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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN DIEGO

CITIZENS OVERSIGHT, INC., a California non-profit corporation; PATRICIA BORCHMANN, an individual

Petitioners and Plaintiffs

v.

CALIFORNIA COASTAL COMMISSION; SOUTHERN CALIFORNIA EDISON COMPANY, Real Party in Interest; and DOES 1 TO 100;

Respondents and Defendants.

Case No.: 37-2015-00037137-CU-WM-CTL

[Assigned to the Honorable Judith F. Hayes – Department 68]

REAL PARTY IN INTEREST SOUTHERN CALIFORNIA EDISON COMPANY'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF ADMINISTRATIVE MANDATE

Trial Date: March 30, 2017
Time: 10:30 a.m.
Department: C-68

Action filed: November 3, 2015

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STATE REGULATIONS

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FEDERAL REGULATIONS

I. SUMMARY OF ARGUMENT

This action concerns the California Coastal Commission's ("Commission" or "Respondent") approval of Southern California Edison Company's ("SCE") expansion of its safe, secure facility to temporarily store the spent nuclear fuel that was used at the San Onofre Nuclear Generating Station ("SONGS"), which has now been permanently retired. Approximately one-third of SONGS' spent nuclear fuel is already stored in a dry storage facility known as an Independent Spent Fuel Storage Installation ("ISFSI") on the SONGS property pursuant to permits issued by the Commission in 2000 and 2001, while the remaining spent fuel is stored in "wet" storage pools submerged in water. The U.S. Nuclear Regulatory Commission ("NRC") has exclusive jurisdiction to regulate nuclear facilities and has extensive regulations governing the transport, monitoring, and storage of spent nuclear fuel. The federal government (U.S. Department of Energy ("DOE")) also has a statutory and contractual obligation to develop a permanent storage facility to accommodate spent nuclear fuel generated by SONGS and other facilities across the country. To date, however, the federal government has developed no such facility. Further, although efforts are underway to obtain the necessary licenses and permits to develop privately-owned interim storage facilities, no such facility is currently available.

Thus, while SCE is more than willing to transport all the remaining spent nuclear fuel to a storage facility off-site, SCE must implement plans now to store the spent fuel at an on-site facility at SONGS. Accordingly, SCE sought approval from the Commission for a coastal development permit ("CDP") to expand its existing ISFSI to accommodate the spent nuclear fuel that remains in wet storage. The NRC has determined that both wet and dry storage systems are safe. However, industry experts, other public agencies, and environmental groups have expressed a preference for dry storage for several reasons. Unlike wet storage, which involves several active systems and components, dry storage involves passive cooling, making it inherently more reliable. The design of a dry storage facility can also offer greater protection against earthquakes, fire, tsunamis and terrorist threats. Furthermore, placing the spent fuel into canisters for dry storage is the first step to transfer the fuel for storage off-site once a facility becomes available.

Petitioners Citizens Oversight, Inc. and Patricia Borchmann (collectively, "Petitioners") challenge the Commission's approval of the CDP for the expanded ISFSI, alleging the Commission's

environmental review did not adequately evaluate (i) one potential off-site alternative for the ISFSI; (ii) the design technology approved for the ISFSI (the Holtec system); and (iii) the ISFSI monitoring program. Petitioners' claims completely ignore the applicable legal requirements under the California Environmental Quality Act (Pub. Resources Code, §§ 21000 *et seq.*) ("CEQA") and the Coastal Act (Pub. Resources Code, §§ 30000 *et seq.*), as well as the exhaustive analysis conducted by the Commission. The Commission carefully reviewed several off-site alternatives to store the spent fuel temporarily and concluded that federal licensing restrictions and numerous practical obstacles would prevent those alternatives from being developed for many years. The off-site alternative presented by Petitioners in their opening brief fails as a viable alternative for reasons that were already carefully considered by the Commission. With respect to Petitioners' other claims, the Commission considered the Holtec system and confirmed that the NRC, which has exclusive jurisdiction over the licensing of that technology, has studied the long term effects of spent fuel storage and has licensed the Holtec system as a safe design that meets all regulatory requirements. The NRC also has extensive regulations that ensure that SCE will implement a safe monitoring program, and the Commission imposed its own monitoring and inspection requirements to ensure the ISFSI's integrity for future transportability.

Given the substantial evidence supporting the Commission's environmental review and express findings, Petitioners have failed to satisfy their burden of demonstrating that the Commission's decision in approving the CDP is not supported by substantial evidence. Accordingly, SCE respectfully requests that the Court deny Petitioners' Petition for Writ of Administrative Mandate ("Petition") in its entirety.

II. FACTUAL AND PROCEDURAL BACKGROUND[1]

A. Factual Background

1. San Onofre Nuclear Generating Station & On-site Spent Fuel Storage

SONGS occupies an approximately 84-acre site on the coast in northern San Diego County, within the U.S. Marine Corps Base, Camp Pendleton. (PAR 317, RSAR 4296.[2]) The site is subject to

[1] To avoid repetition, this brief does not address the issues addressed by Respondent's trial brief, namely, the adequacy of the Commission's review of environmental impacts and policies under the Coastal Act and the various procedural claims alleged by Petitioners. SCE joins in the Respondent's trial brief.

