumulatively considerable given the past and future impacts – including demolition of AGS.

Further, evidence on the record from other similar demolition projects, submitted by the Trust as attachments to Part One Opening Testimony, suggest the demolition of the AGS could last approximately a year if the Applicant uses explosive devices, and longer if other demolition techniques are used. Adding another year or more of significant noise, dust and other adverse impacts is clearly a cumulatively significant timeline.[6]

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[2] See: TN 214529: Evid Hrng Transcript
[3] See: TN 214529: Evid Hrng Transcript

[4] See: TN 214529: Evid Hrng Transcript
[5] See: TN 214529: Evid Hrng Transcript
[6] See: TN 214191: CCC on So Bay Power Plant demo

2. Inadequate Cumulative Impacts Analyses

a. Demolition is Part of the Project

In ruling on Staff's Motion to find that the demolition of AGS Units 1 through 6 is a separate project from construction and operation of the proposed AEC, the Committee relied on a MOU signed by the Applicant and the City stating that AES would demolish the existing facility in exchange for the City assisting them to get the permits needed for the demolition.

The totality of evidence in the record now makes it clear that the Committee's ruling on the Staff Motion to treat demolition of the AGS Units 1 through 6 as a separate project from the proposed AEC was an error.

First, in the Final Ruling on Staff's Motion, despite our request to reconsider given new evidence, the Committee's reliance on the MOU prepared by the City Manager did not recognize nor account for the fact the MOU did not adequately memorialize the promises made to the City Council prior to the City Manager drafting the MOU.

It is now clear that the City Council was led to believe that the Applicant was promising to demolish the existing structures in exchange for the City's support for the proposed AEC. Further, the presentation to the City Council explicitly noted that the MOU was needed because this Commission could not make demolition a "condition of approval" of the proposed AEC, so the MOU would provide a similar certainty.

The Committee's license for this proposed project will be a "catalyst for foreseeable future development" and the "achievement of its purpose would almost certainly have significant environmental impact." (*City of Antioch v. City Council* (1986) 187 Cal. App. 3d 1325, 1334.)

As the CEC baldly admits and the case history demonstrates, Commission approval of a power purchase agreement is a "catalyst for foreseeable future development" and is also grounds upon which the CEC excuses unmitigated environmental impacts of the power plant development. This type of piecemeal review has long been found by the courts as a violation of CEQA. *City of Antioch v. City Council, supra,* 187 Cal. App. 3d at pp. 1333-1334 discusses a number of examples:

> In [*County of Inyo*] the county approved a general plan amendment and zoning on the basis of a negative declaration. As described by the court in *City of Carmel-by-the-Sea*, "The rationale behind the decision was similar to that advanced by the agency in *Bozung* and rejected by the Supreme Court, namely that preparing an EIR would be premature at the zoning stage since the tentative map for the project, a shopping center, was not before the agency. In *County of Inyo*, when the tentative map was in fact before the Board it was again recommended that no EIR was needed since the proposed use now conformed to the existing zoning. The court of appeal, citing *Bozung*, found that this approach--division of the project into two parts with

> 'mutually exclusive' environmental documents--was 'inconsistent with the mandate of CEQA' and constituted an abuse of discretion.

(Ibid. citing *City of Carmel-by-the-Sea v. Board of Supervisors* (1986) 183 Cal.App.3d 229; *Citizens Assn. for Sensible Development of Bishop Area* v. *County of Inyo* (1985) 172 Cal.App.3d 151; *Bozung* v. *Local Agency Formation Com*. (1975) 13 Cal.3d 263.)

The Commission cannot look at the project in a vacuum; the argument fails that EIR preparation is premature and unnecessary because other phases of development will be accorded appropriate environmental review in due course. (*Ibid*.)

Once the proposed AEC is constructed and operating, the City will have little leverage to deny any permits necessary for the demolition, even if the demolition will require significant mitigation the owner is unwilling to provide. Therefore, deferring thorough analysis of demolition until the proposed AEC is complete will create the type of "project momentum" the court has found to effectively undermine CEQA.

Finally, this Commission has found that demolition of an existing power plant, when it is linked to the proposal for a "replacement" power plant, are one and the same project.[7] While the South Bay Power Plant demolition may have been an exercise of agency discretion rather than clear CEQA mandate, there is no reason provided by the Committee in this case to reverse that rationale and discretionary choice in this case.

i. <u>MOU vs. City Staff Report</u>

The Committee Ruling on Staff's Motion to consider demolition as a separate project from the proposed AEC relied on a MOU between the City and the Applicant to find that there was no link between the proposed project and demolition of the existing facility. The MOU relied on by the Committee stated that the Applicant would demolish the existing AGS Units 1 through 6 in exchange for the City's support to get the necessary approvals for demolition.

However, the MOU inaccurately memorialized the information presented to the City Council in support of entering into the agreement. As documented in the City staff's presentation to the City Council, the Applicant would promise the City to demolish the AGS in exchange for the City supporting the AEC project before this Committee.[8]

The City staff made it clear to the City Council that:

> "[The Energy Commission] has no legal authority to order AES to demolish the existing power generating units as a condition of approval. Thus, an MOU between the City and AES for the demolition of the existing steam generators and stacks is highly desirable."

[7] See TN 214146: CEC Chief Counsel opinion on SBPP demo

[8] See TN 213929-2: City Staff Presentation to City Council on MOU

As the Land Trust pointed out in response to the Tentative Ruling, the City Council's approval of the MOU was to ensure the certainty of a "condition of approval" mandating demolition as part of the proposed AEC project, and consequently met the CEQA standard for including demolition as part of the project.

