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9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 COUNTY OF SAN DIEGO

11 CITIZENS OVERSIGHT, INC., et al.,
12 Petitioners and Plaintiffs,

13 v.

14 CALIFORNIA COASTAL COMMISSION,
15 et al.,
16 Respondents and Defendants.

Case No. 37-2015-00037137-CU-WM-CTL
Assigned for All Purposes to the Honorable Judith
F. Hayes, Dept. C-68

**PETITIONER'S REPLY TO CALIFORNIA
COASTAL COMMISSION'S OPPOSITION
TO MOTION FOR WRIT OF
ADMINISTRATIVE MANDAMUS AND
DECLARATORY RELIEF**

Date: March 30, 2017, changed to **April 14, 2017**
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Petition filed: November 3, 2015

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1 **I. INTRODUCTION**

2 The Coastal Commission (CC) approved the placement of three million six hundred thousand
3 pounds of spent nuclear fuel/radioactive waste with no monitoring system to insure the structural
4 integrity of the canisters holding the weight. Knowing key facts – that the canisters must remain
5 there for 35 years and there is no developed means to transport them in the proposed plan – the
6 CC approved a permit for 20 years. The spent nuclear waste from San Onofre’s two reactors that
7 are no longer efficient in creating electricity is still thermally hot and highly radioactive. The only
8 way radioactive waste finally becomes harmless is through decay, which can take hundreds of
9 thousands of years.

10 Thus, this case brings before the Court for decision the most consequential legal issue in San
11 Diego history: Should the Court allow burial of 3.6 million pounds of deadly nuclear waste,
12 expected to last thousands of years, on a San Diego beach? On its face and on the CC record, the
13 answer to the question before the Court is a self-evident “NO.”

14 Had the Coastal Commission done its job, the burden of the decision would not be falling on
15 the Court. Had Southern California Edison (SCE) not deployed defective steam generators at the
16 San Onofre nuclear power station (San Onofre), the problem of how to dispose of San Onofre’s
17 nuclear waste would still be decades into the future. However, SCE did deploy the defective
18 steam generators, its plant closed, and the Coastal Commission did not do its job to prohibit
19 projects that grossly violate the Coastal Act protection of our beaches.

20 Before the 6 October 2015 hearing to vote on Southern California Edison’s (SCE) permit to
21 create a 3.6 million pound nuclear waste cemetery on the beaches of San Diego County, SCE paid
22 a visit to six of the eleven voting members of the Commission. (See PAR 278-308 [SCE
23 roadshow to Commissioners in LA, San Francisco, San Onofre, Malibu, and San Diego]; Vote at
24 PAR 495-499) The perfunctory meeting later held by CC on 6 October 2015 was a one-sided
25 presentation, where CC staff advocated on behalf of SCE to grant the permit. (PAR 378-500)

26 During this litigation, CC worked with SCE to advance defenses. Now CC and SCE file
27 similar briefs, double-teaming Petitioners with briefing on the singular issues as to whether the
28 CC’s permit was issued in violation of Cal. Civ. Code § 1094.1.

1 Contrary to Respondents’ brief, the CC violated the Coastal Act, failed to support its
2 decision with adequate findings, failed to provide evidence supporting the findings it did make,
3 and denied the opponents a fair hearing. See, Code Civ. Proc 1094.1 The permit challenge does
4 not rest on radiological safety issues preempted by federal law. Rather, the CC failed to act in a
5 manner provided by law when it made a mistake of law reading preemption as to issues properly
6 under State jurisdiction. It did so after holding a perfunctory public hearing after its
7 Commissioners held a half dozen meetings in private with SCE up and down the State to reach
8 their decision before starting the CC-SCE-NRC spin presentation at the “public” hearing.

9 As will be shown below, the CC denied a fair hearing as the CC did not proceed in
10 a manner required by law, the permit order is not supported by the findings, and the
11 findings are not supported by the evidence. The findings as to lack of alternatives is not
12 supported by the record when license amendments were possible, and the permit is for a
13 mere fraction of the time the waste will remain with no monitoring/transport plans. A
14 permit for a nuclear waste cemetery on our beaches, on this record, needs to be revoked.