[2] References to the Petitioners' Administrative Record will be to "PAR ___." References to

a long-term easement granted by the U.S. Department of the Navy. (PAR 317.) SONGS previously consisted of three nuclear power reactors referred to as Units 1, 2, and 3.[3] (PAR 318.) Unit 1 operated from 1968 through 1992, and most significant decommissioning activities have been completed. (PAR 318.) Units 2 and 3 began operating in 1983 and 1984, respectively, and both units were permanently retired (and ceased generating spent nuclear fuel) in 2013. (PAR 318.)

Fuel that is removed from a reactor is initially stored in water-filled pools adjacent to the power plant. (PAR 317.) The pools' water and construction design shield the radioactive material when the fuel has the highest level of radioactivity after being removed from the reactor. (PAR 317.) Once the spent fuel's initial level of radioactivity is reduced, the spent fuel can be transferred to dry storage canisters. (PAR 316, 317, 320.) The NRC has found both wet and dry storage to be safe. (PAR 325; RSAR 10006-18, at 10012.) However, various industry experts, public agencies, and environmental groups express a preference for dry storage for several reasons: (i) placing the fuel into dry storage does not require an active cooling system (PAR 325; RSAR 8048); (ii) dry canister technology is less likely to be affected by seismic activity (PAR 325; RSAR 8048); and (iii) dry storage provides more security against terrorist threats (PAR 325; RSAR 11841, 11860-62; *see also* PAR 40-43, 123, 125-26, 131-32). Further, dry storage is a first step in removing the spent fuel from the site because it must be placed into canisters in order to be accepted for storage off-site. (RSAR 10432-49, 11669-74.) Petitioners do not challenge these advantages of dry storage systems in their opening brief.

In 2000, the Commission authorized demolition of the SONGS Unit 1 structures and the construction of an ISFSI with 19 fuel storage modules. (PAR 318.) The ISFSI was constructed in an area referred to as the "North Industrial Area" at SONGS. (PAR 318.) In 2001, to create additional storage capacity needed for spent fuel from Units 2 and 3, the Commission approved a coastal development permit to allow construction of a larger ISFSI facility. (RSAR 1060-63, 4295.) The expanded ISFSI was integrated into the approved Unit 1 ISFSI. (PAR 318.) Following an extended shutdown period, SCE announced plans to decommission Units 2 and 3 in June 2013. (PAR 318.)

Respondents' Supplemental Administrative Record will be to "RSAR___."

[3] Unit 1 is jointly owned by SCE and San Diego Gas & Electric Company ("SDG&E"). Units 2 and 3 are jointly owned by SCE, SDG&E, and the City of Riverside. As a previous owner, the City of Anaheim has decommissioning liability for Units 2 and 3. (PAR 113, 317.)

2. The Proposed Project

In February 2015, SCE and its co-permittees[4] applied to the Commission for an amendment to the 2001 ISFSI CDP to expand the on-site ISFSI to allow for an additional 75 fuel storage modules (the "Project"). (PAR 316, RSAR 4271-331.) The Project's primary purpose is to move spent nuclear fuel from its current location in wet storage pools in Units 2 and 3 to dry storage within a new ISFSI. (PAR 316.) The existing ISFSI at SONGS currently contains approximately 51 fuel storage modules filled with spent fuel in dry storage from Units 1, 2, and 3. (PAR 316.) The existing ISFSI will soon reach full capacity and cannot accommodate all of the spent fuel currently stored in the wet pools. (PAR 316, 318.)

The new ISFSI is located within the North Industrial Area. (PAR 318.) The Project also includes installation of a new security building, a new perimeter security fence, and associated security equipment within the North Industrial Area. (PAR 318.) Because the proposed ISFSI site is an industrial complex (formerly developed with Unit 1), the area has been disturbed and does not contain any native, natural, or other sensitive habitats. (RSAR 4297.) The Project site is surrounded on all sides by existing industrial structures. (RSAR 4297.)

The Project's ISFSI system is known as "HI-STORM UMAX," manufactured by Holtec International. (PAR 319.) The NRC has approved and licensed the HI-STORM UMAX as a safe system to store spent nuclear fuel. (PAR 346; RSAR 6542-86, 8052-53, 10310-11, 10359-62, 10422-26, 11676-77.) The HI-STORM UMAX is designed to provide superior performance during seismic events, better security, and reduced radiation doses at the site boundary in comparison to competing designs. (PAR 319.) The ISFSI will be constructed partially below grade with a 3-foot thick concrete foundation pad, and encased above ground in a berm composed of concrete and fill. (PAR 319; RSAR

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[4] SCE applied for the Project with the previous and current owners of SONGS (SDG&E, the City of Riverside, and the City Anaheim). (RSAR 4273.) Accordingly, the Commission issued the CDP for the Project to all of the SONGS co-owners. (RSAR 542-43.) Since Petitioners seek rescission of the CDP, all co-permittees would be injured by resolution of this action and are therefore necessary and indispensable parties. (Code Civ. Proc., § 389(a)-(b).) Petitioners' failure to name all necessary and indispensable parties by the statute of limitations (30 days) is a fatal flaw and provides grounds for dismissal of the Petition in full. (*See County of Imperial v. Super. Ct. of Sacramento County* (2007) 152 Cal.App.4th 13, 32-41 (denying petition for writ of mandate alleging CEQA violations when petitioner failed to name all indispensable parties in writ petition); *see also* SCE's Verified Answer, first affirmative defense.)