The City Council was led to believe the MOU would link the demolition of AGS and the proposed AEC, meeting the CEQA standard the Committee cited in the Tentative Ruling:

> More recently, in *Tuolumne County Citizens for Responsible Growth, Inc. v. City of Sonora*, the court held that a proposed Lowe's home improvement center and a planned realignment of the adjacent Old Wards Ferry Road were improperly segmented as two separate projects in light of the dispositive fact that the road realignment was included by the City of Sonora as a **condition of approval** for the Lowe's project. The court held that this was really one project, not two, because **"[t]heir independence was brought to an end when the road realignment was added as a condition to the approval of the home improvement center project."** [emphasis added]

As the City staff told the City Council:[9]

> "**The MOU will provide certainty for** the public, the City of Long Beach, and **the Commission** that the existing power plant will be removed after the new facilities are constructed and operating."

In the Memo[10] submitted by the Land Trust after the Tentative Ruling was made available, the Land Trust requested the Committee reconsider the Tentative Ruling given the new evidence of what the City Council had actually approved to be included in the MOU. The Final Ruling neither recognized the new evidence, nor reconsidered the rationale in the Tentative Ruling – consequently we do not accept the Final Ruling on Staff's Motion.

And at the Part One evidentiary hearing a City Councilperson spoke in support of the proposed AEC – fulfilling the City's part of the bargain to ensure demolition is part of the project approval.

ii. South Bay Opinion

Not only is the consideration of demolition as part of the replacement plant application required under relevant CEQA case law, as noted above, but the Energy Commission has precedent for doing so. In the case of a power plant replacement application in Chula Vista, the Energy Commission chief counsel found that:[11]

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[9] Ibid.

[10] See: TN 213929-1: Land Trust Memo

[11] *See footnote 7 above*

> "[T]he existing plant is not a "related facility" in that it is not dedicated and essential to the operation of the replacement power plant, over which the Commission does have permitting authority.
> Indeed, rather than being essential to the operation of the replacement plant, the existing plant is slated for demolition under agreements between its owner, the Port Authority, and the applicant seeking an Energy Commission license for the replacement.
> Because the demolition is part of a master plan to build a replacement plant at another location, however, the Energy Commission staff plans to assess the environmental impacts of the demolition in its environmental assessment of the proposed replacement plant. Actually, all foreseeable activities related to the proposed replacement power plant will be covered in the Commission staff's environmental assessment. As a result, the final staff assessment should be suitable for use in complying with CEQA by the Port Authority and the City of Chula Vista, agencies that we understand do have permittlng authority over the demolition of the existing South Bay power plant."

The CEC attorney decision on demolition being part of a "replacement" proposal is applicable here. Like the South Bay Power Plant project, despite demolition of the AGS not being essential to the replacement project, "it is slated for demolition under agreements" with the City of Long Beach. Further, in South Bay the CEC attorney decision found that, because the demolition was part of a plan to construct a replacement plant that the CEC had authority to permit, "…staff plans to assess the impacts of the demolition in its environmental assessment of the proposed replacement plant" and "all foreseeable activities related to the proposed replacement power plant will be covered in the Commission staff's environmental assessment." And clearly the decision called for much greater analysis than is the case here if, as the CEC attorney decided, "..the final staff assessment should be suitable for use in complying with CEQA…" by other permitting agencies.

The Final Staff Assessment in this case must follow the rationale and precedent set in the South Bay Power Plant decision.

iii. <u>AQMD Requires Decommissioning, Triggering MOU</u>

The AQMD license requires the permanent retirement of AGS. Staff and the Applicant have asserted that the Land Trust confused "decommissioning" with "demolition." This assertion missed the point.

Permanent decommissioning, as required in the AQMD permit, triggers the promises made by the Applicant in the MOU to demolish the AGS as soon as the proposed AEC is operational.

iv. <u>CEC staff says demo is "ministerial" permit and doesn't trigger CEQA</u>

During discussion of this issue in a Status Conference prior to the Tentative Ruling, the Applicant and staff attorneys argued that demolition only requires a

"ministerial" approval by the City, and consequently does not trigger CEQA review, concluding:[12]
"…it's a ministerial thing. So, the(inaudible) -- impacts there really don't exist."

If the Applicant and staff attorney are correct that demolition of the AGS, absent thorough cumulative impacts analyses by this Commission, is a "ministerial thing", the Applicant may never be required to analyze the adverse impacts of demolition.

Clearly this argument precludes any requirement of the Applicant to document the adverse impacts of demolition of the AGS despite the promise to do so in the MOU, creating the type of "momentum" for a project found unacceptable by the courts.

Ironically, the assertion by the Applicant that demolition is a "ministerial thing" only supports the Trust's argument that this Commission must consider demolition of the AGS as part of the proposed AEC.

b. Alternatively: Demolition is Reasonably Foreseeable and Must Be Adequately Described and Analyzed

i. Required Documentation of How and When Demolition will Occur

The Land Trust has repeatedly requested the FSA include a description of the foreseeable demolition. Given that the demolition will be conducted by the Applicant on the same property as the proposed AEC, and that there is a commitment to demolish the existing AGS between the City and the Applicant, it is "reasonable and practical" for the Applicant to provide that information. And that information is required prior to licensing the proposed AEC. Making assumptions about the timing and severity of demolition is not necessary, given that the Applicant can provide actual plans and data.

The FSA must provide a summary of the expected environmental effects to be produced by demolishing the AGS, with specific reference to additional information stating where that information is available, demonstrating the severity of impacts and their likelihood of occurrence.

The Land Trust has provided examples of how demolition of power plants is planned, the potential severity and duration of those potential impacts, and means for minimizing and mitigating the impacts. But the FSA has failed to incorporate that information into the several subject areas in the FSA, including Noise, Dust, Traffic, Hazardous Materials, etc. And the absence of the analyses of air quality degradation in the Part One FSA compounded the inadequacy of the several subject areas.

Adequate cumulative impacts analyses require the FSA to summarize the

[12] See TN 213524: August 24, 2016 Status Conference transcript, Page 23, Lines 5-6

environmental effects of other past, present and future projects. Unlike the impacts of the proposed AEC, which were part of the FSA's project-specific analysis, the impacts from demolishing the AGS and other nearby projects is missing. CEQA requires "a summary of the expected environmental effects to be produced by those projects with specific reference to additional information stating where that information is available" [Guidelines § 15130(b)(4)].

