Sabrina D. Venskus (SBN 219153)
VENSKUS & ASSOCIATES, A.P.C.
1055 Wilshire Boulevard, Suite 1996
Los Angeles, California 90017
Telephone: (213) 482-4200
Email: venskus@lawsv.com

Attorneys for Plaintiff and Petitioner,
The Samuel Lawrence Foundation

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

THE SAMUEL LAWRENCE FOUNDATION, a California Non-Profit Public Benefit Corporation, Plaintiff and Petitioner, vs. CALIFORNIA COASTAL COMMISSION, an agency of the State of California and DOES 1 through 20, inclusive, Defendants and Respondents. ______________________________ SOUTHERN CALIFORNIA EDISON, SAN DIEGO GAS & ELECTRIC COMPANY, CITY OF RIVERSIDE, CITY OF ANAHEIM, and ROES 1 through 20, inclusive, Real Parties in Interest.	CASE NO.: 19STCP05431 **PETITIONER'S REPLY BRIEF**

Table of Contents

Table of Authorities 4

I. THE OPPOSITION WRONGLY RE-FRAMES PETITIONER'S CHALLENGE IN AN EFFORT TO OBTAIN A MORE FAVORABLE STANDARD OF REVIEW 6

II. THE OPPOSITION ATTEMPTS TO CONDUCT THE REQUIRED ANALYSIS IN ITS TRIAL COURT BRIEF BUT THE ANALYSIS IS DIRECTED AT THE WRONG AUDIENCE 6

III. THE OPPOSITION SERIALLY USES "RED HERRINGS" AND "STRAW MEN" TO DEFLECT FROM THE ISSUES RAISED BY PETITIONER 9

   a. The Opposition overplays the NRC Card ....
   b. The Opposition brushes Coastal Act § 30250 under the rug. 9
   c. The Opposition "points fingers" at the State Lands Commission's EIR to distract from the Respondent's failure to appropriately analyze the project under the Coastal Act. 14
   d. The Opposition claims "No Worries," even though SCE should know better...16

IV. IN APPROVING SPECIAL CONDITION 3, RESPONDENT FAILED TO PROCEED IN MANNER REQUIRED BY LAW BECAUSE IT DEFERRED THE ANALYSIS OF THE POTENTIAL ON-SITE LOCATIONS FOR ISFSI RELOCATION...17

   a. The Opposition is wrong that Respondent made a finding that it was too speculative to analyze potential on-site locations. 17
   b. Respondent knew the majority of above and below grade systems, structures and components ("SSC") would be removed and was only uncertain about what below-grade SSCs would be removed from the Containment Dome Area – which does not change Respondent's knowledge as to other portions of the site...19

V. THE OPPOSITION FAILS TO ESTABLISH THAT RESPONDENT HAS NOT ABUSED ITS DISCRETION BY APPROVING THE INSTANT CDP WHICH NULLIFIED CDP 9-15-0228 SPECIAL CONDITION NO. 7 20

VI. CONCLUSION 21

Table of Authorities

Case Law

Alliance of Small Emitters/Metal Industry v. South Coast Air Quality Management Dist.
(1997) 60 Cal.App.4th 55 17

Banning Ranch Conservancy v. City of Newport Beach
(2017) 2 Cal. 5th 918 6

Berkeley Keep Jets Over the Bay Com. v. Board of Port Cmrs.
(2001) 91 Cal. App. 4th 1344 ....8, 20

Cadiz Land Co. Inc. v. Rail Cycle, L.P.
(2000) 83 Cal.App.4th 74 17

Cal. Native Plant Society v. Cty. of Santa Cruz
(2009) 177 Cal.App.4th 957 6

Californians for Alternatives v. Dept. of Food & Agriculture
(2005) 136 Cal.App.4th 1 12

Citizens Opposing a Dangerous Environment v. County of Kern
(2014) 228 Cal.App.4th 360 12

Communities for a Better Environment v. City of Richmond
(2010) 184 Cal.App. 4th 70 7

Ebbetts Pass Forest Watch v. Department of Forestry & Fire Protection
(2008) 43 Cal. 4th 936 6

Iverson v. Muroc Unified Sch. Dist.
(1995) 32 Cal. App. 4th 218 14

Laurel Heights Improvement Assn. v. Regents of University of California
(1988) 47 Cal. 3d 376 ....8, 9, 20

Lessee of Ewing v. Burnet
(1837) 36 U.S. 41 13

Pacific Gas & Electric Co. v. State Energy Com.
(1983) 461 U.S. 190 ....10, 11

Public Watchdogs v. So. Cal. Edison
(9th Cir. 2020) 984 F.3d 744 ....10, 11

Sierra Club v. County of Fresno
(2018) 6 Cal. 5th 502 ....6, 9, 16

Topanga Assn. for a Scenic Community v. County of Los Angeles
(1974) 11 Cal.3d 506 9

Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova
(2007) 40 Cal.4th 412 7

Administrative Law

2014 Cal. PUC LEXIS 554
(Cal. P.U.C. November 20, 2014)..16

Statutes

<u>*Public Resources Code*</u>
§ 25524.1..11
§ 25524.2..11, 17
§ 30106 13
§ 30232..15
§ 30250..*passim*
§ 30253..13, 15
§ 30604..14