8068-69, 8083-84.) Using a partially underground dry storage facility provides additional protection against fire and water inundation. (PAR 284, 339-40.) Constructing and operating an ISFSI at SONGS does not require a new license from NRC since such a facility is authorized under the general license already granted to SONGS by NRC. (PAR 323.)

SCE proposes to store the spent nuclear fuel at the new ISFSI only until the fuel can be moved to an off-site interim storage facility or permanent repository established by the federal government pursuant to the DOE's obligation to accept commercial spent fuel. (PAR 316; RSAR 8044-45.) Spent fuel currently in the wet pools is ready to be placed into canisters in dry storage, which is the first step in making the fuel transportable to an off-site facility when such a facility is developed. (RSAR 10445, 11670.) Based on current assumptions regarding the date when an off-site facility will likely become available, as well as the capacity and acceptance rate of such facilities, the ISFSI is proposed to remain in place only through the year 2051. (PAR 316; RSAR 8044-45, 9221-25.) However, SCE plans to be ready to ship spent fuel off-site as soon as either a consolidated interim dry storage facility or a permanent repository for spent fuel opens. (RSAR 10855.)

Before addressing Petitioners' challenges to the Commission's approval of the CDP, SCE is compelled to first address Petitioners' repeated attempts to cast aspersions on SCE instead of addressing legitimate issues. First, Petitioners falsely claim that the proposed Project was necessary only because SONGS' steam generators failed in Units 2 and 3 before those units ceased generating power in 2012. (*See* Opening Br., p. 10.) Yet, the steam generators are entirely irrelevant to the Project before the Commission, as SONGS would have soon exceeded the dry storage capacity in the existing ISFSI even if Units 2 and 3 had continued operating. (*See* RSAR 7929-36.) Therefore, SCE would have sought a permit authorizing expansion of the ISFSI under a similar time frame regardless of whether Units 2 and 3 ceased operations. (RSAR 7930-31.)

Next, Petitioners cite to their "report" concerning the SONGS steam generators as evidence of "malfeasance" that the Commission should have considered during the administrative proceedings for the CDP (Opening Br., p. 11). Yet, by Petitioners' own admission (Opening Br., p. 11), the Commission was aware of these allegations prior to issuing the CDP. (PAR 232-72.) The Court should refrain from second guessing the Commission's weighing of that evidence and instead focus on the

facts the Commission deemed relevant for the evaluation of the Project. Finally, courts largely disfavor the introduction of evidence of alleged instances of bad acts that are not relevant to the matter at hand, especially when such allegations are not tied to any final judgments or convictions. (See *People v. Chatman* (2006) 38 Cal.4th 344, 373 (holding such impeachment evidence should not be permitted because such evidence "other than felony convictions entails problems of proof, unfair surprise, and moral turpitude," and courts "should consider with particular care whether the admission of such evidence might involve undue time, confusion, or prejudice which outweighs its probative value").)

3. Procedural Background

Petitioners filed their Petition on or about November 3, 2015. Pursuant to a stipulation ("Stipulation") entered by the Court on January 25, 2017, Petitioners agreed that they do not seek declaratory relief in this action, only mandamus relief pursuant to C.C.P. Section 1094.5. Petitioners filed an opening brief and partial administrative record ("Petitioners' Administrative Record") on June 8, 2016. Pursuant to the Stipulation, all parties agreed that the Commission would certify the complete administrative record consisting of the Petitioners' Administrative Record and the Respondents' Supplemental Administrative Record. That record was filed and served on February 17, 2017.

III. STANDARD OF REVIEW AND BURDEN OF PROOF

A. Standard Of Review

In reviewing the Commission's environmental review and its determination made under the Coastal Act, the Court must consider whether the Commission committed a "prejudicial abuse of discretion." (*La Costa Beach Homeowners' Assn. v. Cal. Coastal Commission* (2002) 101 Cal.App.4th 804, 814; *Ross v. Cal. Coastal Commission* (2011) 199 Cal.App.4th 900, 921; Code Civ. Proc., § 1094.5; CEQA, § 21168.5.) For the Commission's factual determinations, the Court must determine whether substantial evidence supports the Commission's findings, and the Commission's findings are presumed to be supported by substantial evidence. (*Ross, supra,* 199 Cal.App.4th 900, 921; *Ocean Harbor House Homeowners Assn. v. Cal. Coastal Commission* (2008) 163 Cal.App.4th 215, 226-27; *see also Ebbetts Pass Forest Watch v. Cal. Dept. of Forestry and Fire Protection* (2008) 43 Cal.4th 936, 944 (holding that factual questions are reviewed under the substantial evidence test when evaluating an agency's CEQA review conducted under a certified regulatory program).) Under that

analysis, a court does not pass upon the correctness of an agency's methodologies and conclusions, but instead must determine whether substantial evidence in the record supports those conclusions. (*See* CEQA, § 21082.2, (a), (c); *Federation of Hillside and Canyon Assn. v. City of Los Angeles* (2000) 83 Cal.App.4th 1528, 1259.) Courts should resolve all disputed questions of fact relating to methodology in favor of the lead agency. (*Cal. Native Plant Society v. City of Santa Cruz* (2009) 177 Cal.App.4th 957, 985; *see also Paoli v. Cal. Coastal Commission* (1986) 178 Cal.App.3d 544, 550 (reviewing court "must resolve reasonable doubts in favor of the [Coastal Commission's] findings and decisions").)