While there is no set standard for the requisite level of detail in that required information, the Guidelines provide that the discussion should be "guided by the standards of practicality and reasonableness, and should focus on the cumulative impact to which the identified other projects contribute rather than the attributes of other projects which do not contribute to the cumulative impact" [Guidelines § 15130(b)]. While the discussion of cumulative impacts "need not provide as great detail as is provided for the effects attributable to the project alone", the analysis should reflect "the severity of impacts and their likelihood of occurrence." [Guidelines § 15130(b).]

The FSA cannot be "devoid of any reasoned analysis," specificity or detail. *[See Whitman ,* 88 Cal. App. 3d at 411 (rejecting the cumulative analysis in an EIR for a proposed oil and gas well which consisted of one sentence stating that the cumulative impact would be "increased traffic" and "a minor increase in air emissions").]

The FSA must attempt to accurately describe cumulative conditions despite the absence of relevant data, particularly if it is not possible to determine the significance of an impact without actual data. For example, in *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal. App. 3d 692, 729, 270 Cal. Rptr. 650 *("Kings County")],* the court found the analysis of cumulative project impacts on water resources inadequate where it provided no information regarding the expected groundwater impacts of nearby energy projects except to say they "would impact regional water sources, but these impacts would be lessened by numerous programs and [conservation measures]." The court concluded that " [a]bsent some data indicating the volume of ground water used by all such projects, it is impossible to evaluate whether the impacts associated with their use of ground water are significant and whether such impacts will indeed be mitigated by the water conservation efforts upon which the EIR relies." [221 Cal. App. 3d at 729-730.]

Thus, the FSA should quantify cumulative impacts whenever data are reasonably available or can be reasonably produced through further study. EIRs or other environmental documents prepared for other projects nearby the AES site may contain such data. Lead agencies, like the Energy Commission in this case, may also obtain data and other relevant information about projects affecting the cumulative impact analysis by contacting the agencies responsibility for carrying out or approving those projects.

Specific to the demolition of AGS, if data are not available, the FSA must explain why

it would not be reasonable or practical to obtain such data. Only then can the FSA explain the reasons why the impact is not quantified. The FSA should then provide a well-reasoned qualitative analysis. In this case, it is reasonable and practical to obtain a demolition plan from the Applicant. If the Applicant is to make good on the promises to demolish the AGS, a plan will have to be developed, and there is no reason not to require that plan now.

Further, as was pointed out in the Land Trust's comments on the PSA[13], analysis of cumulative impacts should not assume that the impacts of other projects will be mitigated unless there is substantial evidence to support this assumption, e.g., if mitigation was adopted as a condition of project approval or is otherwise required by law. For example, a quantitative cumulative impact analysis for groundwater cannot be avoided by simply assuming that impacts of future projects would be mitigated through water conservation efforts. *[Kings County,* 221 Cal. App. 3d at729.]

Similarly, when combining the project's incremental impact with the impacts of other projects, the impact analysis should not assume that the project-specific mitigation measures have been adopted, i.e., it should consider the project's pre-mitigation impact. This reflects the fact that mitigation measures in an EIR are merely recommendations; they are not incorporated into the project until the project is approved subject to such mitigation and following the adoption of CEQA findings.

In this case, the record is void of a satisfactory quantitative analysis of cumulative impacts from operation of the proposed AEC in combination with the potential adverse impacts from demolition of the AGS. And that quantitative analysis is the result of the Applicant failing to submit a demolition plan and timeline, despite the fact it would be "reasonable and practical" for the Applicant to provide that data. Further, it is inadequate for the FSA to simply rely on mitigation measures in future projects to minimize cumulative impacts.

As explained below, it is not consistent with CEQA mandates to simply conclude that -- regardless of when demolition occurs, how demolition is carried out, and what the adverse impacts would be prior to and after mitigation measures -- the proposed AEC contribution to cumulative impacts would not be "considerable."

If the FSA does not include actual data to support those conclusions, it must include an adequate "qualitative" analysis. Unsupported conclusory statements are not adequate.

ii. Required Definition of "Cumulative Impacts" and Contribution of the Proposed Project to Level of "Significance"

[13] See TN 212764-1

First, despite the fact the FSA is void of any description of the demolition of the AGS nor the accompanying adverse impacts, staff argued in the Part One Evidentiary Hearing that contributions of the AEC operations to the adverse impacts of demolishing the AGS were not "considerable" – even if the cumulative impacts were to be found "significant."[14]

The "significance" of a cumulative impact should be determined using the same significance threshold as that used for project specific impacts. Arguably, unless there is a defensible reason to change the threshold, it should remain constant from the project-specific analysis to the cumulative analysis. For example, if the FSA used the Energy Commission's thresholds of significance for measuring whether the proposed AEC's noise, traffic, hazardous material and other impacts are significant, the FSA should use that same threshold for measuring whether the combined impacts of the proposed AEC and other probable future projects is cumulatively significant.

Therefore, the FSA must analyze the proposed AEC's individual impacts to determine if there is a potential to combine with related impacts from other projects to compound environmental harm. The CEQA Guidelines define "cumulative impacts" as "two or more individual effects which, when considered together, are considerable or compound or increase other environmental impacts" [Guidelines § 15355J. If the proposed project will not make any contribution to the cumulative impact, the EIR need not address it. [Guidelines § 15130(a)(1) ("An EIR should not discuss impacts which do not result in part from the project evaluated in the EIR").J

However, if even a tiny portion of the cumulative impact is caused by the proposed AEC, the FSA must analyze it. The ultimate goal of this analysis is to determine whether the proposed AEC's incremental contribution is "cumulatively considerable" and thus significant. *[See* Guidelines § 15130(a).J A project's incremental impact may be individually limited but cumulatively considerable when viewed together with the environmental impacts from past, present, and probable future projects. [Guidelines § 15130(a).J

Therefore, the analysis of cumulative impacts should be a two-step process:
(1) The EIR should determine whether the combined effects from both the proposed project and other projects would be "cumulatively significant," i.e., result in a significant cumulative impact.
(2) If the answer is yes, the EIR should determine whether the proposed project's incremental effect is "cumulatively considerable" and thus significant.

