

**DEPARTMENT 86 LAW AND MOTION RULINGS**

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**Case Number:** 19STCP05431   **Hearing Date:** June 16, 2021   **Dept:** 86

**SAMUEL LAWRENCE FOUNDATION v. CALIFORNIA COASTAL COMMISSION**

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**[Tentative]   ORDER DENYING PETITION FOR WRIT OF MANDATE**

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The single issue before this court is whether Respondent, the California Coastal Commission, abused its discretion when it issued a coastal development permit on October 17, 2019 (the 2019 CDP) to Real Parties in Interest, Southern California Edison, San Diego Gas & Electric Co., the City of Riverside, and the City of Anaheim (collectively, SCE),<sup>[1]</sup> for a project “that is part of the overall effort to decommission the San Onofre Nuclear Generating station (SONGS) . . . .” (AR 25.) To be clear, the challenge here is to the adequacy of the analysis used by the Coastal Commission in approving the 2019 CDP. (Reply 6:3-4.) The issues before this court on this action are not about the wisdom of the manner in which SONGS will be decommissioned.

Petitioner, Samuel Lawrence Foundation, seeks a “Writ of Mandamus directing the Coastal Commission to set aside its approval of the CDP and remanding the permit application back to the Commission for a decision consistent with this Court’s ruling on the merits.” (Petition, Prayer at ¶ 1.) Petitioner’s challenge is primarily<sup>[2]</sup> based upon the California Coastal Act, Public Resources Code<sup>[3]</sup> section 3000, *et seq.* In its single cause of action Petitioner contends:

“The Commission has erred by proceeding without, or in excess of, jurisdiction by violating its own regulations and the provisions of the Coastal Act in issuing the CDP for the project. The Commission has also abused its discretion in failing to proceed in a manner required by its own regulations and the Coastal Act.” (Petition ¶ 30.)

The Coastal Commission and SCE oppose the petition.

The petition is DENIED.

Petitioner’s objection to the request for judicial notice filed by the Coastal Commission and SCE is sustained.

Petitioner’s objection to the “demonstrative” exhibit is sustained. The court agrees it is in the nature of an unauthorized sur-reply.

**STATEMENT OF THE CASE*****Relevant California Coastal Act Background:***

The California Coastal Act (§ 30000 *et seq.*) provides “a comprehensive scheme to govern land use planning for the entire coastal zone of California.”<sup>[4]</sup> (*Yost v. Thomas* (1984) 36 Cal.3d 561, 565.) One of the goals of the Coastal Act is to “[p]rotect, maintain, and, where feasible, enhance and restore the overall quality of the coastal

zone environment and its natural and artificial resources.” (§ 30001.5, subd. (a).) “To achieve this goal, the [Coastal] Act sets forth specific policies governing public access, recreation, the marine environment, land resources, and development along the coast.” (*McAllister v. California Coastal Com.* (2008) 169 Cal.App.4th 912, 922.)

“Chapter 3 of the Act sets out coastal resources planning and management policies,” which constitute standards for proposed development subject to the Coastal Act. (*San Diego Unified Port Dist. v. California Coastal Com.* (2018) 27 Cal.App.5th 1111, 1130 [citing § 30200].) The Coastal Commission “has the ultimate authority to ensure that coastal development conforms to the policies embodied in the Coastal Act.” (*City of Dana Point v. California Coastal Com.* (2013) 217 Cal.App.4th 170, 186.)

A coastal development permit is generally required for a development within the coastal zone. (*Id.* at 185; § 30600, subd. (a).)

### **SONGS Background:**

SONGS is located on United States Marine Corps Base Camp Pendleton, approximately 50 miles northwest of the City of San Diego. (AR 35-37, 1470, 1525.) SONGS began operating in 1968 and ultimately consisted of three nuclear power reactors, Units 1, 2 and 3, as well as supporting infrastructure. (AR 35, 1505-1506.) Unit 1 was shut down in 1992 and has since been dismantled and decommissioned.<sup>[5]</sup> (AR 35, 1505-1506.) Units 2 and 3 began commercial operation in 1983 and 1984, but all power generation from Units 2 and 3 permanently ceased in 2012. (AR 35, 1505-1506.)

Since 2012, SCE has sought the necessary regulatory and governmental approvals to decommission Units 2 and 3 and to dismantle and remove SONGS structures. (AR 35-36.)

Nuclear power facilities are heavily regulated by both federal and state governments. Since 2015, the United States Nuclear Regulatory Commission (the NRC), California State Lands Commission (the SLC) and the Coastal Commission<sup>[6]</sup> have approved various aspects of the nuclear fuel storage and decommissioning activities at SONGS.

“The NRC regulates the on-site storage of [spent nuclear fuel (SNF)] . . . .” (*Public Watchdogs v. Southern California Edison Company, supra*, 984 F.3d 750.) SNF is the “radioactive byproduct that results from the ‘burning’ of nuclear fuel . . . in nuclear reactors.” (*Id.* at 749.)