Evaluating an agency's determinations for substantial evidence, Courts largely recognize it is the agency's job "to weigh the preponderance of conflicting evidence," and the Court "may reverse [the agency's] decision ***only if***, based on the evidence before it, ***a reasonable person could not have reached the conclusion reached by it.***" (*Ross, supra,* 199 Cal.App.4th at p. 922 (emphasis added) (applying the substantial evidence test to petition for administrative mandamus brought under Section 1094.5 of the Code of Civil Procedure and Section 30801 of the Coastal Act).) A court must uphold a decision supported by substantial evidence even if there is substantial evidence to the contrary. (*Laurel Heights Improvement Assn. of San Francisco, Inc. v. Regents of Univ. of Cal.* (1988) 47 Cal.3d 376, 392-93, 407.) The substantial evidence test applies to the Commission's analysis of project alternatives, evaluation of environmental impacts, and its determination that all feasible mitigation measures were imposed. (*Cal. Native Plant Society*, *supra*, 177 Cal.App.4th at p. 987; *Santa Monica Baykeeper v. City of Malibu* (2011) 193 Cal.App.4th 1538, 1546; *Cherry Valley Pass Acres and Neighbors v. City of Beaumont* ("*Cherry Valley*") (2010) 190 Cal.App.4th 316, 350.)

B. Burden Of Proof

Petitioners bear the burden of proof on all of their claims to show that the Commission abused its discretion in approving the Project without substantial evidence. (*Ross, supra,* 199 Cal.App.4th at p. 921; *Ocean Harbor House Homeowners Assn., supra,* 163 Cal.App.4th at p. 227.)

IV. PETITIONERS HAVE NOT MET THEIR BURDEN TO SHOW THE COMMISSION DID NOT ANALYZE A REASONABLE RANGE OF FEASIBLE ALTERNATIVES

A. Applicable Law

When evaluating the potential environmental impacts of a project under a CEQA certified

regulatory program, the lead agency must consider "[a]lternatives to the activity and mitigation measures to avoid or reduce any significant or potentially significant effects that the project might have on the environment." (CEQA Guidelines, § 15252(a).) With respect to how many alternatives must be considered, Courts have widely held that "[t]here is no ironclad rule governing the nature or scope of the alternatives to be discussed other than the rule of reason," which requires an environmental document to "set forth only those alternatives necessary to permit a reasoned choice and to examine in detail only the ones that the lead agency determines could feasibly attain most of the basic objectives of the project." (*In re Bay-Delta Programmatic Environmental Impact Report Coordinated Proceedings* (2008) 43 Cal.4th 1143, 1163.)

The environmental review document "is not required to address every imaginable project alternative." (*Cherry Valley, supra,* 190 Cal.App.4th at p. 354 (emphasis added).) When the environmental document discusses "a reasonable range of alternatives sufficient to foster informed decisionmaking, it is not required to discuss additional alternatives substantially similar to those discussed." (*Id.* at p. 355.) Lead agencies also have discretion to reject alternatives that are not "feasible" alternatives to the project being considered. (CEQA, §21002; *see also Cal. Native Plant Society, supra,* 177 Cal.App.4th at pp. 998-99.) CEQA defines "feasible" as "capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, legal, social, and technological factors."[5] (CEQA Guidelines, § 15364; CEQA, § 21061.1.) Agencies can consider other factors when addressing the feasibility of alternatives, such as "policy considerations," "site suitability, economic viability," and whether a project proponent can "reasonably acquire, control, or otherwise have access to the alternative site." (*Cal. Native Plant Society, supra,* 177 Cal.App.4th at pp. 982, 1001 (citing CEQA Guidelines, § 15126.6 (f)(1)).)

The substantial evidence test governs both whether a lead agency evaluated a reasonable range of alternatives and whether an agency properly rejected alternatives as infeasible. (*See Cherry Valley, supra,* 190 Cal.App.4th at p. 355 ("[t]he selection of alternatives discussed will be upheld, unless the challenger demonstrates that the alternatives are manifestly unreasonable and that they do not

[5] The Coastal Act includes a nearly identical definition, defining "feasible" as "capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, social, and technological factors." (Coastal Act, § 30108.)

contribute to a reasonable range of alternatives"); *see also Cal. Native Plant Society, supra,* 77 Cal.App.4th at p. 957 (an agency's infeasibility findings are "entitled to great deference," are "presumed correct," and "the reviewing court must resolve reasonable doubts in favor of the administrative findings and determination").)