Critically, a proposed project's incremental effects may be "cumulatively considerable" even when its individual effects are limited. [Guidelines §§ 15064(h)(l), 15065(a)(3), 15355(b).] In other words, CEQA does not excuse an EIR

[14] See TN 214529: Hearing Transcript at p100, lines 14-23. See also p107, line 6-9

from evaluating cumulative impacts simply because the project-specific analysis determined its impacts would be "less than significant."

Similarly, a "less than significant" impact conclusion at the project level does not guarantee the project's contribution to a significant cumulative impact will be less than "cumulatively considerable."

For example, the FSA determined construction and operation of the proposed AEC will have traffic noise impacts below the agency's quantitative threshold of significance after mitigation provisions. However, when the operation noise impacts are combined with the anticipated noise impacts of other past, present and probable future projects in the area, they may cumulatively raise noise levels above the threshold. Whenever this potential exists, the EIR must analyze cumulative impacts. The FSA should determine, first, whether the combined emissions result in a significant impact, i.e., breach the impact significance threshold, and, if they do, whether the project's individual contribution to the cumulative impact is "cumulatively considerable" and thus significant.

If the analysis shows either that the cumulative impact is not significant, or that the project's incremental effect is not cumulatively considerable, the EIR should briefly explain the basis for this conclusion. [Guidelines § 15130(a).] <u>As noted above, a conclusion that the cumulative impact is not significant must be accompanied by relevant facts and analysis.</u> [Guidelines § 15130(a)(2).]

But the FSA is void of relevant facts and analyses. For one example, the staff relies on assumptions that the same type of equipment used for construction will be used for demolition, without even a hint how demolition will be carried out. The staff also assumes that the duration of demolition will be “temporary” and consequently not significant. But there are no facts or analysis in the FSA indicating how long demolition will take, when it will start and stop, nor whether the demolition timing will effectively continue the construction timeline of the proposed AEC and cause long-term impacts.

iii. <u>Defining “Cumulatively Considerable”</u>

The FSA must not only determine the significance of the cumulative impacts from the several projects on the “list”, including the AGS demolition, it must also identify whether the proposed AEC's incremental contribution to a significant cumulative impact is "cumulatively considerable." It is not enough for the FSA to include a statement concluding that the adverse impacts from operation of the proposed AEC will not be cumulatively considerable – the required analyses are more complex.

Communities for a Better Environment v. California Resources Agency [(2002) 103 Cal. App. 4th 98, 126 Cal. Rptr. 2d 441 *("Communities for a Better Environment")],* invalidated certain CEQA provisions and clarified the seminal appellate decision on cumulative impacts analysis, *Kings County Farm Bureau v. City of Hanford* [(1990)

221 Cal. App. 3d 692, 270 Cal. Rptr. 650]. In *Kings County,* the court rejected the cumulative analysis prepared for a proposed coal-fired cogeneration plant in which the lead agency determined the project's impact on air quality was not cumulatively considerable because it would contribute less than one percent of area emissions for all criteria pollutants. [221 Cal. App. 3d at 718-719.] The court criticized the lead agency's focus on the ratio between the project's impacts and the overall environmental problem, rather than on the combined effect of the project in addition to already adverse conditions. Under this (impermissible) approach, which the court dubbed the "ratio theory", " the greater the overall problem, the less significance a project has in a cumulative impact analysis." [221 Cal. App. 3d at 721.] Instead of trivializing a project's impacts by comparing them to the impacts of other past, present, and probable future projects, CEQA requires the lead agency to first combine the impacts. When this is done properly, the FSA may find that the scope of the environmental problem is so severe that even a minuscule incremental change would be cumulatively considerable and thus significant.

The *Communities for a Better Environment* decision built upon and expanded the analysis in *Kings County.* In *Communities for a Better Environment,* the court invalidated an amendment to the CEQA Guidelines enacted in 1998 that permitted an EIR to find a project's contribution to a significant cumulative impact "de minimis" if the environmental conditions would be the same whether or not the proposed project is implemented. *[Communities for a Better Environment,* 103 Cal. App. 4th at 117-118.] The court found this approach counter to the *Kings County* decision, as well as other decisions rejecting the "ratio theory", e.g., *City of Long Beach v. Los Angeles Unified School Dist.* [(2009) 176 Cal. App. 4th 889, 98 Cal. Rptr. 3d 137 *("Los Angeles Unified")* (EIR improperly relied on a ratio theory to conclude that a project's relatively small contribution to noise impacts were not significant)].

The relevant question, as set forth by the court, is whether any additional amount of effect is significant (i.e., cumulatively considerable) **in the context of the existing cumulative effect**. [103 Cal. App. 4th at 119.] In other words, "the greater the existing environmental problems are, the lower the threshold should be for treating a contribution to cumulative impacts as significant." [103 Cal. App. 4th at 119.] Although stating the" 'one additional molecule rule' is not the law," the court provided no further guidance on when a very small incremental contribution to an existing environmental problem would be significant, i.e., cumulatively considerable. [103 Cal. App. 4th at 119.]

These two cases illustrate the importance of focusing on the actual effect a project's contribution will have on the environment at the cumulative level, rather than simply comparing the project's contribution to the magnitude of the impact as a whole. The more sensitive the resource -- scarce coastal wetlands in Southern California, like Los Cerritos Wetlands -- the greater potential for the project's incremental impact to be significant.

Thus, the answer to the question "what is cumulatively considerable?" ultimately

falls to the FSA's consideration of the environmental setting, the sensitivity of the resource and the extent of the project's contribution.

