

# ADAMS BROADWELL JOSEPH & CARDOZO

A PROFESSIONAL CORPORATION

## ATTORNEYS AT LAW

601 GATEWAY BOULEVARD, SUITE 1000  
SOUTH SAN FRANCISCO, CA 94080-7037

TEL: (650) 589-1660  
FAX: (650) 589-5062

tenslow@adamsbroadwell.com

SACRAMENTO OFFICE

520 CAPITOL MALL, SUITE 350  
SACRAMENTO, CA 95814-4721

TEL: (916) 444-6201  
FAX: (916) 444-6209

DANIEL L. CARDOZO  
THOMAS A. ENSLOW  
PAMELA N. EPSTEIN  
TANYA A. GULESSERIAN  
MARC D. JOSEPH  
ELIZABETH KLEBANER  
RACHAEL E. KOSS  
JAMIE L. MAULDIN  
ROBYN C. PURCHIA  
ELLEN L. TRESKOTT

February 15, 2013

### VIA EMAIL AND OVERNIGHT MAIL

Armando G. Villa, Director  
Imperial County Planning &  
Development Services Department  
801 Main Street  
El Centro, CA 92243  
[armandovilla@co.imperial.ca.us](mailto:armandovilla@co.imperial.ca.us)

Angelina Havens, Planner III  
Imperial County Planning &  
Development Services Department  
801 Main Street  
El Centro, CA 92243  
[angelinahavens@co.imperial.ca.us](mailto:angelinahavens@co.imperial.ca.us)

**RE: Comments on Imperial Valley Solar Company 2 Draft Environmental Impact Report, SCH # 2012081084**

Dear Mr. Villa and Ms. Havens:

We are writing on behalf of **Imperial Citizens for Responsible Industry** to provide comments on the December 2012 Draft Environmental Impact Report ("DEIR") prepared for the Imperial Valley Solar Company 2 Project ("Project") proposed by Imperial Valley Solar Company 2, LLC ("Applicant"). The Project involves the proposed development of a 30-megawatt AC ("MW<sub>AC</sub>") photovoltaic ("PV") solar facility and related facility and transmission improvements. The Project is located on 158.8 acres of Farmland of Statewide Importance in Imperial County ("County"), near the City of Niland. The Project will include: PV solar modules, module mounting system, electric power collection system and lines, a switchyard and step-up transformer, a 2,700 foot underground transmission line, new accessways for vehicles, lighting and 8-foot high security fencing around the perimeter of the project. In addition, the Project includes the proposed

2737-012j

decommissioning of the solar facility and restoration of the Project site back to agricultural land at the end of the Project's operational life.

As explained more fully below, the DEIR prepared for the Project does not comply with numerous mandatory legal requirements of the California Environmental Quality Act<sup>1</sup> ("CEQA"), including requirements to provide an accurate project description, to provide adequate environmental baseline information, to support findings with substantial evidence, and to identify and mitigate the Project's potentially significant direct, indirect and cumulative impacts. The County may not approve the Project until the errors in the DEIR are remedied and a revised document is recirculated for public review and comment.

The review of the DEIR was performed with the assistance of technical experts, including a biological expert Ellen Berryman, agricultural resources expert Gregory House, hazards and air quality expert Matt Hagemann and air quality expert Uma Bhandaram. The comments and a summary of the qualifications of each these experts are attached to this letter and incorporated herein as Attachments A, B, & C respectively.

Please note that the attached expert comments are comments on the DEIR, which are being submitted to the County during the public comment period and must be addressed and ***responded to separately***, pursuant to section 21091(d)(2) of the Public Resources Code.

Due to the length of the comments contained herein, a detailed Table of Contents is provided as part of the letter. Comments are organized as follows:

---

<sup>1</sup> Pub. Resources Code, §§ 21000 et seq.  
2737-012j

**TABLE OF CONTENTS**

<b>I.</b>	<b>STATEMENT OF INTEREST .....</b>	<b>5</b>
<b>II.</b>	<b>THE DEIR FAILS TO SATISFY CEQA’S FUNDAMENTAL PURPOSES AND GOALS.....</b>	<b>6</b>
<b>III.</b>	<b>THE PROJECT DESCRIPTION IS INADEQUATE.....</b>	<b>7</b>
	<b>A. The Project Description Omits Key Off-Site Activities That May Be Necessary For Project Implementation.....</b>	<b>8</b>
	<b>B. The DEIR Fails to Describe Planned Decommissioning Activities with Sufficient Specificity to Assess Potential Impacts.....</b>	<b>9</b>
<b>IV.</b>	<b>THE DEIR FAILS TO DISCLOSE, EVALUATE AND MITIGATE ALL POTENTIAL IMPACTS TO BIOLOGICAL RESOURCES.....</b>	<b>13</b>
	<b>A. The DEIR Fails to Evaluate Potential Impacts to Biological Resources from Offsite Project Activities.....</b>	<b>13</b>
	<b>B. The DEIR Fails to Evaluate Potential Impacts to Biological Resources from Decommissioning Activities.....</b>	<b>14</b>
	<b>C. The DEIR’s Evaluation and Mitigation of Potential Impacts to the Western Burrowing Owl Is Inadequate.....</b>	<b>14</b>
	<b>1. Adequate Burrowing Owl Surveys Were Not Conducted.....</b>	<b>16</b>
	<b>2. The DEIR Fails to Evaluate the Project’s Cumulative Impact on Loss of Burrowing Owl Habitat.....</b>	<b>22</b>
	<b>3. The DEIR Fails to Require Sufficient Mitigation to Reduce Burrowing Owl Impacts to a Less Than Significant Level.....</b>	<b>24</b>

D.	<b>The DEIR’s Conclusion that the Project Will Not Cause Significant Impacts to the Mountain Plover Is Not Supported by Substantial Evidence.....</b>	<b>26</b>
E.	<b>The DEIR Fails to Disclose or Analyze the Potentially Significant Project Related Impacts to Aquatic Habitats and Resources.....</b>	<b>27</b>
F.	<b>The DEIR Fails to Disclose and Evaluate the Strike Risk that Low-Reflective Solar Panels Pose to Birds.....</b>	<b>28</b>
G.	<b>The DEIR Fails to Evaluate Potential Impacts from the Proposed Use of Chemical Soil Stabilizers.....</b>	<b>29</b>
V.	<b>THE DEIR’S AIR QUALITY ANALYSIS IS INCOMPLETE AND FAILS TO COMPLY WITH THE REQUIREMENTS OF CEQA.....</b>	<b>30</b>
A.	<b>The DEIR Does Not Take into Account Offsite Project Activities in Its Evaluation of Potential Air Quality Impacts.....</b>	<b>30</b>
B.	<b>The DEIR Fails to Evaluate or Mitigate Potential Air Quality Impacts from Decommissioning Activities.....</b>	<b>33</b>
C.	<b>The DEIR’s Evaluation of Operational Air Quality Impacts Relies upon Improperly Deferred Mitigation and Is Not Supported by Substantial Evidence.....</b>	<b>34</b>
D.	<b>The DEIR Fails to Evaluate Non-Cancer Health Risks from Exposure to Diesel Particulate Matter.....</b>	<b>36</b>
VI.	<b>THE DEIR’S EVALUATION OF THE POTENTIAL RISK FROM DISTURBANCE OF PESTICIDE-CONTAMINATED SOILS IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.....</b>	<b>38</b>
VII.	<b>THE DEIR’S EVALUATION OF AGRICULTURAL RESOURCE IMPACTS IS LEGALLY DEFECTIVE .....</b>	<b>42</b>
A.	<b>The DEIR Fails to Evaluate Cumulative Agricultural Resource Impacts in the Manner Required by Law.....</b>	<b>42</b>

<b>B.</b>	<b>The DEIR’s Conclusion that Cumulative Agricultural Resource Impacts Will Be Less than Significant Is Not Supported by Substantial Evidence .....</b>	<b>45</b>
<b>C.</b>	<b>The DEIR Fails to Impose Any Mitigation for the Conversion of Agricultural Land to a Solar Project in Violation of County Requirements.....</b>	<b>47</b>
<b>D.</b>	<b>The DEIR Fails to Provide a Meaningful Baseline Description of the Quality of the Project Farmland.....</b>	<b>48</b>
<b>E.</b>	<b>The DEIR fails to Disclose and Evaluate Potential Indirect Impacts on Nearby Farmland.....</b>	<b>51</b>
<b>VIII.</b>	<b>THE EIR MUST REVISED AND RECIRCULATED.....</b>	<b>52</b>
<b>IX.</b>	<b>CONCLUSION.....</b>	<b>53</b>

\*\*\*\*\*

**I. STATEMENT OF INTEREST**

Imperial Citizens for Responsible Industry (“ICRI” or the “Coalition”) is an unincorporated association of individuals and labor unions that are concerned about public and worker health and safety risks and environmental and public service impacts from industrial development. The Coalition includes California Unions for Reliable Energy (“CURE”), whose members represent workers who live, work, recreate and raise their families in Imperial County, as well as individual Imperial County residents, including Calexico resident Alfonso Carmona-Jimenez.

CURE is a coalition of labor unions whose members build, maintain and operate conventional and renewable energy power plants in Imperial County and throughout California. Individual members of CURE work in areas affected by environmental degradation and health and safety risks from industrial development. Members also live in and use areas that will suffer the impacts of projects related to power plant development, including for example, air pollution,

noise and visual intrusion, water and soil contamination and conversion of agricultural land and wildlife areas. Environmental degradation jeopardizes future jobs by causing construction moratoriums, eliminating protected species and habitat, using limited water and putting added stresses on the environmental carrying capacity of the State. This reduces future employment opportunities. In contrast, well-designed projects that reduce environmental impacts of electrical generation improve long-term economic prospects. Based on these concerns, CURE and its members have a strong interest in ensuring that projects comply with the CEQA and all applicable federal, State and local laws and regulations.

## **II. THE DEIR FAILS TO SATISFY CEQA'S FUNDAMENTAL PURPOSES AND GOALS**

CEQA has two basic purposes, neither of which the DEIR satisfies. First, CEQA is designed to inform decisionmakers and the public about the potential, significant environmental effects of a project.<sup>2</sup> Except in certain limited circumstances, CEQA requires that an agency analyze the potential environmental impacts of its proposed actions in an environmental impact report ("EIR").<sup>3</sup> An EIR's purpose is to inform the public and its responsible officials of the environmental consequences of their decisions before they are made. Thus, an EIR "protects not only the environment but also informed self-government."<sup>4</sup>

To fulfill this function, the discussion of impacts in an EIR must be detailed, complete, and "reflect a good faith effort at full disclosure."<sup>5</sup> CEQA requires an EIR to disclose all potential direct and indirect, significant environmental impacts of a project.<sup>6</sup> In addition, an adequate EIR must contain the facts and analysis necessary to support its conclusions.<sup>7</sup>

The second purpose of CEQA is to require public agencies to avoid or reduce environmental damage when possible by requiring appropriate mitigation measures

---

<sup>2</sup> Cal. Code Regs., tit. 14, (hereinafter, "CEQA Guidelines") § 15002, subd. (a)(1).

<sup>3</sup> See, e.g., Pub. Resources Code § 21100.

<sup>4</sup> *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564.

<sup>5</sup> CEQA Guidelines § 15151; *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 721-722.

<sup>6</sup> Pub. Resources Code § 21100, subd. (b)(1); CEQA Guidelines § 15126.2, subd. (a).

<sup>7</sup> See *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 568.  
2737-012j

and through the consideration of environmentally superior alternatives.<sup>8</sup> If an EIR identifies potentially significant impacts, it must then propose and evaluate mitigation measures to minimize these impacts.<sup>9</sup> CEQA imposes an affirmative obligation on agencies to avoid or reduce environmental harm by adopting feasible project alternatives or mitigation measures.<sup>10</sup> Without an adequate analysis and description of feasible mitigation measures, it would be impossible for agencies relying upon the EIR to meet this obligation.

The DEIR fails to perform either of these roles adequately. The DEIR fails to reflect a good faith effort at public disclosure by failing to describe the Project fully, failing to set forth an accurate and complete environmental baseline, and failing to adequately investigate and disclose the Project's significant impacts on agricultural resources, air quality, biological resources, and public health and safety. As a result, the DEIR's conclusions with regard to the Project's environmental impacts are unsupported. Due to these significant informational gaps in the County's analysis, the DEIR's findings that the Project's potentially significant impacts will be reduced to a less than significant level are speculative and unsupported by substantial evidence. Moreover, these informational gaps preclude the public and decisionmakers from being able to meaningfully evaluate and comment on the potential impacts of this project or the adequacy of the DEIR. The DEIR also fails to propose feasible measures to reduce significant impacts that are identified in the DEIR, often improperly deferring evaluation and identification of such measures until later, post-approval studies. In sum, the DEIR fails to inform decisionmakers and the public of the Project's potentially significant environmental effects and to reduce damage to the environment *before* they occur.

### III. THE PROJECT DESCRIPTION IS INADEQUATE

The DEIR violates CEQA because it contains an incomplete and inadequate Project description. An accurate and complete project description is necessary to perform an adequate evaluation of the potential environmental effects of a proposed

---

<sup>8</sup> CEQA Guidelines § 15002, subs. (a)(2)-(3); see also, *Berkeley Keep Jets Over the Bay Committee v. Board of Port Commissioners* (2001) 91 Cal.App.4th 1344, 1354; *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564; *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 391, 400.

<sup>9</sup> Pub. Resources Code §§ 21002.1, subd. (a), 21100, subd. (b)(3).

