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12 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

13 **COUNTY OF LOS ANGELES**

14 **THE WORLD BUSINESS ACADEMY, A**
15 **TAX-EXEMPT 501(c)(3) PUBLIC**
16 **CHARITY, AND THE IMMACULATE**
HEART COMMUNITY, A TAX-EXEMPT
501(c)(3) PUBLIC CHARITY,

17 Petitioner and Plaintiff,

18 **v.**

19 **CALIFORNIA STATE LANDS**
20 **COMMISSION, AN AGENCY OF THE**
21 **STATE OF CALIFORNIA,**

22 Respondent and Defendant.

23 _____
24 **PACIFIC GAS & ELECTRIC COMPANY,**
DOES 1-10,
25 Real Parties in Interest.

Case No. BS163811

JOINT OPPOSITION TO PETITIONERS'
REQUEST FOR JUDICIAL NOTICE BY
RESPONDENT CALIFORNIA STATE
LANDS COMMISSION AND REAL
PARTY IN INTEREST PACIFIC GAS &
ELECTRIC COMPANY

Dept. 82

Judge: Hon. Mary H. Strobel

Trial Date: July 11, 2017

Action Filed: August 2, 2016

1 **I. Opposition to Petitioners’ Request For Judicial Notice**

2 Petitioners challenge the Commission’s determination that the Lease Replacement project
3 for the Diablo Canyon Power Plant (“DCPP”) was exempt from the California Environmental
4 Quality Act (“CEQA”) (Pub. Resources Code, § 21000 et seq.). The body of evidence
5 appropriate for Petitioners’ challenge is the record of proceedings for the action taken – the Lease
6 Replacement. That record is wholly contained in the certified administrative record. Petitioners
7 now seek to augment the certified administrative record with documents they assert are subject to
8 judicial notice. Petitioners’ request fails.

9 First, it is well-established that judicial review in cases brought under CEQA is limited to
10 review of the evidence that was before the agency when it made its challenged decisions.
11 *Western States Petroleum Association v. Superior Court* (1995) 9 Cal.4th 559 (“*WSPA*”). In
12 *WSPA*, the state Supreme Court established the general rule that extra-record evidence is not
13 admissible in traditional mandamus actions challenging an agency’s quasi-legislative
14 administrative decision.¹ (*Id.* at 576.) Rather, judicial review in such cases is strictly limited to
15 the evidence in the administrative record. (*Ibid.*) Furthermore, the record includes only the
16 evidence that was before the agency when it made its challenged decision. (*Id.* at 573, fn. 4.) All
17 other evidence is considered “extra-record” evidence and, subject to very limited exceptions, is
18 not admissible. (*Id.* at 576.) This restriction ensures that courts do not “engage in independent
19 fact finding rather than engaging in a review of the agency’s discretionary decision.” (*Friends of*
20 *the Old Trees v. Cal. Dept. of Forestry & Fire Protection* (1997) 52 Cal.App.4th 1383, 1391.)

21 Numerous courts have applied *WSPA*’s rule prohibiting extra-record evidence to CEQA
22 cases. (See, e.g., *Eureka Citizens for Responsible Government v. City of Eureka* (2007) 147
23 Cal.App.4th 357, 367 [denying appellants’ motion to “augment” the administrative record with
24 materials that were not presented to or considered by the city council in reaching a challenged
25 decision]; *Sacramento Old City Assn. v. City Council* (1991) 229 Cal.App.3d 1011, 1032, fn. 13

26

¹ Although *WSPA* involved a traditional mandamus action under Code of Civil Procedure
27 section 1085 challenging a quasi- legislative decision, the rule also applies to administrative
28 mandamus challenges to quasi-judicial decisions brought under Code of Civil Procedure section
1094.5. (*Cadiz Land Co., v. Rail Cycle LP* (2002) 83 Cal.App.4th 74, 120.)

1 [supplemental EIR not admissible because it was not before decision-makers prior to or at the
2 time of their decision]; *Schaeffer Land Trust v. San Jose City Council* (1989) 215 Cal.App.3d
3 612, 624, fn. 9 [declaration regarding traffic analysis not admissible in CEQA action because
4 court's "review is limited to issues in the record at the administrative level"]; *City of Carmel-by-*
5 *the-Sea v. Bd. of Supervisors* (1986) 183 Cal.App.3d 229, 249, fn. 11 [subsequent EIR not
6 admissible "since it was not part of the administrative record"]; *Browning-Ferris Indus. v. City*
7 *Council* (1986) 181 Cal.App.3d 852, 861 [declarations, expert reports, and transcript of hearing
8 by separate agency not admissible in action challenging EIR because not in administrative
9 record]; *El Morro Community Assn. v. Cal. Dept. of Parks and Recreation* (2004) 122
10 Cal.App.4th 1341, 1358-1362 [affirming trial court's decision to deny motion to augment record
11 with post-decisional documents because documents were not relevant to agency's compliance
12 with CEQA].) These cases are consistent with the basic premise that only relevant evidence is
13 admissible in court. (Evid. Code, § 350.)

14 There are limited exceptions to the rule prohibiting extra-record evidence. But Petitioners
15 do not even attempt to explain why any of the exceptions might apply here. Rather, Petitioners
16 rely upon citations to the Evidence Code and non-*WSPA* cases. The Supreme Court in *WSPA*
17 made clear that, even when extra-record evidence is admissible under one of the very limited
18 exceptions, "extra-record evidence can never be admitted merely to contradict the evidence the
19 administrative agency relied on in making a quasi-legislative decision or to raise a question
20 regarding the wisdom of that decision." (*WSPA*, supra, 9 Cal.4th at p. 579.) Yet, in their
21 Opening Brief, Petitioners rely on the documents for which they seek judicial notice for that very
22 purpose. Therefore, the Court should not grant Petitioners' request because those documents are
23 not properly part of the record and *WSPA* forbids this Court from considering or relying on them
24 in support of the arguments made by Petitioners.

