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## STATE OF CALIFORNIA

## Conservation and Development Commission

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## INTRODUCTION

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

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

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

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

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

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

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

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

## **STANDARD OF REVIEW AND BURDEN OF PROOF**

### **Warren-Alquist Act**

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

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



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

## CEQA

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

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

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

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

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

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

## **ARGUMENT**

### **I. APPROVAL OF THE PROJECT VIOLATES CEQA.**

#### **A. The Project Description is Incomplete and Unstable.**

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

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

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

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

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

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<sup>1</sup> FSA at 1-1,1-3.

<sup>2</sup> FSA Project Description Figure 2.

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

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

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

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

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<sup>3</sup> FSA at 3-16.

<sup>4</sup> *Id.*

<sup>5</sup> FSA 3-25.

<sup>6</sup> Ex. 1148 at 1-3.

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

<sup>8</sup> Ex. 1148 at pp 3-5 and 3-6 including Table 3, Biological Resources Survey Report showing one globose dune beetle found on outfall access road (TN 219898); See also Ex. 1148 Figure 4, Biological Resources Survey Report showing as many as nine globose dune beetles on or immediately adjacent to the outfall access road, and one globose dune beetle on or immediately adjacent to the demolition access road's northwestern segment. (TN 219898)

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

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

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

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

The PSA assumes that under all alternatives other than the proposed project the existing MGS Units 1 and 2 would remain in place, even after the cessation of operations in 2020. In effect, any alternative other than the proposed project is immediately put at a disadvantage because it is assumed that none of the benefits of the removal of the existing facility would be realized. In conversation with Commission staff, City of Oxnard representatives have stated that, if the MGS Units 1 and 2 were to remain in place following the 2020 shutdown, the City would consider declaring the structures a nuisance under state law and pursue all means of requiring their demolition. The Commission urges the CEC to reconsider its baseline for evaluating project alternatives, taking into account the likelihood that the existing MGS Units 1 and 2 would be removed even in the absence of the P3.<sup>12</sup>

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<sup>9</sup> Ex. 2001 at p 5.4-3, FSA Part 2 (TN 214713).

<sup>10</sup> FSA, p. 3-6

<sup>11</sup> FSA, p. 4.2-1

<sup>12</sup> Ex. 3009 at 17, CCC 30413(d) Report – Final Approved Report (September 15, 2016). (TN213667).

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

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

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

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

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

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

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<sup>13</sup> Ex. 1085 at 11, *NRG, Responses to Comments on the P3 PDOC* (Sept. 2, 2016). (TN 213482).

<sup>14</sup> Ex. 4029 at p 3, *Comments on PSA-Environmental Coalition, Sierra Club, Environmental Defense Center (Intervenors)* (TN 213635).

<sup>15</sup> *Id.* at 3-4; *See* Cal. Pub. Util. C., D. 16-05-050, Finding of Fact 13 (June 1, 2016): “The need determination of the Moorpark sub-area in D.13-02-015 depended upon the retirement of Mandalay Units 1 and 2 and Ormond Beach once-through-cooling generation units.”

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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<sup>18</sup> FSA at 4.2-8, citing to a CCC Memorandum: Designation of ESHA in the Santa Monica Mountains, March 25, 2003.

<sup>19</sup> EX. 3009 at 17.

<sup>20</sup> CCC Local Coastal Program Update Guide – Part I – Section 4. Environmentally Sensitive Habitats and Other Natural Resources (July 31, 2013).



The FSA also discusses the significance of the Oxnard CLUP's Sensitive Habitat Maps and relies on it in part to conclude that the Project site does not contain ESHA, since the CLUP Figures 2.3 and 2.4 amendments to Sensitive Habitat maps do not characterize the site as ESHA.<sup>21</sup> However, the FSA's conclusion was made in error. According to the CLUP's Resolution Nos. 3 and 9, these amended maps, Figures 2.3 and 2.4, are supposed to be *added* to Sensitive Habitats Map No. 7, and do not replace it, as was erroneously assumed in the FSA. In fact, Map No. 7 does identify the Project site as ESHA. Oxnard CLUP, Map No. 7 Sensitive Habitats. However, even if the Project site was not identified on the Oxnard CLUP Sensitive Habitats Map, it must still be designated if the area meets the criteria for ESHA designation in the Oxnard CLUP. *LT-WR, LLC v. California Coastal Commission* (2007) 152 Cal.App.4th 427, 770, *as modified* (June 21, 2007).

Furthermore, the fact that a habitat area is degraded is of no relevance and is not a factor in designating ESHA, nor does it diminish its protection under the law. Section 30240 of the Coastal Act "does not permit its restrictions to be ignored based on the threatening or deteriorating condition of a particular ESHA." *Bolsa Chica Land Trust, supra*, 71 Cal.App.4th at 507. To the contrary, there "is simply no reference in section 30240 which can be interpreted as diminishing the level of protection an ESHA receives based on its viability," but rather, "under the statutory scheme, ESHAs, whether they are pristine and growing or fouled and threatened, receive uniform treatment and protection." *Id.* at 508.

The underlying policy rationale for the Coastal Act's strict protection of ESHA has particular relevance to the proposed siting of this fourth power plant on the City of Oxnard's beaches:

[I]f, even though an ESHA meets the requirements of section 30107.5, application of section 30240's otherwise strict limitations also depends on the relative viability of an ESHA, developers will be encouraged to find threats and hazards to all ESHAs located in economically inconvenient locations. The pursuit of such hazards would in turn only promote the isolation and transfer of ESHA habitat values to more economically convenient locations. Such a system of isolation and transfer based on economic convenience would of course be completely contrary to the goal of the Coastal Act, which is to protect *all* coastal zone resources and provide heightened protection to ESHAs.

*Id.* (emphasis in original). Thus, if a habitat area on or around the Project site meets the definition of ESHA in the City's CLUP and Coastal Act, even if its degraded, it must be identified as ESHA and disclosed as part of the Project's environmental setting in the FSA in order to establish an accurate baseline for assessing the Project's environmental impacts. *Banning Ranch Conservancy, supra*, 2 Cal.5th at 918.

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<sup>21</sup>Ex. 2000 at p 4.2-8, FSA Part 1. (TN 214712)

## **2. Constraints on development: ESHA must be protected *in situ*.**

Once ESHA is identified, the Coastal Act requires that it must be “protected against any significant disruption . . . and only uses dependent on those resources shall be allowed within those areas.” Pub. Res. Code § 30240(a); *see also Sierra Club v. California Coastal Com.* (1993) 12 Cal.App.4th 602, 611 (“development in ESHA areas themselves is limited to uses dependent on those resources”); *Bolsa Chica Land Trust, supra*, 71 Cal.App.4th at 507 (“a literal reading of the statute protects *the area* of an ESHA from uses which threaten the habitat values which exist in the ESHA” (emphasis in original)). Additionally, the Oxnard LCP prohibits industrial and energy related development within coastal resources areas, including ESHA. Oxnard CLUP, Policy 52. The Oxnard CLUP gives the “highest priority” to the “preservation of sensitive habitat areas and coastal resources” and characterizes most of the Project site as ESHA on its sensitive habitats map.<sup>22</sup> Accordingly, all proposed development must be located outside of ESHA areas.

Additionally, developments adjacent to ESHA are also subject to heightened regulation. Pub. Res. Code § 30240(b). “[I]n areas adjacent to environmentally sensitive habitat areas,” any “[d]evelopment . . . shall be sited and designed to prevent impacts which would significantly degrade those areas, and shall be compatible with the continuance of those habitat and recreation areas.” *Id.* For the proposed Project to conform to the Coastal Act and the Oxnard LCP, all proposed development for the Project must be at least 100 feet from areas that meet the definition of ESHA in the Coastal Act and the LCP.<sup>23</sup>

Under these policies, ESHA must be protected where it exists; it cannot be recreated in another location to allow development. The Coastal Act’s “obvious goal” is to protect ESHA *in situ*, and the terms of the statute “do not provide that protection by treating those values as intangibles which can be moved from place to place to suit the needs of the development.” *Bolsa Chica Land Trust, supra*, 71 Cal.App.4th at 507. Thus, any habitat or area meeting the definition of ESHA cannot be developed and must be protected by a 100-foot buffer zone.

## **3. The identification of ESHA has been unduly obstructed throughout the Project’s environmental review process.**

The accurate identification of ESHA on the proposed Project site has been obstructed by several factors that occurred during the environmental review of the Project. First, the applicant’s biologists were the only biologists allowed to conduct surveys on the Project site, and only performed “reconnaissance level” biological resources surveys which were inadequate to detect rare and sensitive species.<sup>24</sup> This limitation was demonstrated by the fact that these “reconnaissance surveys” even failed to detect the presence of two pairs of protected breeding raptors and their nests - the Great Horned Owl and Peregrine Falcon - on the Project site, at the MGS 1 tower, that employees knew had existed for several years.<sup>25</sup>

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<sup>22</sup> Ex. 4024, Oxnard CLUP 1-2; Map No. 7 Sensitive Habitats.

<sup>23</sup> Ex. 4024, CLUP Policy 6; Ex. 3009. *See also*, Transcript on July 27, 2017, Jonna Engel, p.200, ln.3-6.

<sup>24</sup> FSA at 4.2-22.

<sup>25</sup> Survey Report at 3-10.

Second, although the Committee paused the proceedings after the February 2017 evidentiary hearings and issued a Ruling on March 10 ordering the applicant to conduct focused biological surveys “for the proposed Project site,”<sup>26</sup> applicant violated the Order and only surveyed a smaller portion of the Project site defined as the Biological Survey Area (“BSA”), excluding several areas of the Project site from the focused surveys. Notably, this is not evident when reading the applicant’s Biological Resources Survey Report (“Survey Report”), which states that the BSA is composed of the “Project Site.”<sup>27</sup> The Project Site is allegedly outlined in red and illustrated on Figure 1 of the Survey Report, and falsely presented to the public, again, as only including a 3-acre portion of the entire Project site. There was no Figure provided that showed the BSA overlaid onto the actual Project site. As a result, several areas of the Project site were improperly excluded from the Biological Surveys for sensitive species, including: (1) a large portion of the unpaved demolition access roads on the northwestern border that run adjacent to ESHA and is set to be improved and covered with 4 inches of gravel (Survey Report Figure 1); (2) the demolition areas where two nests for protected raptors were observed (Survey Report Figure 1); (3) the gas, ammonia, and water pipelines (FSA Project Description Figure 7); and (4) the unpaved half-acre “Craft Trailer and Fabrication Shop Area” (FSA Project Description Figure 1).

When asked at the July 27, 2017, hearing:

MS. ROESSLER: “You thought it was up to your interpretation to redefine what the project site was for purposes of complying with that order?”<sup>28</sup>

The applicant’s attorney, Mr. Carrol, responded:

MR. CARROL: “Yes, we did, . . .”

Mr. Carroll further admitted:

MR. CARROL: “The fact of the matter is that the BSA was defined more narrowly for purposes of these focused surveys than it was for purposes of the initial biological assessment of the project. And we concede that and we don’t think that there’s any problem with that.”

Accordingly, the evidence in the record is undisputed – the entire Project site still has not been adequately surveyed to detect the presence of rare and sensitive species.

Third, the misleading Project Description and delayed focused biological surveys deprived the CCC of an adequate opportunity to conduct and complete evaluation of the Project’s consistency with the Coastal Act. For example, the misleading presentation of the Project site as just a 3-acre portion of the MGS property has resulted in much confusion and several components of the Project evading review by the CCC. When the CCC’s biologist Dr. Engel originally evaluated the Project for the 30413(d) Report she only reviewed the on-the-ground conditions of the 2-acre jurisdictional wetland on site, and based the rest of her analysis on the PSA, the AFC, and information in the docket.<sup>29</sup> Moreover, when Dr. Engel testified on July 27, 2017, regarding the dune ESHA mistakenly mapped as ice plant mats, she said she only evaluated and walked along the 3-acre site and the BSA, unaware that the Project site extended

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<sup>26</sup> TN216505, Committee Orders For Additional Evidence and Briefing Following Evidentiary Hearings, March 10, 2017.