Regulations

<u>*California Code of Regulations, Title 14*</u>
§ 15251(c) 14

<u>*Code of Federal Regulations, Title 10*</u>
§ 71..11
§ 71.85..12
§ 72..12
§ 72.96..12
§ 72.97..12
§ 72.98..12

I. THE OPPOSITION WRONGLY RE-FRAMES PETITIONER'S CHALLENGE IN AN EFFORT TO OBTAIN A MORE FAVORABLE STANDARD OF REVIEW

Petitioners' challenges are to the adequacy or omission of analyses by Respondent Coastal Commission. Respondent and Real Parties in Interest wrongly try to frame the case as one solely of substantial evidence. The Opposition (hereinafter "Opp.")[1] cites *Cal. Native Plant Society v. Cty. of Santa Cruz* (2009) 177 Cal.App.4th 957 ("*Native Plant*"), suggesting that the question of adequate analysis is reviewed for substantial evidence and not de novo. (Opp. 18:14-16). To the extent that *Native Plant*, a 2009 appellate court case, holds that the challenge to the adequacy of analysis should be reviewed under the substantial evidence standard, the case is wrong, as clarified by the Supreme Court in 2018 *Sierra Club v. County of Fresno* (2018) 6 Cal. 5th 502, 511-514 ("*Friant Ranch*").

The opposition also cites *Ebbetts Pass Forest Watch v. Department of Forestry & Fire Protection* (2008) 43 Cal. 4th 936 ("*Ebbetts Pass*"), but that case supports Petitioner. There, Petitioner's claim was that the Supreme Court needed to review the regulatory functional equivalent of an EIR (there a THP) **de novo** because Petitioner's challenge was to the assessment of cumulative impacts. The Supreme Court agreed. (*Ebbetts Pass,* at 949.) As stated in Petitioner's opening brief, the Supreme Court has made clear that "the standard of review applicable to a challenge to a certified regulatory program's environmental document is the same as that applied to an EIR under CEQA." (OB: 11:7-10). Thus, because Petitioner's challenge is to the adequacy of analysis in the CDP staff report, it should be reviewed de novo. (*Friant Ranch, supra,* 6 Cal. 5th 502, 511-514*; Banning Ranch Conservancy v. City of Newport* Beach (2017) 2 Cal. 5th 918, 935.)

II. THE OPPOSITION ATTEMPTS TO CONDUCT THE REQUIRED ANALYSIS IN ITS TRIAL COURT BRIEF BUT THE ANALYSIS IS DIRECTED AT THE WRONG AUDIENCE

The Opposition takes up a large amount of space explaining how the evidence supports a finding that destruction of the spent fuel pools is consistent with the Coastal Act Chapter 3 policies. Without conceding as such, while the opposition

---

[1] The Joint Opposition Brief filed by Respondent and Real Parties in Interest is herein referred to as "Opp" or "Opposition." Petitioner's Opening Brief is herein referred to as "OB." Citation to briefs is made by page and line number as follows: X: Y, where X is the page number and Y is the line number(s). "AR" refers to the Administrative Record.

brief may present a commendable analysis of the issue of whether the spent fuel pools should be retained or some other repackaging facility should be provided, this analysis was not contained in the staff report, as it should have been. Respondent cannot attempt to cure its deficient analysis below by presenting the analysis in its briefing to the superior court judge. (*Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 443 [The question is therefore not whether the project's significant environmental effects *can* be clearly explained, but whether they *were*.]) Conducting the analysis at the trial court stage is too late. (*Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App. 4th 70,88 [adequate analysis must be presented to the decision maker; not belatedly in the opposition brief].)

The analysis of the evidence cited in the Opposition and the Opposition's conclusion that the pools are unnecessary (Opp. 25:22-27:15), does not appear anywhere in Respondent's staff report, addendum or in the transcript for the CDP 9-19-0194 hearing. Neither is there even a mention of the NRC webinar in the CDP staff report, which the Opposition spends approximately four (4) pages addressing and analyzing to support Respondent's decision. (Opp. at pp. 19, 25, 27-29.)

The Opposition states that the pools could not be utilized for repackaging even if SCE wanted to because the current NRC license as amended on January 9, 2018 prevents the pools from being utilized for storage. (Opposition 26:15-23.) This explanation is also not in the CDP staff report. Further, nothing in the cited evidence says the pools could not be used for repackaging. Storage is not the issue here: whether Respondent analyzed retaining the pools for **repackaging, not for storage** and if the pools are to be demolished, whether an alternative repackaging facility should be constructed, is the issue. (E.g., OB 18:9-14.)

The Opposition ignores Petitioner's point that the CDP staff report is to be the functional equivalent of an EIR with respect to reviewing and analyzing impacts to coastal resources and requiring mitigation measures or feasible alternatives to lessen significant adverse impacts. (OB, pp. 9-10; AR 83-84.)