15 **II. REPLY TO FACTUAL AND PROCEDURAL BACKGROUND**

16 In their tag-team briefing, SCE and CC set forth their version of the facts. For judicial
17 efficiency, Petitioners incorporate and reference herein Petitioners’ response to the facts in their
18 reply to Southern California Edison’s briefing.

19 **III. THERE WAS AN UNFAIR HEARING**

20 **A. The Commission Did Not Provide Notice and Did Not Provide an** 21 **Opportunity to Be Heard**

22 The Commission argues that it provided notice and an opportunity to be heard by the
23 public, when in reality, it was a one-sided presentation of evidence by the Coastal Commission –
24 acting as an advocate for the SCE, tag-teamed by the NRC.

25 The Coastal Commission references the Community Engagement Panel in its brief.
26 However, the engagement panel did not disclose SCE was bringing the nuclear dump before the
27 CC—a disclosure that prompted the SCE spokesperson to proclaim “we have tried to ensure this
28 permit was widely advertised and people had adequate opportunity to participate in the process

1 because that is important.” (PAR 405, 449-450) Not so.

2 9 The Community Engagement Panel, that is
3 10 supposed to disseminate information that's run by
4 11 Edison, **did not even notify us of this meeting.**
5 12 They're supposed to be the ones promulgating
6 13 information. Therefore, a lot of the people that are
7 14 concerned about this were never informed. Why did
8 15 that happen? 'Cause Edison wants to sneak this
9 16 through without adequate review.
10 17 That's why I'm hoping that I can implore on
11 18 you today to at least delay this. There's no need to
12 19 rush into this. You've got 35 years of
13 20 decommissioning ahead of us. Is there a need to rush
14 21 this stuff out, and immediately throw it in these
15 22 unproven canisters, that are too big to transport on
16 23 rail lines, you don't even know where they're going,
17 24 and no one has a plan? No. (PAR 405)

12 With the storage canisters certified for only 20 years, not 35, even the CC Environmental
13 Scientist admitted: it is unclear whether Edison will be able to meet its timeline for
14 decommissioning the facility in 2051 ** the facility could be required beyond 2051, possibly for
15 many decades.” (PAR 385) Without proper notice to the community (and, in fact, a contradiction
16 in the record as to the notice, the CC nonetheless rushed the permit to approval in accordance
17 with what was discussed in the six private SCE-Commissioner only meetings. (PAR 278-308
18 [SCE roadshow to Commissioners in LA, San Francisco, San Onofre, Malibu, and San Diego)

19 The CC did not ensure full and adequate participation by all interested groups and the
20 public at large, nor did advise all interested groups and the public at large as to effective ways of
21 participating in commission proceedings. (Pub. Res. Code § 30339)

22 **1. The Real Discussion was Outside Public View: SCE and Commissioners**
23 **Held Multiple Meetings to Discuss Details of Advancing the Project**

24 Before the short, unfair hearing of 6 October 2015, *six of the the eleven voting Commissioners*
25 *admitted to meeting privately with SCE* at meetings up and down the state in the two weeks prior
26 to discuss details relating to the application for the permit. (See PAR 278-308 [SCE roadshow to
27 Commissioners in LA, San Francisco, San Onofre, Malibu, and San Diego]; Vote at PAR 495-
28 499) The Commissioners had already made their decision. This was a daisy-chain meeting with

1 no safeguards against the collective concurrence being formed. Deliberation in this context
2 connotes not only prohibited collective decision-making, but also “the collective acquisition and
3 exchange of facts preliminary to the ultimate decision.” *216 Sutter Bay Associates v. County of*
4 *Sutter* (1997) 58 Cal.App.4th 860, 877.