<sup>27</sup> Survey Report 1-3.

<sup>28</sup> TN p.176-77, Evidentiary Hearing Transcript for July 27, 2017.

<sup>29</sup> *Id.* TN 215607, Exhibit 4030.

northwest and included the demolition access road.<sup>30</sup> As a result, she did not evaluate the ice plant maps that extended along the northeastern border along the demolition access road, which may also have been incorrectly mapped. Furthermore, the CCC's 30413(d) Report was adopted before the applicant conducted focused surveys to detect rare and special-status species. Although the CCC asked the Energy Commission to postpone the July 2017 hearings to allow time for the CCC to convene and amend the 30413(d) Report based on the new information, the hearings were held anyway. Thus, the CCC's 30413(d) Report is not based on a complete analysis of the Project site's biological resources – and the CCC was not provided with an adequate opportunity to assess the presence of ESHA on the entire Project site. However, the CCC's 30413(d) Report makes clear in its recommendations that they apply to all habitat that meets the CCC and LCP definitions of ESHA and wetlands.<sup>31</sup> Despite this limitation, in order to provide some guidance and address the new information from the survey Report, the CCC's Executive Director, Jack Ainsworth, submitted a letter dated July 21, 2017 on behalf of the CCC staff.<sup>32</sup> This report, however, remains incomplete and has not been considered by the CCC.

#### **4. The FSA Fails to Identify and Disclose the Presence of ESHA on the Project Site.**

Despite these unprecedented obstacles, there is substantial evidence in the record by experts and the CCC that show the proposed Project site does in fact contain habitat that meets the definition of ESHA in the Coastal Act and the Oxnard LCP. As discussed herein, ESHA on the Project site includes: (1) Peregrine falcon foraging habitat; (2) dunes (3) presence of suitable habitat for the Globose Dune Beetle; and (4) the presence of suitable habitat for the legless lizard.

Though there were several expert biologists that presented evidence about the Project site's Biological Resources, only one biologist has over 30 years of field experience studying the coastal dune ecosystem and wildlife that surround the proposed Project site, local biologist Lawrence Hunt.<sup>33</sup> Mr. Hunt is also the only biologist who specializes in assessing habitats and conducting surveys to detect special-status species, and estimates he has conducted hundreds of these assessments. He is also renowned as an expert on this area's local vertebrate species, such as the California legless lizard, and is frequently consulted by local resources agencies.<sup>34</sup> Because of his expertise, Mr. Hunt has been retained by a broad spectrum of stakeholders to evaluate biological resources and determine the presence of ESHA, including local government, state agencies, developers, NGOs, and energy companies alike – demonstrating a credible lack of bias and commitment to his field.<sup>35</sup>

Mr. Hunt has submitted four written reports in these proceedings and testified at both evidentiary hearings held in February and July 2017.<sup>36</sup> One of the most critical findings from

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<sup>30</sup> The Survey Report falsely states, "the Biological Survey Area (BSA) includes the approximately 3-acres site on which the Project will be constructed (referred to herein as the project site))." *Id.* at 3.

<sup>31</sup> Ex. 3009, pp. 10-22.

<sup>32</sup> Ex. 4043, *CCC Comments on New Puente Project New Information* (July 21, 2017) (TN220302).

<sup>33</sup> Ex 4017, Opening Testimony of Lawrence Hunt, at p.2-3 (TN215434); 2/8/2017 Transcript, p.16-17

<sup>34</sup> *Id.*

<sup>35</sup> Ex. 4017.

<sup>36</sup> Exs. 4017, 4027, and 4038.

Mr. Hunt's review of the biological resources information in the PSA, FSA, the CCC's 30413(d) report, and the AFC, was the glaring absence of biological surveys capable of detecting any of the rare and sensitive species that have been documented surrounding the Project site.<sup>37</sup> Given the Project site is "physically surrounding by ESHA with no intervening barriers to dispersal" which gives rise to "a constant potential for special status habitat and wildlife to occupy the Project site,"<sup>38</sup> standard scientific protocol dictates that a biologist would conduct focused surveys for those species.<sup>39</sup>

The applicant's biologist, Ms. Love, confirmed that NRG had not conducted any focused surveys to target special status species on or in the vicinity of the Project site.<sup>40</sup> In fact, prior to the CEC's March 10 Order, neither the applicant nor the CEC had conducted any focused biological surveys before concluding in the FSA and in their testimony, in error, that the Project site did not contain any rare or sensitive species. The only wildlife surveys that were conducted on and in the vicinity of the Project site at that time were reconnaissance level surveys. These surveys were incomplete and omitted critical information regarding the presence of ESHA on the Project site.

***a. The Project Site Contains Mapped ESHA.***

The FSA fails to disclose that the Project site is mapped with ESHA, identified on the Sensitive Habitats Map 7 in the Oxnard CLUP.<sup>41</sup> The CLUP Sensitive Habitats section identifies four examples of known ESHA that occur in the Oxnard coastal zone: wetlands, sand dunes, riparian areas, and McGrath Lake.<sup>42</sup> These ESHAs are shown on CLUP Map No. 7 and cover a large portion of the Project site.<sup>43</sup> The CLUP also discloses five endangered species known in these habitats: the Peregrine falcon<sup>44</sup>, Beldings Savannah Sparrow, the least tern, southern bald eagle, and whitetailed kite.<sup>45</sup> The CCC confirmed the presence of three of these same ESHAs – wetlands, riparian areas, and sand dunes – on and surrounding the Project site.<sup>46</sup> However, the FSA fails to disclose these same examples of ESHA that are mapped on the Project site.

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<sup>37</sup> TN215543 Hunt Rebuttal Testimony at 4.

<sup>38</sup> TN215434, Hunt Opening Testimony, Exhibit 4017, p. 12,

<sup>39</sup> Ex. 3009 at 17, According to the CCC's 30413(d) Report, "due to the rarity, sensitivity to disturbance, and presence of special status, many of the coastal dune, scrub and riparian habitats surrounding the MGS site meet the Coastal Act and LCP definitions of ESHA, and thus require special protection." See also Ex. 4043 at 2-3.

<sup>40</sup> 2/9/17 Transcript at 387-88.

<sup>41</sup> Ex. 4024. Oxnard CLUP.

<sup>42</sup> Ex. 4024, CLUP, Section III-7.

<sup>43</sup> *Id.*

<sup>44</sup> Since the CLUP was adopted the Peregrine falcon was delisted and is now protected as a California Fully Protected Species.

<sup>45</sup> CLUP, III-7-10.

<sup>46</sup> 30413(d) Report at 17; According to the CCC's 30413(d) Report, "due to the rarity, sensitivity to disturbance, and presence of special status, many of the coastal dune, scrub and riparian habitats surrounding the MGS site meet the Coastal Act and LCP definitions of ESHA, and thus require special protection." See also CCC July 21, 2017 letter at 2-3.

***b. Peregrine falcon Foraging Habitat Onsite is ESHA.***

Although they were not identified in the applicant's first round of "reconnaissance surveys," Peregrine falcons, now protected as a CDFW Fully Protected species, were also recently observed in multiple places on the Project site and "were observed resting and regularly foraging in the vicinity of the BSA during the surveys."<sup>47</sup> This is a remarkable discovery considering the Peregrine falcon was *not* one of the species targeted by the surveys. Aside from occurring north of the Project site in the McGrath area, an active Peregrine nest was identified *on* the Project site at MGS Tower 1, alongside a Great Horned Owl nest.<sup>48</sup>

Avian prey remains were also observed "in the BSA, particularly the Laydown area," and provide evidence of foraging on outfall area and access road, the 3.26 acre portion and the buffer.<sup>49</sup> Both the CCC and the Survey Report concluded that Peregrine falcons used the Project site and the surrounding dune area as resting and foraging habitat.<sup>50</sup> The Survey Report also documents other raptors such as red-tailed hawks, California horned lark and American kestrels occurring on and around the Project site.<sup>51</sup> After reviewing the new information from the Survey Report, CCC Staff concluded that the presence of suitable prey species, evidence of predation, and suitable habitat on and in the surrounding coastal dunes and riparian areas reveal that these raptors rest and forage on and around the Project site.<sup>52</sup> Moreover, the CCC staff concluded that "incidental observations of silvery legless lizard, peregrine falcon and California horned lark in and around the biological survey area provide additional evidence that the project area provides habitat for sensitive species."<sup>53</sup>

This new evidence establishes the necessary elements that habitat on and around the Project site is ESHA:

- 1) Presence of Species or Habitat: presence of individual species documented on site and in the vicinity, and presence of suitable habitat on the Project site and in the vicinity;
- 2) Rare: the Peregrine falcon is rare because of its status as a Fully Protected State Species; and,
- 3) Area is at risk of disturbance: the construction, demolition, and operation of the Project will disturb, degrade, and destroy the Project site and surrounding area.

Expert evidence submitted by Mr. Hunt also supports the designation of the Project site and surrounding area as ESHA based on the Peregrine falcon observations and evidence.<sup>54</sup> The CCC Staff letter also disclosed that the CCC has designated raptor foraging habitat as ESHA in other proceedings.<sup>55</sup> Yet, the FSA inexplicably failed to disclose the presence of the Peregrine falcon anywhere on or around the Project site when it updated the Biological Resources section,

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<sup>47</sup> Ex. 1148, Biological Resources Survey Report, at 3-10, and Appendix D.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*; Ex. 4041 at 2.

<sup>51</sup> Ex. 1148, Survey Report, Appendix D.

<sup>52</sup> Ex. 4041 at 2-3.

<sup>53</sup> Ex. 4041 at 3.

<sup>54</sup> Ex. 4038 at 10.

<sup>55</sup> Ex. 4041 at 3.

nor did it discuss whether the habitat on and around the Project site was potential ESHA.<sup>56</sup> Instead, the FSA ignored credible evidence submitted by the applicant's Survey Report, the CCC, the CLUP, and Mr. Hunt that confirm the Project site and the area surrounding it are ESHA. As a result, the FSA also failed to disclose the potential constraints imposed by the presence of ESHA on the Project site and surrounding area.

As discussed above, the LCP and Coastal Act do not permit development in or near ESHA. CLUP Policy 52 specifically prohibits industrial and energy related development in ESHA, and CLUP Policy 6 and the CCC 30413(d) Report require ESHA to be protected by a 100-foot buffer between development and the habitat. Because the extent of the Peregrine falcon ESHA covers the Project site and surrounding area, the Project cannot be approved without violating the LCP and Coastal Act.

***c. Dune ESHA is Present Onsite.***

The CCC determined that the dune habitat surrounding the north and west sides of the Project site, previously mapped as ice plant mats, meets the definition of ESHA.<sup>57</sup> Biological Resources Vicinity Vegetation Figure 3 shows this dune ESHA encroaches into the Project site on the western boundary.<sup>58</sup> Despite this evidence, the FSA does not identify or analyze this area as ESHA, nor discuss how the Coastal Act and LCP prohibit development in this ESHA and require a buffer of 100 feet.<sup>59</sup>

***d. Globose dune beetle ESHA is Present Onsite.***

The Globose dune beetle was identified at multiple locations in the coastal dune ESHA discussed above, within the 100-foot buffer along the north and west sides of the Project site, and at the Project's outfall and outfall access road.<sup>60</sup> However, according to testimony submitted by Mr. Hunt, several fundamental errors in survey methodology reveal that the survey results for the Globose Dune beetle are not adequate to determine its absence on the Project site. First, the Survey Report did not survey the whole Project site as ordered by the Committee. Many components of the Project were excluded, such as: (1) a large portion of the unpaved demolition access roads on the northwestern border that run adjacent to ESHA and is set to be improved and covered with 4 inches of gravel (Survey Report Figure 1); (2) the demolition areas where two nests for protected raptors were observed (Survey Report Figure 1); (3) the gas, ammonia and water pipelines (FSA Project Description Figure 7); and (4) the unpaved half-acre "Craft Trailer and Fabrication Shop Area" (FSA Project Description Figure 1). Several of these areas contain suitable habitat for Globose Dune beetles yet were not surveyed.<sup>61</sup>

Second, the pitfall traps used to detect Globose dune beetles, shown in Appendix A of the Survey Report, were placed in an uneven density in the buffer areas, as a result, most of the 3-

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<sup>56</sup> Ex. 2026, *Biological Resources Supplemental Testimony of Carol Watson and John Hilliard* (TN220168)

<sup>57</sup> Ex. 4041; Ex. 3009, *see also* 7/27/17 Hearing Transcript at 267.