The Opposition says that the Commission considered whether the spent fuel pools were *necessary* for repackaging. (Opp. 25:21-22). While that is not precisely Petitioner's argument – rather the argument is that there should have been an analysis of some

repackaging option before the spent fuel pools were permitted to be demolished by the Commission – the topic was never addressed or analyzed in the CDP staff report or its addendum. This is clear from a reading of the staff report and the addendum, and also the fact the Opposition can cite to no page of the staff report or addendum in support of its claim that this important topic was analyzed. While the Opposition does cite to AR 10095-10097, those pages demonstrate no such analysis took place. These pages are devoted to an Inspection and Monitoring Program that was yet to come after approval of the decommissioning and thus destruction of the pools. "Environmental review which comes too late runs the risk of being simply a burdensome reconsideration of decisions already made and becoming the sort of post hoc rationalization to support action already taken, which our high court disapproved in *Laurel Heights I, supra*, 47 Cal. 3d at page 394" (*Berkeley Keep Jets Over the Bay Com. v. Board of Port Cmrs.* (2001) 91 Cal. App. 4th 1344, 1359.)

The Opposition cites to a SCE letter, dated August 14, 2019, addressed to Commission staff regarding feasibility and necessity of retaining the spent fuel pools. (Opp. 26:23-25.) This letter is sent approximately six weeks before the staff report was published. (See AR 7320 [August 14, 2019 email to staff]; 7321-7326 [SCE's information bulletin]). It was not appended to the staff report (AR 25, 85-87), and none of the information is contained in the staff report or addendum. While this letter may contain some evidence of feasibility or necessity, other evidence on the issue exists as well. (See OB 16:2-14; see also e.g., Lochbaum Decl., ISO Petitioner's TRO ¶ 10 [The NRC approves license amendment requests quite readily]). Yet the Commissioners were not given the benefit of analysis of the evidence in order to make an informed decision.[2] .

Commission staff was on advanced notice that risks relative to destroying the spent fuel pools on repackaging and transportability of SFAs, and alternatives, such as retaining one pool or building a hot cell, was an important Coastal Act issue. It was also raised by Petitioner's representatives to coastal staff, and followed up in a letter dated October 11,

---

[2] Compare the lack of analysis in the staff report with respect to the individual and cumulative effects of demolishing the spent fuel pools with that, for example, of the effects of backfilling holes with different kinds of soils after removal of concrete infrastructure. (AR 54-56). With respect to the former there is no analysis. With respect to the latter, there are three pages of analysis resulting from coastal commission-requested studies and reports. One might ask, what issue is more important: ensuring spent nuclear fuel will be moved off the beach, or ensuring the right kind of dirt fills the holes?

2019 to the Commission in advance of the October 17, 2019 hearing. (AR 8269-8292). Further, requests to analyze the effects of demolishing the pools on the ISFSIs and transportability of the SFAs were raised in numerous other pre-staff report communications. (See e.g., AR 8259, 8260; 8633, 8639-8640; 9930.) Yet the staff report on the CDP was silent on this issue, the result being that the Commissioners were not presented with sufficient analysis so that they could make an informed decision regarding the adverse effects of approving destruction of the spent fuel pools or the alternative or mitigation measure of requiring a hot cell be built in lieu of preserving the spent fuel pools.[3]

III. THE OPPOSITION SERIALLY USES "RED HERRINGS" AND "STRAW MEN" TO DEFLECT FROM THE ISSUES RAISED BY PETITIONER

a. The Opposition Overplays the NRC Card

The Opposition suggests that the NRC has exclusive jurisdiction over ISFSIs, as if the Commission has no say over the topic. (Opp. 9:25-27, etc.) This is belied by the record and the Opposition brief itself. As just one example, the Opposition points out that "SCE sought

---

[3] Statements from Respondent's commissioners at the hearing on CDP 9-19-0194 (Opp. 22:2-4) were so conclusory in nature that they do not meet the *Topanga* standard of showing the analytical road map from evidence to conclusion. (*Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 516-517 ["Among other functions, a findings requirement serves to conduce the administrative body to draw legally relevant sub-conclusions supportive of its ultimate decision; the intended effect is to facilitate orderly analysis and minimize the likelihood that the agency will randomly leap from evidence to conclusions….Absent such road signs, a reviewing court would be forced into unguided and resource-consuming explorations; it would have to grope through the record to determine whether some combination of credible evidentiary items which supported some line of factual and legal conclusions supported the ultimate order or decision of the agency…. Moreover, properly constituted findings…<u>also serve a public relations function by helping to persuade the parties that administrative decision-making is careful, reasoned, and equitable</u>" (emphasis added)]; see also *Friant Ranch* at 518 [citing *Laurel Heights I*). Answers by a self-interested applicant at the hearing, here SCE, is not sufficient analysis of an issue. This is especially true where the issue is identified as significant by a Commissioner. (AR 5155, [Commissioner Wilson: 2015 is a long time ago in terms of what we know now about sea level rise and accidents with canisters and the ISFSI location and removability of the canisters is of concern.]). The analysis of all of the available evidence on the issue should have been in the staff report for the Commissioners to consider so they could make appropriate findings and a truly informed decision.

and obtained the necessary federal and state approvals to construct two on-site ISFSIs to store spent fuel. (Opp. 10:17-18). If the NRC really had exclusive jurisdiction over the ISFSIs, then no state approvals would be necessary. Other examples abound throughout the opposition brief. (See e.g., Opp. 31:17-18 [conceding that actions relating to ensuring "the storage casks could be moved" do not relate to nuclear safety, thereby undermining credibility to its pre-emption argument].) The record contradicts the Opposition's position also. (AR 362, 363, 376, 397-398 399, [Commission referenced preemption when approving the Holtec ISFSI in CDP 9-15-0228. It acknowledged the *dual* federal and state jurisdiction to regulate nuclear power plants; and Commission imposing Special Conditions with respect to nuclear fuel storage and transportation].)