B. Substantial Evidence Supports The Commission's Findings That It Analyzed A Reasonable Range Of Alternatives And There Were No Feasible Alternatives

As part of its initial proposal for the Project, SCE evaluated a wide range of alternatives to the proposed Project by conducting an extensive study of potential on-site and off-site locations, as well as several design and configuration alternatives for the facility. (PAR 325-328; RSAR 4296, 4300-04.) SCE provided additional analysis for each of those alternatives in response to inquiries from the Commission's staff for further information, including a detailed feasibility study. (RSAR 8042-93, 8095-108.) In total, the Commission considered the following sets of alternatives: (i) a No Action Alternative, which would keep the spent fuel in the Unit 2 and Unit 3 wet storage pools; (ii) four off-site alternatives; and (iii) five on-site alternatives on the SONGS site.[6] (PAR 325-28.) The Commission also analyzed the different time frames by which those alternatives could be implemented. (*Id.*) After careful analysis, the Commission rejected all alternatives as infeasible. (RSAR 560-63.) Petitioners challenge the Commission's findings only for the off-site alternatives.[7] Yet, substantial evidence shows the Commission considered and properly rejected a wide range of off-site alternatives as infeasible for legal, logistical and political reasons. (PAR 309-77; RSAR 560-63.)

The four off-site alternatives analyzed included: (i) shipping the material to an off-site reprocessing facility; (ii) shipping the material to a private storage facility; (iii) shipping the material to another nuclear power plant that had sufficient storage space for spent fuel; (iv) and shipping the material to an off-site ISFSI that SCE could develop. (PAR 325-26.) These alternatives were rejected because: (i) shipping material to a reprocessing facility would not be possible due to "political, legal, and logistical uncertainties," since there are no such facilities currently located in the U.S. (PAR 325);

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[6] SCE also looked at using different types of storage canisters, but that issue is exclusively within the NRC's jurisdiction. (PAR 381.)

[7] Petitioners are barred from raising any claims in their reply brief not argued in their opening brief. (*South County Citizens for Smart Growth v. County of Nevada* (2013) 221 Cal.App.4th 316, 331.)

(ii) shipping the material to a private storage facility was an "unavailable" alternative, since the only NRC-licensed private facility does not have the proper permits to construct the facility (at Skull Valley in Utah) and other proposed facilities are not yet licensed and have not been constructed (potential facilities in New Mexico and Texas) (PAR 325-26); and (iii) shipping the material to another nuclear plant with sufficient space was infeasible because other nuclear plants either do not have adequate storage or do not have licenses from the NRC that allow for the acceptance of spent fuel from other power plants. (PAR 326; *see also* 10 C.F.R. § 72.212.) Thus, even if an operator of another nuclear plant is willing to take possession of the SONGS fuel, the NRC license amendment process would take a number of years. (PAR 326.)

Finally, with respect to the alternative involving SCE developing a new off-site ISFSI, the Commission rejected that alternative because any such off-site ISFSI would depend on SCE being able to identify a suitable site and then obtain the necessary NRC license, which would take many years with no guarantee of a successful outcome. (PAR 326.) More specifically, the Commission evaluated the potential for SCE to construct the ISFSI off-site at the "Mesa" site, which is an SCE-operated, non-nuclear auxiliary facility located within Camp Pendleton immediately north and inland of SONGS. (PAR 326.) However, SCE operates that facility pursuant to a lease with the Navy that is planned to terminate in 2017, and Camp Pendleton representatives informed the Commission that the Marine Corps has other plans for the Mesa location following lease termination. (*Id.*) Moreover, the Mesa site is located outside the current SONGS licensed area, and would require a new site-specific license for an ISFSI. (PAR 326; RSAR 8104.) Thus, the Commission concluded that alternative was not feasible. (PAR 326.) The Commission also addressed a hypothetical ISFSI proposed by Petitioner in the town of Fishel in the Mojave Desert, but concluded that the Fishel alternative was not feasible given similar legal, logistical, and political hurdles. (PAR 9, 90-103.) Thus, the Commission's Findings (at RSAR 560-63) concerning off-site alternatives are supported by substantial evidence. (RSAR 544-616.)

C. Petitioners Fail To Meet Their Burden That The Commission Should Have Concluded That The "Palo Verde" Alternative Was Feasible

Ignoring the applicable legal standards and the substantial evidence in the administrative

record supporting the Commission's Findings, Petitioners alleged that the Commission should have considered one specific alternative—sending the spent nuclear fuel off-site to the Palo Verde Nuclear Generating Station ("Palo Verde") located near Tonapah, Arizona. (Opening Brief, pp. 5-6, 13.) Petitioners' argument fails for several reasons. First, as explained above, the Commission extensively evaluated the potential alternative of storing SONGS' spent fuel at another nuclear facility. (PAR 325-26; RSAR 8048-50, 8095-108.) The Commission expressly found that existing off-site nuclear plants either do not have adequate storage or cannot accept spent fuel from other power plants based on their existing licenses. (RSAR 561-62.) The Commission further recognized that the process for an existing facility to amend its existing license to accept SONGS' spent nuclear fuel would be controversial and take many years, preventing the project from "being accomplished within a reasonable timeframe." (PAR 561.) Based on that evidence, the Commission found that off-site alternatives such as Palo Verde were infeasible. (*Id.*)