However, in this case, the FSA fails to adequately describe the sensitive nature of the small remnant of coastal wetlands left from past development, the severity of existing threats to the wetlands, the adverse cumulative impact from demolition of AGS, and whether the additional impact from operation of the proposed AEC is "cumulatively considerable" given those other factors.

iv. "Past Projects" and Timing of Several Foreseeable Future Projects

The FSA, and staff responses at the evidentiary hearing for FSA Part One, imply that the impacts from construction of the proposed AEC are temporary, and the impacts from demolition of AGS are temporary, and similar demolition and/or construction projects nearby would also be temporary. And the FSA assumes that the temporary nature of the adverse impacts of each foreseeable project supports the conclusion that the individual projects' contributions to environmental problems are not "cumulatively considerable."

The California Supreme Court has explained that the requirement to assess past projects "signifies an obligation to consider the present project in the context of a realistic historical account of relevant prior activities that have had significant environmental impacts." *[Environmental Protection Information Center v. California Dept. of Forestry & Fire Protection* [(2008) 44 Cal.4th 459,524, 118 Cal. Rptr. 3d 352].] To do this effectively, the FSA "must reasonably include information about past projects to the extent such information is relevant to the understanding of the environmental impacts of the present project considered cumulatively with other pending and possible future projects." [44 Cal. 4th at 525.] Of course, it is important for the public to understand the adverse impacts from development and operation of the existing power plant for a proper understanding of the severity of continued use of filled wetlands for power plants – especially in the context of alternatives to the proposed 1040MW power plant that would meet the purposes stated in the FSA.

Identifying prior activities is also important when temporary construction impacts from the proposed project have the potential to compound with related impacts of future projects to create significant cumulative impacts. For just one example, wildlife and habitat in the Los Cerritos Wetlands adjacent to the AGS property and roads leading to the property, may be exposed to "temporary" impacts from construction of the AEC project that are mitigated to less than significant in the short term. But those impacts become significant in the long term if numerous construction projects create similar adverse impacts consecutively over time. For example, excessive noise, dust, traffic and other impacts may be mitigated to less than significant for the proposed project, but because those impacts will continue for a longer period of time in future projects, the impacts are "cumulatively considerable." Thus, where the impacts of prior short-term construction past projects, like construction of the proposed AEC, are not part of the baseline due to

their temporary nature, past projects with the potential to cause cumulatively significant longer-term impacts should be specifically identified. That is, for example, construction of the proposed AEC simultaneous with operation of the AGS, followed by demolition of the AGS with simultaneous operation of the proposed AEC, followed by demolition of the Haynes facility and other nearby demolition/construction projects, are cumulatively considerable and cannot be individually excused as "temporary" and/or "dispersed."

In this case, the proposed AEC construction impacts will last approximately 56 months, AGS demolition may last an additional year or more, and then demolition and construction of Haynes will begin. Despite each creating a "temporary" adverse impact individually, the FSA must treat them collectively and document the long-term adverse impacts. The FSA cannot segment the foreseeable projects and cumulative impacts by assuming each is "temporary" -- and individually "less than significant" because of the temporary nature of each project.

Further, the discussion of existing conditions must adequately describe the effects of past projects. This can be done by acknowledging historical trends, e.g., wildlife population declines, degradation and loss of habitat, and the types of projects that have caused such trends. In such cases, so long as the analysis describes the impacts of past projects on existing and future conditions, it is not necessary to provide detailed information about the past projects themselves. For example, in *Los Angeles Unified,* 176 Cal. App. 4th at 910-912, the court upheld the lead agency's determination that existing refineries and diesel fuel stations were necessarily included in the analysis of cumulative air quality impacts because they comprised the baseline. By discussing the degradation of air quality in the air basin and the fact that it was a nonattainment area, and by describing all pollutant sources near the project, the lead agency adequately analyzed all relevant projects for purposes of the cumulative analysis. [176 Cal. App. 4th at 912.]

In this case, the FSA fails to identify the past projects that led to the environmental setting in the baseline, nor how the baseline environmental degradation affects the conclusions of significance and cumulatively considerable impacts.

v. Mitigation Required

"An EIR shall examine reasonable, feasible options for mitigating or avoiding the project's contribution to any significant cumulative effects." [Guidelines § 15130(b)(5).]

The Commission may determine that a project's incremental contribution to a cumulative effect is not cumulatively considerable "if the project will comply with the requirements in a previously approved plan or mitigation program ... that provides specific requirements that will avoid or substantially lessen the cumulative problem within the geographic area in which the project is located. Such plans or programs must be specified in law or adopted by the public agency with jurisdiction over the affected resources through a public review process to implement, interpret,

or make specific the law enforced or administered by the public agency." [Guidelines § 15064(h)(3).] The 2010 amendments to the Guidelines expanded the list of examples of such programs to include water quality control plans, air quality attainment or maintenance plans, integrated waste management plans, habitat conservation plans, natural community conservation plans, and plans or **regulations for the reduction of greenhouse gas emissions.** [Guidelines § 15064(h)(3).] (emphasis added) "When relying on a plan, regulation or program, the lead agency should explain how implementing the particular requirements in the plan, regulation or program ensure that the project's incremental contribution to the cumulative effect is not cumulatively considerable." [Guidelines § 15064(h)(3).]

In this case, the FSA must consider an alternative that is consistent with the CPUC decision enforcing their "loading order" regulations to reduce greenhouse gas emissions by limiting the gas-fired generation at this site to 640 MW. This alternative, required in the Commission's regulations requiring consistency with LORS, would also limit the time of constructing the proposed AEC that adds to long-term cumulative impacts from demolition of the AGS and other nearby projects, as well as limit the noise, dust and other the cumulatively considerable adverse impacts from operation of the proposed AEC that occur simultaneously with demolition of the AGS.

Further, in addition to the requirement to mitigate a project's incremental contribution to a cumulative impact, the Guidelines recognize that for some projects "the only feasible mitigation for cumulative impacts may involve the adoption of ordinances by regulations rather than the imposition of conditions on a project-by-project basis." [Guidelines § 15130(c).]