In order to deflect and dodge, the Opposition claims that Petitioner is attempting to dictate radiological safety and therefore invade the NRC's jurisdiction (Opp. 19:22-24.) This is a strawman. The point is not "how" fuel is stored, but rather "where" it is stored. Further, this is about transportability of the spent fuel, not whether it is radiologically hazardous; there is no dispute that nuclear fuel is radiologically hazardous. Coastal protection is not NRC authority. It is the Coastal Commission's authority and responsibility to ensure that any leaking canisters on the beach can be dealt with. That requires a canister handling capability. By doing so, the Commission is not encroaching on NRC jurisdiction because it is not dictating the radiological safety aspects of the fuel handling facility; just the need for there to be an actual facility instead of a promise, and the reason is to protect the coast. A good – though not perfect analogy – is how cooling is decided for nuclear reactors. Environmental permits at the state level drive the choice as to whether a plant will have a cooling tower, or a direct flow to a river or ocean. (*See also* e.g., AR 40; 64 [SONGS required to have a State Water Quality Control Board permit to discharge radiologically-contaminated water].) The NRC does not decide whether the plant will have a cooling tower, or will discharge contaminated water into a state water body. (See e.g., *Pacific Gas & Electric Co. v. State Energy Com*. (1983) 461 U.S. 190, 212, fn 24.)

The Opposition cites *Public Watchdogs v. So. Cal. Edison* (9th Cir. 2020) 984 F.3d 744 ("*Public Watchdogs"*), for the proposition that the NRC has exclusive jurisdiction over construction and operation of nuclear power plants and storage of nuclear fuel, claiming that the case "affirmed" this "exclusive" jurisdiction. (Opp. 13:23-24.) The case did no such

thing; there was not even a holding regarding jurisdiction in *Public Watchdogs.* The case was about whether an organization's challenge was brought in the correct court. (*Id.* at 752-753, 756.) In providing context for the case, the appellate court provided a general description of the NRC's licensing and regulatory powers but did not give any indication that its jurisdiction was exclusive. (*Id.* at 748-751.) The case has nothing to do with preemption.

The Opposition also cites *Pacific Gas & Electric Co. v. State Energy Com*. (1983) 461 U.S. 190 in support of its exclusive jurisdiction claim. (Opp. 13:22-25.) The case supports Petitioner and undermines the opposition.

The issue in *Pacific Gas* was whether the federal Atomic Energy Act preempted the State of California from passing a moratorium on the building of new nuclear plants until the federal government developed, approved and demonstrated a technology for the permanent disposal of nuclear waste.[4] (*Id.* at 195.) The United States Supreme Court articulated the three bases for preemption 1) express-preemption, based on pre-emptive language contained in a statute, 2) field-preemption, based on a federal regulatory scheme so pervasive as to make a reasonable inference that congress left no room for the states to supplement it, and 3) conflict-preemption, where a state law actually conflicts with a federal law because compliance with both is a physical impossibility or where the state law stands as an obstacle to the accomplishment of the full purpose and objective the federal law. (*Id.* at 203-204.) The Supreme Court found that none of the three bases applied to the California law or its interpretation. The Court held that Congress has preserved the **dual regulation** of nuclear-powered electricity generation: the states exercise their traditional authority over the need for additional generating capacity, the type of generating facilities to be licensed, land use, ratemaking, and the like (i.e., states may still act under and in matters related to their police powers). (*Id* at 205-206, 209, 211-212.) The Supreme Court said that even when it comes to safety issues, states may act to impose certain siting and land-use requirements for nuclear power plants. (Id at 212, fn 25.)

The Opposition does not explain which, if any, of the three bases for finding pre-emption that were articulated in *Pacific Gas* purportedly exist in this case. It is not Petitioner's burden to show why preemption does not apply. Nevertheless, as cited in the Opening Brief, 10 CFR 71 contains the NRC's regulation regarding packaging and

[4] Warren-Alquist Act of 1976, Pub. Res. Code sections § 25524.1 and § 25524.2.

transportation and generally prohibits the transportation of damaged canisters. (Opening OB 18:fn 7.) It does not however, regulate how an operator must deal with damaged canisters. (10 CFR 71.85(a) [only stating that the operator must ascertain that there are no cracks or defects that could significantly reduce the effectiveness of the package].) Rather, the NRC leaves to the utility company the determination of what method/structure will be used to repackage SFAs in an NRC approved package/canister. (See OB 16:3-8.) The NRC also made clear that it is on SCE to figure out which option will be used. (OB 16:4-14). This is a point that the Opposition ignored. (See generally Opp.) Clearly the NRC has no express regulation preempting Respondent from imposing conditions to ensure transportability of SFAs or removability of the ISFSIs. Similarly, 10 CFR 72 contains NRC regulations regarding ISFSIs, but those do not contain any directive indicating that the NRC decides exactly where the ISFSIs will be sited. Instead, the regulations give factors to be considered in siting the ISFSIs which the Commission is then free to apply to reach its own decision. (E.g., 10 CFR 72.96-72.98.)