25 Second, the documents are not appropriate for judicial notice for other reasons:

26 **Exhibit 1:** Petitioners claim that this is a committee report from the time of CEQA's
27 enactment. However, it is undated and is not authenticated as a legislative document.
28 Furthermore, it relates to a challenge that the Court does not have jurisdiction to hear, as

1 Petitioners did not exhaust their administrative remedies by administratively challenging the
2 existing facilities exemption during the Commission proceedings, did not plead it in their petition,
3 or comply with Government Code section 11350 relating to challenges to administrative
4 regulations.

5 **Exhibit 2:** This document is a PowerPoint presentation prepared by a private company –
6 Anatech Corp. This is not, as Petitioners allege, an “official act” of an administrative agency and
7 Petitioners provide no evidence of such. The PowerPoint presentation is also not authenticated.
8 Moreover, the document shows a June 21, 2016 date which was before the Commission acted on
9 June 28, 2016, and Petitioners could have submitted this document to the Commission for its
10 consideration and inclusion in the administrative record, but Petitioners failed to do so.

11 **Exhibit 3:** This report is not authenticated and appears to have been created in 2015, prior
12 to the Commission’s action. As such, Petitioners could have submitted this document to the
13 Commission for its consideration and inclusion in the administrative record, but Petitioners failed
14 to do so.

15 **Exhibit 4:** This report is not authenticated, appears incomplete and appears to have been
16 created in 2007, prior to the Commission’s action. As such, Petitioners could have submitted this
17 document to the Commission for its consideration and inclusion in the administrative record, but
18 Petitioners failed to do so.

19 **Exhibit 5:** This report is part of a larger document and therefore incomplete; it has not
20 been authenticated nor is it dated. The report is irrelevant as it addresses the arrival of certain
21 9/11 terrorists to the United States. (Evid. Code § 350.) Moreover, Petitioners allege the
22 document was created in 2010, prior to the Commission’s action. As such, Petitioners could have
23 submitted this document to the Commission for its consideration and inclusion in the
24 administrative record, but Petitioners failed to do so.

1 **Exhibit 6:** This document is an unauthenticated 2004 report. Petitioners could have
2 submitted this document to the Commission for its consideration and inclusion in the
3 administrative record, but Petitioners failed to do so.

4 **II. CONCLUSION**

5 For all the aforementioned reasons, the Court should deny Petitioners' Request For
6 Judicial Notice.

7
8 Dated: April 24, 2017

ARMBRUSTER GOLDSMITH & DELVAC LLP

9
10
11 By: 

Damon P. Mamalakis
Attorney for Real Party in Interest
PACIFIC GAS & ELECTRIC COMPANY

12
13
14 DATED: April 24, 2017

XAVIER BECERRA, Attorney General

15
16
17 By: 

John Saurenman
Senior Assistant Attorney General
Attorneys for Defendant and Respondent
CALIFORNIA STATE LANDS COMMISSION

1 **PROOF OF SERVICE**

2 I am a resident in the State of California. I am over the age of 18 and not a party to the
3 within action. My business address is 12100 Wilshire Blvd., Suite 1600, Los Angeles, California
4 90025.

5 On April 24, 2017, I served the within Document:

6 **JOINT OPPOSITION TO PETITIONERS' REQUEST FOR JUDICIAL NOTICE BY**
7 **RESPONDENT CALIFORNIA STATE LANDS COMMISSION AND**
8 **REAL PARTY IN INTEREST PACIFIC GAS & ELECTRIC COMPANY**

9 ☐ By transmitting the document(s) listed above via facsimile from sending facsimile
10 machine number 310.209.8801 to the fax number(s) set forth on the attached Service
11 List on this date before 5:00 p.m. and receiving confirmed transmission reports
12 indicating that the document(s) were successfully transmitted.

13 ☒ By transmitting the document(s) listed above via email to the person(s) named on the
14 attached Service List at the respective email addresses next to their names, on this date
15 before 5:00 p.m. and receiving confirmed transmission reports indicating that the
16 document(s) were successfully transmitted.

17 ☒ By placing the document(s) listed above in a sealed envelope with postage thereon
18 fully prepaid, in the United States mail at Los Angeles, California, addressed as set
19 forth on the attached Service List, to each of the persons named on the attached Service
20 List.

21 ☐ By causing overnight delivery by Federal Express of the document(s) listed above,
22 addressed as set forth on the attached Service List, to each of the person(s) named on
23 the attached Service List.

24 ☐ By causing personal delivery by messenger service of the document(s) listed above,
25 addressed as set forth on the attached Service List, to each of the person(s) named on
26 the attached Service List.

27 **SEE ATTACHED SERVICE LIST**

28 I am readily familiar with this firm's practice of collection and processing correspondence
for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same
day in the ordinary course of business. I am aware that on motion of party served, service is
presumed invalid if postal cancellation date or postage meter date is more than one day after date
of deposit for mailing in affidavit.

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

Executed on April 24, 2017 at Los Angeles, California.

Laura M. Awad

(Type or print name)

(Signature)

SERVICE LIST

DOCUMENT(S) SENT

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