<sup>58</sup> *See also* Ex. 4038 at 15

<sup>59</sup> Ex. 4024, CLUP, Policies 6 and 52.

<sup>60</sup> Ex. 1148, *Survey Report* at p 3-6 – 3-7 and Figure 4.

<sup>61</sup> Ex. 4038.

acre portion of the Project site and the 1 acre overflow and laydown area, were not sampled.<sup>62</sup> According to Mr. Hunt, the negative results of the surveys cannot be used as proof of absence in the Project site.<sup>63</sup>

Third, the surveyors did not use sieves to sift the soil to detect dune beetles during the transect walks.

Lastly, the applicant's biologists did not identify all dune beetles found to see if they were the Globose dune beetle.<sup>64</sup> Not only does this defeat the single purpose of the surveys – to identify Globose dune beetles – it demonstrates a significant departure from standard biological field procedures.<sup>65</sup>

Given the significant flaws in the survey methodology, the presence of suitable dune habitat on the Project site along the western border, the lack of a physical barrier, the confirmed presence of Globose dune beetles and their habitat surrounding the Project site, the Globose dune beetle has a high likelihood of occurring on the Project site.<sup>66</sup> The FSA is deficient for failing to disclose the presence of this potential ESHA onsite.

*e. There is a high potential for Silvery legless lizard ESHA onsite.*

In May of 2017, two legless lizard specimens were observed and reported by incidental observations recorded by Mr. Trautwein while he was walking around the perimeter of the MGS property.<sup>67</sup> These observations were reported and confirmed by CDFW's California Natural Diversity Database. The legless lizards were found in two locations, one was located just "ten inches from the northern MGS property line" a few feet from the demolition access road, and the other specimen was found just west of the outfall.<sup>68</sup> Mr. Hunt testified that these legless lizard observations are consistent with his legless lizard findings along the same northern MGS fence lines in 2005 and 2006.<sup>69</sup> According to CCC Staff, the presence of these legless lizards in coastal dune habitat is consistent with the ESHA determination contained in the CCC's 30413(d) report.<sup>70</sup>

Mr. Hunt also provided evidence showing that the Survey Report results for legless lizards are unreliable due to significant flaws in the survey methodology.<sup>71</sup> First, several areas of the Project site were excluded from the surveys, and, as discussed above, contained potential habitat for legless lizards. Second, the ineffective use of coverboards reduced the probability of identifying legless lizards. Only forty coverboards were placed on the 9.96-acre BSA, amounting to less than .07% of the BSA. In other words, more than 99% of the BSA was not

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<sup>62</sup> *Id.* at p. 4-5.

<sup>63</sup> *Id.*

<sup>64</sup> Ex. 1148, Survey Report at pp. 2-3, 3-6, and 3-7.

<sup>65</sup> Ex. 4038 at 5.

<sup>66</sup> Ex. 4038 at 5.

<sup>67</sup> Ex. 4039, *Intervenors Submission of Evidence of Rare Species Findings at Puente Project Site*, (TN217571).

<sup>68</sup> Ex. 4039 at 1; Ex. 4038 at 7.

<sup>69</sup> Ex. 4038 at 7.

<sup>70</sup> Ex. 4043 at 3.

<sup>71</sup> Ex. 4038 at 6-9.



surveyed by the coverboards.<sup>72</sup> Third, the only other survey method employed, raking surveys, were also too limited to be effective, and also surveyed less than 1% of the BSA.<sup>73</sup> Mr. Hunt's experience, expertise and knowledge surveying for legless lizards in this geographical area is unmatched.<sup>74</sup> His assessment of the flawed methodology employed in the Survey Report for the legless lizard is based on his experience identifying thousands of legless lizards in his field work.<sup>75</sup>

Evidence that: 1) legless lizards have been easily found along the borders of the northern and western borders of the Project site, 2) there are no barriers to dispersal, and 3) the presence of suitable habitat on the Project site,<sup>76</sup> support a conclusion that legless lizards have a high potential to occur on the Project site. The FSA is deficient for failing to disclose or discuss the potential for this ESHA on the Project site.

## **5. The Project site is surrounded by ESHA not identified in the FSA.**

According to the CCC, the Project site is "situated within a remnant coastal dune, lagoon and wetlands complex that formerly extended along the coast between the Santa Clara River and the Mugu Lagoon."<sup>77</sup> Although much of the area in the coastal system has been developed, "intact dune, beach and wetland habitats and vegetation communities remain in the vicinity of the MGS property . . ."<sup>78</sup> One of the most significant errors in the environmental review of this Project is the FSA's complete omission of the identification or substantive discussion of areas that qualify as potential ESHA on and around the Project site. Instead, the FSA includes no more than two paragraphs about ESHA that serve only to misinterpret the CLUP ESHA Maps and provide no meaningful disclosure or analysis of potential ESHA on and surrounding the Project site.<sup>79</sup>

### ***a. Mapped ESHA surrounds the Project Site.***

As addressed above, the FSA fails to disclose that the Project site and surrounding area are mapped with ESHA, identified on the Sensitive Habitats Map 7 in the Oxnard CLUP. The Oxnard CLUP Sensitive Habitats section identifies four examples of known ESHA that occur in the Oxnard coastal zone: wetlands, sand dunes, riparian areas, and McGrath Lake.<sup>80</sup> These are shown on CLUP Map No. 7 and cover a large portion of the Project site. The CCC confirmed the presence of three of these same ESHAs – wetlands, riparian areas, and sand dunes – on and

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<sup>72</sup> Ex. 4038 at 8.

<sup>73</sup> *Id.*

<sup>74</sup> Transcript 7/27/17 at p. 154, wherein the applicant's biologist Ivan Parr testified that he had only found and identified 6 legless lizards in his 6 year career; whereas Mr. Hunt testified that he had surveyed for and identified 6,000-7,000 legless lizards over the last 30 plus years.

<sup>75</sup> *Id.*

<sup>76</sup> Legless lizards are not precluded by disturbed habitat and can occur in narrow strips of sandy soil in between developed areas, on old roadways, and under chunks of pavement. Ex. 4038 at 6.

<sup>77</sup> Ex. 3009 at 16.

<sup>78</sup> *Id.*

<sup>79</sup> FSA at 4.2-8.

<sup>80</sup> Ex. 4024, CLUP, Section III-7.

surrounding the Project site in the 30413(d) Report.<sup>81</sup> The CLUP also discloses five endangered species known in these habitats: the Peregrine falcon, Beldings Savannah Sparrow, the least tern, southern bald eagle, and whitetailed kite.<sup>82</sup>

The FSA fails to disclose information regarding the mapped ESHA that surrounds the Project site. This omission prejudices the CEC's consideration of the Project's impacts and consistency with the Coastal Act and Oxnard LCP, which not only protect onsite ESHA, but also offsite ESHA that may be impacted by the Project. Pub. Res. Code §30240(b).

***b. Peregrine Falcon Foraging Habitat Surrounding the Project Site is ESHA.***

As discussed above, Peregrine falcons and their habitat have been identified both on the Project site as well as the surrounding area. The CLUP documents Peregrine falcons in riparian habitat north of the Project site in its ESHA section.<sup>83</sup> Expert evidence submitted by Mr. Hunt also supports the designation of the Project site and surrounding area as ESHA based on the peregrine falcon observations and evidence.<sup>84</sup>

***c. Critical Habitat for Ventura marsh milk-vetch Adjacent to northern Project Site Boundary is ESHA.***

Running adjacent to the northern boundary of the MGS property line and the Project's northern demolition access road site is designated critical habitat for Ventura marsh milk-vetch, shown in FSA Biological Resources Figure 4. Milk-vetch is a federal and state listed plant. Designated critical habitat for an endangered species qualifies as ESHA because it is "habitat" that supports a "rare" plant species, and is sensitive to "disturbance." Although the FSA addresses critical habitat for milk-vetch, it fails to discuss the presence of the habitat adjacent to the northern border or running directly along the northeastern portion of the demolition access road.<sup>85</sup> The FSA also fails to disclose or provide any substantive analysis about milk-vetch ESHA and its constraints on the Project. The CCC's 30413(d) Report, the Coastal Act, and LCP 6 require that all development must occur a minimum of 100 feet away from this ESHA. As such, the Project's demolition access road, which lies within just a few feet of this ESHA<sup>86</sup>, is inconsistent with these policies.

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<sup>81</sup> Ex. 3009 at 17: according to the CCC's 30413(d) Report, "due to the rarity, sensitivity to disturbance, and presence of special status, many of the coastal dune, scrub and riparian habitats surrounding the MGS site meet the Coastal Act and LCP definitions of ESHA, and thus require special protection." See also, Ex. 4041, at 2-3.

<sup>82</sup> Ex. 4024, CLUP, III-7-10.

<sup>83</sup> Ex. 4024, CLUP, III-10.

<sup>84</sup> Ex. 4038 at 10.

<sup>85</sup> FSA4.2-8; Biological Resources Figure 2.

<sup>86</sup> FSA, Biological Resources Figure 4 (showing Critical Habitat), and EX. 1148, Survey Report Figure 1 (showing location of demolition access road on northeastern boundary).

***d. Riparian, Mulefat and Wetland Restoration Area Surrounding the Project Site is ESHA.***

Active riparian and wetland restoration area is also present on the other side of the northern portion of the Project, along with mule fat scrub.<sup>87</sup> According to the CCC's 30413(d) Report, "due to the rarity, sensitivity to disturbance, and presence of special status, many of the coastal dune, scrub and riparian habitats surrounding the MGS site meet the Coastal Act and LCP definitions of ESHA, and thus require special protection."<sup>88</sup> This ESHA area is mapped on Biological Resources Figure 3 as mule fat scrub restoration, and runs adjacent to the northern portion of the Project site, as well as the Project's demolition access road that runs along the northeast corner, shown on Figure 1 in the Biological Resources Survey Report. . This habitat also supports the special-status legless lizard.<sup>89</sup> The CCC's 30413(d) Report, the Coastal Act, and LCP 6 require that all development must occur a minimum of 100 feet away from this ESHA. However, the Project's northern boundary and demolition access road, which abuts this ESHA<sup>90</sup>, is located inside the required 100-foot buffer. This habitat is not disclosed or identified in the FSA as ESHA, nor are its constraints on the Project.

***e. Habitat that supports coastal dunes, the Globose dune beetle, and legless lizard is ESHA.***

During a site visit in May 2017, CCC biologist Jonna Engel concluded that ice plant mats mapped along the north and west border of the Project site in Biological Resources Map 3 were incorrectly mapped and should be updated as coastal dune habitat.<sup>91</sup> After the 301413(d) Report was adopted, new information confirmed the presence of two special status species occurring in the dune habitat - the Globose dune beetle and the California legless lizard - in the buffer and along the boundary of the Project site.<sup>92</sup> The Globose dune beetle was identified at multiple locations in coastal dunes to the north and west of the Project site, within the 100-foot buffer, and at the outfall and outfall access road.<sup>93</sup> The legless lizard was reported and confirmed by the CNDBB in two locations, one was located just "ten inches from the northern MGS property line, and the other was found just west of the outfall."<sup>94</sup> Mr. Hunt also pointed out in his Supplemental Testimony that these findings are consistent with his legless lizard findings along the same northern MGS fence lines in 2005 and 2006.<sup>95</sup> According to CCC Staff, the presence of these two special status species, in coastal dune habitat, is consistent with the ESHA determination contained in the CCC's 30413(d) report.<sup>96</sup> Thus, both the western boundary of the Project site and the northern boundary of the Project site contain habitat previously mapped as ice plant mats. The CCC's recommendations and LCP 6 require that all development must occur a

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<sup>87</sup> Ex. 3009 at 16-17.

<sup>88</sup> *Id.* at 17.

<sup>89</sup> Ex. 4039; Ex. 4038 at pp.6-7.