<sup>10</sup> Pub. Resources Code §§ 21002-21002.1.  
2737-012j

project.<sup>11</sup> In contrast, an inaccurate or incomplete project description renders the analysis of environmental impacts inherently unreliable.<sup>12</sup> Without a complete project description, the environmental analysis under CEQA will be impermissibly narrow, thus minimizing the project's impacts and undercutting public review.<sup>13</sup> The courts have repeatedly held that “[a]n accurate, stable and finite project description is the *sine qua non* of an informative and legally sufficient EIR.”<sup>14</sup>

The project description fails to meet this basic threshold by offering or omitting representations that appear designed to confuse the reader into thinking either the proposed project will produce a less than significant impact or the project's impacts can be reduced to below a level of significance with minimal mitigation. CEQA places the burden of environmental investigation on the government rather than the public. Accordingly, a lead agency may not hide behind its failure to obtain a complete and accurate project description.<sup>15</sup> The project description in the DEIR needs to be augmented to provide the relevant information discussed in detail below.

In sum, the DEIR fails to set forth key Project components and elements relating to: (1) Imperial Irrigation District transmission system upgrades that may be required as a result of the project; and (2) the Applicant's proposed decommissioning and site restoration activities at the end of the Project's lifetime.

**A. The Project Description Omits Key Off-Site Activities That May Be Necessary For Project Implementation**

The DEIR's Project description violates CEQA because it fails to describe all of the potential additional Imperial Irrigation District transmission system upgrades that may be required as a result of the Project. As a result of this failure, the DEIR fails to evaluate the impacts of the whole of the action, its impacts are understated and its conclusions regarding the significance of Project impacts are not supported by substantial evidence.

---

<sup>11</sup>*County of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185,192.

<sup>12</sup>*Id.* at 192-193.

<sup>13</sup> See, e.g., *Laurel Heights Improvement Association v. Regents of the University of California* (1988) 47 Cal.3d 376.

<sup>14</sup>*County of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185, 193.

<sup>15</sup> *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 311. 2737-012j



The Imperial Irrigation District stated that the Project may require upgrades to its system in addition to those described in the NOP, including new, relocated, modified or reconstructed electrical utility substations, electrical transmission and distribution lines, canals or drains.<sup>16</sup> The DEIR, however, fails to fully describe the related activities that may need to be undertaken by the Imperial Irrigation District in order to implement the Project by connecting it to the State electrical grid. By failing to describe these potential Imperial Irrigation District system upgrades, the DEIR understates potential Project impacts, including air and water quality impacts, biological resource impacts, hazard impacts and agricultural resource impacts.

Pursuant to CEQA, the project description must describe the “whole of an action” which is being approved, including *all* components and activities that are reasonably anticipated to become part of the project.<sup>17</sup> This includes, but is not limited to, “any secondary, support, or off-site features necessary for its implementation.”<sup>18</sup>

Because the DEIR fails to describe key Project details, it lacks foundation for its conclusion that the Project will not have any significant environmental impacts. Moreover, this failure renders public comment and review meaningless since the public is not provided the basic information about the Project necessary to assess potential impacts. The shortcomings in the Project description have the very real consequence of defeating the public’s efforts to understand and assess the Project’s impacts. The DEIR must be withdrawn and a revised EIR prepared and must be recirculated that contains a complete and accurate Project description.

## **B. The DEIR Fails to Describe Planned Decommissioning Activities with Sufficient Specificity to Assess Potential Impacts**

The DEIR’s Project description is also inadequate because it fails to describe decommissioning activities that are part of the project design. In its agricultural resources section, the DEIR states that the solar facility is “temporary in nature”<sup>19</sup> and “[a]s part of project design, a decommission plan will be prepared for the

---

<sup>16</sup> DEIR, Appendix A, Imperial Irrigation District NOP letter (Sept. 25, 2012).

<sup>17</sup> CEQA Guidelines §15378.

<sup>18</sup> *Bozung v. Local Agency Formation Com.* (1975) 13 Cal.3d 263, 283-84.

<sup>19</sup> DEIR at p. 117.

Proposed Project.”<sup>20</sup> The DEIR goes on to state that during Project decommissioning, “the solar panels and other facilities would be removed, and the land would be available for other purposes, including agricultural.”<sup>21</sup> The agricultural resources section then goes on to rely upon the decommissioning of the project and its returns to agricultural land to support its conclusion that the Project would not contribute to the cumulative loss of farmland in Imperial County.<sup>22</sup>

Comment  
ABJC 10a  
Continued

Despite elsewhere identifying decommissioning as part of the Project design, the DEIR fails to describe the decommissioning PHASE of the project in its Project description section. As a result, the DEIR also fails to assess any air quality, water quality, biological resource or other environmental impacts that may result from decommissioning the project. Moreover, the DEIR does not anywhere describe decommissioning activities in sufficient detail to allow the public or decisionmakers to meaningfully assess these impacts on their own.

Under CEQA, the whole of the action that is required to be described in the project description includes any future activities that are reasonably anticipated to become part of the project, including “later phases of the project.”<sup>23</sup> The requirements of CEQA cannot be avoided by excluding reasonably foreseeable future activities that may become part of the project.<sup>24</sup> The EIR must supply enough information so that the decision makers and the public can fully understand the scope of the project.<sup>25</sup> Without an accurate description on which to base an EIR’s analysis, CEQA’s objective of furthering public disclosure and informed environmental decision-making would be impossible and consideration of mitigation measures and alternatives would be rendered useless.<sup>26</sup> If key Project features are not described, then the related direct, indirect and cumulative impacts cannot be evaluated; mitigation measures cannot be imposed; and alternatives cannot be effectively evaluated.

Comment  
ABJC 10b

The DEIR here fails to describe the full scope of the Project being approved, and thus fails to disclose the full range and severity of the Project’s environmental

---

<sup>20</sup> DEIR at p. 115.

<sup>21</sup> DEIR at p. 117.

<sup>22</sup> DEIR at p. 116-117.

<sup>23</sup> *Bozung v. Local Agency Formation Com.* (1975) 13 Cal.3d 263, 283-84; CEQA Guidelines §15378.

<sup>24</sup> Pub. Resources Code § 21159.27 (prohibiting piecemealing); *see also, Rio Vista Farm Bureau Center v. County of Solano* (1992) 5 Cal.App.4th 351, 370.

<sup>25</sup> *Dry Creek Citizens Coalition v. County of Tulare* (1999) 70 Cal.App.4th 20, 26.

<sup>26</sup> *County of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185, 192-193, 197-198, 203.  
2737 012j

impacts. The public and decision makers have this, and only this, opportunity to comment on the Project. For this reason, every phase of the project must be assessed now, including the decommissioning phase.

In this case, the Project has three distinct phases, construction, operation and decommissioning. The decommissioning phase is thus part of the “whole of the project.” The DEIR, however, fails to describe the decommissioning activities at all, other than to say that they are “part of the project design” and will include removal of “the solar panels and other facilities.”<sup>27</sup>

Moreover, there is no question that decommissioning activities may result in environmental impacts, including impacts to air quality, biological resources, water and solid waste capacity. “Decommissioning entails a range of considerations to restore a site to its original environment, including removal of all structures, foundations, wires and hazardous materials.”<sup>28</sup> In addition, restoration of project topsoil, vegetation and irrigation capabilities may also be necessary.<sup>29</sup> Decommissioning will thus require significant excavation, grading and demolition activities that may result in “environmental disturbances like noise, dust, water quality and impact on local wildlife and vegetation.”<sup>30</sup>

Because the DEIR does not include the decommission activities as part of the Project description, the EIR does not evaluate the additional impacts to air quality, biological resources and agriculture that may result from decommissioning activities. As a result, the Project’s actual impacts are understated and minimized.<sup>31</sup>

To the extent that the County is relying on the future preparation of a decommission plan to provide such an analysis, such reliance violates CEQA’s general prohibition on deferring analysis of Project impacts to a post-approval

---

<sup>27</sup> DEIR at p. 115.

<sup>28</sup> Voegelé & Changala, *Decommissioning Funds for Renewable Energy Facilities*, Vermont Law School Institute for Energy and Environment (Sept. 2010) at p. 1.

<sup>29</sup> See Voegelé & Changala, *Decommissioning Funds for Renewable Energy Facilities*, Vermont Law School Institute for Energy and Environment (Sept. 2010) at p. 1; see also *Proposed Policies for Solar Energy Facilities in Rural Alameda County*, Alameda County Planning Department (Sept. 13, 2011) at p. 2.

<sup>30</sup> Voegelé & Changala, *Decommissioning Funds for Renewable Energy Facilities*, Vermont Law School Institute for Energy and Environment (Sept. 2010) at p. 1.

<sup>31</sup> See *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376 (EIR failed to describe or analyze project accurately).  
2737-012j

study.<sup>32</sup> Project modifications necessary to avoid significant impacts must be made *before* the lead agency issues a proposed EIR for public review.<sup>33</sup> Deferring preparation of a decommissioning plan until after the issuance of an EIR, precludes disclosure of potential impacts and modification of the project to avoid such impacts prior to project approval. Post-approval studies and adoption of mitigation measures *after* project approval cannot validate the issuance of an EIR, since this deferral denies the public the opportunity to comment on potential impacts or the sufficiency of proposed mitigation measures.<sup>34</sup>

An agency may only rely on post-approval studies when it “recognizes the significance of the potential environmental effect, commits itself to mitigating its impact, and articulates *specific performance criteria* for the future mitigation.”<sup>35</sup> The DEIR has not complied with any of these requirements for post-approval study. The DEIR has not recognized the potential significance of the environmental effects of decommissioning activities, it has not committed to mitigating decommissioning impacts and it has not articulated any specific performance criteria for determining whether mitigation will be necessary and what form such mitigation will take.

The DEIR must be revised to provide a description of what activities decommissioning entails and an analysis of the potential impacts from such activities. Because such revisions would be significant, the revised DEIR must be recirculated for public review and comment.<sup>36</sup>

---

<sup>32</sup> *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 308-309.

<sup>33</sup> Pub. Resources Code § 21061.

<sup>34</sup> *Gentry v. City of Murrieta* (1995) 36 Cal.App.4th 1359, 1393; *Quail Botanical Gardens Foundation v. City of Encinitas* (1994) 29 Cal.App.4th 1597, 1604, fn. 5.

<sup>35</sup> *Gentry v. City of Murrieta*, 36 Cal.App.4th at 1411 (emphasis provided), citing *Sacramento Old City Assn. v. City Council* (1991) 229 Cal.App.3d 1011, 1028-1029.

<sup>36</sup> Pub. Resources Code § 21092.1; CEQA Guidelines § 15088.5; *Laurel Heights Improvement Association v. Regents of Univ. of Cal.* (1993) 6 Cal.4th 1112, 1129.  
2737-012j

#### **IV. THE DEIR FAILS TO DISCLOSE, EVALUATE AND MITIGATE ALL POTENTIAL IMPACTS TO BIOLOGICAL RESOURCES**

##### **A. The DEIR Fails to Evaluate Potential Impacts to Biological Resources from Offsite Project Activities**

The DEIR violates CEQA because its evaluation of potential impacts to biological resources fails to consider impacts from offsite project activities. These offsite project activities include the construction of underground transmission lands from the Project site to the Niland Substation, which is located over a half mile away.<sup>37</sup> Offsite activities will also include any Imperial Irrigation District transmission system upgrades that may be required as a result of the Project, which the Imperial Irrigation District has identified as including new, relocated, modified or reconstructed electrical utility substations, electrical transmission and distribution lines, canals or drains.<sup>38</sup>

CEQA requires an EIR to evaluate *all* significant impacts of the proposed project, including any secondary, support, or off-site features necessary for its implementation.”<sup>39</sup> The DEIR, however, contains no analysis or discussion of sensitive species that may be found along the transmission line route or in the potential areas of Imperial Irrigation District transmission system upgrades. Furthermore, the surveys conducted for the biological report were limited to the site of the proposed solar facility and did not include the transmission line route or potential areas of Imperial Irrigation District transmission system upgrades.<sup>40</sup> Since sensitive species are known to occur in the immediate area, construction in these offsite areas could result in significant impacts.<sup>41</sup> The DEIR both fails to survey and describe the existing environmental conditions.

As a result, the DEIR fails to establish the environmental setting, or baseline for biological resource impacts related to offsite Project activities. The environmental setting, or baseline, refers to the conditions on the ground and is a starting point to measure whether a proposed project may cause a significant

---

<sup>37</sup> DEIR at p. 19.

<sup>38</sup> DEIR, Appendix A, Imperial Irrigation District NOP letter (Sept. 25, 2012).

<sup>39</sup> *Bozung v. Local Agency Formation Com.* (1975) 13 Cal.3d 263, 283-84.

<sup>40</sup> DEIR, Appendix F, Biological Resources Report (June 20, 2012).

<sup>41</sup> Berryman, *Comments on the Draft Environmental Impact Report Prepared for the Imperial Valley Solar Company 2 Project* (Feb. 14, 2013) (hereafter “Berryman Comments”) at p. 2.  
2737-012j

environmental impact.<sup>42</sup> Describing the environmental setting is a prerequisite to an accurate, meaningful evaluation of environmental impacts.

Furthermore, the failure to provide a proper baseline or to otherwise disclose, investigate or evaluate the potential impact of offsite Project activities on biological resources precludes the public from meaningfully evaluating the potential biological impacts that may result from these off-site project activities. An incomplete agency record also precludes the County from dismissing the likelihood of potential impacts.<sup>43</sup> Because the County has failed to investigate, disclose or evaluate the potential impacts from these offsite Project activities, the County lacks substantial evidence to support a determination that the Project's offsite activities will not result in significant impacts on biological resources.