“After SNF is removed from a nuclear reactor, it is first stored in deep pools of continuously flowing water that cool the spent fuel. . . . Once the SNF has cooled sufficiently, it is often transferred into dry casks. . . . Dry casks are ‘typically made of leak-tight, welded, and bolted steel and concrete surrounded by another layer of steel or concrete. . . . The dry casks are normally stored on site in facilities called independent spent fuel storage installations (‘ISFSI’).” (*Id.* at 750.)

Thus, the NRC allows SNF to be stored in enclosed steel-lined pools (wet storage) or in dry, passively cooled storage facilities known as ISFSIs. (AR 35, 1538.)

At SONGS, SCE obtained the necessary federal and state approvals to construct two on-site ISFSIs to store SNF at SONGS, pursuant to license from the NRC. (AR 375-376, 398-399.) The Coastal Commission issued coastal development permits in 2000 and 2001 for the first ISFSI. (AR 35-36, 1507, 5359-5400.)

The Coastal Commission also approved a coastal development permit to construct and operate a second ISFSI for SNF generated by Units 2 and 3, referred to as the Holtec ISFSI.<sup>[7]</sup> (AR 35-36, 362-434, 1531-32.) The Coastal Commission approved the coastal development permit for the construction and operation of the Holtec ISFSI in 2015 (the 2015 CDP) for a 20-year term. (AR 35-36, 362-434, 1531-32.) The 2015 CDP contained several special

conditions, including Special Condition 2, which requires that SCE apply for a permit amendment by 2035 to retain, remove, or relocate the Holtec ISFSI and to provide an update on potential alternative off-site and on-site locations to relocate the Holtec ISFSI. (AR 36, 367 [Special Condition 2].) The 2015 CDP also contains Special Condition 7, which requires SCE to develop strategic plans to relocate SONGS SNF to an off-site location. (AR 35, 369.)

### **The Project:**

The SONGS decommissioning project consists of decontaminating, dismantling and removing certain offshore and onshore above- and below-grade structures at SONGS (the Project). The Project includes dismantling the fuel handling buildings and spent fuel pools. (AR 39, 88-153, 1469-1471, 8030-47.)

On November 12, 2015, SCE applied to the SLC for a lease amendment to renew SCE's lease for the purpose of decommissioning SONGS. (AR 717, 758.)

The SLC considered the lease amendment to allow the SONGS' offshore discharge conduits and associated appurtenances to be dismantled. The SLC therefore prepared an EIR as a lead agency in anticipation of the overall decommissioning. (AR 1469-1589, 1472.) On February 27, 2019, the SLC certified a Final Environmental Impact Report (FEIR). (AR 717-2855 [FEIR]; AR 7061-7095 [Lease Renewal].)

The FEIR discussed the dismantlement and demolition of the spent fuel pools. (AR 1555. ["The spent fuel pools would be prepared for demolition by removing the [spent nuclear fuel] storage racks."]; see also 789-96 [EIR master response to comments regarding retention of the spent fuel pools], AR 8042.)

On March 21, 2019, after a public hearing, the SLC certified the FEIR for the Project and approved the lease. (AR 46.) An environmental group challenged the SLC's certification of the FEIR under CEQA in 2019. (See *Public Watchdogs v. Cal. State Lands Com.* (April 20, 2021, D077166) 2021 WL 1232109.) The action settled.

In addition to the SLC's consideration of the lease amendment to allow SCE to decommission the SONGS' offshore structures, the Coastal Commission reviewed the Project and the decommission of SONGS' onshore structures. The Coastal Commission relied in part on the SLC's environmental review in the FEIR to determine the Project's environmental impacts and consistency with the Coastal Act. (AR 25-87, 10095-10098, 83-84, 32-33, 8010-8017.)

On October 17, 2019, the Coastal Commission approved the 2019 CDP for the Project but conditioned approval on 18 special conditions. (AR 14-24, 4989-5229.) The Coastal Commission determined, as conditioned, the Project would be consistent with applicable Coastal Act policies. (See AR 49-82 [Staff Report analysis of applicable Coastal Act policies].)

Petitioner filed its Verified Petition for Writ of Mandate challenging the Coastal Commission's action issuing the 2019 CDP.

### **STANDARD OF REVIEW**

Here, Petitioner alleges the Coastal Commission abused its discretion when it issued the 2019 CDP. Petitioner contends the Coastal Commission (1) failed to proceed in a manner required by law, and (2) the 2019 was "not supported by the findings and the findings were not supported by the evidence." (Petition ¶¶ 30, 31.)

Any aggrieved person may seek judicial review of a Coastal Commission decision by filing a petition for writ of administrative mandate under Code of Civil Procedure section 1094.5.

(§ 30801.) Under Code of Civil Procedure section 1094.5, subdivision (b), the issues for review of an administrative decision are: whether the respondent has proceeded without jurisdiction, whether there was a fair trial, and whether there was a prejudicial abuse of discretion. An abuse of discretion is established if the respondent has

not proceeded in the manner required by law, the decision is not supported by the findings, or the findings are not supported by the evidence. (Code Civ. Proc. § 1094.5, subd. (b); *La Costa Beach Homeowners' Assn. v. California Coastal Com.* (2002) 101 Cal.App.4th 804, 814.)