<sup>90</sup> FSA, Biological Resources Figure 4 (showing Critical Habitat), and Ex.1148, Figure 1 (showing location of demolition access road on northeastern boundary).

<sup>91</sup> Ex. 4041,p. 2-3; see also 7-27-17 Hearing Transcript, Jonna Engel at pp. 265-266.

<sup>92</sup> Ex. 1148, Appendix D.

<sup>93</sup> Ex. 1148 at 3-6 – 3-7 and Figure 4.

<sup>94</sup> Ex. 4039 at 1; Ex. 4038, *Hunt Supplemental Testimony* (TN No. 220216) at 7.

<sup>95</sup> Ex. 4038 at 7.

<sup>96</sup> Ex. 4043 at 3.

minimum of 100 feet away from this ESHA. Mr. Hunt's Supplemental Testimony, Figure 1, illustrates how the interior edge of the 100-foot buffer significantly invades the Project site.<sup>97</sup> The FSA does not disclose the presence of this ESHA. The Project is not consistent with the Coastal Act and LCP policies mandating protection of ESHA.

*f. Critical Habitat for Snowy Plover is ESHA.*

Critical habitat for the Snowy Plover (federal listed as threatened) runs adjacent to the western border of the Outfall Access Road on the Project site.<sup>98</sup> As addressed above, critical habitat meets the definition of ESHA and must be protected from development by a 100-foot buffer. The outfall access road, a component of the Project, is within the 100-foot buffer of this ESHA.

**D. The FSA Fails to Disclose, Analyze and Mitigate the Project's Impacts.**

The fundamental purpose of CEQA is to maintain a "quality environment for the people of this state now and in the future" and to ensure that agencies of the state government act such that "major consideration is given to preventing environmental damage..." Pub. Res. Code § 21000. CEQA was enacted to ensure informed decision making that would consider potential environmental harm and ways to avoid or significantly reduce such harm. CEQA Guidelines § 15002(a). As noted above, a project cannot be approved if there are feasible mitigation measures or alternatives that would avoid significant environmental impacts. Pub. Res. Code § 21002.

An EIR (or equivalent document under a certified regulatory program) is critical to effectuating the procedural and substantive mandates of CEQA. An EIR must inform decision makers and the public regarding the significant effects of a proposed project, ways to minimize such effects, and alternatives to the project. Pub. Res. Code § 21061; CEQA Guidelines § 15121(a). To be an effective informational document, an EIR must evaluate potential environmental impacts (Guidelines § 15126, 15126.2), discuss mitigation measures which could minimize significant adverse impacts (Guidelines § 15126.4), and consider alternatives that would achieve most of the basic project objectives while avoiding or substantially lessening any significant effects of the project (CEQA Guidelines § 15126.6).

As explained herein, the FSA violates the informational mandates of CEQA because the document omits critical information and analysis. The FSA fails to adequately analyze or disclose all of the potential impacts of the Project. As a result, the FSA also fails to fully discuss mitigation measures and alternatives that could avoid or reduce Project impacts.

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<sup>97</sup> Ex. 4038 at 15.

<sup>98</sup> FSA, Biological Resources Figure 4.

**1. The Project's Impacts to Biological Resources are Undisclosed, Underestimated and Unmitigated.**

***a. Impacts to ESHA Are Not Avoided or Buffered by the COCs.***

As discussed in Section A, the habitat located on and surrounding the Project site meets the Coastal Act and Oxnard LCP definition of ESHA. Accordingly, ESHA must be avoided and buffered from all new development by 100 feet. Yet, none of the Project's proposed mitigation measures are consistent with these mandatory requirements to protect ESHA, which were recommended in the CCC's 30413(d) Report and July 21, 2017, letter to protect coastal resources.

For example, COC BIO-7 is routinely relied upon in the FSA to mitigate impacts to special-status species and ESHA. However, BIO-7 has since been revised and limited by the applicant and the CEC staff to now only apply to "McGrath Lake ESHA and coastal dune ESHA that supports western snowy plover and California least tern breeding."<sup>99</sup> None of the analysis in Staff's Supplemental Testimony addresses the impact of this revision on the Project's biological resources. Even before it was revised, BIO-7 still did not require that the entire Project avoid ESHA, and it only required construction activities to maintain a 100-foot buffer from ESHA, instead of all new development, which would allow a plethora of other activities (such as demolition, operation, grading, and development/improvement and use of access roads) to impact ESHA. The CCC specifically required that a minimum 100-foot buffer be maintained between *all* Project related development and nearby areas that meet the CCC and LCP definition of ESHA and wetlands.<sup>100</sup> Accordingly, there is no analysis or evidence in the record to support the FSA's unfounded conclusion that all of the Project's impacts to biological resources will be mitigated to a level below significance.<sup>101</sup>

***b. The Project's Impacts to the Several Species and ESHA are Not Adequately Disclosed or Omitted Entirely, and are Not Mitigated.***

*Peregrine falcon ESHA on and the surrounding the Project*

As discussed above in Section A, the FSA failed to identify or discuss the presence of Peregrine falcons and their habitat on and surrounding the Project site, which qualifies as ESHA under the Coastal Act and Oxnard LCP. Peregrine falcons were observed nesting, resting and foraging all over the Project site, including the 3.26-acre gas turbine construction, the outfall, outfall access road and buffer, the demo access road, and materials storage, parking, and laydown areas.<sup>102</sup> Yet, the FSA omits any analysis of the Project's impacts on the Peregrine falcon and fails to mitigate significant impacts to Peregrine falcons and Peregrine falcon ESHA, in violation of CEQA. Impacts to ESHA must be avoided according to the Coastal Act and the Oxnard CLUP.

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<sup>99</sup> Ex.1098, at 5; and Ex. 2006 at 2, CEC staff accept the Applicant's proposed changes to limit the application of COC BIO-7.

<sup>100</sup> Ex. 4071 at 18.

<sup>101</sup> Ex. 2026 at 10.

<sup>102</sup> Ex. 1148, Survey Report, Appendix D, and p. 3-10-11.

### *Globose Dune Beetle*

Impacts to the Globose dune beetle are only mitigated in the outfall area. The FSA states that, “[i]mmediately adjacent habitat such as McGrath Lake and surrounding habitat may support . . . globose dune beetles” and, “[t]hese species may occasionally traverse the project site and laydown areas while moving between suitable riparian or dune habitat.”<sup>103</sup> The FSA discloses that “these species may also be subject to crushing or burying by increased traffic during construction and demolition.”<sup>104</sup> As discussed in Section A, Globose dune beetles have a high potential to occur on the Project site, such as in dune ESHA on the western boundary, in the 3.26-acre gas turbine construction area, and in the northern portion of the demo access road; however, BIO-7 does not mitigate impacts to ESHA where these species are likely to occur because it does not require that the Project avoid development on ESHA or within 100 feet of ESHA supporting this species.

The translocation plan is supposed to mitigate impacts for habitat that is part of the outfall removal and restoration. The translocation plan for Globose dune beetle (BIO-10 #8B) requires pitfall traps and pedestrian surveys to locate any Globose dune beetles in the outfall area. However, these survey methods have been criticized as inadequate to locate the Globose dune beetles because they do not employ methods most likely to identify Globose dune beetles.<sup>105</sup> As such, the translocation plan for Globose dune beetles cannot ensure that every Globose dune beetle in the outfall area, or outfall access road, will be captured and relocated. This would be inconsistent with COC BIO-10 #2, which requires avoidance or relocation of all Globose dune beetles in this area.

Moreover, COC BIO-2 and BIO-10 do not require the Designated Biologist (“DB”) or Biological Monitors to be present during all work, including outfall removal and improvements to existing onsite roads, which may harm Globose dune beetles. As a result, grading could occur and could uncover Globose dune beetles in the absence of the DB or Biological Monitors, so these individual beetles would likely not be spotted, identified or translocated.

Additionally, the outfall access road, where a number of Globose dune beetles were found, is going to be developed with four inches of gravel, which will cause significant impacts by eliminating suitable habitat. The Outfall Removal and Beach Restoration Plan and the Outfall Removal Impacts Avoidance Plan do not appear to require restoration of the outfall access road, resulting in a permanent loss to ESHA from this development. This impact to ESHA is not discussed in the FSA. While COCs are alleged to mitigate impacts to this species, none of the proposed mitigation measures avoid Globose dune beetle ESHA with a 100-foot buffer, and thus this species and ESHA remain unmitigated by the proposed Project.

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<sup>103</sup> FSA 4.2-28.

<sup>104</sup> *Id.*

<sup>105</sup> Ex. 4038 at 4 – 5, Hunt Supplemental Testimony (TN 220216); *See also* Ex. 4040 at 2, Hunt comments on draft survey methodology (216914).

### *Dune ESHA*

As discussed in Section A, the CCC identified the dune habitat surrounding the Project on the western and northern borders as ESHA.<sup>106</sup> A portion of the dune ESHA on the western boundary is within the 3.26-acre gas turbine construction area and would be destroyed by the Project. However, the FSA fails to disclose or analyze the presence of dune ESHA on the Project site. As discussed above, none of the COCs require the Project to avoid this ESHA and protect it with a 100-foot buffer.<sup>107</sup> A 100-foot buffer around this dune ESHA is shown on Figure 1 in Mr. Hunt's Supplemental Testimony, and illustrates the extent of the Project's development footprint that will destroy this ESHA.<sup>108</sup> This significant impact to ESHA is not disclosed and not mitigated.

### *Silvery Legless Lizard ESHA*

Staff's Supplemental Testimony discusses impacts to silvery legless lizards located in the outfall area and outfall access road that would be impacted by the restoration of the outfall area but mitigated by BIO-10, along with BIO-1 – BIO 4 and BIO-7.<sup>109</sup> As discussed in Section A, legless lizards also have a high potential to occur on the Project site, such as in dune ESHA on the western boundary, in the 3.26-acre gas turbine construction area, and in the northern portion of the demo access road. In fact, legless lizards have been recorded on two sides of the 3.26-acre area where the gas turbine is proposed.<sup>110</sup> The FSA addresses the potential for the Project's construction and demolition to impact this species, and concludes that BIO-7 will be sufficient to mitigate these impacts. However, since then, BIO-7 has been revised by the applicant and the CEC staff such that impacts to the legless lizard ESHA onsite and in the buffer are not mitigated by the required 100-foot buffer.

### *Ventura Marsh Milk-vetch ESHA*

As discussed in Section A, Milk-vetch critical habitat (i.e., ESHA) occurs in the area mapped as "Mule fat scrub (habitat restoration in progress)" on FSA Biological Resources Figure 4, within 100 feet north of the project's 3.26-acre gas turbine construction area and within 100 feet of the demo access road's northern segment. BIO-7 does not require Milk-vetch ESHA to be buffered and protected by 100 feet as required by the Coastal Act and LCP. The CCC concluded that the proximity of the Project to ESHA in this area could exacerbate indirect effects from construction and operation, such as dewatering, noise, vibration, and Project lighting on listed species in this habitat.<sup>111</sup> The FSA at 4.2-28 considers these indirect impacts on wildlife within the adjacent ESHA, and applies mitigation measures; however impacts to the Milk-vetch critical habitat ESHA are not mitigated by application of the required 100-foot buffer in BIO-7 or any of the COCs.

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<sup>106</sup> Dr. Engel 7-27-17 Hearing Testimony at 265-266; Hunt Supplemental Testimony Table 1 at 14.

<sup>107</sup> Ex. 3009 at 17 - 18, CCC 30413(d) Report (TN 213667); CLUP Policies 6 and 52; Coastal Act § 30240.

<sup>108</sup> Ex. 4038 at 15, Figure 1.

<sup>109</sup> Ex. 2026 at 8, Biological Resources Supplemental Testimony of Carol Watson and John Hilliard (TN 220168)

<sup>110</sup> Ex. 4039 at 1 and Exhibit C, Intervenor EDC, Sierra Club and Environmental Coalition of Ventura County Submission of Additional Evidence of Rare Species (TN 217571).

<sup>111</sup> Ex. 3009 at 17.