#### **B. The DEIR Fails to Evaluate Potential Impacts to Biological Resources from Decommissioning Activities**

Similarly, the DEIR is legally inadequate because it fails to investigate, disclose or evaluate the potential impacts from decommissioning activities. As discussed *supra*, the DEIR states that, “[a]s part of project design,” the project will include a decommission plan to remove the solar panels and other facilities at the end of the solar facilities operational phase.<sup>44</sup> Because the DEIR does not evaluate the additional impacts to biological resources that may result from decommissioning activities, the Project's actual impacts are understated and minimized. The failure to evaluate evidence of potential impacts from project activities is a *prima facie* violation of CEQA. CEQA requires an EIR to evaluate *all* significant impacts of the proposed project, including *all* future activities that are reasonably anticipated to become part of the project.<sup>45</sup>

#### **C. The DEIR's Evaluation and Mitigation of Potential Impacts to the Western Burrowing Owl Is Inadequate**

The Western burrowing owl is considered a Species of Special Concern by the California Department of Fish and Game (“CDFG”) and is protected federally under

---

<sup>42</sup> *Save Our Peninsula Com. v. Monterey Bd. of Supervisors* (2001) 87 Cal.App.4th 99, 125.

<sup>43</sup> See *Gentry v. City of Murietta* (1995) 36 Cal.App.4th 1359, 1378-1379; *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 311.

<sup>44</sup> DEIR at p. 115.

<sup>45</sup> CEQA Guidelines §15378; CEQA Guidelines section 15126.2; Pub. Resources Code, § 21100, subd. (b)(1)

the Migratory Bird Treaty Act.<sup>46</sup> Approximately 71 percent of the burrowing owls in California occur in Imperial Valley, primarily in agricultural areas.<sup>47</sup> For many years the Imperial Valley was thought to be a safe stronghold for this species. However, recent evidence indicates owl numbers are plummeting rapidly in the region placing added importance on the remaining population.<sup>48</sup> Furthermore, the CDFG has concluded that habitat loss and degradation from rapid urbanization of farmland in the core areas of the Central and Imperial valleys is a significant threat to burrowing owls in California.<sup>49</sup>

In Imperial Valley, burrowing owl nest primarily along the edges of canals and ditches that border agricultural fields.<sup>50</sup> In these locations, owls occur at a density approximately *eight times* that of other locations within the State.<sup>51</sup> In addition, the burrowing owls associated with agricultural fields in Imperial Valley have some of the highest survival and reproductive rates.<sup>52</sup> The Project site is characterized by agricultural lands and is bordered by the East Highline Canal.<sup>53</sup> Accordingly, it provides prime burrowing owl habitat. Because the Project will eliminate prime burrowing owl habitat, it is imperative for the County to adequately assess the potential scope of the Project's impact on burrowing owls.

The DEIR finds that burrowing owls and their burrows are present in the Project area.<sup>54</sup> However, the DEIR fail to adequately investigate and disclose the scope of their presence and thus fails to adequately set forth the existing baseline conditions necessary to measure the Project's impact on burrowing owls and burrowing owl habitat. The DEIR also lacks foundation for its conclusion that the enumerated mitigation will reduce impacts to a less-than-significant level.

---

<sup>46</sup> DEIR at p. 147.

<sup>47</sup> Wilkerson, et al, *Assessing Changes in Distribution and Abundance of Burrowing Owls in California, 1993-2007*, Bird Populations 10:1-36 (2010).

<sup>48</sup> "California's Largest Burrowing Owl Population Is in Rapid Decline," press release, Center for Biological Diversity, September 22, 2010.

<sup>49</sup> CDFG, Staff Report on Burrowing Owl Mitigation (March 7 2012) at p. 22.

<sup>50</sup> Wilkerson, et al, *Assessing Changes in Distribution and Abundance of Burrowing Owls in California, 1993-2007*, Bird Populations 10:1-36 (2010).

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> DEIR at p. 66.

<sup>54</sup> DEIR at p. 147  
2737-012j

## 1. Adequate Burrowing Owl Surveys Were Not Conducted

The DEIR's evaluation of burrowing owl impacts is deficient because adequate surveys were not conducted to determine their presence and location in the Project area.<sup>55</sup> The County's General Plan requires burrowing owl surveys to adhere to survey guidelines.<sup>56</sup> The CDFG currently recommends surveys that adhere to its 2012 *Staff Report on Burrowing Owl Mitigation*.<sup>57</sup> The DEIR, however, acknowledges that focused breeding season surveys for burrowing owls consistent with CDFG protocol *were not conducted*.<sup>58</sup> As a result, the DEIR violates the requirements of the General Plan and fails to establish the environmental setting, or baseline for impacts to burrowing owls.

Describing the environmental setting is a prerequisite to an accurate, meaningful evaluation of environmental impacts.<sup>59</sup> Without this information an appropriate analysis cannot be made, effective mitigation cannot be designed, and the necessity of additional surveys cannot be determined. Because the DEIR provides an insufficient description of the existing use of the Project site by burrowing owls, it also lacks sufficient evidentiary foundation to support its finding that the project would not have a substantial adverse effect on special status species. Indeed, Ms. Berryman finds that, due to the failure to comply with CDFG survey protocol, there is insufficient information to determine: (1) the actual number of burrowing owls onsite; (2) number of owls living in the buffer areas; (3) the breeding status of owls on and near the Project site; (4) the size of the detected owls' foraging territory; (5) the cumulative impact of the Project on burrowing owls in the region; and (6) the details of required mitigation.<sup>60</sup>

Based on the information provided in the DEIR and the Biological Report, Ms. Berryman identified four significant deficiencies in the burrowing owl surveys:

---

<sup>55</sup> Berryman Comments at p. 2.

<sup>56</sup> County of Imperial. 2008 (Revised). General Plan, Land Use Element. p. 66.

<sup>57</sup> CDFG, Staff Report on Burrowing Owl Mitigation (March 7, 2012).

<sup>58</sup> DEIR at p. 157.

<sup>59</sup> *Save Our Peninsula Com. v. Monterey Bd. of Supervisors* (2001) 87 Cal.App.4th 99, 125.

<sup>60</sup> Berryman Comments at p. 2.  
2737-012j



**(a) Burrowing Owl Surveys Failed to Follow CDFG Guidance Regarding the Number of Surveys and Timing**

The burrowing owls surveys conducted for the DEIR failed to meet the protocol recommendations of the 2012 Staff Report on Burrowing Owl Mitigation regarding the number of surveys and timing. The 2012 Staff Report on Burrowing Owl Mitigation, Appendix D, calls for four survey visits that should include: (1) “at least one site visit between 15 February and 15 April” and (2) “a minimum of three survey visits, at least three weeks apart, between 15 April and 15 July, with at least one visit after 15 June.”<sup>61</sup>

The Project’s Biological Resources Report, however, fails to state how many burrowing owl surveys were conducted and further states that the surveys that were conducted all occurred within a two week span in May 2012. The Biological Report states that “Field surveys were conducted on May 5, 6, 7, 10, 19 and 20, 2012.”<sup>62</sup> The Report goes on to say that some of these surveys were plant surveys and vertebrate and invertebrates surveys and that one of the surveys were conducted at night.<sup>63</sup> It does not, however, disclose how many of these surveys were for burrowing owls. Accordingly, there is no evidence in the record that four burrowing owl surveys were performed.

Even if four burrowing surveys were conducted, the timing of these surveys fails to meet CDFG protocol and guidance. The CDFG calls for burrowing owl surveys to be conducted at least three weeks apart.<sup>64</sup> Since all surveys were performed within a two week period, these surveys violated CDFG protocol.

Moreover, CDFG protocol calls for one survey to be conducted between February 15 and April 15 and at least one survey to be conducted after June 15.<sup>65</sup> Since all surveys were conducted in May, neither of these requirements was met.

While, the DEIR acknowledges that “Breeding-season surveys should be conducted during the next breeding season,”<sup>66</sup> this acknowledgement does not

---

<sup>61</sup> CDFG, Staff Report on Burrowing Owl Mitigation (March 7, 2012) at p. 28.

<sup>62</sup> DEIR, Appendix F, Biological Resources Report (June 20, 2012) at p. 11.

<sup>63</sup> DEIR, Appendix F, Biological Resources Report (June 20, 2012) at p. 11.

<sup>64</sup> CDFG, Staff Report on Burrowing Owl Mitigation (March 7, 2012) at p. 28.

<sup>65</sup> CDFG, Staff Report on Burrowing Owl Mitigation (March 7, 2012) at p. 28.  
2737-012j

remedy the failure of the burrowing owl surveys to follow CDFG protocol. First, the statement that further breeding-season surveys should be conducted has no meaning because the DEIR does not include such a requirement as part of its biological resource mitigation measures. This statement is simply a suggestion without any sort of enforceable mechanism.

Furthermore, post-approval surveys violate both the Imperial County General Plan's requirement that such surveys be prepared "prior to approval of development of existing agricultural land"<sup>67</sup> and CEQA's requirement that the environmental baseline and potential environmental impacts of a project be disclosed in an EIR prior to approval of a project.<sup>68</sup>

**(b) The Burrowing Owl Surveys Failed to Encompass All Areas Where Direct or Indirect Effects Could Potentially Extend Offsite**

The burrowing owl surveys further violated CDFG guidance by failing to encompass all areas where the Project might impact burrowing owls. In particular, the burrowing owl surveys failed to (1) survey 500 meters beyond all site boundaries; (2) survey all potential habitat within 150 meters of site boundaries; and (3) survey areas off-site construction activities, including the offsite 2,700 foot transmission line and offsite Imperial Irrigation District transmission system upgrades that may be required as a result of the Project.

The 2012 CDFG Staff Report on Burrowing Owl Mitigation states that surveys should include adjoining areas within at least 150 meters, *or more where direct or indirect effects could potentially extend offsite*.<sup>69</sup> The 2012 Staff Report on Burrowing Owl Mitigation indicates that avoidance of impacts to burrowing owls requires a 500-meter buffer around burrows for moderate to high impact projects.<sup>70</sup> Since just about the entire Project site will be disturbed, excavated or graded, this Project will have high impacts on any existing habitat and its direct or indirect effects on burrowing owls could potentially extend 500 meters offsite.<sup>71</sup> Accordingly, under CDFG guidance, the surveys should have included adjoining

---

<sup>66</sup> DEIR at p. 157.

<sup>67</sup> See DEIR at p. 155.

<sup>68</sup> *Save Our Peninsula Com. v. Monterey Bd. of Supervisors* (2001) 87 Cal.App.4th 99, 125.

<sup>69</sup> CDFG, Staff Report on Burrowing Owl Mitigation (March 7, 2012) at p. 28.

<sup>70</sup> CDFG, Staff Report on Burrowing Owl Mitigation (March 7, 2012) at p. 9.

<sup>71</sup> Berryman Comments at p. 4.  
2737-012j

areas within at least 500 meters, not just 150 meters.<sup>72</sup> The burrowing owl surveys conducted for the Biological Resources Report, however, were limited to just 150 yards (approximately 140 meters) and thus failed to comply with CDFG guidance.

Moreover, the Biological Resources Report states that it did not even conduct a complete survey of potential habitat within 150 yards. The biological resources report states that surveys were conducted 150 yards beyond the west, south, and north project boundaries “unless impeded by private residences such as residences, fences and posted lands.”<sup>73</sup> The Biological Report does not disclose how much of the 150 yard survey beyond the project boundaries was impeded and not included in the survey. In addition, no surveying was done, at all, of the potential habitat to the east of the Project property.

The 2012 CDFG Staff Report on Burrowing Owl Mitigation states that “if lawful access cannot be achieved to adjacent areas, surveys can be performed with a spotting scope or other methods.”<sup>74</sup> The Biological Resources Report, however, states that where offsite boundaries were impeded, no survey was conducted at all.<sup>75</sup> Accordingly, the burrowing owl survey of adjoining project areas failed to comply with CDFG guidelines.

In addition, the burrowing owl surveys relied upon by the DEIR failed to encompass other project-related areas of off-site construction activities, including the offsite 2,700 foot transmission line and offsite Imperial Irrigation District transmission system upgrades that may be required as a result of the Project. Under CEQA, an EIR must evaluate potential impacts of the whole of the action being approved, including *all* components and activities that are reasonably anticipated to become part of the project.<sup>76</sup> This includes “any secondary, support, or off-site features necessary for its implementation.”<sup>77</sup>

Here, the DEIR states that the Project encompasses construction of a transmission line from the Project site to the existing Niland Substation over 2,700 feet away.<sup>78</sup> In addition, the Imperial Irrigation District has stated that the Project

---

<sup>72</sup> *Id.*

<sup>73</sup> DEIR, Appendix F, Biological Resources Report (June 20, 2012) at p. 11.

<sup>74</sup> CDFG, Staff Report on Burrowing Owl Mitigation (March 7, 2012) at p. 26.

<sup>75</sup> DEIR, Appendix F, Biological Resources Report (June 20, 2012) at p. 11.

<sup>76</sup> CEQA Guidelines §15378.

<sup>77</sup> *Bozung v. Local Agency Formation Com.* (1975) 13 Cal.3d 263, 283-84.