5 **B. The Staff Report was Changed after the Private SCE-Commissioner Meetings**

6 Before the hearing began, the CC staff report for the project was changed in favor of the
7 permit with last minute interlineations. For example, at one part of the staff report the following
8 was cross-out: ~~For several reasons, Commission staff believes that SCE’s analysis underestimates~~
9 ~~the potential for future flooding at the project site.~~ (PAR 5-6)

10 **C. The Hearing Was a One-Sided Presentation**

11 When the CC developed its consensus to allow a new nuclear waste dump on the beach in
12 San Diego, there was supposed to be a seat at the table reserved for the public. Govt Code §
13 11120. The CC Commissioners made its “findings of fact in secret which ought to [have been]
14 made in public and then conduc[ed] a mere 'ceremonial' hearing to satisfy the open meeting
15 requirement.” *Morrison v. Housing Authority of the City of Los Angeles Bd. of Comrs.*, (2016)
16 107 Cal. App. 4th 860, 876. After limiting public comment time, the hearing was a one-sided
17 presentation by SCE working collusively with the NRC, with the CC personnel as their
18 advocates. For this important of a decision, the CC discussed the case after comment for less than
19 an hour (mostly allowing SCE to rebut so the Commissioners could reach their predetermined
20 decision) before voting in favor of SCE. This a fair hearing is not.

21 The CC “action determining the rights or obligations of numerous specified persons is
22 invalid unless the mandates of due process are satisfied.” Due Process and the Administrative
23 State 72 Calif . L. Rev. 1044, 1050.

24 The hearing opened with CC Deputy Director Alison Dettmer giving a sanitized version
25 of how and why SCE was coming before the CC for a permit to build the new nuclear waste
26 dump. There was no discussion about SCE credibility, despite SCE’s decision to deploy the
27 defective steam generators that failed 11 months into their 40-year life span. (PAR 379)

28 ///

1 Deputy Director Dettmer, with no citation to any authority, made the misleading statement
2 that the “D.O.E. is under obligation to take custody and accept the fuel for final disposal at a
3 federal repository.” (PAR 380) However, it is the operators who have the basic responsibility for
4 disposal of their nuclear waste. *United States v. Domenic Lombardi Realty, Inc.*, 2001 U.S. Dist.
5 LEXIS 24645, *20 (D.R.I. 2001) Those who create or assist in creating a system that causes
6 hazardous waste to be disposed of improperly, or who instruct users to dispose of wastes
7 improperly, can be liable under the law of nuisance." *San Diego Unified Port Dist. v. Monsanto*
8 *Co.*, 2016 U.S. Dist. LEXIS 134882, *25 (2016) SCE cannot delegate its responsibility to
9 dispose of the nuclear waste its’ plant produced. *Evard v. Southern California Edison* (2007)
10 153 Cal.App.4th 137, 146.; *Srithong v. Total Investment Co.* (1994) 23 Cal.App.4th 721, 726;
11 *Fanjoy v. Seales* (1865) 29 Cal. 243, 250; *Dow v. Holly Mfg. Co.* (1958) 49 Cal.2d 720, 725;
12 *Sabella v. Wisler* (1963) 59 Cal.2d 21, 28; *Muth v. Urricelqui* (1967) 251 Cal.App.2d 901, 907.

13 Ms. Dettmer admitted there are spent fuel dry cask storage facilities, but omitted any
14 discussion of the Palo Verde site, of which SCE is an owner. (PAR 380) Ms. Dettmer told the
15 Commissioners the State was limited to “impos[ing] requirements related to other issues and our
16 recommended findings in the staff report relate to conformity to applicable policies of the Coastal
17 Act.” (PAR 381) Ms. Dettmer told them they could not deny the permit if the Commission
18 wanted SCE to use what the Commissioners believed were safer storage canisters. (PAR 381)

19 Next, CC Environmental Scientist Joseph Street told the CC Commissioners “the seaward
20 edge of the new facility would be approximately 100 feet inland of the existing seawall.” (PAR
21 383) Street told the Commissioners SCE was to “operate the facility until 2049, when Edison
22 **assumes** that the federal Department of Energy will have taken custody of the spent fuel.” (PAR
23 384) Street made the misleading statement that other “nuclear power plants are not licensed to
24 accept outside fuel, even if they are willing to do so.” (PAR 384) Street left out the fact that those
25 licenses can be amended. In fact, SCE had to obtain an amendment of its San Onofre for the new
26 ISFSI. ¹ As SCE admits, its new ISFSI uses technology different from its existing dry storage.