The court reviews the Coastal Commission's factual determinations in the context of a Code of Civil Procedure section 1094.5 challenge under a substantial evidence standard. (*Ross v. California Coastal Com.* (2011) 199 Cal.App.4th 900, 921. ["The agency's findings and actions are presumed to be supported by substantial evidence."])

The court examines the entire record and considers all relevant evidence when reviewing the agency decision. (*Bolsa Chica Land Trust v. Superior Court* (1999) 71 Cal.App.4th 493, 503.) "Although this task involves some weighing to fairly estimate the worth of the evidence, that limited weighing does not constitute independent review where the court substitutes its own findings and inferences for that of the [Coastal] Commission. Rather, it is for the [Coastal] Commission to weigh the preponderance of conflicting evidence, as [the court] may reverse its decision only if, based on the evidence before it, a reasonable person could not have reached the conclusion reached by it." (*Kirkowicz v. California Coastal Com.* (2000) 83 Cal.App.4th 980, 986; *La Costa Beach Homeowners' Assn., supra*, 101 Cal.App.4th at 814. [Generally, "[c]ourts may reverse an agency's decision only if, based on the evidence before the agency, a reasonable person could not reach the conclusion reached by the agency."])

"The trial court presumes that the agency's decision is supported by substantial evidence, and the party challenging that decision bears the burden of demonstrating the contrary." (*Ocean Harbor House Homeowners Assn. v. California Coastal Com.* (2008) 163 Cal.App.4th 215, 227.)

Questions of whether the Coastal Commission proceeded in the manner required by law are legal questions, and therefore, are reviewed *de novo*. (*Ballona Wetlands Land Tr. v. City of L.A.* (2011) 201 Cal.App.4th 455, 468.)

## **ANALYSIS**

Petitioner argues the Coastal Commission abused its discretion when it approved the 2019 CDP. Petitioner makes three substantive arguments in support of its petition.

First, Petitioner argues the Coastal Commissions abused its discretion when it failed to analyze sections 30250 and 30253 of the Coastal Act. Specifically, Petitioner argues the Coastal Commission "did not analyze the individual and cumulative impacts of destroying the spent fuel pools, or the environmental benefits (minimizing risk to property and life) of retaining the spent fuel pools, or using alternative spent fuel repackaging options." (Opening Brief 17:25-27.) Thus, this challenge is focused on that aspect of the Project allowing the removal of the spent fuel pools.

Second, Petitioner argues the Coastal Commission failed to proceed in the manner required by law when it approved the 2019 CDP because it improperly deferred on-site relocation analysis for the ISFSIs. According to Petitioner, Condition 3 of the 2019 CDP inappropriately requires "SCE to submit annual reports updating [the Coastal Commission] on potential opportunities for relocating the . . . ISFSIs as the decommissioning project proceeds . . ." (Opening Brief 23:14-16.) Petitioner asserts deferring the on-site relocation analysis precluded the Coastal Commission from making all required findings under the Coastal Act.

Finally, Petitioner contends the Coastal Commission abused its discretion when it approved the 2019 CDP because issuing the permit nullified Special Condition 7 of the 2015 CDP. Petitioner believes the Coastal Commission's action left "the decommissioning of the site without a way to ensure SONGS' canisters remained transportable." (Opening Brief 25:15-17.)

### **1. Section 30250 and Coastal Resource Impacts:**

Petitioner contends policies of the Coastal Act requires the Coastal Commission to consider both the individual and cumulative impacts on coastal resources of any dismantling of the spent fuel pools before it issued the 2019 CDP. (See § 30250.) (See Opening Brief 18:5-8, 18:21-23.) To the extent the Coastal Commission did not consider such impacts and make required findings, Petitioner argues the Coastal Commission abused its discretion because it failed to proceed as required by law.

There is no dispute the Coastal Commission did not make specific findings concerning individual and cumulative impacts when it approved the 2019 CDP. (AR 14-84.) Nonetheless, the Coastal Commission contends it did not err because it was not statutorily required to consider such impacts. The Coastal Commission argues section 30250 does not apply under these facts. The court agrees.

The plain language of section 30250 addresses the location of new coastal development. Under the statute, the Coastal Commission is required to consider individual and cumulative impacts only where new development will not be located at or near existing development. That is, section 30250 requires consideration of impacts on coastal resources where existing developed areas are not able to accommodate the new development.

Section 30250 provides in full:

- a. New residential, commercial, or industrial development, except as otherwise provided in this division, shall be located within, contiguous with, or in close proximity to, existing developed areas able to accommodate it or, where such areas are not able to accommodate it, in other areas with adequate public services and where it will not have significant adverse effects, either individually or cumulatively, on coastal resources. In addition, land divisions, other than leases for agricultural uses, outside existing developed areas shall be permitted only where 50 percent of the usable parcels in the area have been developed and the created parcels would be no smaller than the average size of surrounding parcels.
  