Second, Petitioners provide no evidence that the Palo Verde license could accept fuel from off-site facilities, such as SONGS. (*See* Opening Br., p. 6, citing only to an email at PAR 273 that provides no substantive information on Palo Verde.) Nor do Petitioners provide any evidence that the majority owners of the Palo Verde facility would be willing to take possession of the SONGS' spent nuclear fuel and proceed with the lengthy regulatory process to amend their NRC license to accept fuel from a different facility (SCE has only 15% ownership in Palo Verde; SCE Answer, para. 43). Petitioners have also failed to show how the Palo Verde alternative is substantially different from the off-site alternatives that the Commission expressly evaluated, including the alternative of another nuclear facility taking SONGS' spent fuel. Case law is clear that a lead agency need not discuss additional alternatives that are "substantially similar" to those already evaluated. (*See Cherry Valley, supra,* 190 Cal.App.4th at pp. 355.)

Third, to support their arguments about the Palo Verde location, Petitioners rely on speculation and evidence outside of the administrative record. (Opening Br., pp. 5-6.) While Petitioners represent to the Court that the information concerning the Palo Verde facility that is discussed at pp. 5-6 of their Opening Brief was provided to the Commission, Petitioners only provided a single email to the Commission that mentions the Palo Verde facility in one sentence (stating SCE should find another

site, "*e.g.* Palo Verde"). (PAR 273-74.) Petitioners' other evidence offered to this Court could have been presented before the Commission approved the CDP. Indeed, Petitioners showed they were capable of presenting such information to the Commission as they provided a report to the Commission concerning the off-site location near Fishel in the Mojave Desert. (*See* PAR 1-277, at 90-103.) With respect to the Palo Verde facility, however, Petitioners did not provide to the Commission any evidence except for one email. (PAR 273-74.) Given the California Supreme Court's decision prohibiting the use of extra-record evidence in cases challenging an agency's administrative decision, this Court should not consider Petitioners' other proffered evidence concerning the Palo Verde facility. (*See* the Commission and SCE's Joint Objection to Petitioners' Request for Judicial Notice; *see also* Code Civ. Proc., § 1094.5(e); *Western States Petroleum Assn. v. Super. Ct. of Los Angeles County* (1995) 9 Cal.4th 559, 578.)

Finally, Petitioners failed to exhaust their administrative remedies concerning the potential Palo Verde alternative. The one email submitted by Petitioners to the Commission only mentioned the Palo Verde facility in a single sentence and provided no information as to how that facility may differ from the other off-site nuclear facilities considered by the Commission (it does not). Absent any such information, Petitioners failed to satisfy their burden under the exhaustion doctrine. (*McAllister v. County of Monterey* (2007) 147 Cal.App.4th 253, 275 ("[t]he doctrine [of administrative exhaustion] has been specifically applied to review of Coastal Commission actions"); Coastal Act, § 30801.) The exhaustion doctrine requires that petitioners raise specific issues during the administrative proceeding because an agency "is entitled to learn the contentions of interested parties before the litigation arises." (*Hagopian v. State of Cal.* (2014) 223 Cal.App.4th 349, 371.) An objection must be "sufficiently specific so that an agency has the opportunity to evaluate and respond to them." (*See Sierra Club v. City of Orange* (2008) 163 Cal.App.4th 523, 535-36.) Petitioners bear the burden of demonstrating compliance with the exhaustion doctrine. (*Id.*) Under this doctrine, parties cannot make only a "perfunctory or skeleton showing in the [administrative] hearing and thereafter obtain an unlimited trial *de novo* on expanded issues, in the reviewing court." (*Citizens for Responsible Equitable Environmental Development v. City of San Diego* (2011) 196 Cal.App.4th 515, 527-28.) Citing only to one line in an email, Petitioners have not met their burden to show they fairly apprised the

Commission of their allegations concerning the Palo Verde alternative.

V. SUBSTANTIAL EVIDENCE SUPPORTS THE COMMISSION'S FINDINGS THAT THE HOLTEC SYSTEM IS SAFE WIH RESPECT TO COASTAL HAZARDS

Petitioners' challenge to the Commission's analysis concerning the Holtec technology that will be used at the ISFSI is also unfounded. As detailed in the Commission's staff report, the Holtec system is licensed for use by the NRC, and there are no clear environmental or practical benefits provided by any other system that is already licensed by the NRC. (RSAR 563.) The Commission reviewed the Holtec system and noted that the system and design provide for "better performance during seismic events, provide better security, and reduce radiation doses at the site boundary in comparison to competing designs." (RSAR 554-55, 563.) The Holtec system also meets the NRC regulatory requirements to address unexpected conditions or events. (RSAR 8083-84, 8068-69, 10515.)

Petitioners' unsupported allegations that the Holtec system is unsafe fail for two reasons. First, nuclear safety and radiological issues are within NRC's exclusive jurisdiction, and the NRC has determined that the Holtec system meets all of NRC's safety and monitoring requirements. (PAR 323; RSAR 592, 6542-86, 10359-62, 10423, 11676.) As confirmed by a representative of the NRC at the Commission hearing, "we are confident in the UMAX system." (PAR 400.) The substantial evidence considered by the Commission concerning the Holtec system, coupled with the NRC's licensing of the Holtec system, fully supports the Commission's findings that the ISFSI's design and technology are safe with respect to those matters within the Commission's jurisdiction (i.e., coastal hazards).