### *Western Snowy Plover Critical Habitat ESHA*

Western snowy plover nesting habitat, designated as critical habitat and ESHA, occurs northwest, west, and south of the Project site including in the outfall area.<sup>112</sup> The CCC concluded that the proximity of the Project to this ESHA could exacerbate indirect effects from construction and operation, such as noise, vibration, and Project lighting on listed species in this habitat.<sup>113</sup> The FSA also concluded that this area could be impacted by noise associated with construction (including pile driving) and demolition.<sup>114</sup> The FSA analyzed noise impacts and mitigation measures.<sup>115</sup> However, COC BIO-7 is limited to only require a 100-foot buffer from ESHA that “supports western snowy plover breeding,” and does not employ the required 100-foot buffer to protect all of the snowy plover critical habitat ESHA depicted on the FSA Biological Resources Figure 4.

In addition, the Outfall Avoidance Removal Plan, COC BIO-10, would appear to require pre-construction surveys and translocation or avoidance of the special-status bird(s) (e.g., western snowy plover). This Plan sets forth a 500-foot avoidance area if plovers are found, and requires outfall removal construction work to avoid plover nesting season; however, COC BIO-10 #8A and #8B do not address snowy plovers or other special-status bird species.<sup>116</sup> The impacts to western snowy plovers are not adequately analyzed or mitigated in the FSA because the required 100-foot buffer is not applied to snowy plover critical habitat.

#### ***c. Impacts to Wetlands are Not Mitigated as Required by the Coastal Act and LCP.***

The CCC confirmed that the Project site contains a 2.03-acre wetland that meets the Coastal Act and LCP definition of a wetland,<sup>117</sup> and the FSA supports this designation.<sup>118</sup> The LCP does not permit energy related development within wetlands.<sup>119</sup> The Coastal Act only allows energy development within wetlands if there is no feasible environmentally less damaging alternative and if feasible mitigation measures minimize adverse environmental effects. Pub. Res. Code § 30233(a). This 2.03-acre wetland would be completely eliminated by the proposed Project.

In order to comply with the LCP and Coastal Act, the CCC recommended that the Project be relocated to another site that would avoid the direct impacts and fill of coastal wetlands.<sup>120</sup> This is a significant impact that cannot be mitigated by COC BIO-9, which requires a 4-acre:1-acre replacement. Although this replacement ratio is consistent with the CCC’s recommended replacement ratio, it is only permissible when the loss of wetlands are unavoidable and

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<sup>112</sup> Ex. 1008, Application Figure 4.2-3 Sheet 3 (TN No. 204219-9)

<sup>113</sup> Ex. 3009 at 17

<sup>114</sup> FSA at 4.2-28 – 30 and 4.2-35 - 38

<sup>115</sup> FSA at 4.2-35 – 4.2-38

<sup>116</sup> Ex. CEC Staff Supplemental Testimony re Biological Resources at 10. (TN 220168)

<sup>117</sup> Ex. 4041 at 3-4; and Ex. 3009 at 13.

<sup>118</sup> FSA at 4.2-33

<sup>119</sup> Oxnard CLUP, Policy 52. Ex. 3009 at 13.

<sup>120</sup> Ex. 3009 at 14; Ex. 4041 at 5.



allowable. Since the LCP prohibits energy related development in wetlands, and since there are feasible environmentally less damaging alternatives, COC BIO-9 cannot mitigate this impact.

There are also jurisdictional wetlands and ESHA in the 100-foot buffer north of the Project site that would be impacted; however, the COCs do not adequately mitigate impacts to these habitats because they do not require a 100-foot buffer from wetlands or ESHA of this type, as discussed above.<sup>121</sup> As a result of this significant weakening of COC BIO-7 #13, impacts to the wetlands within 100 feet of the 3.26-acre gas turbine construction area and the demolition access road (which is approximately ten feet from the mulefat scrub wetlands) will not be mitigated through application of the 100-foot buffer.

In sum, the FSA fails to disclose the full extent of the Project's impacts to biological resources. Even where impacts are disclosed, they are not mitigated in accordance with CEQA, the Coastal Act, and the Oxnard LCP.

## **2. The FSA Fails to Mitigate the Project's Air Quality Impacts.**

The FSA fails to properly analyze and mitigate the air quality impacts of the Project as permitted by basing air quality mitigation on fewer hours of operation than the Project will be permitted to run by its permit. This inconsistency fails to mitigate the reasonably foreseeable impacts of the project, misleads the public and decision makers, and causes the FSA to fail as an informational document under CEQA.

CEQA requires the characteristics of a project – which serve as the basis for the analysis of environmental impacts and the mitigation of those impacts — to remain consistent throughout the FSA; the agency may not analyze a curtailed project in some sections of the document but not in others. *County of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185, 198 (“A curtailed, enigmatic or unstable project description draws a red herring across the path of public input.”). In *San Joaquin Raptor Rescue Center v. County of Merced*, the Court of Appeal rejected the environmental impact report (“EIR”) for a gravel quarry because the document contained conflicting assumptions about the expected post-project level of mining activity, and therefore inconsistent assessments of the project's impacts. *San Joaquin Raptor Rescue Ctr. v. County of Merced* (2007) 149 Cal.App.4th 645, 655 (“San Joaquin Raptor”). In that case, the quarry owner sought a permit to produce 550,000 tons per year of aggregate, while discussion of some impacts of the project was based on production of half that amount. The court found that the “curtailed and inadequate characterizations of the Project were enough to mislead the public and thwart the EIR process.” *Id.* at 656. The court concluded that this discrepancy gave “conflicting signals to decision-makers and the public about the nature and scope of the activity being proposed,” and therefore found the EIR “insufficient as an informational document for purposes of CEQA, amounting to a prejudicial abuse of discretion.” *Id.* at pp. 655-56, 657.

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<sup>121</sup> For instance, just north of the northern MGS fence line and adjacent to the demolition access road, wetlands and ESHA, including mulefat scrub, exist and are being restored on the McGrath parcel. Ex. 1008 at Figure 4.2-2 (TN No. 204219-9).

The same failing is at issue here. Applicants have applied for a permit allowing the Project to run 2,150 hours per year.<sup>122</sup> Accordingly, Air Quality Condition of Certification AQ-48 allows the Project to operate 2,150 hours per year.<sup>123</sup> The Project Description defines the Project as “expected to operate at up to approximately 30 percent capacity factor,”<sup>124</sup> which is based on 2,150 hours per year. However, the FSA fails to base the required air quality mitigation on these operations limits and instead assumes, inconsistent with the FSA as a whole, that Puente will operate only 964 hours per year.<sup>125</sup> Staff justifies using a lower estimated run time to by stating that operation at 2,150 hours per year is unlikely to occur.<sup>126</sup> However, just as in *San Joaquin Raptor*, this argument poses a problem for the public and decision makers attempting to evaluate the Project and its impacts. As the FSA makes clear, operation at 2,150 hours per year is legally permitted to occur and the resulting emissions would be a reasonably foreseeable impact under CEQA.<sup>127</sup> Staff unhelpfully insists that this worst case will never happen, and creates a new category of “reasonably [sic] worst case operations.”<sup>128</sup> By basing air quality mitigation on this lower estimate of run time, the FSA fails to adequately mitigate a situation when the Project runs more than 964 hours of the year, as it would be allowed to do under its air quality permit and Condition of Certification AQ-48.

Staff argues that this new operating level was used “for CEQA purposes,” as opposed to air district permitting purposes.<sup>129</sup> This justification does not withstand scrutiny, as 2,150 hours of operation was used “for CEQA purposes” in all other sections of the FSA where the Project’s run time is relevant. For example, analysis of greenhouse gas emissions from the Project is based on its “maximum permitted air quality limits” of 2,150 hours per year.<sup>130</sup> Maximum operation of 2,150 hours per year is used to categorize the Project as a non-baseload plant under 40 C.F.R. 60 Subpart TTTT.<sup>131</sup> Outside of the air quality sections, the impacts due to the Project’s water use are based on a 30 percent capacity factor, or 2,150 hours per year.<sup>132</sup> As in *San Joaquin Raptor*, the FSA cannot quantify some Project impacts based on the Project Description and permit, and elsewhere in the FSA allege the level of operations requested in the permit will not occur.

This inconsistent view of the Project results in a complete failure to mitigate the Project’s significant air quality impacts. To correctly mitigate the reasonably foreseeable emissions from the Project, required mitigation for all pollutants must be raised drastically: particulate matter must be based on 11 tons of emissions instead of 5 tons, sulfuric oxide emissions mitigation must be based on 5.9 instead of 1 ton, and nitrous oxide emissions mitigation must be based on 33 tons, not 19 tons. Staff’s invented category of “Reasonable Worst Case Emissions” frustrates

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<sup>122</sup> Ex. 2000 at 4.1-2.

<sup>123</sup> Ex. 2000 at 4.1-113.

<sup>124</sup> Ex. 2000 at 3-1. As stated elsewhere in the FSA, 2,150 hours of operation translates to a full load capacity factor is 24%. Ex. 2000 at 4.1-26.

<sup>125</sup> Ex. 2000 at 4.1-50.

<sup>126</sup> Ex. 2000 at 4.1-49.

<sup>127</sup> See, e.g. Ex. 2000 at 4.1-29, Air Quality Table 21a.

<sup>128</sup> See, e.g. Ex. 2000 at 4.1-50.

<sup>129</sup> See, e.g. Ex. 2000 at 4.1-50.

<sup>130</sup> Ex. 2000 at 4.1-139.

<sup>131</sup> Ex. 2000 at 4.1-66.

<sup>132</sup> The FSA estimates annual industrial process water use will be 16 acre feet per year. Ex. 2000, p. 3-2. This estimate appears to come from Applicants’ estimates of water use in their Application, which were based on a 30 percent capacity factor. See Ex. 1004, *Puente Power Project Application for Certification, Chapter 2.0, Project Description* (TN# 204219-5), p. 2-12.

public and decision maker review, causing the FSA to fail as an informational document. The FSA violates CEQA and cannot support certification of the Project.

### **3. The FSA Improperly Discounts the Flood Risks to the Project and the Resulting Impacts to Reliability and the Environment.**

Briefing in this proceeding comes at a time of massive and unprecedented flooding in the Houston area. The resulting havoc underscores both the scale of potential disruption from the extreme weather events that are projected to occur with increased frequency and severity due to human-induced climate change and the importance of proper planning to improve resiliency when such events invariably occur. As California has recognized, “even under the best-case scenario for global emission reductions, additional climate change impacts are inevitable, and these impacts pose tremendous risks to the state’s people, agriculture, infrastructure and the environment.”<sup>133</sup> Yet despite the potentially devastating consequences of coastal flooding, the FSA disregards the conclusions of the CCC and Coastal Conservancy that find substantial flood risk to the project site and declines to use the Coastal Resilience model, whose results have been validated to match observed flood conditions. Instead, the FSA relies on the CoSMoS model, which yields results that substantially underestimate actual observed flooding, assumes the retreat of coastal dunes despite The Project’s construction making such retreat impossible, and for which data supporting model assumptions has not been made publicly available. The FSA’s treatment of coastal flood risk is not credible and violates CEQA’s information standards. In accordance with the findings of the CCC, Coastal Conservancy, and the Coastal Resilience model, the Energy Commission should find flood risk to the project site is significant.

#### ***a. The FSA’s Reliance on CoSMoS Does Not Withstand Scrutiny.***

In dismissing the risk of coastal hazards and sea level rise, the FSA chose to rely entirely on the CoSMoS model under development by the United States Geological Survey (“USGS”).<sup>134</sup> The FSA’s exclusive reliance on CoSMoS is insufficient to support its determination that the project site is not subject to flood risk. CoSMoS projects outcomes that fall far short of real world conditions captured by photos of recent flood events. For example, Oxnard Shores is a development ½ mile from the The Project site located on the edge of an approximately 300-foot wide beach.<sup>135</sup> As illustrated in the following photo, CoSMoS projections of a 100-year storm event at Oxnard Shores show water levels that would only minimally submerge the seaward edge of the beach.<sup>136</sup>

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<sup>133</sup> Exec. Order B-30-15.

<sup>134</sup> Exhibit 2025 at 1.

<sup>135</sup> Exhibit 3068, p. 9.