- a. Where feasible, new hazardous industrial development shall be located away from existing developed areas.
  
- a. Visitor-serving facilities that cannot feasibly be located in existing developed areas shall be located in existing isolated developments or at selected points of attraction for visitors.

Relying on the definition of “development” (§ 30106), Petitioner argues the Project is new, and new development “need not just be sited appropriately, but it also must avoid adverse individual and cumulative effects on coastal resources.” Petitioner contends “section 30250 requires the [Coastal] Commission to find that the decommissioning project does not cause individual or cumulative adverse impacts, regardless of location . . . .” (Reply 13:20-22.)

There can be no dispute the Project is a new development as defined by section 30106. In fact, the Coastal Commission treated it as such with its analysis under section 30253. That the Project is a new development, however, does not mandate consideration of individual and cumulative impacts because the new development is located in “existing developed areas able to accommodate it.” (§ 30250, subd. (a).) The new development—including the dismantling of the spent fuel pools—will occur where there is existing development. The new development is not outside of existing developed areas such that individual and cumulative impacts on coastal resources must be considered. In the context of Petitioner’s challenge (the spent fuel pools), the new development is the removal of previously permitted development. Section 30250 has no application here.

Petitioner recognizes the plain language of the statute with its punctuation supports the court's interpretation of section 30250, subdivision (a). (See Reply 13 n. 5.) The absence of a comma in the statute between the words "services" and "and" suggests the phrase "and where it will not have significant adverse effects" is intended to inform on and modify the requirements for a new development's location that is not otherwise in close proximity to existing development. The court disagrees that reading the language according to its plain meaning and punctuation leads to absurd results. Understandably, where new development will not be within or in close proximity to existing development, section 30250 requires the Coastal Commission to consider individual and cumulative impacts on coastal resources.

Accordingly, the court finds Petitioner has not met its burden of demonstrating error on any alleged failure of the Coastal Commission to make individual and cumulative impacts findings under these facts pursuant to section 30250. The Coastal Commission did not fail to proceed as required by section 30250.

### ***1. Section 30253 Analysis:***

Petitioner contends the Coastal Commission did not properly consider the Project (specifically dismantling the spent fuel pools) as required section 30253 when it approved the 2019 CDP.

Petitioner argues the Coastal Commission abused its discretion because it did not properly consider and analyze:

"1) whether demolishing the pools may pose a risk to life or property, or creates or significantly contributes to impacts on the coastal zone, given that damaged canisters cannot be transported under federal regulations; 2) whether [] retention of the spent fuel pools would minimize risk to life or property; or 3) whether alternative fuel canister repackaging options were available or should be required to ensure transportability, like an 'overpack' or dry transfer system." (Opening Brief 18:9-14.)

Section 30253 states in relevant part:

New development shall do all of the following:

- a. Minimize risks to life and property in areas of high geologic, flood, and fire hazard.
- b. Assure stability and structural integrity, and neither create nor contribute significantly to erosion, geologic instability, or destruction of the site or surrounding area or in any way require the construction of protective devices that would substantially alter natural landforms along bluffs and cliffs.

Petitioner's generalized challenge appears focused on section 30253, subdivision (a) and the statutory requirement the Coastal Commission consider that part of the Project that is the spent fuel pools' dismantlement and minimizing risks to life and property. Whether and to what extent, if at all, Petitioner's relies on section 30253, subdivision (b) is unclear.[\[8\]](#)

The Coastal Commission argues it complied with section 30253, subdivisions (a) and (b). The Coastal Commission notes its "Staff Report expressly evaluated the consistency of the Project (including the dismantlement of the spent fuel pools) with Section 30253, subdivisions (a) and (b), determining the Project would minimize risks to life and property and would not create geologic instability." (Opposition 20:16-19 [citing AR 49].) The Coastal Commission argues substantial evidence supports its finding the Project is consistent with section 30253.[\[9\]](#)

In the Coastal Commission's Staff Report advising on the 2019 CDP, the Coastal Commission recognized it did not have the authority ("is preempted") to consider section 30253 on issues of nuclear and radiological safety. (AR 49.) Nonetheless, the Coastal Commission acknowledged the Project—including the dismantling of spent fuel pools—must address how to minimize environmental risks and neither create nor contribute adverse impacts to the environment. (AR 26, 49-56.) Specifically, the Staff Report considered the geologic and seismic activity-related hazards that may apply to the Project site, the threat of tsunamis and sea level rise as well as coastal erosion. (AR 49-56.) The Staff Report concluded—with the inclusion of Special Conditions 3, 4, and 5—the Project is consistent with section 30253, subdivision (a) and (b).<sup>[10]</sup> (AR 56.)

Additionally, the Staff Report further evaluated the Project's consistency with other applicable Coastal Act policies. The Staff Report considered water quality and marine resources (AR 56), coastal access and recreation (AR 66), environmentally sensitive habitat (AR 69), visual and scenic resources (AR 79), and protecting cultural resources. (AR 80.)