<sup>78</sup> DEIR at p. 68.

may require upgrades to its system in addition to those described in the NOP, including new, relocated, modified or reconstructed electrical utility substations, electrical transmission and distribution lines, canals or drains.<sup>79</sup> The Biological Resources Report, however, states that the biological survey was limited to the approximately 162-acre parcel where the solar facilities will be located.<sup>80</sup> Therefore, not all offsite areas that potentially support burrows that would be impacted by the Project were surveyed. Since burrowing owls were observed in the area of the project site, it is highly likely that active burrows may be present near these areas of offsite activity as well.<sup>81</sup>

By failing to survey all offsite areas that may be potentially impacted by Project activities, the DEIR fails to establish a sufficient baseline regarding the scope of burrowing owl activity in the project area, fails to adequately disclose and mitigate potential impacts to burrowing owls, and lacks substantial evidence for its conclusion that impacts to burrowing owls will be less than significant.

**(c) The Biological Resources Report Fails to Identify Where the Observed Burrowing Owls and Active Burrows Were Located**

The 2012 CDFG Staff Report on Burrowing Owl Mitigation states that the CEQA documentation should include a “detailed map showing locations of all burrowing owls, potential owls, occupied burrows, areas of concentrated burrows, and burrowing owl sign,” as well as a description of the behavior of the owls during the surveys.<sup>82</sup> The DEIR and the Biological Resources Report fail to provide any of this information. The DEIR indicates that four individual burrowing owls and four active burrows were observed in the Project area, but fails to identify where these burrows were found or even what distance from the Project site the active burrows were observed. The 2012 Staff Report on Burrowing Owl Mitigation indicates that avoidance of impacts to burrowing owls requires a 500-meter buffer around burrows for moderate to high impact projects. By failing to identify where the observed burrowing owls are located, it is impossible to assess the potential impact of the Project on these burrows.

---

<sup>79</sup> DEIR, Appendix A, Imperial Irrigation District NOP letter (Sept. 25, 2012).

<sup>80</sup> DEIR, Appendix F, Biological Resources Report (June 20, 2012).

<sup>81</sup> Berryman Comments at p. 4.

<sup>82</sup> CDFG, Staff Report on Burrowing Owl Mitigation (March 7, 2012) at p. 30.  
2737-012j

**(d) The Biological Resources Report Fails to Identify Key Survey Methodology**

The 2012 CDFG Staff Report on Burrowing Owl Mitigation states that the CEQA documentation should include: (1) a description of the date, start and end time of surveys; (2) a description of weather conditions and possible predators present; and (3) a description of survey methods used, including transect spacing, pint count dispersal and duration, and any calls used.<sup>83</sup> The DEIR and the Biological Resources Report fail to provide any of this information. As a result, it is impossible to assess the reliability of the survey results.

For example, Appendix D of the 2012 Staff Report on Burrowing Owl Mitigation calls for walking straight line transects spaced 7 to 20 meters apart.<sup>84</sup> The Biological Resources Report states that it conducted plant surveys in transects at 10 yard intervals, but fails to provide any information as to how it conducted burrowing owl surveys.<sup>85</sup> Western burrowing owl burrows can be difficult to detect from a distance, thus requiring appropriately spaced transects for 100% visual coverage of a site. Therefore, burrows could have been present on the property, but missed if CDFG protocol was not applied.<sup>86</sup>

In addition, the 2012 CDFG Staff Report on Burrowing Owl Mitigation states that poor weather conditions may affect the ability to detect burrowing owls and provides guidance on what time of day surveys should be conducted.<sup>87</sup> The failure to provide the dates and times and weather conditions of the burrowing owl surveys precludes an assessment of how many surveys were conducted and of whether surveys were conducted at times and in conditions that would not inhibit reliable survey results.<sup>88</sup>

The 2012 CDFG Staff Report on Burrowing Owl Mitigation also warns that if raptors or other predators are present, they may suppress burrowing owl activity. The CDFG recommends that in such cases, the survey should be performed at another time or a later date.<sup>89</sup> The Biological Resources Report discloses that

---

<sup>83</sup> CDFG, Staff Report on Burrowing Owl Mitigation (March 7, 2012) at p. 30.

<sup>84</sup> CDFG, Staff Report on Burrowing Owl Mitigation (March 7, 2012) at p. 28.

<sup>85</sup> DEIR, Appendix F, Biological Resources Report (June 20, 2012) at p. 11.

<sup>86</sup> Berryman Comments at p. 5.

<sup>87</sup> DEIR, Appendix F, Biological Resources Report (June 20, 2012) at p. 28.

<sup>88</sup> Berryman Comments at p. 5.

<sup>89</sup> DEIR, Appendix F, Biological Resources Report (June 20, 2012) at p. 28.  
2737-012j

raptors, including hawks and falcons were observed during Project surveys, but fails to indicate if they were observed during burrowing owl surveys.<sup>90</sup>

Because the Biological Report fails to provide key surveying information that CDFG has identified as essential to CEQA review, the burrowing owl surveys relied upon in the DEIR are inherently unreliable. While burrowing owls were found in the Project area, the failure to follow burrowing owl survey protocol makes it possible that the DEIR significantly understates the actual number of burrowing owls on the sites.<sup>91</sup> As stated in the Burrowing Owl Consortium's 1993 Burrowing Owl Survey Protocol and Mitigation Guidelines, "[t]he absence of standardized field survey methods impairs adequate and consistent impact assessment during regulatory review processes, which in turn reduces the possibility of effective mitigation."<sup>92</sup>

## **2. The DEIR Fails to Evaluate the Project's Cumulative Impact on Loss of Burrowing Owl Habitat**

The DEIR's evaluation of the Project's impact on burrowing owls is further inadequate because it fails to take into account the significant cumulative impact from loss of burrowing owl nesting and foraging habitat in the region, including loss of habitat from the related cumulative projects listed in the DEIR. Recent reports have identified loss of foraging habitat as a key factor in the plummeting numbers of burrowing owls in the region.<sup>93</sup> These reports underscore the importance of evaluating these cumulative impacts and imposing meaningful mitigation measures to compensate for loss of habitat.

As defined by the CEQA Guidelines, a cumulative impact is one "which is created as a result of the combination of the project evaluated in the EIR together with other projects causing related impacts."<sup>94</sup> The potentially significant impacts of the proposed Project must be considered in conjunction with the impacts from these other projects. CEQA thus requires consideration of the incremental impacts

---

<sup>90</sup> DEIR, Appendix F, Biological Resources Report (June 20, 2012) at pp. 5-6.

<sup>91</sup> Berryman Comments at p. 6.

<sup>92</sup> Burrowing Owl Consortium, Burrowing Owl Survey Protocol and Mitigation Guidelines (1993).

<sup>93</sup> "California's Largest Burrowing Owl Population Is in Rapid Decline," press release, Center for Biological Diversity, September 22, 2010.

<sup>94</sup> CEQA Guidelines § 15130 subd. (a)(1).  
2737-012j

caused by a project, together with other past, present, and reasonably foreseeable future projects, including projects outside of the lead agency's jurisdiction.<sup>95</sup>

The DEIR's cumulative analysis of burrowing owl impacts fails, however, to look at these impacts in the context of other past, present, and reasonably foreseeable future projects.<sup>96</sup> Moreover, the analysis provided does not provide anything close to what is required under CEQA.

DEIR Table 2-1 identifies 61 cumulative current and proposed projects in the area. These projects will convert approximately 35,000 acres of agricultural land in Imperial County to solar and other energy/industrial facilities.<sup>97</sup> This cumulative loss represents approximately 6% of the agricultural land in Imperial County. The County's own general plan recognizes that agricultural land is often of significant habitat value to burrowing owls.<sup>98</sup> The DEIR's analysis of cumulative impacts to burrowing owls, however, fails to disclose, discuss or evaluate the potential loss of burrowing owl habitat that may result from these 61 projects, along with the Project at hand.

Here, the Project will directly eliminate, potentially permanently, approximately 159 acres of agricultural habitat that is also foraging and breeding habitat for burrowing owls. When this loss of habitat is looked at in connection with the loss of 35,000 additional acres of potential burrowing owl agricultural habitat from other related past, present, and reasonably foreseeable future projects and in connection with the reports of recently plummeting numbers of burrowing owls in the Imperial Valley region, the cumulative impact of this loss of habitat is likely significant even with compliance with CDFG burrowing owl survey protocol and mitigation guidelines.<sup>99</sup>

The DEIR's failure to evaluate the cumulative loss of burrowing owl habitat from this project and closely related past, present, and reasonably foreseeable probable future projects violates CEQA. As such, the DEIR must be revised to incorporate an analysis of how the cumulative loss of more than 35,000 acres of

---

<sup>95</sup> CEQA Guidelines, § 15064(h)(1); *see also* 15355, subd. (b); *see also Los Angeles Unified School Dist. v. City of Los Angeles* (1997) 58 Cal.App.4th 1019, 1024-1025.

<sup>96</sup> DEIR at p. 160.

<sup>97</sup> DEIR at pp. 72-75.

<sup>98</sup> County of Imperial General Plan, Conservation and Open Space Element, p. 18.

<sup>99</sup> Berryman Comments at pp. 8-9.  
2737-012j

agricultural farmland will affect burrowing owls that rely on agricultural fields as habitat.

**3. The DEIR Fails to Require Sufficient Mitigation to Reduce Burrowing Owl Impacts to a Less Than Significant Level**

The DEIR is further deficient because it fails to provide sufficient mitigation to fully mitigate impacts to burrowing owls that are identified in the Project area. Under the 2008 Burrowing Owl Survey Protocol and Mitigation Guidelines, adequate mitigation for loss of nesting habitat requires the acquisition of offsite nesting habitat at a ratio of 9.75 acres per active burrow found on or adjacent to the Project site or in the 500-foot disturbance area around the sites. The 2012 CDFG Staff Report on Burrowing Owl Mitigation continues to call for mitigation, but states that actual acreage ratios should be determined on a case by case basis in consultation with the CDFG.<sup>100</sup> The acquired land must be comparable in habitat quality and be purchased and/or placed in a conservation easement in perpetuity.<sup>101</sup>

The DEIR, however, fails to require the purchase of *any* conservation easements to replace the loss of habitat.<sup>102</sup> Furthermore, no Project-specific analysis is conducted to determine the appropriate ratio. Without such an analysis, mitigation for the Project's impact on burrowing owl habitat should include at a minimum acquisition of offsite nesting habitat at a ratio of 9.75 acres per active burrow, as required under earlier guidance. By failing to include any mitigation for loss of habitat, the DEIR lacks foundation for its conclusion that the proposed mitigation measures will reduce impacts to the burrowing owl below a level of significance.

In addition, the DEIR fails to include numerous mitigation measures for direct impacts to burrowing owls set forth in the 2012 CDFG Staff Report on Burrowing Owl Mitigation. Instead, the EIR relies upon a yet to be developed

---

<sup>100</sup> CDFG, Staff Report on Burrowing Owl Mitigation (March 7, 2012) at pp. 11-12.

<sup>101</sup> *Id.* at p. 12.

<sup>102</sup> At one point, the DEIR states that "Mitigation acreages will be determined in consultation with CDFG." (DEIR at p. 160.) The DEIR, however, does not identify any requirement to purchase mitigation acreages as part of the proposed enforceable mitigation. The County's response to comments should clarify whether mitigation acreage will be required and, if so, how the amount of acreage will be determined, where it will be located and what sort of land will it contain.



“Burrowing Owl Mitigation and Monitoring Plan “that will detail the approved, site-specific methodology proposed to minimize and mitigate impacts to this species.

Deferring formulation of mitigation measures to post-approval studies is generally impermissible.<sup>103</sup> Mitigation measures adopted after Project approval deny the public the opportunity to comment on the Project as modified to mitigate impacts.<sup>104</sup> If identification of specific mitigation measures is impractical until a later stage in the Project, specific performance criteria must be articulated and further approvals must be made contingent upon meeting these performance criteria.<sup>105</sup> The Courts have held that simply requiring a project applicant to obtain a future report and then comply with any recommendations that may be made based upon the report is insufficient to meet the standard for properly deferred mitigation.<sup>106</sup> Here, no showing has been made that identification of specific mitigation measures is impractical at this stage of Project review. To the contrary, the 2012 CDFG Staff Report on Burrowing Owl Mitigation sets forth the mitigation measures that must be included. Furthermore, no performance standards have been articulated. Because mitigation of burrowing owl impacts has been improperly deferred, the DEIR must be revised to address these impacts prior to Project approval.

For all of the foregoing reasons, the County may not conclude that impacts to Western burrowing owls are reduced to a less-than-significant level. The County must require that adequate surveys be conducted to assess all of the Project’s impacts to Western burrowing owls. The results of these surveys must be included in an EIR prepared for the Project. The EIR must also assess the cumulative impacts on burrowing owl populations in the region and identify specific, enforceable mitigation to address both disturbance of burrowing owls and loss of their habitat.

---

<sup>103</sup> *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 308-309; Pub. Resources Code § 21061.

<sup>104</sup> *Gentry v. City of Murrieta* (1995) 36 Cal.App.4th 1359, 1393; *Quail Botanical Gardens Foundation v. City of Encinitas* (1994) 29 Cal.App.4th 1597, 1604, fn. 5.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

**D. The DEIR's Conclusion that the Project Will Not Cause Significant Impacts to the Mountain Plover Is Not Supported by Substantial Evidence**

The DEIR is further inadequate because its conclusion that the Project will not cause significant impacts to the mountain plover is not supported by substantial evidence. The mountain plover is a California Species of Special Concern and a Bureau of Land Management Sensitive Species.<sup>107</sup> Imperial Valley provides critical habitat for the mountain plover.<sup>108</sup> Imperial Valley is the primary wintering area for approximately 50 percent of the global population of mountain plovers.<sup>109</sup> The DEIR, however, incorrectly states that the likelihood of mountain plover on the Project site is “very low” because preferred wintering habitat is not present on the Project site.<sup>110</sup>

This conclusion is not supported by any evidence in the record. The DEIR states that the Project site is generally flat and has been historically farmed for the production of okra, but is currently fallowed land devoid of substantial vegetation.<sup>111</sup> The DEIR (citing the California Audubon Society 2011 *California Statewide Mountain Plover Survey; January 20-24 Survey Protocol*) also acknowledges that mountain plovers often use agricultural fields that are fallowed, or flat with bare dirt.<sup>112</sup> Since the Project site is fallowed, flat and largely devoid of vegetation, it meets the very definition of suitable wintering habitat for mountain plovers. In addition, there are several recorded occurrences of wintering mountain plovers within five miles of the Project site.<sup>113</sup> Since the site supports suitable habitat in an area that plovers are known to winter, the likelihood of this species using the site is moderate to high.<sup>114</sup>

The DEIR's contrary conclusion that the Project site has a very low potential for the occurrence of mountain plovers is not supported by any evidence.<sup>115</sup> The

---

<sup>107</sup> DEIR at p. 151.