<sup>136</sup> Exhibit 3068, p. 10.

## Site 1: Oxnard Shores

Oxnard Shores is located about ½ mile south of the proposed Puente site.

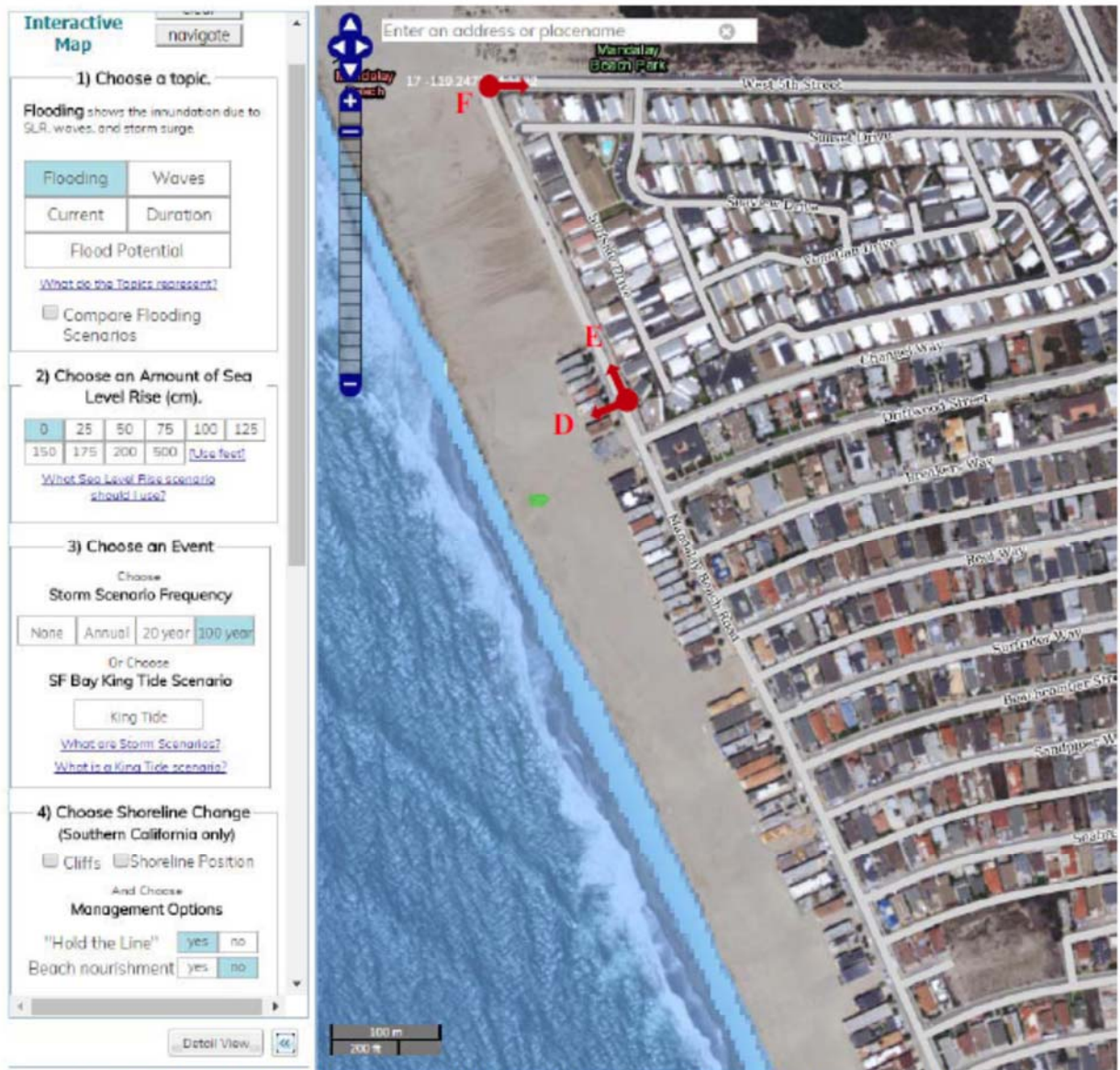


Figure 2A. COSMOS 3.0 Modeling at Oxnard Shores 100 year event, No sea level rise. Flooded area shown in light blue. Red arrows indicate approximate location (dot) and orientation of photo. Letters correspond to the ground photo figures for the site (Figures 2D, 2E, 2F).

Yet actual photos of a high tide, large wave event in December 2015 that Dr. Revell estimated as only a 20 to 25-year event show standing water well into the streets of this development.<sup>137</sup>

<sup>137</sup> Exhibit 3068, p. 10; 7/26/17 Transcript, 170:18-19.



Figure 2E. Oxnard Shores Flooding December 11, 2015 high tide (5.8') large wave event. Mandalay Beach Road looking north toward 5<sup>th</sup> Street. Photo taken by Chris Williamson

The FSA's exclusive reliance on a model that so grossly fails to correlate with observed flood conditions puts public health and safety alarmingly at risk and must be rejected. Moreover, CoSMoS' predictive failures are not limited to Oxnard Shores. The same discrepancy between a lack of flooding projected by CoSMoS and actual observed flooding was shown at Pierpont Beach, two miles from the Project, and in front of the Project itself.<sup>138</sup> In direct contrast, the Coastal Resilience model, which the FSA opted not to use, accurately reflects observed flood conditions at those locations.<sup>139</sup>

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<sup>138</sup> Exhibit 3068, p. 12-16; Exhibit 3072, slides 16-17; Exhibit 3060.

<sup>139</sup> Exhibit 3068, p. 11.



CoSMoS' understatement of current risk is compounded by assumptions used to determine future flood risk. CoSMoS inexplicably assumes coastal dunes continue to migrate landward with sea level rise at the The Project site.<sup>140</sup> Yet, with development of Puente, such landward migration, essential to adapting to climate change, would be foreclosed. Dunes will erode and no longer offer flood protection to the The Project site. In contrast, the Coastal Resilience model assumes that a storm of sufficient intensity and duration can erode those dunes.

CoSMoS' failure to accurately predict actual flood events coupled with assumptions at odds on-the-ground conditions compel rejection of the FSA's assertion that the Project site is not at risk of flooding. As demonstrated by the Coastal Resilience model and in analysis by the CCC and Coastal Conservancy, flood risk to the Project site is substantial and these risks must be properly recognized by the Energy Commission.

***b. FSA Fails as an Informational Document by Not Providing Data Underlying CoSMoS assumptions.***

Especially in light of the failure of CoSMoS to accurately predict observed flooding, availability of data on the inputs that generated model result is critical for the public to understand the model's flaws. Yet data needed to validate CoSMoS assumptions was not publically available at the time the FSA was released. Even by the time of hearings, USGS confirmed that dune erosion data needed to understand modelling assumption on dune migration was still not publicly available.<sup>141</sup> The failure to provide the public with underlying modelling data precluded the ability to scrutinize the validity of the model relied upon in the FSA and rendered the FSA inadequate as an informational document. *See* Guideline § 15003(i); *Madera Oversight Coalition v. County of Madera*, 199 Cal.App.4th 48, 102-05 (overruled on other grounds) (rejecting EIR for failure to provide public with full disclosure of uncertainties related to project's water supply).

***c. The FSA Improperly Dismisses Reliability Impacts Resulting from Flooding of the Project Site.***

Despite Federal Emergency Management Agency and CCC Guidance defining power plants as "critical infrastructure," the FSA is at pains to distinguish Project, arguing that an interruption of service would not have serious consequences.<sup>142</sup> The FSA's reasoning is fundamental flawed. The proposed procurement of The Project is for the sole purpose of addressing a reliability need that would only occur upon loss of multiple transmission lines (an N-1-1 contingency). The conditions under which not one, but two transmission lines are out of service would only likely occur under extreme conditions. As CAISO observes in its Special Study, local area need requirements help provide reliability services in the event of an earthquake or other disaster.<sup>143</sup> Yet the Project site "could be subject to very strong levels of earthquake-related ground shaking," is bounded by "a tsunami inundation zone," and "may be subject to soil failure caused by liquefaction and/or dynamic compaction."<sup>144</sup> In other words,

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<sup>140</sup> 7/26/17 Transcript, 8:11-14.

<sup>141</sup> 7/26/17 Transcript, 147:23-148:1.

<sup>142</sup> Exh. 2000, p. 4.11-113-116.

<sup>143</sup> TN 220813, p. 27.

<sup>144</sup> Exh. 2000, p. 1-8.

the very same events that might trigger the need for Project could also render Project non-operational due to the project site's many vulnerabilities. By proposing to meet the vast bulk of local reliability need through a single large power plant on a vulnerable location, the Project presents significant reliability risks that the FSA fails to acknowledge. Distributed energy resources solutions, such as those proposed in the CAISO Study, are a more secure reliability solution because unlike the Project, the loss of a single resource does not meaningfully reduce the total amount of local capacity resources that remain operational.

#### **4. The FSA Fails to Properly Analyze the Project's Impact on Environmental Justice Communities.**

The Project would add environmental impacts to historically burdened environmental justice communities in the City of Oxnard. According to CalEnviroScreen, the census tract where the Project would be constructed is in the 86-90th percentile of the most environmentally burdened areas in the state.<sup>145</sup> It is in the 94th percentile in the state for pollution burden, the 100th percentile for pesticides, the 91st percentile for impaired water bodies, the 89th percentile for low birth weight infants, and the 92nd percentile for asthma.<sup>146</sup> In fact, the seven census tracts stretching to the east of the project site all rank in the 92nd to 96th percentile for the highest asthma rates in the state.<sup>147</sup> No other city within the Moorpark Sub-area has a census tract with an overall CalEnviroScreen score placing it in the 90th percentile.<sup>148</sup> Oxnard is already home to a six gas-fired power units serving the entire Moorpark sub-area, which serve to limit public access to Oxnard's coast, a critical source of outdoor recreation for the "park poor" community.<sup>149</sup> But despite the already substantial environmental burdens borne for decades by the residents of Oxnard, the FSA's analysis of environmental justice impacts from the Project is incomplete.

The FSA fails to apply the proper test of environmental justice impacts by not evaluating whether project would disproportionately impact environmental justice communities in Oxnard, as compared to impacts on other communities in the Moorpark area who will benefit from the project. As the FSA articulates, environmental justice review contains two parts: (1) evaluating the Project's "impacts on the environmental justice population living within a six-mile radius of the project site, and [(2)] assessing whether "any impacts would disproportionately affect an environmental justice population."<sup>150</sup> The second part of the test stems from the state of California's anti-discrimination law, which holds that no person in a protected class shall be "unlawfully subjected to discrimination under, any program or activity that is conducted, operated, or administered by the state or by any state agency," such as the CEC. Cal. Gov. Code § 11135. The FSA must assess whether a project will have any discriminatory impacts – whether it disparately impact on a protected group – regardless of whether or not any impacts were separately found to be significant and immitigable. For example, air pollution from the project may not rise to the level of an air quality law violation, but it still violates the

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<sup>145</sup> Ex. 6000, *Testimony of Strela Cervas on Behalf of the California Environmental Justice Alliance*, TN#215443, p. 7.

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.* at 8.

<sup>149</sup> *Id.* at 9-10.

<sup>150</sup> Ex. 2000 at 4.5-1 (emphasis added).

environmental justice standard if the air pollution from the facility will disproportionately impact environmental justice communities in comparison to other areas.

The FSA stops after the first step in the analysis, and fails to evaluate whether the Project's impacts will place a burden on environmental justice communities that is disproportionate to the burden placed on the other Moorpark area communities who will benefit from it. Instead, the FSA insufficiently concludes that because the Project would not create any new significant and inmitigable impacts, then by extension an environmental justice community cannot be disproportionately impacted.<sup>151</sup> This logic is not sound, and this analysis is incomplete. The FSA does not assess whether direct and cumulative impacts of the project will have disparate impacts on minority or low-income populations, and therefore does not satisfy the CEC's legal obligations.