The Opposition states that "the Commission properly relied on the NRC's determinations to evaluate the Project's consistency with the Coastal Act." (Opp. 19:25-26). There is no evidence cited to support the Opposition's claim that the Commission "relied" on the NRC's "determinations" to evaluate the Project's "consistency" with the Coastal Act. Moreover, this is essentially an admission of legal error, since the NRC does not regulate land use or coastal resource preservation and protection. In any event, merely complying with existing regulations "is not enough to support a finding of no significant impact." (*Californians for Alternatives v. Dept. of Food & Agriculture* (2005) 136 Cal.App.4th 1, 17.) A CEQA-equivalent environmental review document cannot just defer to a regulatory scheme or standards to conclude that there will be no adverse impacts without analyzing impacts in the specific circumstances. (*Californians for Alternatives, supra*, 136 Cal.App.4th at pp. 16–17.) The Opposition uses *Citizens Opposing a Dangerous Environment v. County of Kern* (2014) 228 Cal.App.4th 360, to argue that an agency can rely on regulatory schemes of other agencies having expertise over certain environmental impacts where pre-emption applies. (Opp. 23:1-5.) But the *Citizens* holding is premised on pre-emption applying, and there is none here.

b. The Opposition brushes Coastal Act § 30250 under the rug.

The Opposition claims that Coastal Act § 30250 "is not applicable to the Project, because it governs only the siting of new development, and that because the subject project is dismantling of an existing development, section 30250 does not apply." (Opp. 17:7-14). This is wrong and is even belied by the staff report, which refers to Coastal Act § 30253 as requiring "new development" to meet that policy also. (AR 49). The Opposition cannot fairly have it both ways – the development is not new when it is convenient to ignore a Chapter 3 policy, but otherwise is new for purposes of other Chapter 3 policies.

"Development" is defined in Coastal Act § 30106 very broadly; it means:

> "on land, in or under water, the placement or erection of any solid material or structure; discharge or disposal of any dredged material or of any gaseous, liquid, solid, or thermal waste; grading, removing, dredging, mining, or extraction of any materials; **change in the** density or **intensity of use of land**….change in the intensity of use of water, or of access thereto; construction, **reconstruction, demolition, or alteration of the size of any structure, including any facility of any private, public, or municipal utility**… As used in this section, "structure" includes, but is not limited to, any building, road, pipe, flume, conduit, siphon, aqueduct, telephone line, and electrical power transmission and distribution line." (Emphasis added.)

The decommissioning project is new. Thus, the project constitutes new "development" under section 30106. New development need not just be sited appropriately, but it also must avoid adverse individual and cumulative effects on coastal resources. Section 30250 is a foundational policy of Chapter 3. To suggest section 30250 is merely a "siting" provision, ignores the other language in provision. The Coastal Act contemplates protection of coastal resources in both the built and unbuilt environment. The Coastal Act even requires protection of the special coastal communities, which are by their very nature built areas. Thus, section 30250 requires the Commission to find that the decommissioning project does not cause individual or cumulative adverse impacts, regardless of location, although location may be a factor as to whether certain development is allowable.[5] This is

---

[5] A missing comma in the statute between the words "services" and "and" should not be so definitive that it would lead to absurd results. (*Lessee of Ewing v. Burnet* (1837) 36 U.S. 41, 54 [Punctuation is a most fallible standard by which to interpret a writing; it may be resorted to when all other means fail; but the Court will first take the instrument by its four corners, in order to ascertain its true meaning: if that is apparent on judicially inspecting the whole, the punctuation will not be suffered to change it.]; *Iverson v. Muroc Unified Sch. Dist.* (1995) 32 Cal. App. 4th 218, 224-25.)

consistent with the Secretary of Resources determination that the CDP program is a functional equivalent of the EIR process. (14 Cal. Code Regs. §15251(c); *see also* OB, p. 9).

Finally, the Opposition's claim that the Commission "did not apply Section 30250 as a Coastal Act policy" (Opp 17:11-12) is an admission of an error of law. The Commission cannot ignore a policy of Chapter 3, since the Coastal Act requires the Commission find that a development is "in conformity with Chapter 3 (commencing with Section 30200)" before issuing a CDP. (Pub. Res. Code § 30604, subd. (a).)

c. The Opposition "points fingers" at the State Lands Commission's EIR to distract from the Respondent's failure to appropriately analyze the project under the Coastal Act.

In attempting to explain the Coastal Commission's decision, the Opposition points to the State Lands Commission's EIR repeatedly. While Respondent may have appended the EIR to the staff report for CDP 9-19-0194 (Opp. 25:22-26:22), that just means that Respondent's staff report is only as good as the analysis contained in the EIR. If the EIR's analysis falls short, then Respondent would have to fill in those analytical gaps within the CDP Staff Report in order to find the project consistent with the Coastal Act. In other words, just because Respondent can rely on the EIR to the extent that the EIR has weighed in on a given subject, does not mean that Respondent is excused from performing any further analysis of that subject under the Coastal Act.

First, the EIR expressly said that it was deferring analysis under the Coastal Act to Respondent, (AR 717, 1897- 1898) so the EIR does not take Respondent particularly far with respect to analysis under the Coastal Act. Second, the EIR claimed that the ISFSIs were a part of the existing environmental background and baseline and admitted that EIRs must analyze project-induced impacts on the baseline environment. (AR 778) But the EIR did not take the next analytical step of analyzing what project-induced impacts would occur to the ISFSIs, if for example the pools were destroyed. Instead, the EIR skipped ahead and concluded that the potential impacts associated with the continued storage of SNF in the ISFSI would not be significantly affected by the removal of the spent fuel pools **<u>because there are existing technologies to repackage and/or transport damaged canisters</u>** such as a hot cell. (AR 792-793). Yet, there was no requirement that these technologies be analyzed or any be implemented.