<sup>108</sup> Wunder, et al, *The Imperial Valley of California Is Critical to Wintering Mountain Plovers*, *Journal of Field Ornithology*, Vo. 74, No. 1 (Winter, 2003) at pp. 74-80.

<sup>109</sup> *Id.*

<sup>110</sup> DEIR at Table 3-19.

<sup>111</sup> DEIR at p. 107.

<sup>112</sup> DEIR at p. 151.

<sup>113</sup> Berryman Comments at p. 6.

<sup>114</sup> Berryman Comments at p. 6.

<sup>115</sup> DEIR at p. 147.

DEIR does not provide any explanation or analysis to support its conclusion that Mountain Plover habitat is not present on site or even indicate where this conclusion came from.<sup>116</sup> The DEIR's Appendix F Biological Resources Report upon which it relies does not contain any analysis of the mountain plover and does not, itself, state that the Project site has a very low potential for the occurrence of mountain plovers. Moreover, no surveys were performed for mountain plover consistent with recognized survey guidance for wintering mountain plovers in the Imperial Valley.<sup>117</sup> The surveys that were conducted on the Project site took place in May, *after* the mountain plovers migrate from their California breeding grounds.<sup>118</sup>

In the absence of relevant and timely surveys, the County must assume that the Project site supports potentially occupied habitat for mountain plover. Because the County's conclusion that the Project would not eliminate mountain plover habitat was not supported by substantial evidence, the EIR must be revised to disclose the Project's potential impact on the mountain plover and to identify feasible mitigation to address such impacts.

**E. The DEIR Fails to Disclose or Analyze Potentially Significant Project Related Impacts to Aquatic Habitats and Resources**

The DEIR fails to address the Project's foreseeable impacts to aquatic resources in and downstream of the adjacent East Highland Canal. Riparian vegetation that may exist along the laterals and drains, are extremely sensitive to changes in hydrology, as are the species that depend on the riparian vegetation for habitat. The Project has the potential to affect the regional hydrology by changing the land use, altering the irrigation system, and discharging wastewater, and from the Project's installation of stormwater retention basins and outlets. The DEIR, however, fails to assess if the adjacent East Highland Canal supports habitat for any sensitive special status species that could be affected by construction runoff, increased stormwater runoff, or the proposed use of soil stabilizers to suppress dust.

Table 3-19 of the DEIR indicates that canals surrounding the Project site could support habitat for leopard frog, Sonoran desert toad, and Couch's spadefoot toad, each of which is listed as a California Species of Special Concern. There are

---

<sup>116</sup> DEIR at pp. 147, 151.

<sup>117</sup> Berryman Comments at pp. 6-7.

<sup>118</sup> Berryman Comments at p. 7.  
2737-012j

recorded occurrences for all three of these amphibians within five miles of the Project site.<sup>119</sup> Neither the DEIR nor the Biological Resources Report contains any indication or evidence that the adjacent canal was surveyed for the presence of these special status species.

As a result, the DEIR fails to establish the environmental setting, or baseline for biological resource impacts related to the potential existence of special status species in the adjacent canal. Describing the environmental setting is a prerequisite to an accurate, meaningful evaluation of environmental impacts.<sup>120</sup>

The failure to provide a proper baseline or to otherwise disclose, investigate or evaluate the potential impact of Project activities on biological resources within the East Highland Canal, precludes the public from meaningfully evaluating potential impacts to special status species, such as the leopard frog, Sonoran desert toad, and Couch's spadefoot toad. This violates CEQA because it precludes informed decisionmaking and informed public participation.<sup>121</sup>

While the Applicant does not propose any direct alteration of the canal, the Project may have indirect effects on the canal and the resources it supports from construction and operational runoff and from potentially pesticide-contaminated construction and operational dust settling into the waterway. The EIR must be revised to evaluate these potential indirect impacts. Because the County has failed to investigate, disclose or evaluate the potential impacts to special status species that may inhabit the adjacent canal, the County lacks substantial evidence to support a determination that the Project's construction activities will not result in significant impacts on biological resources.

#### **F. The DEIR Fails to Disclose and Evaluate the Strike Risk that Low-Reflective Solar Panels Pose to Birds**

The DEIR's failure to disclose and evaluate the strike risk that low-reflective solar panels pose to birds violates CEQA. The proposed Project will install hundreds of thousands of low-reflective glass PV panels, which pose known risk to

---

<sup>119</sup> Berryman Comments at p. 7.

<sup>120</sup> *Save Our Peninsula Com. v. Monterey Bd. of Supervisors* (2001) 87 Cal.App.4th 99, 125.

<sup>121</sup> *Napa Citizens for Honest Government v. Napa County Board of Supervisors* (2001) 91 Cal.App.4th 342, 355-356.  
2737-012j

birds. While low or non-reflective glass reduces glare, it is responsible for nearly twice the number of bird strikes compared to conventional clear panels.<sup>122</sup>

Studies have found an estimated collision rate of 6.13 birds per MW per year at solar facilities utilizing reflective panels, with rates increasing the lower the reflectivity.<sup>123</sup> It is important to note these numbers are conservative, as the study was conducted in a region with relatively low abundance of birds compared to the Project sites, which is in the vicinity a major highway for migratory birds. Based on these studies, the most conservative fatal collision rate at the Project's PV facility would be 180 bird fatalities per year (i.e., 6.13 collision/MW x 30 MW).<sup>124</sup>

The Project spans an area that is part of the Pacific Flyway, a critical corridor for migratory birds.<sup>125</sup> Under the Migratory Bird Treaty Act, "take" of any migratory bird, nest, egg, or part thereof is unlawful at any time, by any means or any manner. The DEIR's failure to identify, assess and mitigate the potential significance of migratory birds being among the annual bird fatalities expected to be caused by the Project is a fundamental flaw that violates CEQA.

#### **G. The DEIR Fails to Evaluate Potential Impacts from the Proposed Use of Chemical Soil Stabilizers**

The DEIR states that the Project may rely on chemical soil stabilizers to reduce dust impacts during construction,<sup>126</sup> but then fails to evaluate the potential that these chemicals have to cause adverse impacts to biological resources. The application of such chemicals has been associated with the browning of trees along roadways and stunted vegetation growth in forestlands.<sup>127</sup> The aquatic ecosystems are affected by direct contamination from spills or runoff from off-site application of soil stabilizers (e.g., access and unpaved public roads). Fish may be affected by direct ingestion of toxic constituents. The soil stabilizers can cause sickness and reproductive effects in terrestrial animals. The DEIR is silent as to any of these potentially significant environmental impacts. Additional information must be

---

<sup>122</sup> Berryman Comments at p. 11.

<sup>123</sup> Berryman Comments at pp. 10-11.

<sup>124</sup> Berryman Comments at p. 11.

<sup>125</sup> Berryman Comments at p. 11; *see also*, The Importance of the Salton Sea and Other Terminal Lakes in Supporting Birds of the Pacific Flyway, California Department of Water Resources. Available at: <http://www.water.ca.gov/saltonsea/historicalcalendar/docs/TerminalLakes.pdf>.

<sup>126</sup> DEIR at p. 137.

<sup>127</sup> Berryman Comments at pp. 11-12.  
2737-012j

disclosed regarding the Project's intended use of chemical soil stabilizers in order to allow evaluation of potential impacts. Information that is needed to assess this impact includes the type and concentration of the chemical stabilizer and the expected frequency of use. The failure to evaluate potential impacts from the use of chemical stabilizers is a violation of CEQA.

**V. THE DEIR'S AIR QUALITY ANALYSIS IS INCOMPLETE AND FAILS TO COMPLY WITH THE REQUIREMENTS OF CEQA**

The air quality section of the DEIR is inadequate because it is truncated in scope, fails to disclose information necessary to evaluate the significance of the Project's construction emissions and relies on improperly deferred mitigation. Relying on an air quality study included as Appendix E to the DEIR, the DEIR concludes that Project construction and operation will not result in any significant unmitigated air quality impacts. This conclusion, however, is not supported by substantial evidence because the air quality study: (1) fails to account for all potential Project construction activities; (2) fails to evaluate potential air quality impacts from the Project's decommissioning phase; (3) improperly defers identification of mitigation for operational PM<sub>10</sub><sup>128</sup> impacts; and (4) fails to evaluate potential non-cancer health risks from exposure to diesel particulate matter emissions. These failures are significant because the Salton Sea Air Basin, where the project is located, has been in "nonattainment" for the federal and state ozone and PM<sub>10</sub> standards since 1994. Imperial Valley remains in Serious Non-Attainment for PM<sub>10</sub> and is in Non-Attainment for Particulate Matter less than 2.5 microns (PM<sub>2.5</sub>) for 2012.

**A. The DEIR Does Not Take into Account Offsite Project Activities in Its Evaluation of Potential Air Quality Impacts**

The DEIR's calculation of Project construction emissions fails to take into account emissions from all offsite Project construction activities. The Project encompasses not just the construction of the solar facility on the Project site, but also various related offsite Project construction activities. Because it fails to take into account all Project construction activities, the DEIR's conclusion that air

---

<sup>128</sup> Particulate matter less than 10 microns.  
2737-012j

quality impacts from Project construction will be less than significant is not supported by substantial evidence.<sup>129</sup>

Offsite Project construction activities include the construction of underground transmission lines from the Project site to the Niland Substation, which is located over a half mile away.<sup>130</sup> Offsite construction activities will also include any additional Imperial Irrigation District transmission system upgrades that may be required as a result of the Project. The Imperial Irrigation District has stated that such upgrades may include new, relocated, modified or reconstructed electrical utility substations, electrical transmission and distribution lines, canals or drains.<sup>131</sup> The DEIR also states that upgrades to a switchyard and construction of an additional step-up transformer may be required as part of the interconnection with the Imperial Irrigation District Niland Substation.<sup>132</sup>

The DEIR's air emission calculation, however, provides no indication that it took into account emissions from construction along the transmission line route or in the potential areas of Imperial Irrigation District transmission system upgrades.<sup>133</sup> CEQA requires an EIR to evaluate *all* significant impacts of the proposed project, including any secondary, support, or off-site features necessary for its implementation."<sup>134</sup> By failing to evaluate *all* sources of construction impacts, including construction of any secondary, support, or off-site features necessary for its implementation, the air analysis understates emissions and lacks evidentiary support for its conclusions that emissions will be less than significant.

In particular, this failure renders the DEIR's analysis of NOx emissions inadequate. The DEIR estimates that Project construction will result in an estimated 97 pounds/day of unmitigated NOx emissions.<sup>135</sup> This is just barely below the Imperial County APCD significance threshold of 100 pounds/day. There

---

<sup>129</sup> Hagemann & Bhandaram, SWAPE, *Comments on the Draft Environmental Impact Report for the Imperial Valley Solar Company 2 Project, Imperial County, California* (Feb. 14, 2013) (hereafter "SWAPE Comments") at pp. 8-9.

<sup>130</sup> DEIR at p. 19.

<sup>131</sup> DEIR, Appendix A, Imperial Irrigation District NOP letter (Sept. 25, 2012).

<sup>132</sup> DEIR at p. 68.

<sup>133</sup> If the County is asserting that the calculation of 97 lbs per day of NOx construction emissions *did* include construction of the transmission line, switchyard, additional step-up transformer and all other potential offsite project components, then, in its response to comments, we request that the County identify where in the record it shows that these offsite emissions are calculated.

<sup>134</sup> *Bozung v. Local Agency Formation Com.* (1975) 13 Cal.3d 263, 283-84.

<sup>135</sup> DEIR at p. 133.

is no question that the inclusion of related offsite Project construction activities into this estimate would increase NOx emissions above this threshold of significance. By failing to take into account related off-site construction activities, the DEIR's conclusion that NOx emissions would be less than significant is speculative and not supported by relevant data.<sup>136</sup>

The DEIR assertion that the 97 pounds/day of NOx emissions will be mitigated to 64 pounds/day is also not supported by substantial evidence.<sup>137</sup> This is a 34% reduction in emissions. This assertion is also not supported by the record. First, as with the 97 pounds/day estimate, the 64 pounds/day estimate does not take into account all related off-site construction activities and thus is based upon an incomplete analysis. Second, no mitigation measures are provided in the DEIR that are specific to NOx emissions. The only mitigation measures for air quality in the DEIR, measures AQ-1, AQ-2, and AQ-3, are targeted towards reducing PM10 emissions.<sup>138</sup> Without providing specific NOx mitigation measures, there is no evidence in the DEIR to support its claim of a 34% reduction in NOx emissions.<sup>139</sup>

The Salton Sea Air Basin is in non-attainment for ozone and NOx emissions can react in the atmosphere to form ozone.<sup>140</sup> Because Project NOx emissions may contribute to ozone levels and worsen air quality in the basin, and because total NOx emissions (taking into account offsite construction activities) likely exceeds the Imperial County Air Pollution Control District threshold of significance, specific mitigation measures should be identified and required to protect local air quality.<sup>141</sup> A revised DEIR should be prepared to include the following feasible mitigation measures specifically designed to reduce NOx emissions:<sup>142</sup>

- Implement Best Available Control Technology (BACT) for the emissions unit. For compressor engines, this can result in NOx emission rate of 1 g/bhp-hr, which is lower than the 1.5 g/bhp-hr rate used in the modeling.
- Utilize electric powered compressor engines in place of fuel combustion sources. Using electric-powered compressor motors in place of the typical

---

<sup>136</sup> SWAPE Comments at pp. 8-9.