#### **5. The FSA Fails to Accurately Disclose and Analyze the Project's Land Use Impacts.**

CEQA requires that an EIR or its equivalent "shall discuss any inconsistencies between the proposed project and applicable general plans, specific plans, and regional plans. Such regional plans include, but are not limited to, the applicable air quality attainment or maintenance plan or State Implementation Plan, area-wide waste treatment and water quality control plans, regional transportation plans, regional housing allocation plans..." Guidelines § 15125(d). CEQA Guidelines further specify that a project results in significant environmental impacts if it would, among other things, "conflict with any applicable land use plan, policy, or regulation of an agency with jurisdiction, or that would normally have jurisdiction, over the project." Guidelines, Appendix G, Sections II, IX, XVI. This "includes, but is not limited to, a General Plan, community or specific plan, local coastal program, airport land use compatibility plan, or zoning ordinance." *Id.* The FSA addresses these requirements in the land use section, under the laws, ordinances, regulations, and statutes subsection ("LORS"). As detailed below in Section II, the Project conflicts with numerous LORS.

#### **6. The FSA's Analysis of Plume Impacts Is Flawed and Overstates the Impacts to Aviation from Thermal Plumes.**

The Supplemental Testimony analyzes impacts to aviation at off-site alternatives. Inaccuracies in the model, however, led Staff to the incorrect conclusion that there would be significant impacts to aviation at the DelNorte/5th Street site. The Spillane methodology used in the Supplemental Testimony fails to account for numerous atmospheric factors that mitigate the impact of thermal plumes, leading the potential impacts to be over-estimated.

As Intervenors' expert witness Dr. Andrew Gray testified, the Spillane model is based on unrealistic meteorological conditions. For example, the model assumes calm winds in the entire lower stratosphere up to unrealistic heights, includes no shear between the plume the ambient air and no turbulent mixing of the air.<sup>152</sup> Dr. Gray demonstrated that if even a very light wind is incorporated into the model, this more realistic assumption will dramatically lower the prediction

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<sup>151</sup> Ex. 2000 at 4.5-13 to 4.5-17.

<sup>152</sup> Ex. 4037, Supplemental Testimony of Dr. H Andrew Gray (July 14, 2017), TN#220217.



of the height at which thermal plumes would be expected to pose a problem for aircraft.<sup>153</sup> The Supplemental Testimony also omits a critical component of the Spillane method: a calculation of the temperature of the thermal plume. In combination with the speed of the plume, its temperature relative to ambient air determines how much force, or disturbance, the plume exerts on passing aircraft. When Dr. Gray conducted these calculations, he found that at the critical height for impacts on aircraft, the Spillane model predicts plumes will be a few degrees warmer than ambient air and therefore would exert very little force on passing aircraft.<sup>154</sup>

These errors and omissions cause the Supplemental Testimony to incorrectly overestimate impacts to aviation at the Del Norte site. However, as discussed in Section E. below, even with these overestimation errors, the Spillane method shows that the plume from a single turbine – and, it follows, the plumes from a set of turbines whose plumes do not merge – will not cross the threshold for impacts to aviation.

## **E. The FSA’s Alternatives Analysis Fails To Meet CEQA’s Requirements.**

### **1. The Incomplete and Inaccurate Baseline Impedes the Comparison of Alternatives.**

Because the description of the environmental setting is incomplete and inaccurate (see comments above), the potential impacts that would result from the proposed Project are understated. Therefore, it is not possible to compare the impacts of the Project to any of the alternatives. Moreover, the failure of the FSA to adequately survey the entire MGS site renders the information regarding the onsite alternatives incomplete and inaccurate as well.

### **2. The FSA Improperly Excludes the Retirement, Decommissioning, and Demolition of MGS Units 1 and 2 from the Analysis of Offsite Alternatives.**

As noted above, the State’s Once-Through Cooling policy applies not only to the proposed Project, but also to the alternatives. In addition, the City of Oxnard has stated its intention to ensure full removal of MGS Units 1 and 2 through enforcement of State nuisance laws if necessary. Therefore, the FSA is deficient for assuming that MGS Units 1 and 2 will only be decommissioned and demolished if the proposed Project or a reconfigured onsite project is approved.

### **3. The FSA Improperly Excludes Feasible Alternatives.**

The alternatives analysis in the FSA fails to sufficiently evaluate smaller-sized fossil fuel projects located at alternative inland sites. These smaller projects could feasibly attain the basic objectives of the Project while avoiding its significant environmental impacts and – as the FSA’s own analysis demonstrates but does not acknowledge – would do so without causing significant impacts to aviation.

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<sup>153</sup> *Id.*

<sup>154</sup> *Id.* at 8-12.

The purpose of an alternatives analysis under CEQA is to explore alternatives that “feasibly attain most of the basic objectives of the project” while avoiding or lessening the Project’s environmental impacts. CEQA Guidelines § 15126.6; *Save Round Valley Alliance v. County of Inyo* (2007) 157 Cal.App.4th 1437, 1456. The alternatives analysis must not provide exactly the same benefits as the proposed project: instead, the analysis should focus on alternatives to the project that are capable of avoiding or substantially lessening any significant effects of the project, even if the alternative “would impede to some degree the attainment of the project objectives, or would be more costly.” CEQA Guidelines §15126.6(b).

In this case, Energy Commission Staff were ordered to provide supplemental testimony on “one or more smaller (50-100 MW) turbines” at the Del Norte/5th Street and Ormond Beach alternative sites, “to determine whether it is feasible to reduce or eliminate the previously identified potential impacts on aviation.”<sup>155</sup> The Supplemental Testimony submitted in response to this order evaluated impacts on aviation of five 55 MW “LM6000” turbines or three 100 MW “LMS100” turbines. It concludes that impacts to aviation would be significant and immitigable “regardless of how many stacks are operating.”<sup>156</sup> However, this conclusion directly contradicts the methodology used in the FSA to determine impacts to aviation: the FSA states that the height above ground level at which the average vertical velocity of a thermal plume drops below 5.3 m/s (the “critical velocity”) is a height at which the plume no longer poses significant impacts to aviation.<sup>157</sup> The Supplemental Testimony shows that the plume from one LM6000 turbine would drop below the critical velocity at 512 feet above ground level, and the plume from one LMS100 turbine would drop below the critical velocity at 656 feet above ground level.<sup>158</sup> Both of these heights are below the traffic pattern for single engine aircraft, 800 feet above ground level.<sup>159</sup> However, the Supplemental Testimony fails to acknowledge that the plume from one smaller turbine would, using the Staff’s methodology, pass the FSA’s threshold for posing no significant impacts to aircraft.

Furthermore, the Supplemental Testimony omits and fails to analyze an off-site alternative that would configure smaller turbines to avoid impacts to aircraft. The Supplemental Testimony assumes smaller turbines are configured close together, causing the thermal plumes to merge and exacerbating the potential impacts.<sup>160</sup> But as Applicants’ testimony demonstrates, the Del Norte/5th Street site has ample space to configure up to three LM6000 turbines (165 MW) or two LMS100 turbines (200 MW) so that plumes do not merge and therefore do not pose aviation hazards. As Applicants’ expert witness Gary Rubenstein testified, plumes from these turbines will not merge if the stacks are spaced sufficiently far apart.<sup>161</sup> For the LM6000 turbines, positioning the stacks 53.4 meters apart will prevent the plumes from merging.<sup>162</sup> When plumes do not merge, the critical height of the turbines’ thermal plumes is the same as for

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<sup>155</sup> *Committee Orders for Additional Evidence and Briefing Following Evidentiary Hearings* (March 10, 2017), TN#216505.

<sup>156</sup> Ex. 2025, *Staff’s Supplemental Testimony* (June 13, 2017) TN#218274, p. 32.

<sup>157</sup> Ex. 2000 at 4.12-55.

<sup>158</sup> Ex. 2025 at 45, 46.

<sup>159</sup> *Id.* at 32.

<sup>160</sup> Ex. 2025 at 42-43.

<sup>161</sup> Ex. 1147, *Expert Testimony of Gary Rubenstein in Response to March 10 Committee Orders* (June 15, 2017) TN#218887 at A-1 (stating that “[o]nly plumes that are less than the critical distance apart will merge.”).

<sup>162</sup> *Id.*, Table A-1 at p. A-2.

a single turbine.<sup>163</sup> As Mr. Rubenstein testified at the July 27 Committee Hearing, three LM6000 turbines could be configured at the Del Norte site so that the stacks were 72 meters apart, preventing the thermal plumes from merging.<sup>164</sup> According to the FSA, the plume from a single LM6000 turbine would no longer pose a significant impact to aviation at 512 feet above ground level, below the 800 foot minimum elevation of air traffic.<sup>165</sup> Similar analysis would apply to two LMS100 turbines.<sup>166</sup> Staff failed to evaluate these very feasible alternatives, which could provide as much as 200 MW of capacity at the Del Norte site without posing a hazard to aviation.

The FSA should not have omitted an off-site alternative of two LMS100 turbines or three LM6000 turbines, both of which could have met the basic project objectives while eliminating the Project's significant environmental impacts. The two-turbine LMS100 alternative could provide 200 MW of capacity; while this is less power than the 262 MW capacity of the Project, that difference in size does not mean the alternative would fail to meet the project's basic objectives. The Project's objective is not to provide exactly 262 MW of power, but to provide electric reliability in the Moorpark Subarea. The near-term need for additional resource procurement to meet Moorpark reliability needs may be as little as 42 MW, and is almost certainly less than 200 MW. As Sierra Club expert witness Matt Vespa testified, the 234 MW Category C (multiple) contingency deficiency identified by CAISO in this area to guide procurement does not account for 12 MW of preferred resources contracts approved by the California Public Utilities Commission or the up to 50 MW of additional preferred resources SCE intends to procure in Goleta.<sup>167</sup> The deficiency also assumes the retirement of the the 130 MW non-OTC Mandalay Unit 3, which owner NRG stated is "capable of operating well into the future."<sup>168</sup> When these resources are taken into account, residual reliability need could be as little as 42 MW. Up to two 100 MW LMS100 turbines or up to three LM6000 turbines could have met this LCR need while still avoiding impacts to aviation.

The FSA and the Staff's Supplemental Testimony omit consideration of feasible alternatives with one or more smaller turbines, which would meet the project's objective of satisfying LCR need in the area while reducing or eliminating the Project's environmental impacts and its incompatibility with LORS, as discussed above. CEQA Guidelines require an FSA's alternatives analysis to consider alternatives like these that would avoid significant effects of the project, even if these alternatives would impede to some degree the attainment of the project objectives, or would be more costly. CEQA Guidelines §15126.6(b). By not considering any feasible, off-site alternatives that use smaller turbines, the FSA's discussion of alternatives does not satisfy CEQA.

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<sup>163</sup> Transcript of July 26, 2017 Committee Hearing, p. 76, ln. 6-11.

<sup>164</sup> Transcript of July 26, 2017 Committee Hearing, p. 74, ln. 15-17, referencing Ex. 1147, Figure A-4.

<sup>165</sup> Ex. 2000 at 45 and 32.

<sup>166</sup> The critical distance to prevent plume merge of LMS100 turbines is 62.4 meters. Ex. 1147 at A-1. As shown in Figure A-1 of Ex. 1147, eliminating the central LMS100 turbine would leave two turbines with stacks 122 meters apart. These plumes would therefore not merge and would cease posing significant impact to aircraft at 656 feet. Ex. 2025 at 46.

<sup>167</sup> Ex. 4000, Opening Testimony of Matthew Vespa (Jan. 18, 2017), TN#215432-1, p. 8.

<sup>168</sup> *Id.* at 9.

#### 4. The Analysis Regarding the Environmentally Superior Alternative is Flawed.

The comparison of alternatives and analysis of the environmentally superior alternative is similarly affected by the incomplete and inaccurate environmental setting, and the restriction of decommissioning and demolition of MGS Units 1 and 2 to the proposed Project and not the offsite alternatives. Regarding the latter point, even the FSA “assume[s] that future land use agreements or property division or sale would include removal of some of the existing power block structures and infrastructure.”<sup>169</sup> Without a complete and accurate environmental setting, adequate assessment of impacts that would result from the proposed Project and onsite alternatives, and consistent treatment of MGS Units 1 and 2, the entire comparative analysis is deficient and fails to provide the necessary information required under CEQA.