Petitioner contends the Coastal Commission's analysis is flawed because it relied on the SLC's FEIR to make its findings the Project is consistent with Coastal Act policies. Petitioner believes the FEIR's focus on the potential hazards associated with the continued storage of SNF in ISFSIs and removal of the spent fuel pools requires an analysis other than whether the Project as proposed minimizes the risks to life and property under section 30253, subdivision (b). That is, Petitioner posits "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." (Reply 15:4-5.) Thus, Petitioner argues, to the extent the Coastal Commission relied on the FEIR to consider Coastal Act policies, it erred as a matter of law.

Petitioner correctly notes while the FEIR did analyze some environmental impacts associated with the Project, the FEIR did not contain any direct analysis about the Project and consistency with the Coastal Act. The court acknowledges the FEIR does not expressly perform the required analysis or reach conclusions required under the Coastal Act.

Nonetheless, nothing precludes the Coastal Commission from relying on facts and findings contained within the FEIR for purposes of the Coastal Commission's analysis of the Project and its Coastal Act consistency. (See *Sierra Club v. California Coastal Com.* (1993) 19 Cal.App.4th 547, 558.) Certainly, Petitioner could challenge the underlying FEIR's conclusions and whether it constitutes substantial evidence supporting the Coastal Commission's findings.

Thus, evaluating whether substantial evidence supports the Coastal Commission finding the Project as conditioned is consistent with section 30253 must include the information before the Coastal Commission through whatever source, including the FEIR. To reiterate, on substantial evidence review, this court's role is not to "weigh conflicting evidence and determine who has the better argument." (*Vineyard Area Citizens for Responsible Growth, Inc. v. County of Rancho Cordova* (2007) 40 Cal.4th 412, 435.) "The Commission's findings and actions are presumed to be supported by substantial evidence, and [the challenger] bears the burden to show otherwise." (*San Diego Navy Broadway Complex Coalition v. California Coastal Com.* (2019) 40 Cal.App.5th 563, 572.)

First, *in addition to the FEIR*, the Coastal Commission relied on NRC regulations to reach its consistency and safety conclusions. The Coastal Commission found "spent fuel pools are not necessary to ensure to safe onsite spent fuel storage and eventual off-site transport after fuel is transferred to the ISFSI for storage." (Opposition 24:23-25.) (AR 7322.) NRC guidance "indicates that a spent fuel pool is not necessary or required once spent fuel is placed in dry storage." (AR 7322.) A representative of the NRC advised safe options other than a spent fuel pool are available "for the purpose of repacking or opening the cannister." (AR 7388-7389, 792.) Ultimately, the NRC would have to approve the process of repacking or opening a canister. (AR 7389.) Further, within the United States, "all decommissioned commercial nuclear plants have removed their spent fuel pools while they continue to store fuel onsite."<sup>[11]</sup> (AR 8055; see also 7323-7324.)

Second, the FEIR expressly addresses the impacts resulting from dismantling the spent fuel pools. Specifically, the FEIR reports the potential for damage or corrosion that would render canisters unsuitable for transport is unlikely, as there are numerous ISFSIs at shutdown nuclear reactors nationwide, and—as noted above—all of those sites have removed the spent fuel pools. (AR 792.) In fact, the record shows that spent fuel in dry storage, such as an ISFSI, has been used for more than three decades in the United States, and there has never been a need to replace any major component of the dry storage systems or repackage the SNF in some different way to date. (AR 7321, 7043-7044.) The FEIR specifically explained:

“if SNF needed to be retrieved from a canister at some point in the future there are alternatives to using a spent fuel pool which could include licensing and installing a hot cell or transferring the canister to another radiological facility where repackaging could be performed The NRC also noted that corrosion cracking of stainless steel materials is a slow developing and well understood phenomenon and a through wall crack of a canister from stress corrosion cracking would take decades to develop from the time of initiation. (SCE 2018e).

[¶]

In the unlikely event that a canister did require repair or replacement there are available technologies to remedy the issue without the need for a spent fuel pool. For example, if a stress corrosion crack is detected on a canister, existing technologies could be employed to mitigate the damage such as grinding to the root (if the crack is shallow) or remote welding (if the crack is larger, or through the thickness of the canister). There are also existing technologies to repackage and/or transport damaged canisters, if necessary. A damaged canister could be transferred to an oversized overpack canister and stored onsite, or transported offsite in a transportation cask, if it was determined that the canister required replacement (MPR Associates Inc 2017; AREVA 2014). Therefore, the potential hazards associated with the continued storage of SNF in the Approved ISFSI would not be significantly affected by the removal of the spent fuel pools.” (AR 792-794; see also 7022-7024 [December 8, 2017 “Range of Alternatives” Letter].)