Second, the alleged evidence cited by the Petitioners does not undermine the substantial evidence that supports the Commission's determination. Petitioners cite only to comment letters submitted by Ms. Donna Gilmore[8] as alleged evidence that the Holtec system will not address coastal corrosion issues, cannot be inspected, and does not have an adequate warranty. (Opening Br., p. 14.) Those concerns, however, were fully addressed by the various analyses submitted by SCE to Commission staff. (*See e.g.*, RSAR 6587-89, 6602, 6612, 6668-69, 6674-92, 7334, 8052-53, 8068-69, 10422-26.) Petitioners also refer to a cask storage system in Germany (the "CASTOR" system) that

[8] While Petitioners allege Ms. Donna Gilmore is a "highly regarded student of the Holtec cask system," Petitioners provided no credentials that speak to Ms. Gilmore's alleged expertise in this subject area to the Commission. (Opening Br., p. 14.)

"appear[s] to be a safer feasible alternative" to the Holtec system. (Opening Br., p. 14.) The Commission inquired about the safety record of that system, but concluded that the CASTOR system is not licensed by the NRC for the storage or transport of spent fuel in the U.S. (RSAR 563, 8051-52, 11670.) Without a license for use in the U.S., the Commission found that the CASTOR system was not a feasible alternative for the ISFSI to pursue. (CEQA, § 21061.1; CEQA Guidelines, § 15364; Coastal Act, § 30108.) Finally, Petitioners' citations to alternative storage systems do not undermine the substantial evidence supporting the Commission's conclusions concerning the Holtec system because when faced with different expert opinions on a subject matter, lead agencies have wide discretion to choose between the merits of differing expert opinions. (*See* CEQA Guidelines, § 15151; *Oakland Heritage Alliance v. City of Oakland* (2011) 195 Cal.App.4th 884, 900.) Therefore, the Commission properly exercised its discretion in relying on the expertise of the NRC to conclude the Holtec system provides a safe storage mechanism for the ISFSI.

VI. THE COMMISSION PROPERLY RELIED ON NRC'S REGULATIONS CONCERNING AGING MANAGEMENT PLANS AND EVEN IMPOSED ITS OWN MONITORING REQUIREMENTS

Although Petitioners do not cite to any statutory authority or case law concerning monitoring requirements, Petitioners challenge the Commission's decision on the basis that SCE did not have what is known as an "Aging Management Plan" ("AMP") in place when the Commission approved the CDP. Yet again, Petitioners ignore the applicable regulatory scheme as well as the conditions that the Commission actually imposed on the Project. (*See* RSAR 521-43.) The NRC (not the Commission) has exclusive jurisdiction over radiological and nuclear safety issues and has comprehensive regulations that impose extensive maintenance, reporting, and monitoring requirements. (PAR 322-23; 10 C.F.R. Part 72.) The NRC studied the environmental impacts of long term storage of spent nuclear fuel over 60- and 100-year timeframes through a full Environmental Impact Study under the National Environmental Policy Act ("NEPA") (42 U.S.C. §§ 4321 *et seq.*) and concluded that long term storage of spent nuclear fuel is safe when stored in compliance with NRC's regulations. (RSAR 10498.) As to the Holtec system, the NRC "has determined that the HI-STORM UMAX Canister Storage System, when used within the requirements of the proposed [Certificate of Compliance], will safely store SNF [Spent Nuclear Fuel] and prevent radiation releases and exposure consistent with

regulatory requirements, including seismic requirements." (RSAR 10424-25.)

As part of those regulations, the NRC requires an ISFSI license holder to implement an AMP that will ensure all ISFSI components are effectively monitored so the spent fuel can be safely removed for off-site transport. (RSAR 10512-13; *see* 10 C.F.R. § 72.240.) Based on its environmental study, its monitoring regulatory scheme, and observing the successful operation of existing ISFSI components at other sites over the last 30 years, the NRC has determined that AMPs are not required until the initial ISFSI license is up for renewal. (RSAR 10423-26, 10513; *see also* PAR 473-78 (testimony to the Commission from NRC's Director of Spent Fuel Management, explaining the NRC has built a regulatory framework that includes "aggressive aging management programs").) Accordingly, the NRC requires ISFSI operators to implement AMPs after the ISFSI has been in service for more than 20 years, not when an ISFSI is first constructed. (PAR 320-21; RSAR 10512-13; *see also* 10 C.F.R. § 72.240.)