The Commission has authority to pre-empt the enforcement of local ordinances -- but it is unclear whether the Commission has the authority and an obligation to compel adoption of such ordinances. A lead agency is only responsible for mitigating a project's proportional contribution to a significant cumulative impact; it is not required to mitigate other projects' contributions.

However, the Commission should, at a minimum, discuss whether a comprehensive ordinance would mitigate the cumulative impacts, and consider whether the City might adopt such an ordinance. For example, the City could adopt a traffic mitigation ordinance that applies to all future projects and requires each project to pay its proportional fee towards future traffic improvements. Given the adoption of such an ordinance is outside the scope of the Commission's jurisdiction, the FSA should nevertheless identify the ordinance as a mitigation option for the significant cumulative impact. The Commission should then make an express finding that adoption of the ordinance is within the responsibility and jurisdiction of the City or another agency, which has adopted it or can and should adopt it. [Pub. Res. Code § 21081(a)(2); Guidelines § 15091(a)(2).]

CONCLUSION

The FSA's analysis of cumulative impacts is clearly inadequate. While not the only example, the most telling example is the lack of any description of impacts associated with the demolition of the AGS, which is controlled by the Applicant and required in an agreement between the Applicant and the City. It is both reasonable and practical to require the Applicant to provide a description of the demolition plans for analysis of cumulative impacts prior to finalizing the FSA.

Further, CEQA requires a more detailed analysis of "cumulatively considerable" impacts than what is provided in the FSA. That analysis cannot simply rely on existing conditions to assume the addition of impacts from the proposed AEC would not be "cumulatively considerable." Nor can the FSA rely on the assumption that other projects will include mitigation measures to minimize the project-specific impacts to "less than significant" and assume that the cumulative impacts are therefore less than significant.

The Land Trust has highlighted the need for more thorough cumulative impacts analyses since the release of the Preliminary Staff Assessment. Approving the FSA, and relying on the FSA to license the facility without first ensuring the Applicant minimize and mitigate the significant cumulative impacts would create the "momentum" for demolishing the existing AGS the courts have rejected in the past.

Finally, the inadequate cumulative impacts analyses have resulted in conclusions that there is no requirement to analyze alternatives that would minimize the adverse impacts. As stated below, we disagree with that conclusion.

3. Inadequate Alternatives Analyses

As noted below, the proposed AEC must be no larger than 640MW of gas-fired generation to be consistent with applicable LORS and CPUC Decision D.15-11-041, and the FSA must consider alternatives to minimize impacts from a 640MW gas-fired facility.

The FSA is void of any discussion of the need for a 1040MW of gas-fired generation. The AFC simply states:[15]

> "The California Public Utilities Commission (CPUC) confirmed the need for new generation in the Los Angeles Basin in a decision authorizing procurement of between 1,400 and 1,800 MW of new electrical capacity in the western Los Angeles sub-area to meet long-term local capacity requirements by 2021 and that at least 1,000 MW but no more than 1,200 MW must be from conventional gas-fired resources (including combined heat and power resources)."

[15] See TN 206427-1: Alamitos Energy Center AFC at Page 1-2.

But the AFC and FSA fail to document that the November 19, 2015 CPUC decision approving SCE's application local capacity requirements for the western Los Angeles sub-area specifically limited the gas-fired generation at Alamitos to 640 MW.[16]

And, as the Commission knows, the Applicant is currently seeking a license for 844 MW of gas-fired generation at the proposed Huntington Energy Center.[17] The combined capacity of the Applicant's Alamitos and Huntington Beach proposals would equal approximately 1884 MW of gas-fired generation – 640 MW more gas-fired generation than what the CPUC approved for Alamitos and Huntington Beach to meet 2022 forecast local capacity requirements for the LA Basin. And importantly, that CPUC decision included a mix of supply solutions, including energy efficiency, battery storage, and gas-fired generation, and at least acknowledged that the resources selected to meet the need must comply with the loading order as codified in California Public Utilities Code.

CEC staff, in rebuttal testimony to Trust witness William Powers, advise against revisiting the CPUC need determination that addresses AEC, stating:[18]

> "Second guessing the conclusions and findings of the CPUC, after it has gone through the multiyear LTPP process, in staff's environmental analysis of a specific project is not appropriate because each process entails different sets of facts, information, stakeholders and purposes. . . The LTPP is the appropriate proceeding to discuss regional energy development and reliability. . . Commission staff is not in a position to reopen the LTPP proceeding nor is the siting process the appropriate place to consider regional demand forecasting and grid reliability."

Yet that is exactly what the CEC proposes to do in this proceeding by authorizing a 1,040 MW gas-fired power plant at AEC when the CPUC LTPP and resulting SCE application identified 640 MW as sufficient gas-fired generation at this specific site to meet the identified local reliability need.

The statement in the AFC regarding the need for AEC makes clear the project size is based only loosely on the CPUC LTPP process, as a substantial portion of the capacity in the AFC, 400 MW of simple-cycle CTGs, have not even been considered in a CPUC LTPP process:[19]

> "In recognition of its critical grid reliability benefits, the AEC combined-cycle CTGs were selected by Southern California Edison (SCE) in its Local Capacity Requirements Request for Offer (LCR RFO) on November 5, 2014. The simple-cycle CTGs will meet the capacity needs anticipated to be

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[16] CPUC Decision D.15-11-041 (attached)

[17] See 12-AFC-02C, TN 206087: AES Petition to Amend Huntington Energy Center license

[18] S. Kerr and D. Vidaver – CEC staff, Alternatives Rebuttal Testimony, October 26, 2016, p. 3.

[19] See TN 206427-1: Alamitos Energy Center AFC at Page 1-2.

identified in future procurement authorizations through the CPUC LTPP process. "

The AFC definition, and the proposed AEC itself, if licensed by this Commission, would violate the loading order by presupposing, prior to any CPUC LTPP process, that the generation type at the bottom of the loading order – utility-scale natural gas-fired generation, will be presumptively selected as necessary to meet California's clean energy mandates. The Commission will also violate the loading order, and as a result LORS, by pre-approving an additional 400 MW of gas-fired generation at AEC with no determination of need for this gas-fired generation by the CPUC or any other regulatory body.