The FEIR, in considering project alternatives, also expressly considered and addressed the possibility of retaining the spent fuel pools. The FEIR concluded retaining the spent fuel pools was infeasible with decommissioning SONGS because they are an integral part of the containment buildings. The FEIR reported it may not be feasible to retain the spent fuel pools with the dismantling of the containment building. Finally, the FEIR concluded the spent fuel pools were unnecessary because their need is based on speculation the dry storage canisters will be unsuitable for transport in the future. (AR 1988.)

The record details the physical infeasibility of retaining the spent fuel pools:

“Current operation of the SONGS spent fuel pools relies on infrastructure that is interconnected with other plant buildings and structures, systems and components (SSCs), including power supply systems, heating, ventilation, cooling and lighting systems; radiation monitoring equipment; communications equipment; and a command center. In order for the pools to remain functional and in compliance with NRC licenses and NRC regulations, either: a) some or all of those components would have to be retained (meaning a number of adjacent buildings and components many of which are likely contaminated would have to remain); or b) it would be necessary to seismically analyze, license, design, procure, and install new SSCs to replace the removed SSCs. Either way, a substantial amount of infrastructure that otherwise would be decommissioned as part of the Project would be left in place at SONGS, contrary to several of the Project Objectives (e.g., prompt completion of radiological decontamination, maximizing efficiencies, retaining flexibility, and prudent use of ratepayer funds). (See FEIR at 1-13.)

In addition, because the spent fuel pool buildings are located in the heart of the plant in an area that is central to Project work, it would pose significant challenges to the performance of decontamination and dismantlement work in that area should the decommissioning contractor

have to cautiously avoid operational pools. For all these reasons, if SCE were required to maintain a spent fuel pool, it may no longer be feasible to undertake the Project.” (AR 7324.)

Finally, the Coastal Commission submits evidence that SCE does not have the authorization to even utilize the pools under its current NRC license. (AR 7324.) “In January 2018, the NRC approved amendments to the SONGS operating license that, among other things, require that no spent fuel storage will be permitted in the spent fuel pools after all fuel has been transferred to the ISFSI.” (AR 7324.) Thus, it is currently legally infeasible to maintain the spent fuel pools. (See AR 7041.) “SCE is prohibited from placing fuel back into the pools after completion of fuel transfer operations.” (AR 7324.)

Petitioner challenges the Coastal Commission’s reliance on certain FEIR statements that decommissioned plants in the country have removed spent fuel pools from service or dismantled them. Petitioner argues the statements do not demonstrate the spent fuel pools must be removed because the NRC provides licensees with “leeway” in determining the manner of decommissioning. (AR 4989, 5124.) While Petitioner is factually correct, the focus here is on whether the Coastal Commission had substantial evidence to support its approval of the 2019 CDP. Again, the court is not authorized to determine who has the better evidence—here the issue is whether substantial evidence supports the Coastal Commission’s action.

Petitioner did not meet its burden of demonstrating error under section 30253. The court finds the Coastal Commission made the findings required by section 30253. [\[12\]](#) The Coastal Commission did not fail to proceed as required by law. In addition, the Coastal Commission’s section 30253 findings are supported by substantial evidence. Petitioner has not met its burden by demonstrating otherwise.

### ***1. Whether Special Condition 3 Constitutes Deferred Analysis of a Foreseeable, Future Project:***

The 2019 CDP imposed Special Condition 3 on SCE. Special Condition 3 provides in part SCE:

“shall provide the Executive Director [of the Coastal Commission] with annual progress reports by June 15 of each year and shall post these reports on a publically accessible web site. These reports shall include: . . . Updates regarding the opportunities for long-term storage of nuclear waste, including specific discussion of potential opportunities to relocate waste currently stored in the ISFSI either elsewhere on the SONGS site or at offsite locations; . . .

Within 30 days of the receipt of these annual reports, the Executive Director shall make a determination as to whether there is a need for an amendment to this permit.” [\[13\]](#) (AR 19-20.)

Petitioner’s challenge to Special Condition 3 is not specifically set forth in its petition. Petitioner asserts in its Opening Brief, however, the Coastal Commission:

“did not analyze the impacts that decommissioning activities would have on the likelihood of relocating the . . . ISFSIs to other on-site areas, including but not limited to what cleared areas would be best suited for relocating ISFSIs off the beach and further from the ocean.” (Opening Brief 23:2-23.)

Petitioner argues the relocation of the ISFSIs constitutes a foreseeable, future project. According to Petitioner, the Coastal Commission is required to consider the impacts of this foreseeable future project arising from the decommissioning activities. (See *Laurel Heights Improvement Assn. v. Regents of the University of California* (1988) 47 Cal.3d 376, 394-396.) Petitioner argues deferring the analysis of this foreseeable, future project precluded the Coastal Commission from making the findings required to support approval of the 2019 CDP. The error, in Petitioner’s view, demonstrates the Coastal Commission failed to proceed in the manner required by law.

The Coastal Commission and SCE contend Petitioner's claim is time barred because it is a disguised challenge to the 2015 CDP. The Coastal Commission and SCE argue the Coastal Commission already evaluated five alternative on-site locations for the ISFSIs before approving the 2015 CDP. (AR 380.) Ultimately, the Coastal Commission approved the ISFSIs locations based on several criteria. (AR 380.) Therefore, according to the Coastal Commission and SCE, any claim about the location of an ISFSI should have been brought as a challenge to the 2015 CDP.