27 _____
28 ¹ <https://www.nrc.gov/docs/ML1532/ML15327A401.pdf>

1 After the CC staff stated the CC could not exercise jurisdiction, Street told the CC
2 “Within Edison's proposed 35-year timeframe for the project, the siting and design of the dry cask
3 storage facility would be sufficient to assure stability and structural integrity and minimize * .”
4 However, the NRC certified the canisters for only 20 years, not 35. Even worse, Street admitted:
5 it is unclear whether Edison will be able to meet its timeline for decommissioning the facility in
6 2051 ** the facility could be required beyond 2051, possibly for many decades.” (PAR 385)

7 Street admitted “over time, the site would eventually be exposed to coastal -- and I should
8 say in the absence of shoreline protection -- the site would eventually be exposed to coastal
9 flooding and erosion hazards beyond its design capacity, or else would re – it would -- or else it
10 would require protection by retaining, replacing, or expanding the existing shoreline armory,
11 which we believe would be inconsistent with a number of Coastal Act policies. The ability of the
12 project to avoid potential hazards also depends on the spent fuel casks remaining in adequate
13 physical -- physical condition to allow for on or off-site transfer to another storage location out of
14 harm's way, thus allowing for the removal of the ISFSI. At present, the N.R.C. has certified the
15 integrity of the proposed system, including the casks, for 20 years. (PAR 385-386)

16 Street then made the absurd statement, “In order to address these various uncertainties and
17 assure that the dry storage facility remains safe from geologic hazards, and avoids adverse
18 impacts to coastal resources over its actual lifespan, staff recommends Condition 2: to limit
19 authorization of the development to 20 years, to require Edison to return for a C.D.P. amendment
20 at the end of this period to retain, remove, or relocate the dry cask storage facility. (PAR 386)
21 Next, 6 of the 12 Commissioners admitted recent ex parte meetings with SCE’s retained Coastal
22 Commission hired gun David Neish. Neish has “a long lasting working relationship with Coastal
23 Staff and individual Commissioners.”² (PAR 388-389)

24 After the CC staff made their one-sided presentation, Ms. Dettmer spoke up to say
25 “Edison would like to speak.” (PAR 392) SCE’s VP for San Onofre Decommissioning, Thomas
26 J. Palmisano,³ told the CC he “want[ed] to play a short video and then reserve ten minutes at the

27 _____
28 ² <http://dbnplanning.com/about-us/>

³ <http://www.edison.com/home/about-us/leadership/southern-california-edison-leaders/thomas-j-palmisano.html>

1 end for any rebuttal comments. Mr. Palmisano stated SCE was “fully supportive of the
2 recommendation and the special commission.” (PAR 393) Palmisano told the CC SCE was
3 dedicated to safety. He failed to disclose that it was *after* SCE’s decision to evade the NRC safety
4 review of SCE’s new steam generators that they failed, causing the current problem of how to
5 dispose of the waste. (PAR 394) Palmisano claimed it was SCE’s “commitment to safe storage of
6 used nuclear fuel [that was] at the heart of our decision to promptly place this radioactive waste in
7 robust dry storage containers.” (PAR 394) No one asked *why* SCE had not tried to move the
8 waste to the Palo Verde ISFSI in the desert. Palmisano said SCE “support[ed] removal of the
9 fuel from the site by the Federal Government as required by law.” (PAR 395) No one asked
10 Palmisano if the law in question, the Nuclear Waste Policy Act,⁴ prohibited SCE from moving the
11 San Onofre spent fuel to Palo Verde.

12 Palmisano told the CC that SCE supports alternatives to establish interim used fuel
13 storage sites in New Mexico and Texas. (PAR 395) No one asked *why* SCE supported alternatives
14 in New Mexico and Texas that were *not* licensed ISFSIs, but not the *licensed* ISFSI at Palo
15 Verde. An NRC spokesperson told the CC, “I’m confident that this system is -- will perform
16 safely and securely.” He was not asked about (1) the gap between the NRC’s 20-year certification
17 and SCE’s 35+year storage plan; (2) the lack of a canister aging management system; (3) the lack
18 of license for the transportation casks; or (4) whether Palo Verde could serve as an interim site.