According to the record, staff and the hearing officer argue that the Commission's organic law was amended to prohibit the consideration of "need" in licensing new power plants. We disagree that this prohibits a thorough consideration of "need" under CEQA standards.

Trust lawyer April Sommer highlighted at the November 15, 2016 hearing the logical and ludicrous result of the Commission divorcing some demonstration of need before approving an AFC:[20]

MS. SOMMER: So, let's say the Applicant, hypothetically, had applied for a 4,040-megawatt plant, would Staff have dismissed alternatives based upon an inability to meet 4,040 megawatts?
HEARING OFFICER CELLI: Mr. Kerr?
MR. KERR: It would depend on the -- on Staff's analysis and the impact that would be associated with such a proposed project.
MS. SOMMER: So, you're talking about, in your rebuttal testimony, I believe what you're referring to is a statement made in the FSA, page 6-22, that under the Public Resources Code Staff assumes them proposed project is needed, if an FAC (AFC) was filed.

But contrary to the staff's assumption, and/or reliance on the Commission's organic law, the fact is the CPUC has already defined the level of gas-fired generation "need" -- approving 640 MW of gas-fired generation at Alamitos, along with 644 MW at Huntington Beach and 98 MW at Stanton. This is the sum total of gas-fired generation needed in the LA Basin according to the CPUC. Further, CPUC Decision D.15-11-041 approving these gas-fired generation contracts clearly stated that any remaining reliability projects be confined to "preferred resources" – contrary to the Applicant's assertion regarding need for the simple-cycle CTGs as stated in the AFC. As stated in the final CPUC decision:[21]

"To the extent that further analysis indicates that additional procurement is necessary, however, SCE remains *authorized* to obtain

[20] See: TN 214529: Hearing Transcript, November 15, 2016, p. 65.
[21] See: TN 212764-2: Final CPUC decision at page 11 [emphasis added]

> additional **preferred resources (only),** up to the limits specified in D.14-03-004 or via other approved procurement mechanisms."

The CPUC decision was based on the government's enforcement of State laws to reduce GHG emissions. The CPUC's loading order (regulations) is an element of those state laws along with the 50 percent by 2030 Renewable Portfolio Standards (standards).

Finally, the CPUC, as part of their review of need for gas-fired generation in the LA Basin, made it clear that it was this Commission's duty to review the contract for 640 MW of gas-fired generation they approved under CEQA:[22]

> "The CEC's CEQA review can and should be conducted independent of the parties' opinions regarding potential damages and risks based on the Commission's approval of the underlying contract."

For the FSA to start with an unquestionable assumption of 1040 MW to meet the stated purpose of the project, and refuse to consider the 640 MW the CPUC has already found as the maximum allowed under State laws, regulations and standards, is a clear violation of State LORS.

Further, absent an analysis of alternatives with less capacity than the 640 MW allowed in the CPUC decision, the FSA undermines the CPUC's reliance on this Commission to provide CEQA review of their decisions.

a. <u>Alternatives to Minimize Adverse Impacts</u>

The FSA relies on findings that the adverse impacts of proposed AEC will be mitigated to "less than significant" and that the addition of those project specific impacts will not be "cumulatively considerable." As noted above, the FSA fails to substantiate those assumptions.

As pointed–out by Trust witness Powers at the November 15, 2016 hearing, the proposed 1,040 MW AEC will emit double the greenhouse gas emissions (GHG), by itself, compared to all of the aging coastal steam units in the LA Basin:[23]

I just want to point out that, given this is a big issue in the PUC proceeding, which I was in as an expert, the PSA indicates that this project will emit more than 2 million tons a year of greenhouse gases.

> In 2014, all of the steam boiler plants in the L.A. Basin emitted less than a million tons of CO2. So, this is a big deal and I presume we'll get to it at the next round.

[22] Ibid at page 30

[23] Hearing transcript, November 15, 2016, p. 37.

The doubling of GHG emissions is due primarily to the assumed high usage rate of the 640 MW of combined cycle capacity at AEC. Meeting a 1-in-10 year reliability need does not require high usage combined cycle capacity, as such need is of short and infrequent duration. Nowhere in the CPUC's 2012 LTPP decision (Track 4 Decision D.14-03-) does the CPUC identify a specific need for combined cycle capacity. Low usage simple cycle capacity, from among gas-fired sources, is the best match for meeting reliability need while minimizing GHG emissions. It is not credible that the doubling of GHGs from power generation in the LA Basin that would result from the AEC as proposed is considered a "less than significant" adverse impact.

Further, meeting a 1-in-10 year reliability need can be effectively accomplished with demand response, which the FSA Alternatives analysis acknowledges.[24]

> DR has attributes that can partially meet some of the AEC's project objectives by: 1) contributing to or reducing the need for capacity-related reliability services, including an array of ancillary services (regulation and spinning reserves), and 2) reducing the need for flexible generation if called upon during hours in which ramping needs are highest. When such programs reduce loads in the West LA Basin, they reduce local capacity requirements.

DR emits no GHG and is the highest clean energy resource in the loading order. As Mr. Powers pointed-out in his opening testimony prepared on behalf of the Trust, the CPUC Track 4 decision scoping memo assumed that approximately 800 MW of DR will be added in the LA Basin by 2018 that has not yet been credited by CAISO as available capacity to meet local LA Basin reliability need. The FSA ignores the fact that even the CPUC assumes that more DR will potentially be available to meet the identified 2022 reliability need beyond the 640 MW of gas-fired generation approved by the CPUC at AEC in D.15-11-041.

Any need for gas-fired generation capacity outside of the 1-in-10 year reliability scenario can and should be met with existing regional combined cycle generation, specifically the soon-to-be-mothballed 965 MW La Paloma combined cycle plant, as explained by Trust witness Powers in his opening testimony.[25] This gas-fired alternative has the added advantage of drawing its natural gas supply from pipelines outside the LA Basin, and would therefore not be affected in any way by the supply reliability of natural gas stored in the Aliso Canyon storage field.