##### *No Project Alternative*

The FSA concluded that the No Project Alternative would result in greater impacts to special-status birds nesting in the area, because of the assumption that MGS Units 1 and 2 would remain and provide habitat for raptors and other predatory birds.<sup>170</sup> As noted above, however, decommissioning and demolition of MGS Units 1 and 2 should be treated similarly for the proposed Project and all alternatives, as there is no likely scenario that would involve the shutdown of these Units without their removal.

In addition, the FSA improperly limited the analysis of the No Project Alternative by stating that staff has no data on the thermal plumes generated at MGS Units 1 and 2, which could continue operating through 2020, and thus “the comparative impact conclusion for the No-Project Alternative is **indeterminate**.”<sup>171</sup> Given that the proposed Project would not commence until 2020 (FSA at p. 3-2), and would continue until 2050 (*id.*), well after the shutdown of MGS Units 1 and 2, the FSA is misleading and once again understates the benefits of the No Project Alternative as compared to the proposed Project.

##### *Offsite Alternatives*

The comparison to the offsite alternatives is inaccurate because the FSA assumes that MGS Units 1 and 2 will not be decommissioned and demolished.<sup>172</sup> As explained here, the removal of Units 1 and 2 should be part of the description and analysis of all of the alternatives.

Additionally, as noted above, the FSA’s conclusion regarding exposure to thermal plumes for the Del Norte/Fifth Street offsite alternative is based on a faulty analysis.

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<sup>169</sup> FSA at p. 4.2-149.

<sup>170</sup> FSA at p. 4.2-149, 156.

<sup>171</sup> FSA at p. 4.2-150, emphasis in original.

<sup>172</sup> FSA at pp. 4.2-151, 152, and 155.

### *Onsite Alternatives (“Conceptual Site Reconfigurations 1 and 2”)*

The FSA appropriately describes these alternatives as including the decommissioning and demolition of MGS Units 1 and 2. (FSA at p. 4.2-155) However, as discussed above, the FSA fails to include complete and accurate information regarding the environmental setting for these sites and thus the impact analysis is deficient. For example, constraints from wetlands and ESHA will significantly impede the development footprint on both of these onsite alternatives.<sup>173</sup> Accordingly, the FSA’s conclusions are not based on complete information and fail to properly inform the public and decision-makers.

### *Environmentally Superior Alternative*

The FSA admits that if MGS Units 1 and 2 are demolished and removed, the No Project Alternative “would be environmentally superior to the proposed project.”<sup>174</sup> However, because the FSA does not describe the No Project Alternative to include the decommissioning and demolition of Units 1 and 2, the document concludes that this alternative is not environmentally superior to the proposed Project. *Id.* Because it is most likely that the facilities will have to be removed, the FSA should be revised to find the No Project Alternative to be environmentally superior.

## **II. THE PROJECT IS INCONSISTENT WITH LORS**

Pursuant to the Warren-Alquist Act, the Energy Commission must make findings that the proposed Project conforms to all LORS. Pub. Res. Code § 25523(d)(1). The Energy Commission cannot certify a facility when it is inconsistent with any of the LORS “unless the commission determines that the facility is required for public convenience and necessity and that there are not more prudent and feasible means of achieving public convenience and necessity.” Pub. Res. Code § 25525. As detailed below, there are multiple LORS inconsistencies that plague this Project. The Energy Commission cannot find that the Project is required for public convenience and necessary, or that there are not more prudent and feasible means of achieving such public convenience and necessity. The FSA is deficient for failing to identify the Project’s inconsistency with local, state, and federal standards. Therefore, the Energy Commission cannot rely on the FSA and the Project must be denied.

### **A. The Project Fails to Conform to the City’s Land Use Regulations.**

#### **1. The Project Conflicts with Oxnard’s General Plan Safety and Hazard Policies.**

The FSA correctly determines that the Project conflicts with Safety and Hazard (“SH”) Policy 3.5, which prohibits siting of power plants of 50 MW or more in areas where “the City has documented that the location of such facilities is threatened by seismic hazards, wildfire, flooding, or coast hazards.”<sup>1</sup> The City fully documented flooding and other coastal hazards

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<sup>173</sup> Ex. 4038 at 14-17.

<sup>174</sup> FSA at p. 4.2-156.

threatening the Project site as part of its LCP update process and incorporated into its General Plan.<sup>2</sup> Policy SH-3.5 squarely prohibits locating the Project on the site proposed by NRG.

The Project similarly conflicts with General Plan Policy ICS-17.1, which requires that new electrical generating facilities are “built in accordance with the Coastal Commission’s Sea Level Policy Guidance.”<sup>3</sup> CCC Guidance calls for “avoid[ing] the expansion or perpetuation of existing structures in at-risk locations.”<sup>4</sup> In seeking to perpetuate use of the Project site for electric generation, the Project runs afoul of this Guidance and Policy ICS-17.1.

## **2. The Project is Inconsistent with the Oxnard LCP.**

The LCP consists of the CLUP and the CZO. The CLUP established priorities for competing use of coastal resources and determined that “preservation of sensitive habitat areas and coastal resources and the provision of coastal access are the highest priority.”<sup>175</sup> When LCP policies overlap or conflict, “the most protective of coastal resources shall prevail.”<sup>176</sup> As discussed herein, the Project is inconsistent with LCP policies protecting wetlands and sensitive habitat areas.

### ***a. The Project Fails to Protect Wetlands as Required by CLUP Policy 6.***

CLUP Policy 6(d) provides that “new development adjacent to wetlands or resource protection areas shall be sited and designed to mitigate any adverse impacts to the wetlands or resource” and requires a 100-foot buffer to protect those resources.<sup>177</sup> As addressed above in Section I, the Project will eliminate the 2-acre wetland and ESHA on site, and impact nearby wetlands and ESHA located within the 100-foot buffer of the Project’s development footprint. In order to ensure consistency with Policy 6 and the Coastal Act, the CCC recommended that Condition BIO-7 be modified to require all Project-related development to be located at least 100 feet, and further if feasible, from nearby areas that meet the CCC and LCP definitions of wetlands and ESHA.<sup>178</sup> However, as detailed in Section I.D above, BIO-7 does not require a 100-foot buffer from wetlands and all ESHA. It was revised and limited by the applicant and the CEC staff to now only apply to “McGrath Lake ESHA and coastal dune ESHA that supports western snowy plover and California least tern breeding.”<sup>179</sup> Thus, the Project did not follow the CCC recommendation and includes multiple components that are inconsistent with Policy 6.

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

CLUP Policy 52 provides that “energy-related development is not an allowable use within coastal resource areas and sensitive habitats, including wetlands as defined in the

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<sup>175</sup> Ex. 4024, CLUP I-2.

<sup>176</sup> Ex. 4024, CLUP, III-1.

<sup>177</sup> Ex. 4024.

<sup>178</sup> Ex. 3009 at 18.

<sup>179</sup> EX.1098 at 5, and EX.2006 at 2, where CEC Staff accepted Applicant’s proposed changes to COC BIO-7.

LCP.”<sup>180</sup> As addressed above in Section I, the CCC concluded that the Project site contains a two-acre jurisdictional wetland that meets the definition of wetland in the LCP, and that this wetland would be eliminated by the Project.<sup>181</sup> Additionally, the entire Project site is constrained by ESHA as defined by the LCP due to the presence of Peregrine falcon and other raptor foraging, resting and nesting habitat; dune habitat; and habitat that supports the Globose dune beetle and silvery legless lizard.<sup>182</sup> In order to comply with Policy 52, the CCC recommended that the Project be relocated to an alternative site that does not result in the direct impact to wetlands and ESHA.<sup>183</sup> As a result, the Project is not consistent with CLUP Policy 52 and cannot be found in conformance with this policy as long as it is located on this site.

***c. The Project does not Conform to the CZO Coastal Energy Facilities Sub-Zone.***

Most of the proposed site for the Puente Project is zoned as within the Coastal Energy Facilities sub-zone (“EC”) under the Oxnard CZO. The EC sub-zone is intended to “provide areas that allow for siting, construction, modification, and maintenance of power generating facilities and electrical substations consistent with Policies 52, 54, 55 and 56 of the Oxnard coastal land use plan.”<sup>184</sup> Because the Project is not consistent with CLUP 52, the Project does not comply with the EC sub-zone designation. This finding is consistent with the CLUP’s prioritization of the preservation of sensitive habitat areas and coastal resources over energy facilities.

In sum, the Project conflicts with the City of Oxnard’s General Plan and LCP.

**B. The Project Conflicts with State Law.**

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

There are several inconsistencies identified throughout this brief that describe multiple inconsistencies between the Project and the Coastal Act, that were also identified by the CCC in its 30413(d) Report and subsequent July 2017 letter. Unfortunately, the concerns specifically identified by the CCC have largely been ignored. These include:

- The filling of wetlands on the Project site is prohibited and violates Coastal Act Sections 30233(a) and 30231.<sup>185</sup> There are feasible, less damaging alternatives available offsite that would avoid filling wetlands.
- The Project’s development in ESHA on site (detailed in Section I.B) violates Coastal Act Section 30240(a), which prohibits development in ESHA other than

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<sup>180</sup> Ex. 3009 at 13.

<sup>181</sup> *Id.*; Ex. 4041; *see also* FSA at 4.2-33.

<sup>182</sup> See Section A for details.

<sup>183</sup> Ex.3009 at 14, and Ex. 4041 at 5.

<sup>184</sup> Ex. 4024, Oxnard CZO Section 17-20.

<sup>185</sup> Ex. 3009 at 14.

uses dependent on that ESHA.<sup>186</sup> As described above, there are multiple types of ESHA that are not protected from the Project's development.

- The Project's impacts to nearby ESHA (described in Section I.B) violate Coastal Act Section 30240(b), which requires a buffer to protect ESHA from adjacent development. In this case, the CCC determined that a minimum 100-foot buffer was required.<sup>187</sup> Condition BIO-7 does not require a 100-foot buffer from all ESHA impacted by the Project. As described above, there are multiple types of ESHA surrounding the Project site that are not protected from the Project's development and impacts.

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

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

## **C. The Project Conflicts with Federal Law.**

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

The Endangered Species Act ("ESA") designates and protects threatened and endangered plant and animal species, and their critical habitat. 16 U.S.C. § 1531 *et seq.*, § 1536 (a)(2). As discussed above in Sections I.A and D, the Project site is surrounded by designated western snowy plover critical habitat and Milk-vetch critical habitat that would be subject to direct and indirect impacts from the Project. The FSA erroneously relies on BIO-1 through BIO-10 to support a conclusion that the Project would not have an adverse impact on these species or their critical habitat; however, as discussed above, these COCs were revised to only avoid and buffer McGrath Lake ESHA and coastal dune ESHA that supports western snowy plover and California least tern *breeding* habitat, but not all critical habitat that constitutes ESHA.<sup>188</sup> As a result, the Project could potentially cause take of endangered species in violation of Section 9, and destroy or adversely modify critical habitat in violation of Section 7(a)(2). *Gifford Pinchot Task Force v. United States Fish & Wildlife Serv.*, (9th Cir. 2004) 378 F.3d 1059, 1069-74.

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<sup>186</sup> Ex. 3009 at 16-18, and Ex. 4041 at 5.

<sup>187</sup> Ex. 3009 at 18; Ex. 4041 at 3.

<sup>188</sup> FSA Project Description Figure.



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

The FSA concludes that the Project is consistent with the Migratory Bird Treaty Act (“MBTA”) but fails to disclose the presence of at least two birds that are protected under it, the Peregrine falcon and Great horned owl.<sup>189</sup> The MBTA prohibits the take of designated species or their habitat.<sup>190</sup> The FSA fails to provide any analysis or discussion as to how the Project is consistent with the MBTA when the Project will have significant, unmitigated impacts (described in Section I) to species under its protection. As such, the FSA is deficient and the Project must be denied.

**CONCLUSION**

For the foregoing reasons, the Project must be denied.

Respectfully submitted,

s/Alicia Roessler

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s/ Alicia Roessler

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<sup>189</sup> FSA 4.2-48.

<sup>190</sup> FSA at 4.2-8; 16 U.S.C. § 703.