<sup>137</sup> DEIR at p. 133.

<sup>138</sup> DEIR, p. 132

<sup>139</sup> SWAPE Comments at pp. 8-9.

<sup>140</sup> SWAPE Comments at p. 8.

<sup>141</sup> SWAPE Comments at pp. 8-9.

<sup>142</sup> SWAPE Comments at p. 9.



natural gas-fired compressor engines could eliminate primary NOx emissions from compressor stations.

- Use alternative fuels, which have lower fuel nitrogen content. Natural gas-fired compressor engines typically have lower NOx emissions than diesel-fired engines.
- A plan to demonstrate that heavy-duty (50 horsepower or more) off-road vehicles to be used in the construction Project will achieve a project wide fleet-average 20% NOX reduction and 45% particulate reduction compared to the most recent California Air Resources Board fleet average.
- Limiting emissions from all off-road diesel powered equipment to a maximum of 40% opacity (the degree to which light is obscured) for more than three minutes in any one hour. Any equipment found to exceed 40 percent opacity (or 2 on the Ringelmann smoke chart) shall be repaired immediately.

#### **B. The DEIR Fails to Evaluate or Mitigate Potential Air Quality Impacts from Decommissioning Activities**

The DEIR's air quality analysis is also inadequate and incomplete because it fails to investigate, disclose or evaluate the potential impacts from decommissioning activities.<sup>143</sup> The DEIR states that the solar facility is "temporary in nature"<sup>144</sup> and "[a]s part of project design" the project will include a decommission plan to remove the solar panels and other facilities at the end of the solar facilities lifespan.<sup>145</sup>

Decommissioning can include a range of activities from removal of all structures, foundations, wires and hazardous materials, as well as restoration of site vegetation.<sup>146</sup> Emissions from decommissioning activities include truck and equipment traffic emissions, diesel emissions from generator equipment and fugitive dust emissions from land clearing, panel and support structure removal, backfilling, dumping, and restoration of disturbed areas through grading, seeding, and planting.<sup>147</sup> The DEIR, however, fails to disclose, evaluate or ensure that

---

<sup>143</sup> SWAPE Comments at p. 9.

<sup>144</sup> DEIR at p. 117.

<sup>145</sup> DEIR at p. 115.

<sup>146</sup> Voegelé & Changala, Decommissioning Funds for Renewable Energy Facilities, Vermont Law School Institute for Energy and Environment (Sept. 2010) at p. 1.

<sup>147</sup> Solar Energy Decommissioning Impacts, <http://teeic.anl.gov/er/solar/impact/decom/index.cfm> 2737-012j

mitigation measures will be implemented to address the potential impact on regional air quality that may result from decommissioning activities. At a minimum, decommissioning activities should be required to prepare an air quality analysis and to implement mitigation measures based upon enforceable performance standards that are identified now.

**C. The DEIR's Evaluation of Operational Air Quality Impacts Relies upon Improperly Deferred Mitigation and Is Not Supported by Substantial Evidence**

The DEIR's evaluation of impacts from operational dust emissions violates the requirements of CEQA. The DEIR finds that construction of the solar panels will alter wind patterns and "potentially create cumulatively significant operational impacts to PM10" and that an operational dust control plan will be prepared to reduce impacts to a less than significant level.<sup>148</sup> No details or enforceable performance standards are set forth regarding the operational dust control plan. The DEIR then concludes that this future preparation of an enforceable dust control plan will reduce the Project's cumulatively significant operational PM10 impacts to less than significant.<sup>149</sup> CEQA, however, prohibits an EIR from relying upon deferred and inadequately described mitigation to support a finding that impacts are less than significant.

Mitigation measures identified and adopted *after* project approval cannot validate the issuance of an EIR, since this deferral denies the public the opportunity to comment on the Project as modified to mitigate impacts.<sup>150</sup> Accordingly, deferral of the formulation of mitigation measures to post-approval studies is generally impermissible.<sup>151</sup> An agency may only defer the formulation of mitigation measures when it "recognizes the significance of the potential environmental effect, commits itself to mitigating its impact, and articulates *specific performance criteria* for the future mitigation."<sup>152</sup>

---

<sup>148</sup> DEIR at p. 138-139.

<sup>149</sup> DEIR at p. 138-139.

<sup>150</sup> *Gentry v. City of Murrieta* (1995) 36 Cal.App.4th 1359, 1393; *Quail Botanical Gardens Foundation v. City of Encinitas* (1994) 29 Cal.App.4th 1597, 1604, fn. 5.

<sup>151</sup> *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 308-309.

<sup>152</sup> *Gentry v. City of Murrieta*, 36 Cal.App.4th at 1411 (emphasis provided), citing *Sacramento Old City Assn. v. City Council* (1991) 229 Cal.App.3d 1011, 1028-1029.  
2737-012j

Here, the reliance on the future preparation of an operational dust control plan violates CEQA's prohibition on deferred mitigation measures because it fails to set forth meaningful performance standards and does not allow for independent review and analysis of the plan's adequacy in mitigating the Project's operational PM10 emissions. The only performance standard identified by the DEIR is the requirement that the dust control plan be prepared "to the satisfaction of the ICAPCD".<sup>153</sup> "To the satisfaction of the ICAPCD" is not a performance standard that can be used to evaluate the adequacy and effectiveness of the dust control plan.<sup>154</sup> Such a standard is vague and provides no assurance that dust impacts will be reduced below a level of significance.

An operational dust control plan, to be included with a revised DEIR, should be prepared now to allow for the public review and analysis required under CEQA. Without identification of specific mitigation measures or specific performance standards, the DEIR's conclusion that operational dust impacts will be less than significant is not supported by substantial evidence and violates the requirements of CEQA.

This is not an insignificant violation of CEQA. Because the Project is located in an air basin designated non-attainment for PM10, significant operational dust emissions would further degrade air quality and pose health risks to site personnel and nearby residents. Exposure to PM10 can result in damage to lung tissue, cancer, and premature death.<sup>155</sup> Children are especially susceptible to higher risks.<sup>156</sup> As of 2010, Imperial Valley had the highest asthma hospitalization rate.<sup>157</sup> If Project operation results in cumulatively significant PM10 emissions, the Project may worsen regional air quality leading to increased childhood asthma rates.

The DEIR also needs to disclose if future operational dust suppression activities will include the use of chemical soil stabilizers. Chemical properties, particularly toxic contaminants, can vary significantly depending on the type of

---

<sup>153</sup> DEIR at pp. 38, 139.

<sup>154</sup> SWAPE Comments at pp. 11.

<sup>155</sup> SWAPE Comments at p. 10; see also <http://www.epa.gov/airtrends/aqtrnd95/pm10.html>

<sup>156</sup> SWAPE Comments at p. 10; see also

<http://www.co.imperial.ca.us/airpollution/attainment%20plans/final%20ic%202009%20pm10%20sip%20document.pdf>

<sup>157</sup> SWAPE Comments at p. 10; see also Childhood Asthma in the Imperial Valley, <http://blogs.kqed.org/ourxperience/2010/08/24/childhood-asthma-in-the-imperial-valley/> [Accessed February 12, 2013].  
2737-012j

stabilizer (and manufacturer).<sup>158</sup> U.S. EPA experts have found that the use of dust suppressants can “affect air quality characteristics’ in a number of ways. In arid areas, for example, the use of water may add moisture to air fostering the proliferation of microorganisms. Dust suppressants that adhere to soil particles can be re-entrained into the air with strong winds, potentially adding contaminants to the air in addition to particulate matter. In addition, dust suppressants can pose risks to biological resources.<sup>159</sup>

If future operational dust suppression activities will include the use of chemical soil stabilizers, then the impacts associated with the long-term use of soil stabilizers must also be addressed. If a mitigation measure would itself cause significant environmental impacts distinct from the impacts cause by the Project, those impacts must be discussed in the EIR.<sup>160</sup> Accordingly, the revised discussion of operational dust impacts must also evaluate associated impacts with the use of soil stabilizers, including impacts relating to the change in volume, rate, and timing of runoff from the Project sites and the impacts of the chemicals on health and biological resources.

#### **D. The DEIR Fails to Evaluate Non-Cancer Health Risks from Exposure to Diesel Particulate Matters**

The DEIR’s evaluation of air quality impacts related to diesel particulate matter (“DPM”) is legally deficient because it fails to evaluate potential non-cancer health risks.

CEQA requires that an EIR discuss health and safety problems caused by the physical changes that the proposed project will precipitate.<sup>161</sup> The Air Quality study for the Project, included as Appendix E to the DEIR, conducts a cancer risk analysis from exposure to DPM. The analysis shows that cancer risks from the Project would be below the significance threshold of one in one million and, therefore, have no impact.<sup>162</sup>

---

<sup>158</sup> Environmental Protection Agency, *Potential Environmental Impacts of Dust Suppressants: “Avoiding Another Times Beach,”* (May 30-31, 2002), available at: <http://www.epa.gov/nerlesd1/cmb/pdf/dust.pdf>.

<sup>159</sup> See Berryman Comments.

<sup>160</sup> CEQA Guidelines, § 15126.4, subd. (a)(1)(D).

<sup>161</sup> CEQA Guidelines § 15126.2, subd. (a).

<sup>162</sup> DEIR at p. 136; DEIR, Appendix E at p. 32.  
2737-012j

Exposure to DPM, however, results in numerous other health effects in addition to cancer. Short-term exposures to diesel exhaust include eye, nose, throat, and lung irritation, coughs, headaches, nausea, and lung tissue damage.<sup>163</sup> The DEIR does not identify or evaluate the impact of non-cancerous health risks from DPM exposure on construction workers and nearby residents.

The closest residents to the Project are located just 213 feet away. In addition, up to 120 construction workers may be on site for six days a week over a 14-month construction schedule period.<sup>164</sup> Project construction will require the use of diesel-powered equipment such as scrapers, graders, forklifts, tractors, backhoes, loaders, water trucks, welders, and cranes.<sup>165</sup> Diesel equipment will be used during all phases of construction.<sup>166</sup>

Because Project construction may expose workers and nearby residents to non-cancerous health impacts from DPM exposure, a revised DEIR should be prepared to evaluate and mitigate these non-cancerous health risks. These mitigation measures should include:<sup>167</sup>

- Regular preventive maintenance to prevent emission increases due to engine problems;
- Use of low sulfur and low aromatic fuel meeting California standards for motor vehicle diesel fuel;
- Reduce equipment and vehicle idle times. Diesel equipment standing idle for more than five minutes shall be turned off. This includes trucks waiting to deliver or receive aggregate or other bulk materials. Rotating drum concrete trucks could keep their engines running continuously as long as they were onsite;
- Use of low-emitting Diesel engines meeting federal emissions standards;

---

<sup>163</sup> SWAPE Comments at p. 11; see also Office of Environmental Health Hazard Assessment, Health Effects of Diesel Exhaust, [http://oehha.ca.gov/public\\_info/facts/dieselfacts.html](http://oehha.ca.gov/public_info/facts/dieselfacts.html) January [accessed Jan. 22, 2013].

<sup>164</sup> DEIR, Appendix E at p. 26.

<sup>165</sup> DEIR, Appendix E at Attachment A.

<sup>166</sup> DEIR at p. 130.

<sup>167</sup> SWAPE Comments at pp. 11-12.  
2737-012j

- Diesel engines from 50 to 750 horsepower are to meet Tier 3 California Emission Standards for Off-road Compression-Ignition Engines;
- Off-road equipment with diesel engines larger than 750 horsepower shall meet Tier 2 California Emission Standards;
- All equipment shall be turned off when not in use. Engine idling of all equipment shall be minimized;
- All equipment engines shall be maintained in good operating condition and in tune per manufacturers' specification; and
- Meet Tier 3 California emission standards for off-road compression-ignition engines (for engines between 50 horsepower and 750 horsepower).

## **VI. THE DEIR'S EVALUATION OF THE POTENTIAL RISK FROM DISTURBANCE OF PESTICIDE-CONTAMINATED SOILS IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE**

The DEIR's conclusion that Project construction will not create a risk of exposure to pesticide-contaminated soils violates CEQA, because it is based on an unsupported assumption that no agriculture existed on the site when organochlorine and organophosphate pesticides were in use. CEQA requires conclusions in an EIR to be supported by substantial evidence.<sup>168</sup> Substantial evidence includes facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts.<sup>169</sup> The assumption that no agriculture existed on the site when organochlorine and organophosphate pesticides were in use does not meet this standard.

Organochlorine pesticides such as DDT were first used in the early 1940s until they were banned in the 1970s. The Department of Toxic Substances Control states that:

---

<sup>168</sup> Pub. Resources Code § 21081.5; CEQA Guidelines § 15091, subd. (b).

<sup>169</sup> Pub. Resource Code § 21082.2(c).