Mr. Powers summarized these alternatives to the proposed AEC in the following manner at the November 15, 2016 hearing:[26]

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[24] CEC Staff, AEC FSA Alternatives Section, September 2016, p. 6-13.
[25] See: TN 214149: Powers Opening Testimony, October 21, 2016, pp. 2-4.
[26] See TN 214529: Hearing Transcript, November 15, 2016, p. 58.

> Two, in my opening testimony I talked about 800 megawatts of demand response available. The Staff looked at 997 megawatts of demand response, both numbers from the Long-Term Procurement proceeding. And we also have a nearly 1000-megawatt combined-cycle unit in La Paloma. Part of my thinking in that opening testimony was the demand response is to be used on that peak, 1-in-10-year reliability day to shed the same types of services that would be provided by these turbines. Ancillary services, spinning reserve, cut down on reliability requirements. And La Paloma's available to provide bulk power. Combined, that's 2,000 megawatts. It's not that La Paloma and 800 to 1,000 megawatts of DR are necessary to offset this proposal. These are just tools that are available in combination to meet the need.

The FSA must also be modified to include a more robust discussion of the plans to demolish the existing AGS before the PMPD is drafted. In particular, to comply with the Commission's regulations, the PMPD must find:[27]

> Estuaries in an essentially natural and undeveloped state; Findings and conclusions on whether the facility will be consistent with the primary land use of the area; whether the facility, after consideration of feasible mitigation measures, will avoid any **substantial** adverse environmental effects; and whether the approval of the public agency having ownership or control of the land has been obtained.

The FSA required findings of no "significant impacts" from the project, or "cumulatively considerable" contributions to other foreseeable nearby projects are inadequate. The FSA fails to identify the standards in the Commission's regulations that heighten the duty to avoid "substantial adverse environmental effects" in coastal estuarine wetlands like the Los Cerritos Wetlands. A finding that the impacts to estuarine wetlands are not "significant" is the wrong standard.

Clearly the construction impacts and operation impacts from the proposed AEC will be reduced by a smaller project. A smaller project can meet the project purpose and objectives. The CPUC has already defined the "maximum" need at the Alamitos site, and deferred to the Energy Commission to decide whether that maximum is allowed after careful consideration of the adverse environmental impacts.[28]

b. 1,040 MW of Gas-Fired Generation at AEC Is Not Consistent with LORS

[27] *20 Cal Code Reg Sec. 1752 (f) (5) [emphasis added]*

[28] See TN 212764-2: Final CPUC decision at page 30

The Applicant has applied for a 1040 MW plant in Alamitos, and a 844 MW plant in Huntington.[29] Yet the CPUC has already defined the "need" for gas-fired generation in the LA Basin at no more than 1,382 MW, which includes 98 MW at Stanton.

In the August 24, 2016 Status Conference, the Applicant stated that:[30]

> "In terms of need, as I think we're all aware, the integrated assessment of need is no longer part of your siting process. To the extent that issue is relevant at all, it's talked about at the PUC and long-term procurement. So, it's not -- the question of need is not an issue that needs to be decided by the Commission."

The Applicant explains in both the Alamitos and Huntington Beach applications to this Commission that capacity in excess of what the CPUC approved is for future needs. But the CPUC has already considered demands beyond what was approved in the contracts and ruled they must be filled with preferred resources. Some of the additional reliability from preferred resources may, ironically, come from the Applicant's plan to also build a 300MW battery storage facility at Alamitos – 200MW more than what was contemplated in the CPUC decision.

California has enacted laws to reduce greenhouse gas emissions. The California Public Utilities Commission has created regulations and standards to implement those laws. Those laws and regulations have been directly enforced on this project through the award of a contract for 640 megawatts of gas-fired generation – and no more than that. Licensing 1040 Megawatts of gas-fired generation would be inconsistent with State laws, regulations and standards as already determined and enforced by the CPUC for this specific facility.

To override these LORS, the Presiding Member Proposed Decision must find:[31]

> With respect to any facility which does not comply with an applicable state, local or regional standard, ordinance or law, findings and conclusions on whether the noncompliance can be corrected or eliminated; and if such noncompliance cannot be corrected, findings on both the following:
> (1) Whether the facility is required for public convenience and necessity; and
> (2) Whether there are no more prudent and feasible means of achieving such public convenience and necessity.

The record in this case is void of any such findings.

It may be true that the Commission's enabling act was amended to generally relieve

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[29] See 12AFC-02C, TN 206087: Huntington Beach AFC and Petition to Amend
[30] August 24, 2016 AEC Status Conference Transcript, page 24 at Line 13.
[31] 20 Cal Code Reg Sec. 1752(k).

the Commission of a duty to find a "need" for the capacity of a proposed facility. Nonetheless, if the facility is inconsistent with LORS, the PMPD must still find the facility is required for "public necessity", and that "there are no more prudent and feasible means of achieving that necessity." The CPUC decision has already defined the maximum capacity "need" for the Alamitos site.

Further, in prior decisions, the Commission has referred to the use of a LORS override as "…an extraordinary measure which…must be done in as limited a manner as possible." *See e.g., Metcalf Final Decision, page 469* The evidentiary record here does not justify use of this "extraordinary measure" for the proposed AEC. Instead of describing a critical and compelling need for the project, the evidence shows that the CPUC, through enforcement of State laws, regulations and standards, has found the need for 640 MW of gas-fired generation at this specific site – and no more than 640 MW of gas-fired generation.

CONCLUSION

This Commission's regulations require a finding of consistency with applicable laws, ordinances, regulations and standards (LORS). The State has adopted laws, regulations and standards to reduce greenhouse gas emissions. Those regulations are applicable to the project on this site. In fact, the CPUC has already enforced those LORS for a proposed project on this site. To license a facility that is inconsistent with those LORS requires the Commission to justify overriding the applicable LORS. There is no such overriding consideration in the record for this proceeding.