19 Over 20 speakers then opposed the proposed project, given only two minutes each and not
20 asked any questions, nor allowed to ask questions. When Palmisano was brought back up to
21 rebut those 20 opponents, he made the misleading statement the storage cannisters were “designed
22 and licensed for storage and transport.” The travel canisters have not been developed and
23 licensed, and there are no rail cars licensed to transport the cannisters. Palmisano obscurely
24 corrected himself: “They are **currently licensing** the transport cask, which will transport these
25 canisters with the San Onofre fuel, so let's make that clear. (PAR 447) Palisimo admitted SCE
26 “will need an aging plan -- management plan by 2022.” (PAR 449) He said “we have tried to
27 ensure this permit was widely advertised. (PAR 449-450) **No one asked why the SCE**

28 ⁴ <https://www.epa.gov/laws-regulations/summary-nuclear-waste-policy-act>

1 **engagement panel had not disclosed SCE was applying for a permit.**

2 As soon as Palmisano stopped, a Commissioner, as if on cue, stated “So, therefore, uh, I
3 would move that the Commission approve, uh, Coastal Development Permit 9-15-0228, subject to
4 the conditions set forth in the staff recommendations specified bel -- uh, by staff and I would
5 recommend a yes vote.” (PAR 458)

6 Vice Chair Bochco, repeated the misinformation about the CC’s jurisdiction regarding
7 alternatives, but no real discussion ensued with Deputy Director Dettmer, who said “No.”
8 Bochco repeated her question “So you just didn't even look at it, okay. Uh --.” Deputy Director
9 Dettmer responded, “Not -- not in any --” The Vice Chair added “Any significant way.” Deputy
10 Director Dettmer responded “serious analytical way.” (PAR 458-459) The CC could decide to
11 issue a permit for what it determined were safer alternatives.

12 The Vice Chair asked Palmisano if he could explain the “difference between the two casks
13 are and why you chose not to use them.” Palmisano explained the canisters were 5/8 1/2 inch to
14 5/8 inch thick stainless steel, sealed, welded, and put into a concrete overpack. And the concept is
15 that's pulled out, never opened again, and put in a transportation overpack, and shipped by rail.
16 (PAR 459-460) No one asked why a system with no approved transportation was allowed. Then
17 Commissioner Schallenberger asked the CC “why isn't it a condition of finding the permit
18 complete before we proceed.” (PAR 465) She repeated: “The question is, if we have the authority
19 to, uh, on a 20-year permit, uh, add Special Condition 2, and specifically 2-D, why is it we're not
20 asking for that information prior to issuing this permit?” (PAR 466)

21 Deputy Director Dettmer gave this absurd response to the question:

22 Well, if I understand your question correctly -- so, we analyzed the effects for 20
23 years and determined that it gonna remain in a physical condition. **We're hoping**
24 that after 20 years, **hopefully** the stuff will be gone, but what we're basically
25 saying is, at that time, we need to do a reevaluation of the site conditions then
26 'cause things **could** change in 20 years and that we would want new data and a
27 new evaluation then regarding seismic hazards, bluff stability, sea level rise,
28 flooding hazards, things like that. (PAR 466)

26 No one asked how the staff could determine whether the canisters would be maintained
27 when there was no aging management plan. No one asked how the CC could determine the
28 canisters were safe after stating that to do so was beyond CC jurisdiction. No one asked if it was

1 wise to base the permit on what was hoped for in the future.