The EIR's analysis that the potential hazards associated with the continued storage of SNF in the ISFSIs would not be significantly affected by the removal of the pools requires a different analysis than whether the decommissioning project as proposed **minimizes the risks to life and property** under the Coastal Act. (Coastal Act § 30253(b).) The obligation to determine whether a project minimizes a risk is a more focused analysis than simply identifying whether potential hazards would not be significantly affected. The former requires that potential hazards be reduced, while the latter condones their existence and only requires that they not be increased. Even if the Court concludes that these two issues require the same inquiry, the EIR still left Respondent with more analysis to perform.

Since the EIR conditioned its conclusion that the ISFSIs would not be significantly affected by pool destruction on the fact that **existing technology** was available to provide alternative repacking options, it was incumbent on Respondent – in order to find that the project minimizes risk to life and property, assure structural stability and integrity and to avoid the need for construction of protective devices (section 30253(b))[6] - to discuss those different existing technologies, analyze whether any would accomplish the goals of the Coastal Act policies and if so, present them to the Commission for consideration of adoption. However, Respondent erred as a matter of law because it failed to conduct this analysis and ultimately approved CDP 9-19-0194, which sanctioned destruction of the pools without any alternative fuel repackaging options.

Next, the Opposition argues that retention of the pools "was not feasible" (Opp. 25:22-26:7), and pointing to the EIR, not the CDP staff report. (Opp. 26:8-14.) The Opposition's description of the EIR's statements on this point are grossly exaggerated. First, the EIR just says that the pools are an "integral part" of the containment buildings and that retention of the pools "could interfere" with decommissioning activities, (AR 793, 1988), a clear indication that additional analysis was required to definitively conclude infeasibility. (*Friant Ranch, supra,* 6 Cal.5th 502, 614, 524-25 [agencies are still required to implement all mitigation measures unless those measures are truly infeasible and if the project proponent concludes that there are no feasible alternatives, it must explain in meaningful detail in the

---

[6] Also, relevant is Coastal Act § 30232 which states "Protection against the spillage of…hazardous substances shall be provided in relation to any development or transportation of such materials. Effective containment and cleanup facilities and procedures shall be provided for accidental spills that do occur." (AR 57)

EIR the basis for that conclusion"].) Indeed, the "speculative" claim is unsupported by any referenced evidence. Respondent could have, and should have, inserted additional analysis and evidence into its CDP staff report that filled this analytical gap. It failed to do so. Second, the EIR's statement about interference with decommissioning activities is not necessarily determinative in a Coastal Act analysis about whether the decommissioning project as proposed minimizes the risk to life and property. The inference being that analysis of whether the project minimizes the risks to life and property should not be constrained by notions of mere inconvenience.

d. The Opposition Claims "No Worries," Even Though SCE Should Know Better.

The Opposition claims that it will be decades before canisters could significantly degrade so not to worry if there is not a repackaging and handling plan for degraded fuel canisters. (Opp. 28:10-22). SCE of all nuclear plant owners should not be making this argument. The new steam generators in Units 2 and 3, installed in January 2010, replaced old steam generators that were wearing out after years of use. To a tune of $612.1 Million in ratepayer money, SCE installed new steam generators manufactured by MHI. (2014 Cal. PUC LEXIS 554 (Cal. P.U.C. November 20, 2014) Finding #12 at p. 202.) Both steam generators broke after about 1 year in service, causing a potential environmental catastrophe and resulting in permanent closure of the plant. (Id., pp. 9-10). The NRC did not require SCE to purchase a particular type of steam generator, just as the NRC does not require SCE to choose a particular type of fuel repackaging method or facility. (See discussion *supra.*) But the lack of a requirement does not mean there is no risk of an accident or potential adverse consequence. SCE, better than anyone, knows this to be true.

Similarly, the Opposition contends that there is no need for a pre-existing alternative to using the spent fuel pools for coping with a dry cask issue because degradation to "necessitate either canister repair or replacement would take a long time to form, providing sufficient time to construct such a facility." (Opp. 25:13-16 and FN 10.) Petitioner has searched the record and technical documents supporting the notion that "a long time" is available. Petitioner submits that there is no scientific foundation for "a long time." California has been waiting "a long time" for the federal government to come up with a permanent nuclear waste repository. (Pub. Res. Code § 25524.2 [a 1975 moratorium against new nuclear power plants until federal waste repository is built is still in effect].). On the

other hand, it did not take as long as the NRC thought for corrosion to start forming on canisters at Diablo. (AR 8336-8337 [2 years]; 8298-8299.)