The court finds the notion that Petitioner's challenge to Special Condition 3 is time barred unpersuasive. Here, Petitioner asserts decommissioning SONGS will lead to other potential on-site locations for the ISFSIs. The potential to relocate the ISFSIs should have, according to Petitioner, been evaluated because the Coastal Commission "had new information, not available in 2015, that allowed it to perform this analysis." (Opening Brief 17:14-15.)

The Coastal Commission expressly found the uncertainty of relocating the ISFSIs that existed in 2015 existed at the time it considered SCE's application for the 2019 CDP. (AR 47. ["These conditions reflected the uncertainty in 2015, which continues to the present, regarding the long-term storage of spent nuclear fuel." See also AR 10097. [2019 CDP Staff Report Addendum] ["Additionally the Commission authorized the ISFSI until October 6, 2035 with Special Condition 2 of CDP 9-15-0228 requiring the applicant to apply for an amendment to retain remove or relocate the ISFSI at that time accompanied by an evaluation of coastal hazards."]) The Coastal Commission and SCE argue uncertain and unspecified future development does not require the analysis Petitioner contends the Coastal Commission should have undertaken. (See *Laurel Heights Improvement Assn. v. Regents of the University of California*, *supra*, 47 Cal.3d at 395.)

Thus, the Coastal Commission's factual determination—future development is uncertain and speculative—is subject to substantial evidence review.

First, the need to relocate an ISFSI on-site is unknown. Whether on-site relocation is required will be "based on an analysis of future coastal hazards to determine if the Approved ISFSI must be relocated or retained at its current site for a specified time." (AR 1514.) Petitioner does not provide evidence to support its underlying supposition on-site relocation is required. (Opening Brief 17:27-18:1.) Nothing in Special Condition 3 requires relocation of the ISFSI on-site. Thus, Petitioner has not demonstrated a foreseeable, future project requiring consideration—this is fatal to Petitioner claim based on deferred analysis.

As explained in the FEIR, although the SNF will eventually be transferred to an off-site facility, no such facility currently exists or will exist until the Department of Energy takes action to permanently dispose of the SNF. (AR 1514.) Thus, the location and timeline for off-site transfer is "unknown and speculative" making it difficult to define the scope of the project beyond the Project in the FEIR. (AR 1514.) The FEIR sets forth a number of contingencies requiring resolution before ISFSI off-site relocation can be considered and resolved. (AR 1514-1515.)

The Coastal Commission's Staff Report also explains the physical nature of the site after decommissioning and disposal is uncertain. (AR 26. ["It is presently unknown if and how much additional subsurface material the NRC or the Navy would require to be removed beyond what is currently proposed SCE would need to return to the Commission for a new permit or permit amendment for any further decommissioning work that is not covered by this permit."]; see also AR 772-773 [explaining "the general nature of anticipated future decommissioning activities even though the exact nature of these Future Activities will be dependent on the decisions and actions of multiple federal and state public agencies including the Navy in the future and will not be known for many years"].) The Staff Report states:

"In the proposed project, most of the visible elements of the SONGS facility related to Units 2 and 3 (generally to three feet below grade, although deeper in certain portions of the site) would be decommissioned, demolished, and disposed of in accordance with federal Nuclear Regulatory Commission (NRC) standards for handling and disposing of radioactive waste. As part of the

proposed activities, sampling would identify materials or components of SONGS that have contamination in excess of these federal standards, if any, and thereafter identify further decommissioning and disposal activities, if any, that would be necessary to meet federal standards in NRC licensing requirements or additional site owner (i.e., the Navy) requirements.” (AR 26.)

The court finds the Coastal Commission’s finding the uncertainty concerning ISFSI on-site relocation that existed in 2015 existed at the time the Coastal Commission approved the 2019 CDP is supported by substantial evidence. Given the uncertainty involved—including whether there is a foreseeable, future project based on a need for future on-site relocation—the Coastal Commission did not abuse its discretion.

***1. Whether the Coastal Commission Failed to Proceed in the Manner Required by Law Because an Inspection and Maintenance Program (IMP) Had Not Then Been Approved:***

Special Condition 7 of the 2015 CDP required SCE to submit an IMP for the ISFSI as soon as technologically feasible or by 2022. Special Condition 7 of the 2015 CDP requires, in relevant part:

"As soon as technologically feasible, and no later than October 6, 2022, the Permittee shall provide for Commission review and approval an inspection and maintenance program designed to ensure that the fuel storage casks will remain in a physical condition sufficient to allow both on-site transfer and off-site transport, for the term of the project as authorized under Special Condition 2 (i.e., until October 6, 2035).

...

If the Commission determines that the inspection and maintenance program required . . . is not sufficient to assure cask transportability over the term of the project authorized under Special Condition 2, the Applicant shall submit an amendment to this coastal development permit proposing measures to assure cask transportability." (AR 362, 369 [CDP 9-15-0228 Special Condition 7B].)