SCE has taken a more proactive approach to management of the storage facility than is required under the NRC regulations by supporting the development of the UMAX AMP shortly after the fuel is completely transferred to the ISFSI, well *in advance* of the NRC requirement to complete the AMP at the 20-year mark. (PAR 320; RSAR 10513.) In establishing its AMP, SCE will focus on engineered controls (i.e., conservative design, material selection and fabrication controls), operational controls (e.g., inspection and monitoring), and mitigation plans that address potential degradation. (PAR 320-21; RSAR 10508-15.) Going beyond regulatory requirements, SCE will use a test canister that will be empty and placed in the same environment as the loaded system to provide additional monitoring. (PAR 321.) To further ensure the fuel storage casks remain in a physical condition sufficient to allow for future transport, the Commission imposed its own requirements through CDP Condition of Approval Number 7, which requires SCE to develop by October 2022 an inspection and maintenance program that will be reviewed and approved by the Commission. (RSAR 551, 581-82.)

Petitioners do <u>not</u> cite to a single statute, regulation, or case decision to support their challenge concerning the AMP. And for good reason because none exist. To protect against the potential environmental impacts of a project, CEQA expressly authorizes lead agencies to rely on the regulatory schemes of other agencies charged with protecting the environmental resource at issue, such as the

NRC's safety and monitoring regulations. (*See Clover Valley Foundation v. City of Rocklin* (2011) 197 Cal.App.4th 200, 236 ("[a] condition requiring compliance with environmental regulations is a common and reasonable mitigating measure"); *see also North Coast Rivers Alliance v. Marin Municipal Water Dist. Bd. of Directors* (2013) 216 Cal.App.4th 614, 647.) The NRC has exclusive responsibility over radiological safety aspects of the ISFSI, and SCE will comply with all NRC regulations concerning long term inspections and monitoring, even in advance of NRC's deadline requirements. (RSAR 556-58.)

Without law to support their argument, Petitioners instead rely on a comment submitted by Ms. Gilmore to the Commission during the administrative proceedings concerning the dry storage canisters in the existing ISFSI facility. (Opening Br., pp. 15-16.) Yet, as the Commission explained in response to that comment, the maintenance and monitoring of the existing ISFSI storage is "primarily a matter of radiological safety, which is under the exclusive jurisdiction" of the NRC, and the Commission is preempted from imposing regulatory requirements concerning "radiation hazards and nuclear safety." (PAR 10-11.) Moreover, the expert federal agency with exclusive jurisdiction over nuclear hazards and safety concluded that an ISFSI does not need an AMP until 20 years after its initial license to remain safe. (RSAR 581, 592.) The NRC has expressly found that compliance with its regulations for storage systems protects the public from a variety of risks (e.g., degradation of the canisters). (RSAR 10424-26.) The Commission had discretion to weigh the evidence and to rely on the NRC's expertise and regulations to ensure the timeline of the ISFSI's AMP is safe. (*Oakland Heritage Alliance, supra,* 195 Cal.App.4th at 900; *Ross*, *supra*, (2011) 199 Cal.App.4th at 922.)

VII. CONCLUSION

For the foregoing reasons, SCE respectfully requests the Court deny the Petition in its entirety.

Dated: March 3, 2017

ALSTON & BIRD, LLP

By _____
Ed Casey
Attorneys for Real Party in Interest

PROOF OF SERVICE

I, Yolanda S. Ramos, declare:

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is Alston & Bird LLP, 333 South Hope Street, Sixteenth Floor, Los Angeles, California 90071. I am over the age of eighteen years and not a party to the action in which this service is made.

On March 3, 2017, I served the document(s) described as **REAL PARTY IN INTEREST SOUTHERN CALIFORNIA EDISON COMPANY'S BRIEF IN OPPOSITION TO VERIFIED PETITION FOR WRIT OF ADMINISTRATIVE MANDATE** on the interested parties in this action by enclosing the document(s) in a sealed envelope addressed as follows:

SEE ATTACHED SERVICE LIST

☐ BY MAIL: I am "readily familiar" with this firm's practice for the collection and the processing of correspondence for mailing with the United States Postal Service. In the ordinary course of business, the correspondence would be deposited with the United States Postal Service at Alston & Bird LLP, 333 South Hope Street, 16th Floor, Los Angeles, CA 90071 with postage thereon fully prepaid the same day on which the correspondence was placed for collection and mailing at the firm. Following ordinary business practices, I placed for collection and mailing with the United States Postal Service such envelope at Alston & Bird LLP, 333 South Hope Street, 16th Floor, Los Angeles, CA 90071.

☒ UPS NEXT DAY AIR I deposited such envelope in a facility regularly maintained by UPS with delivery fees fully provided for or delivered the envelope to a courier or driver of UPS authorized to receive documents at Alston & Bird LLP, 333 South Hope Street, 16th Floor, Los Angeles, CA 90071.

☐ BY FACSIMILE: I telecopied a copy of said document(s) to the following addressee(s) at the following number(s) in accordance with the written confirmation of counsel in this action.

☒ BY ELECTRONIC MAIL TRANSMISSION WITH ATTACHMENT: On this date, I transmitted the above-mentioned document by electronic mail transmission with attachment to the parties at the electronic mail transmission address set forth on the attached service list.

☒ [State] I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

☐ [Federal] I declare under penalty of perjury that the foregoing is true and correct.

Executed on March 3, 2017, at Los Angeles, California.

Yolanda S. Ramos

Citizens Oversight, Inc., et al., v. California Coastal Commission, et al.
San Diego County Superior Court, Case No. 37-2015-00037137-CU-WM-CTL

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