IV. IN APPROVING SPECIAL CONDITION 3, RESPONDENT FAILED TO PROCEED IN MANNER REQUIRED BY LAW BECAUSE IT DEFERRED THE ANALYSIS OF THE POTENTIAL ON-SITE LOCATIONS FOR ISFSI RELOCATION

The Opposition begins its counter argument by stating that Petitioner's challenge is a veiled attempt to reopen the CDP 9-15-0228 permit. (Opp. 33:10-22; 34:8-18.) The discussion that occurs in these sections of the Opposition is subterfuge. Petitioner's challenge is expressly to Special Condition No. 3 of CDP 9-19-0194. It is unclear how the Opposition can conclude otherwise. While Respondent may or may not have selected a bad location for the Holtec ISFSI in 2015, that decision is not being challenged. Rather, Petitioner's argument is that given Respondent's own concession in 2015 about an eventual release of debris into the environment, it was incumbent upon Respondent to analyze other potential on-site ISFSI locations where land at SONGS would become available due to the decommissioning project. SCE's application materials for CDP 9-19-0194 and the EIR provided Respondent with new information, not available in 2015, that allowed it to perform this analysis. Respondent erred by not doing so.

a. The Opposition is Wrong that Respondent Made a Finding that it was too Speculative to Analyze Potential On-Site Locations.

The Opposition argues that Respondent made a finding that it was too speculative to analyze potential on-site locations for the ISFSI in conjunction with CDP 9-19-0194 and that this finding was contained in Respondent's staff report for CDP 9-19-0194. (Opp. 34:21-37:17; 35:27-36:8, citing AR 47.) But AR 47 says no such thing. Thus, the cases the Opposition cites in support of this claim are distinguishable – two of those cases involved a finding by the agency that the analysis was too speculative to conduct. (See *Cadiz Land Co. Inc. v. Rail Cycle, L.P.* (2000) 83 Cal.App.4th 74, 105; *Alliance of Small Emitters/Metal Industry v. South Coast Air Quality Management Dist.* (1997) 60 Cal.App.4th 55, 65-66.)

All that AR 47 says is that the uncertainty in 2015 that surrounded "long-term storage" [i.e., permanent storage in a federal repository] is still present and that therefore the timing of removing the SFAs, and therefore the ISFSIs, is unknown. (AR 47.) (Emphasis added.) But it does not address moving the IFSFI to another location on-site until a federal repository is

available.[7] There is no finding or conclusion in the CDP staff report that moving the IFSFI away from the beach to some other place on site is too speculative to analyze. In fact, the uncertainty surrounding the long-term storage in a federal repository is the very reason that this analysis should have been done in conjunction with approving CDP 9-19-0194 in light of the new evidence presented by SCE's application materials for the decommissioning, which identified what structures would be removed and land cleared by the decommissioning (e.g., AR 90, 1524)

The Opposition relies on statements in the EIR to excuse the Commission from doing the analysis of moving the IFSFI to a different location. (Opp. 35:12-15.) But the EIR did not perform an analysis of relocating the ISFSIs because the EIR claimed it was too speculative to do so given a new location would require approval by other agencies, including Respondent Coastal Commission. (AR 1983) The Opposition is engaging in circular logic.[8]

Ironically, evidence cited by the Opposition (Opp. 36:14, citing AR 5139) indicates that it is Respondent who sites an ISFSI, not the Navy. (AR 5139.) The Navy's purported "end-state requirements" for the site were not an impediment to Respondent siting the Holtec ISFSI in 2015 and therefore these "requirements" should not be considered as an impediment to analyzing the potential relocating of the ISFSI now.

Finally, the Opposition suggests that without Respondent's review of the final status surveys referenced in Special Condition 3, an analysis of potential on-site ISFSI relocation options is too speculative. (Opp. 36:14-16). Again, the Opposition includes analysis and a "finding" that was not performed or made by Respondent. There is no indication in the Staff Report or addendum for CDP 9-19-0194 that Respondent concluded that the analysis of relocating the ISFSI was speculative without the Final Status Surveys, which are essentially contamination testing reports which apply to only those areas of the site containing below-grade SSCs, which is not the majority of the site. (AR 41-42, 47, 53.)

---

[7] Given that we are no closer now to a federal repository then we were when nuclear reactors first came online in the 1960's, arguably one would be reasonable to assume that the federal government will never find a permanent site for nuclear waste.

[8] Besides, until the analysis is done, one cannot know whether the "other agencies" (including the Navy) would approve. This is always the case with overlapping jurisdiction of agencies.

b. Respondent knew the majority of above and below grade systems, structures and components ("SSC") would be removed and was only uncertain about what below-grade SSCs would be removed from the Containment Dome Area – which does not change Respondent's knowledge as to other portions of the site.

The Opposition also suggests that the analysis of the potential on-site locations for relocation of the ISFSI is too speculative to conduct now because the Holtec ISFSI is constructed partially below grade, and the extent to which the subsurface structures at SONGS will be removed remains unknown. (Opp. 33:27-34:6) Both the Staff Report for CDP 9-19-0194 and the EIR indicate that certain below grade SSCs will be removed and that other below grade SSCs will be left in place. Both documents indicate that the Navy or NRC may subsequently require removal of certain below grade SSCs that SCE currently plans to leave in place. (AR 25-26; 1523-1524). Yet both documents overlook the fact that SCE knows the layout of its own plant and the areas that will be cleared above grade and which contain no below grade SSCs related to power generation. The bottom line is that SCE knows what above grade SSCs will be removed and the areas of the site that <u>do not</u> contain below grade SSCs. Yet, Respondent failed to conduct an analysis of relocating the ISFSI to those areas.