DDT is ubiquitous to California soil due to heavy agricultural usage prior to cancellation in 1972. Therefore, agricultural land which is currently being developed or considered for new uses [...] frequently contains DDT.<sup>170</sup>

The U.S. EPA has classified DDT and DDE as probable human carcinogens.<sup>171</sup> Although their use was banned in the 1970s, these compounds can persist in soil for hundreds of years.<sup>172</sup> Exposure to DDT can result in headaches, nausea, and convulsions as well as damage the liver, nervous, and reproductive system.<sup>173</sup> Chlordane has also been classified as a probable human carcinogen by the U.S. EPA and exposure can result in neurological effects such as headaches, irritability, dizziness, and nausea.<sup>174</sup>

Project construction requires grading and other earthmoving activities which would disturb any soil contaminated with these pesticides, putting construction workers, nearby residents and the environment at risk.<sup>175</sup> Construction workers may be exposed to pesticides sorbed on soil through dust inhalation and through dermal contact, potentially resulting in adverse health effects to the nervous and reproductive systems. Nearby residents may also be exposed to pesticide residuals transported offsite by wind. The closest residents are located just over 200 feet from the Project boundary.<sup>176</sup> Additional residences are located within 0.5 miles to the southeast and 0.8 miles to the southwest of the Project site.

The Project site and adjacent areas also support burrowing owls and may support mountain plover and other migrating birds.<sup>177</sup> In addition, it is adjacent to a canal that may contain special status frogs and toads.<sup>178</sup> These special status

---

<sup>170</sup> SWAPE Comments at p. 2; see also Office of the Science Advisor, DDT in Soil: Guidance for the Assessment of Health Risks to Humans, at p. 11, <http://www.dtsc.ca.gov/AssessingRisk/upload/chap8.pdf> [accessed February 1, 2013].

<sup>171</sup> SWAPE Comments at p. 3; see also Agency for Toxic Substances and Disease Registry. Toxicological Profile for DDT, DDE, and DDD, at p. 7, <http://www.atsdr.cdc.gov/toxprofiles/tp35.pdf>, [accessed January 28, 2013].

<sup>172</sup> *Id.* at p. 3

<sup>173</sup> SWAPE Comments at p. 3; see also U.S. EPA, DDT <http://www.epa.gov/pbt/pubs/ddt.htm> [accessed Jan. 28, 2013].

<sup>174</sup> SWAPE Comments at p. 4; see also U.S. EPA, Chlordane, <http://www.epa.gov/ttnatw01/hlthef/chlordan.html>, [accessed Jan. 31, 2013].

<sup>175</sup> See DEIR, p. 52.

<sup>176</sup> DEIR at p. 136.

<sup>177</sup> Berryman Comments.

<sup>178</sup> Berryman Comments.  
2737-012j

species would also be at risk if they are exposed to DDT contaminated soil residues due to project construction.<sup>179</sup>

The DEIR, however, summarily dismisses this risk based on an inaccurate statement in the Phase I ESA that organochlorine pesticides were not used during the years the site was used for agriculture.<sup>180</sup> This statement is not supported by the evidence in the record.

The Phase I ESA provides evidence that the site was used for agricultural purposes in 1949, but then temporarily ceased agricultural use from sometime before 1959 until sometime after 1984, when agricultural activities resumed on the Project site.<sup>181</sup> In addition, all of the aerial photographs from 1949 to 2009 show agricultural use immediately adjacent to the Project site.

Organochlorine<sup>182</sup> pesticides, such as DDT, DDE, and chlordane, were used in California from the early 1940s until they were banned in the 1970s.<sup>183</sup> Thus organochlorine pesticides were in use precisely during the years that the project site was in active agricultural use. Based upon the aerial photographs relied upon in the Phase I ESA, organochlorine pesticides may have been used on the Project site from the early 1940s until at least 1949 and potentially up through 1958.<sup>184</sup> In addition, these pesticides may have drifted onto the Project site from the adjacent active agricultural parcel throughout the period of time that organochlorine pesticides such as DDT were in widespread use.<sup>185</sup>

The potential for Project soil to be contaminated with organochlorine pesticides is further supported by investigations on other sites in Imperial County

---

<sup>179</sup> SWAPE Comments at pp. 5-6.

<sup>180</sup> DEIR at p. 190.

<sup>181</sup> The Phase I ESA cites to historical aerial photographs dated 1949, 1959, 1972, 1984, 1992, 2002 and 2009. DEIR, Appendix H, Phase I Environmental Assessment Report (Aug. 2012) at p. 7 & Appendix C. These photographs show agricultural use of the Project site during 1949, but that the agricultural use ceased by 1959 and did not resume again until sometime between 1984 and 1992.

<sup>182</sup> The Phase I ESA and the DEIR use the term “organochloride” while the attached SWAPE comments refer to these pesticides as “organochlorine”. While “organochlorine” is more widely used to describe this class of pesticides, both terms are acceptable.

<sup>183</sup> SWAPE Comments at pp. 2-3; see also U.S. EPA, DDT – A Brief History and Status. <http://www.epa.gov/pesticides/factsheets/chemicals/ddt-brief-history-status.htm> [accessed Jan. 29, 2013].

<sup>184</sup> SWAPE Comments at p. 2.

<sup>185</sup> SWAPE Comments at p. 3.  
2737-012j



that have revealed the presence of organochlorine pesticides on sites used for agricultural purposes since the early 1940s.<sup>186</sup> Moreover, organochlorine pesticides such as DDT, DDE, and chlordane have been used to cultivate okra, which has been historically grown on the site.<sup>187</sup>

Accordingly, the Phase I report's statement that organochlorine and pesticides were never used and are unlikely to present on the Project site is not supported by the evidence in the record. The disturbance of soils that contain organochlorine pesticides poses a substantial risk to human health and the environment.<sup>188</sup> The DEIR must be revised to disclose and evaluate this risk, and impose any feasible mitigation measures to address the risk.

The DEIR also states the potential for "release of pesticides into dust during grading activities would be minimized by the fugitive dust control plan."<sup>189</sup> However, no evidence or analysis is supported to suggest that this would be sufficient to reduce the risks to human health and the environment to a less than significant level if the grading activities disturbed soil contaminated with organochlorine pesticides.<sup>190</sup> The mitigation measures in the dust control plan do not identify or address the potential for toxic compounds, such as organochlorine pesticides, as components of the dust. Where such contamination may exist, additional mitigation measures, such as respiratory protection and fence-line monitoring of dust, would normally be required to ensure public health and minimize impacts from toxic compounds on construction workers and nearby residents.<sup>191</sup>

---

<sup>186</sup> SWAPE Comments at p. 3; see also [http://www.envirostor.dtsc.ca.gov/public/profile\\_report.asp?global\\_id=60001011](http://www.envirostor.dtsc.ca.gov/public/profile_report.asp?global_id=60001011); and [http://www.envirostor.dtsc.ca.gov/public/profile\\_report.asp?global\\_id=13010007](http://www.envirostor.dtsc.ca.gov/public/profile_report.asp?global_id=13010007) (accessed Jan. 31, 2013).

<sup>187</sup> SWAPE Comments at p. 4; see also U.S. Food and Drug Administration, CPG Sec. 575.100 Pesticide Residues in Food and Feed - Enforcement Criteria, at p. 302, <http://www.fda.gov/iceci/compliancemanuals/compliancepolicyguidancemanual/ucm123236.htm>; and <http://www.atsdr.cdc.gov/toxprofiles/tp35-c8.pdf>, [Accessed January 31, 2013].

<sup>188</sup> SWAPE Comments at p. 4.

<sup>189</sup> DEIR at p. 190.

<sup>190</sup> SWAPE Comments at p. 7.

<sup>191</sup> SWAPE Comments at p. 7.

## **VII. THE DEIR'S EVALUATION OF AGRICULTURAL RESOURCE IMPACTS IS LEGALLY DEFECTIVE**

The Legislature has repeatedly held that conversion of agricultural land is a significant concern and that the preservation of agricultural land is a significant goal of the State.<sup>192</sup> The Legislature has further stated that CEQA shall play an important role in the preservation of agricultural lands.<sup>193</sup>

Despite this legislative admonition, the EIR's evaluation of the Project's direct, indirect and cumulative impacts on agricultural resources fails to comply with the requirements of CEQA. As discussed in detail by the attached comments of agricultural resource expert Gregory House, the DEIR: (1) fails to evaluate cumulative agricultural resource impacts in the manner required by law; (2) bases its finding that agricultural resource impacts will be less than significant on speculative assumptions that are not supported by substantial evidence; (3) fails to impose standard mitigation for the conversion of agricultural land to a solar project; (4) fails to provide a meaningful baseline description of the quality of the Project farmland; and (5) fails to disclose and evaluate potential indirect impacts on nearby farmland.<sup>194</sup>

### **A. The DEIR Fails to Evaluate Cumulative Agricultural Resource Impacts in the Manner Required by Law**

The DEIR's analysis of the Project's cumulative agricultural resources impacts violates CEQA because it fails to conduct the cumulative analysis in the manner required by law. The Project will convert approximately 158.8 acres of Farmland of Statewide Importance to an industrial solar power plant use.<sup>195</sup> The threat that farmland conversion poses to the viability of continued agriculture in California cannot be overstated. In only a century and a half since the Gold Rush,

---

<sup>192</sup> Gov. Code, § 51220 (Williamson Act findings that agricultural preservation is valuable and necessary); Civ. Code, § 815 (legislative declaration that preservation of agricultural lands "is among the most important environmental assets of California"); Pub. Resources Code, § 10200, et seq. (California Farmland Conservancy Program Act, promoting the establishment of agricultural easements as a means to preserve agricultural land).

<sup>193</sup> This language was used as the finding behind amendments to Pub. Resources Code sections 21060.1, 21061.2 and 21095 in 1993 (Stats. 1993, ch. 812, §1, subd. (d)).

<sup>194</sup> House, Agronomic Review of Imperial Valley Solar Company 2 Project (Feb. 14, 2013) (hereafter "House Comments").

<sup>195</sup> DEIR at p. 114.  
2737-012j

almost 700,000 acres in the Central Valley alone have been developed for urban use. Almost 100,000 acres of this land was paved over in the 1990s alone. Within just the next generation, close to a million more acres of farmland could vanish, putting additional pressure on the ability of the region's farmers to continue producing food for the State, the nation and the world.<sup>196</sup> The EIR, however, finds that the Project will not have any significant cumulative impact on agricultural resources and imposes no mitigation.<sup>197</sup>

A cumulative impact consists of “an impact which is created as a result of the combination of the project evaluated in the EIR together with other projects causing related impacts.”<sup>198</sup> A project's cumulative impacts are significant if the Project's incremental contribution to the impact is “cumulative considerable.”<sup>199</sup> A Project's incremental contribution is cumulatively considerable if the incremental effects of the project are significant “when viewed in connection with the effects of past projects, the effects of other current projects, and the effects of probable future projects.”<sup>200</sup>

The fact that a particular project's incremental impact is not alone significant, or is relatively small when compared to the greater overall problem, does not mean the project does not have significant cumulative impacts. This theory was rejected in the case *Kings County Farm Bureau* because it would allow “the approval of projects which, when taken in isolation, appear insignificant, but when viewed together, appear startling.”<sup>201</sup> The proper standard for a cumulative impacts analysis is whether the impacts are “collectively significant.”<sup>202</sup>

In the case at hand, the DEIR's “cumulative analysis” is based only on the Project's individual impact on loss of agricultural land.<sup>203</sup> The DEIR fails to disclose or address the collective loss of agricultural land from related past, current and probable future projects. Instead, the DEIR looks only at the direct impact of the loss of land from this Project – stating that the 158 acres is only 0.05% of the total

---

<sup>196</sup> American Farmland Trust, *The Future is Now: Central Valley Farmland at the Tipping Point?* (2006) <http://www.farmland.org/programs/states/futureisnow/default.asp>.

<sup>197</sup> DEIR at pp. 33-34.

<sup>198</sup> CEQA Guidelines § 15130, subd. (a)(1).

<sup>199</sup> CEQA Guidelines § 15130(a).

<sup>200</sup> CEQA Guidelines § 15065(a)(3).

<sup>201</sup> *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 720-721.

<sup>202</sup> *Id.* at p. 721, citing CEQA Guidelines § 15355.

<sup>203</sup> See DEIR pp. 116-117.

Farmland of Statewide Importance within the County and holding that the loss of 158 acres is not substantial when compared to the 307,221 acres in Imperial County as a whole.<sup>204</sup>

This is an improper cumulative analysis under CEQA. Under CEQA, an EIR must evaluate the cumulative impacts of the proposed project *along with other closely related and reasonably foreseeable past, present and future projects that may cause related impacts*. The EIR fails to do this. Instead it only looks at the loss of land from this Project alone in the context of the geographic scope of the entire Imperial Valley. By looking at the Project's impacts in isolation rather than in connection with the collective loss of agricultural land from related past, current and probable future projects, the DEIR fails to comply with CEQA's cumulative analysis requirements.

Moreover, Mr. House's examination of the agricultural resource impacts of the Project combined with the related agricultural resource impacts of past, current and probable future projects reveals that these cumulative impacts are not just significant, but historically startling. For the purposes of its cumulative analysis, DEIR Table 2-1 sets forth a list of "closely related, past, present, and reasonably foreseeable probable future projects that would likely result in similar impacts and are located in the same geographic area."<sup>205</sup> This list identifies approximately 61 current and proposed projects in the area that will convert over 31,000 acres of agricultural land in Imperial County to solar and other energy/industrial facilities.<sup>206</sup>

According to the DEIR, Imperial County has 539,273 acres of farmland and 307,221 acres of Farmland of Statewide Importance.<sup>207</sup> The cumulative projects would thus convert almost 6% of all farmland ( $31,000 \div 539,273$ ) and up to 10% of Farmland of Statewide Importance in the County ( $31,000 \div 307,221$ ).<sup>208</sup> The significance of the near-term projected loss of over 31,000 acres of agricultural land cannot be overstated. To put this loss in perspective, the total loss of Farmland of Statewide Importance from 1984 to 2008 was 7,114 acres.<sup>209</sup> In other words, these

---

<sup>204</sup> DEIR pp. 116-117.