2 Commissioner Shallenberger noted that there was no system in place to provide “adequate
3 inspection” of the storage casks. Deputy Director again came to SCE’s aid: “So, the -- the -- the
4 issue that we want to look at at 20 years is -- is to make sure that they are movable.” (PAR 468)
5 In other words, the CC approved putting the casks in the ground, not knowing if they could be
6 removed, and waiting 20 years to see **if** they could be removed. Meanwhile, the radioactive fuel
7 requires secure storage for thousands of years. (PAR 309)

8 There was more back and forth on what was going to happen, and what SCE was going to
9 do, but the vote was called and the permit was granted. (PAR 495-499)

10 **IV. THE ORDER IS NOT SUPPORTED BY THE FINDINGS, AND FINDINGS ARE NOT**
11 **SUPPORTED BY THE EVIDENCE (Code Civ. Proc., § 1094.5, subd. (b).)**

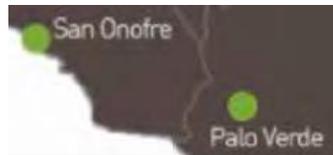
12 For the reasons set forth in the Petitioners’ Reply to the SCE brief, filed herewith, the order is
13 not supported by the findings, and the findings are not supported by the evidence. The CC granted
14 a Coastal Development Permit (permit) until October 2035 while finding in conflict the spent
15 nuclear fuel will remain to at least 2051 and perhaps in perpetuity. There were other conflicts
16 between the findings and the order. The finding SCE plans to move the spent fuel was not
17 supported with a finding a monitoring system will ensure the casks integrity. A finding was made
18 the casks would be moved when the federal government establishes a site but no finding was
19 made that SCE was obligated to find one.

20 The finding the Department of Energy had a statutory obligation to accept commercial spent
21 fuel was unsupported by any legal citation. The finding there is no other off-site storage options
22 was unsupported by a finding that SCE attempted to use the Palo Verde site. There are 51 fuel
23 loaded fuel storage modules above ground. The new storage casks will be put partially
24 underground to provide better performance during seismic events, but no finding was made about
25 the exposure to seismic events of the 51 modules stored above-ground.

26 The findings do not support the permit because there is no “inspection and monitoring”
27 system. The findings do not support the permit because there is no transport cask—it remains to
28 be dsigned and licensed. The findings do not support the order because they misstated the

1 holding of *Pacific Gas and Electric Company State Energy Commission* 461 US 190 (1983)
2 which upheld a total moratorium on new nuclear plants in California. The Supreme court ruled
3 “States retain their traditional responsibility in the field of regulating electrical utilities for
4 determining questions of need, reliability, cost, and other related state concerns.” *Pac. Gas &*
5 *Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 205 (U.S. 1983)
6 The findings that the ISFSI will eventually become threatened by coastal hazards such as erosion
7 or coastal flooding does not support the order under Section 30253 of the Coastal Act which
8 prohibits new developments that necessitate construction of new shoreline protective devices.

9 SCE claims it and CC considered alternatives, repetitively citing the same sources. The
10 CC concluded “alternatives are either unavailable or infeasible.” (PAR 009, 310) However, the
11 CC did not consider whether under Coastal Act § 30108 relocation to the Palo Verde ISFSI could
12 be accomplished in a successful manner within a reasonable period of time taking into account
13 economic and environmental and technological facts.” The proximity is not far from San Onofre,
14 yet away from the coast which presents the issues that threaten the viability of the ISFSI on the
15 San Diego beach. (PAR 299)



16
17
18 Indeed, SCE admitted it was possible for an existing ISFSI like Palo Verde “to amend its
19 license to accept fuel generated off-site.” (PAR 326) Yet no evidence or CC finding was made
20 showing SCE made any such effort to do so.

21 **V. THE COMMISSION DID NOT ACT IN A MANNER REQUIRED BY LAW**

22 In exercising its authority, the CC imposes a Coastal Development Permit requirement and its
23 accompanying review process to protect the shoreline – not to oversee “nuclear safety
24 regulation.” *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. at
25 216. Here, the CC issued its permit to allow burial of 3.6 million pounds of nuclear waste on the
26 shoreline because the CC “did not act in a manner required by law” when it assumed it was
27 preempted from exercising its routine and lawful state authority over land use. Cal. Civ. Code §
28 1094.5(b) (See additional argument in Petitioners’ response to SCE brief, filed herewith, not

1 duplicated for judicial economy)

2 **VI. CONCLUSION**

3 For the foregoing reasons, a writ should issue directing to CC to revoke the permit as issued.

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AGUIRRE & SEVERSON, LLP

Dated: March 21, 2017

/s/Michael J. Aguirre
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