At the outset, it must be noted that the Opposition, by stating that the uncertainty pertains to below grade SSCs (Opp. 33:27-34:6), implicitly admits that Respondent knows what above grade SSCs will be removed. Even without that admission, it is beyond dispute that Respondent knew that "all major structures" and "most visible elements of the SONGS facility related to Units 2 and 3 generally to three feet below local grade although deeper in certain portions of the site" would be removed because SCE said so in its CDP application. (AR 43.) This was confirmed in the CDP Staff Report. (AR 25, 26; 1550; *see also* e.g., AR 1541, 1547-1548 [Figures 2-3, 2-5, 2-6]; *see also* AR 1540 [describing what facilities will remain after completion].)

The Opposition correctly points out that Figure 2-3 shows the remaining above-grade structures after decommissioning (Opp. 34:4, citing AR 1541), and it also shows which above grade areas of land will be clear of structures. Figures 2-5 and 2-6 show below grade structures and SSCs, for the containment domes and the area immediately surrounding the domes. (AR 1547-1548.) There is no evidence that there are below grade SSCs that would

require final status surveys in any other area of the plant. (AR 1541, 1547-1548.) Thus, Respondent clearly knew that the "uncertainty" surrounding the extent of below grade SSCs in need of final status surveys would only apply to the containment domes and the area immediately surrounding them. Thus, Respondent had enough information at the time it considered CDP 9-19-0194 to analyze other areas of the SONGS site where the IFSFI could potentially be relocated. (AR 1541, see also 1547). Additionally, the record shows that there are at least 4 parking lots that exist on site and that some of these lots may be destroyed during the decommissioning project (AR 1559), leaving cleared areas of land.

Accordingly, at minimum, Respondent could have analyzed cleared areas that would not need final status surveys. There was nothing preventing this analysis from being performed in conjunction with the decision to approve CDP 9-19-0194. Respondent's failure to do a relocation analysis now, before it issued the vesting CDP to SCE, and give the Commissioners the information and opportunity to condition the CDP on potentially moving the IFSFI (rather than just provide post-approval "reports" which do not require SCE to move the IFSFI at all regardless of what the reports ultimately conclude), was legal error.

Finally, the authority in the Opposition at p. 37:3-7 is inapplicable, because the relocation of the IFSIS is a reasonably foreseeable consequence of the decommissioning project. (*Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal. 3d 376, 394-396; *Berkeley Keep Jets Over the Bay Com. v. Board of Port Cmrs*. (2001) 91 Cal. App. 4th 1344, 1359.)

V. THE OPPOSITION FAILS TO ESTABLISH THAT RESPONDENT HAS NOT ABUSED ITS DISCRETION BY APPROVING THE INSTANT CDP WHICH NULLIFIED CDP 9-15-0228 SPECIAL CONDITION NO. 7

The Opposition claims that Petitioner has mischaracterized the purpose of CDP 9-15-0228 Special Condition No. 7. (Opp. 31:21-22.) The Opposition does not explain the nature of Petitioner's purported mischaracterization or what the "correct" characterization is. CDP 9-15-0228 Special Condition No. 7 required that SCE come up with an Inspection and Maintenance Program ("IMP"), and the ISFSI CDP was approved as consistent with Chapter 3 in part on that basis. (OB 25:2-14.) The purpose of the condition was nullified when Respondent approved the destruction of the pools in 2019 without any repackaging option and without an approved IMP. (OB 25:15-27.) The Opening Brief acknowledged that CDP 9-19-0194 Special Condition No. 19 did accelerate submission of the IMP by March 2020. (OB

25:24-25.) However, the language of CDP 9-19-0194 Special Condition No. 19 permitted the destruction of the pools any time after July 2020, meaning that the pools could be destroyed as of July 2020, whether the IMP was approved by Respondent by that time or not. (AR 25, 34-35.)

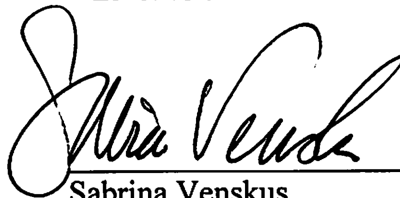
The Opposition argues that Special Condition No. 19 did not nullify Special Condition No. 7 because the NRC requires that an "Aging Management Plan" be implemented after 20 years of storage and the IMP's more expedited implementation only provides an additional layer of security for the ISFSIs. (Opp. 32:2-16.) Respondent's staff report for CDP 9-15-0228 indicates that the IMP was not an added layer of security, but a critical gap-filling measure to avoid the unwanted scenario of no inspection pursuant to an approved plan being performed in the first 20 years of the ISFSIs emplacement. (AR 362, 398.)

VI. CONCLUSION

Respondent has erred and abused its discretion in approving CDP 9-19-0194. Petitioner requests that the Court 1) issue a writ of mandate directing the Coastal Commission to set aside its approval of CDP 9-19-0194 and remanding back to the Commission for a decision consistent with the Court's ruling on the merits, and 2) issue an injunction prohibiting Real Parties in Interest, their contractors, agents and employees, from taking any action to destroy the spent fuel pools and their SSCs, as more specifically set forth in Exhibit A to Exhibit 1 of the Amended Stipulation For Jurisdiction Over Partial Settlement Agreement and Order filed on June 1, 2021 with this Court.

DATED: June 1, 2021

VENSKUS & ASSOCIATES, A.P.C.



Sabrina Venskus
Attorneys for The Samuel Lawrence Foundation