Special Condition 19 of the 2019 CDP advanced the date for approval of the IMP to March 31, 2020. (AR 24.) Thus, the condition advanced SCE’s compliance date (or the deadline for Special Condition 7 in the 2015 CDP) by 18 months.

Petitioner argues the Coastal Commission’s approval of the 2019 CDP defeated the purpose of the Special Condition 7 by approving the decommissioning of the site without a way to ensure SONGS’ fuel storage canisters remain transportable. Petitioner argues the Coastal Commission’s actions demonstrate a failure to proceed as required by law.

Petitioner does not explain how the Coastal Commission’s reduction of the time for SCE to provide its IMP by 18 months constitutes a failure to proceed as required by law. Had the Coastal Commission not imposed the condition, SCE would have had an additional 18 months to submit its IMP. The court finds no prejudicial abuse of discretion here.

Petitioner’s argument is also undermined by the substantial evidence supporting the Coastal Commission’s Coastal Act consistency findings and destruction of the spent fuel pools. That is, substantial evidence shows—even after dismantling the spent fuel pools—safe storage and transport alternatives for SNF exist. Petitioner does not demonstrate that the IMP is necessary to ensure safe storage and transport of SNF. (See 374; see also 10 C.F.R. § 72.720 [NRC requires Aging Management Plan only after ISFSI has been in service for more than 20 years], § 72.240.)

**CONCLUSION**

Based on the foregoing, the petition is denied.

**IT IS SO ORDERED.**

June 16, 2021

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Hon. Mitchell Beckloff  
Judge of the Superior Court

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[1] SCE, San Diego Gas & Electric Co., and the City of Riverside jointly own SONGS. (AR 35.) The City of Anaheim is a prior owner and co-participant in the decommissioning project. (AR 35.)

[2] Petitioner also invokes the California Environmental Quality Act (CEQA), Public Resources Code section 21000 *et seq.*

[3] Unless otherwise noted, all statutory references are to this Code.

[4] The coastal zone “means that land and water area of the State of California from the Oregon border to the border of the Republic of Mexico . . . .” (§ 30103, subd. (a).)

[5] The Coastal Commission issued a coastal development permit in February 2000 authorizing the demolition of Unit 1 structures and the construction of an Independent Spent Fuel Storage Installation (ISFSI) to store radioactive waste within the 19 spent nuclear fuel modules in dry container storage. (AR 35.)

[6] On the federal level, the NRC has exclusive jurisdiction over all radiological issues relating to nuclear power facilities. (AR 44.) “The NRC also regulates the storage of spent nuclear fuel . . . which is the radioactive byproduct that results from the ‘burning’ of nuclear fuel (i.e., uranium fuel rods bundled into fuel assemblies) in nuclear reactors.” (*Public Watchdogs v. Southern California Edison Company* (9<sup>th</sup> Cir. 2020) 984 F.3d 744, 749.) The United States Department of Energy is responsible for developing repositories suitable for storage of all spent nuclear fuel in the United States. (AR 44, 1504; see also the Nuclear Waste Policy Act of 1982, 42 U.S.C. § 10101 *et seq.*) On the state level, a number of regulatory agencies may have jurisdiction over non-radiological issues depending on the location of the facility. Relevant to the SONGS location here, SLC exercised jurisdiction over the offshore elements of the facility, and the Coastal Commission exercised authority over the onshore elements of the facility. (AR 46,

[7] Holtec manufactured the ISFSI.

[8] Petitioner does raise section 30253 generally in the context of its attack on Special Condition 3 discussed *infra*.

[9] The Coastal Commission also argues the NRC has exclusive jurisdiction to regulate the safety of nuclear material relying on *Public Watchdogs v. Southern California Edison Co.* (9<sup>th</sup> Cir. 2020) 984 F.3d 744. Petitioner argues *Public Watchdogs* does not vest exclusive jurisdiction with the NRC. Petitioner also asserts the issue here is not about how the spent fuel is stored, but where it is stored. (Reply 10:11.) No one disputes the “NRC . . . regulates the storage of spent nuclear fuel . . . .” (*Id.* at 749.) The court need not resolve the Coastal Commission’s exclusive jurisdiction claim.

[10] That the Coastal Commission made this finding undermines Petitioner’s claim the Coastal Commission did not proceed as required by law. Thus, Petitioner’s challenge is whether substantial evidence supports the Coastal Commission’s findings.

[11] The record also reflects current and developing technology provides options for inspecting and addressing potential ISFSI canister damage and/or degradation. Such technologies are more effective (and preferable) to the use of spent fuel pools. (AR 7325-7326; see also 5158-5159.)

[12] As noted, that the Coastal Commission made the findings section 30253 undermines Petitioner’s claim de novo review is appropriate here.

[13] Given the scope of the required report, whether amendment of the 2019 CDP is required is not limited to on-site relocation of the ISFSIs.