<sup>205</sup> DEIR at p. 71.

<sup>206</sup> DEIR at pp. 72-85.

<sup>207</sup> DEIR at p. 116.

<sup>208</sup> House Comments at p. 18.

<sup>209</sup> California Dept. of Conservation, Imperial County 1984-2008 Land Use Summary, Farmland Mapping and Monitoring Program. 2737-012j

cumulative projects will likely convert more than four times the total amount of Farmland of Statewide Importance than was converted in total over the prior quarter century. The DEIR's failure to disclose this cumulative loss of agricultural land or determine if this cumulative loss is significant violates CEQA.

**B. The EIR's Conclusion that Cumulative Agricultural Resource Impacts Will Be Less than Significant Is Not Supported by Substantial Evidence**

The DEIR's determination that the Project's cumulative impact on agricultural resources will be less than significant also violates CEQA because it is not supported by substantial evidence. The DEIR concludes that the Project will only have a minimal incremental contribution to cumulative effects because it would only "temporarily convert" the farmland since the Project is "temporary in nature" and will be decommissioned at the end of the Project's lifespan.<sup>210</sup> The assumption that the Project is temporary in nature and will be decommissioned and returned to agricultural use is speculative and not supported by any evidence in the record.

First, there is no evidence to support the claim that the Project will be returned to agricultural use after decommissioning. The EIR states that after decommissioning, "the land would be available for other purposes, including agriculture."<sup>211</sup> In other words, there is no requirement to restore the parcel to agriculture use after decommissioning. Furthermore, no restoration plan is identified or required to be prepared and no bonds or other financial assurances for the restoration back to farmland are imposed. Nor does the DEIR contain any other evidence of the likelihood of the Project parcel returning to agricultural use after decommissioning. Accordingly, the assumption that this farmland will only be temporarily converted is speculative and without foundation.

Second, the Project does not contain any timetable or enforceable requirement for decommissioning and site restoration. The entire cumulative impact analysis is predicated on the possibility that the Project might be decommissioned and the agricultural land restored sometime in the distant future, but there is no requirement, guarantee or other showing of likelihood that this will

---

<sup>210</sup> DEIR at pp. 116-117.

<sup>211</sup> DEIR at p. 117.  
2737-012j

actually occur. A 30- to 50-year lifetime period for the proposed Project is mentioned, but as discussed below, even this distant estimate is speculative.

Third, the DEIR's underlying assumption that solar facilities are "temporary in nature" is not supported by any substantial evidence. Unlike geothermal energy plants which have limited effective lifetimes, a solar facility will never run out of its energy source and may continue in operation for as long as its panels are maintained. While individual solar panels may wear out, that does not mean that the solar facility has a finite lifespan.<sup>212</sup> Panels may be repaired, replaced or upgraded over time, allowing indefinite use of the parcel for these purposes. Accordingly, the California Farm Bureau has taken the position that solar photovoltaic power projects are not temporary regardless of the time frame of an initial power purchase agreement, and the erection of solar photovoltaic projects on agricultural land constitute permanent loss of farmland in California.<sup>213</sup>

Moreover, because the investment in infrastructure by the power company to connect to the subject project will have already been made, the necessary use permits and other entitlements already obtained, and the need for clean energy in California unlikely to be abated in the coming decades, a strong economic incentive will exist to continue operating the solar facility at this site for the foreseeable future.<sup>214</sup> When the first phase ends, it would be a cost savings to renew the agreement, remodel as needed and continue providing power, as all the permitting, transmission connection and legal costs will have already been recovered.

The DEIR's assumption to the contrary, that solar facilities are "temporary in nature," is not supported by any substantial evidence. The DEIR fails to point to a single large solar project that has been decommissioned and the land returned to agricultural use.

To the contrary, Mr. House testifies in his comments that older solar PV power facilities in California have not, in fact, been decommissioned and returned to agricultural use.<sup>215</sup> Rather they have been refurbished, upgraded and continued in use. For example, one of the oldest photovoltaic solar energy generation facilities in the United States is located in Davis, California. This 86-acre project was installed

---

<sup>212</sup> House Comments at pp. 18-19.

<sup>213</sup> House Comments at p. 19.

<sup>214</sup> House Comments at pp. 18-19.

<sup>215</sup> House Comments at p. 19.

in 1986 by Pacific Gas and Electric as part of a research project sponsored by government and private industry. After it outlived its usefulness as a research facility, it was reactivated in 2003 to generate power for the city. The facility can currently generate approximately 650 kilowatts with an annual output of 1,300 megawatt-hours. The current leaseholder of the site plans to expand the solar power production capability of the facility even further, to as much as 15 MW. This project is now 26 years old and demonstrates that, rather than being decommissioned when components wear out or technologies improve, existing solar power facilities will continue to be refurbished and upgraded for continued use into the foreseeable future.<sup>216</sup>

Finally, the DEIR fails to consider the increasing unlikelihood that the Project site will be converted back to agricultural use when so much of Imperial County has now been converted to solar farms and the infrastructure to continue using these lands for solar farms in the future is in place. Mr. House testifies that the amount of solar farms and solar power conveyance infrastructure in Imperial Valley has now reached a tipping point where there it is inconceivable that all of these facilities will be eventually torn down and returned to agricultural use.<sup>217</sup>

Because the EIR lacks substantial evidence to support its finding that the temporary nature of the Project will reduce the Project's cumulative agricultural resource impacts below a level of significance, the EIR must be withdrawn and a new cumulative analysis performed, consistent with the requirements of CEQA.

**C. The DEIR Fails to Impose Any Mitigation for the Conversion of Agricultural Land to a Solar Project in Violation of County Requirements**

In order to address the increased demand for solar facilities, Imperial County has developed the following measures to apply to all new proposed solar projects, as described in the Staff Memorandum dated September 2, 2011:

- 1) Preservation of Comparable Agricultural Lands. Each solar project is required to procure agricultural conservation easements or pay an "Agricultural In-Lieu Mitigation Fee" that would result in the conservation of farmland of comparable quality and classification as would be temporarily

---

<sup>216</sup> House Comments at p. 19.

<sup>217</sup> House Comments at p. 18.  
2737-012j

removed from agricultural use by the solar facility. A solar project may satisfy the in-lieu fee requirement by executing a Public Benefit Agreement with the County.

2) Reclamation Plan. Each solar project is required to prepare a site reclamation plan that demonstrates that the project site will be returned to its current agricultural condition when the solar facility is decommissioned. The typical length of operation of the solar facilities is anticipated to range from 30 to 50 years. The project applicant must also provide financial assurances in the amount equal to the cost estimate for the reclamation in order to ensure that funds will be available to implement the reclamation plan.<sup>218</sup>

Despite adoption of this clear, unequivocal policy requiring solar projects to comply with the above mitigation measures in order to address the cumulative demand for solar facilities in the County, the DEIR fails apply these (or any other) agricultural mitigation requirements to the Project.<sup>219</sup>

Furthermore, the DEIR is misleading because it sets forth these mitigation measures as if they are applicable, yet then fails to apply them without any discussion alerting the public that they will not be applied and without any explanation for why they are not being applied. The County's response to comments should clarify whether or not these measures will be applied to the Project. If they are not applied, the County should explain why. If they are applied, the County must explain how these measures will be made enforceable requirements if they are not included in the mitigation adopted as part of the certification of the EIR.

#### **D. The DEIR Fails to Provide a Meaningful Baseline Description of the Quality of the Project Farmland**

The DEIR's analysis of farmland impacts is also deficient because it is based on an inadequate and inaccurate description of the Project's value as agricultural land. This failure violates CEQA's requirement to provide an accurate and complete description of the existing environmental setting.

---

<sup>218</sup> DEIR at pp. 111-112.

<sup>219</sup> DEIR at pp. 33-34.  
2737-012j



The existing environmental setting is the starting point from which the lead agency must measure whether a proposed Project may cause a significant environmental impact.<sup>220</sup> Describing the Project's environmental setting accurately and completely is critical to an accurate, meaningful evaluation of environmental impacts. "It is only against this baseline that any significant environmental effects can be determined."<sup>221</sup> For this reason, the courts have held that establishing an accurate baseline is "a central concept of CEQA" and that "the significance of a Project's impacts cannot be measured unless the DEIR first establishes the actual physical conditions on the property."<sup>222</sup> Moreover, the description of the environmental setting that is described must contain *sufficient detail* to enable a proper analysis of Project impacts and to "permit the significant effects of the Project to be considered in the full environmental context."<sup>223</sup>

In the case at hand, the description of the environmental setting in the DEIR is inadequate because it omits highly relevant information regarding the unique characteristics of the agricultural land that make its Class IV soil as valuable as Class I and Class II soils (i.e., prime farmland). The failure to provide this information results in an unreliable evaluation of the impact of converting the property to non-agricultural use.

The DEIR states that the Project has class IV soil, which generally is considered a lower quality and much less productive soil for agriculture than Class I or Class II soils, which are generally considered prime farmland.<sup>224</sup>

Mr. House, however, testifies that the project site has a unique subset of Class IV soil that has productivity and value on par with Class I and Class II soils. Mr. House testifies that the Project property has a microclimate that permits early and longer frost-free production of vegetables than most other areas of the Imperial Valley and that results in agricultural productivity approximately seven times greater than is typical for class IV soils in California.<sup>225</sup> As a result, Mr. House testifies that the Project property's class IV soils can be and have been used for the

---

<sup>220</sup> See, e.g., *Communities for a Better Env't v. S. Coast Air Quality Mgmt. Dist.* (March 15, 2010) 48 Cal.4th 310, 316; *Fat v. County of Sacramento* (2002) 97 Cal.App.4th 1270, 1278 ("*Fat*"), citing Remy, et al., Guide to the Calif. Environmental Quality Act (1999) p. 165.

<sup>221</sup> *County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, 952.

<sup>222</sup> *Save our Peninsula Comm. v. Monterey County Bd. of Supervisors* (2001) 87 Cal.App.4th 99, 125.

<sup>223</sup> *Galante Vineyards v. Monterey Peninsula Water Mgmt. Dist.* (1997) 60 Cal.App.4th 1109, 1121-22.

<sup>224</sup> House Comments at p. 14.

<sup>225</sup> House Comments at pp. 14, 16, 21.

production of high-dollar-value vegetable crops, which are typically grown on class I and class II soils (i.e., prime farmland).<sup>226</sup>

The unique importance of the Project's agricultural soil cannot be overstated. Mr. House testifies that there are just 16,794 acres of this uniquely productive Class IV soil in this particular microclimate in Imperial County.<sup>227</sup> The Project would convert approximately 1% of this high value agricultural land.<sup>228</sup>

The DEIR fails to disclose this key information regarding the Project setting. This failure is significant because, in using the California LESA model as its measure of the significance of the agricultural land being converted, the DEIR fails to assess the high real dollar value of the potential vegetable production on the subject property. The California LESA model applied by the DEIR does not take into account these unique soil characteristics; rather it treats all class IV soils alike.<sup>229</sup> In Mr. House's attached expert comments, he testifies that, in this particular case, the LESA model used in the DEIR provides a poor measure of the agricultural value of the Project property and results in an unreliable evaluation of the impact of converting the property to non-agricultural use.<sup>230</sup>

Because the DEIR failed to disclose the unique characteristics of the Project site's agricultural soil and microclimate, the DEIR failed to determine whether the LESA model's reliance on soil type in determining the agricultural value of the land being converted was applicable in this case. This failure violates the USDA standards for applying the LESA model.<sup>231</sup> The LESA model is not meant to be a one-size fits all type of analysis. Rather, it was intended to be tailored to adjust for local circumstances.<sup>232</sup>

In particular, the USDA's LESA guidebook recommends that Projects with scores falling close to a threshold level should be subject to a secondary, case-specific evaluation.<sup>233</sup> Here, the DEIR calculated a LESA score of 39, just below the

---

<sup>226</sup> House Comments at pp. 14, 21.

<sup>227</sup> House Comments at p. 14.

<sup>228</sup> House Comments at pp. 13-16, 21.

<sup>229</sup> House Comments at pp. 13-16, 21.

<sup>230</sup> House Comments at pp. 13, 16.

<sup>231</sup> House Comments at pp. 13, 16.

<sup>232</sup> House Comments at p. 13.

<sup>233</sup> House Comments at p. 16.

threshold of significance of 40.<sup>234</sup> In other words, this is precisely the type of property that the USDA guidebook advises should undergo a secondary review to take into account other property-specific factors that may not have been assessed in the LESA modeling.<sup>235</sup>

By failing to disclose the unique, prime-farmland-like characteristics of this property, the DEIR precluded any meaningful secondary review and, thus, violated CEQA. The DEIR should be revised to disclose the unique value of the Project's agricultural land and to evaluate its significance in the context of this unique value.

#### **E. The DEIR Fails to Disclose and Evaluate Potential Indirect Impacts on Nearby Farmland**

The EIR also fails to evaluate adequately the indirect impact that Project construction may have on adjacent farmers due to its inconsistency with the aerial application of pesticides and due to its potential to harbor pests detrimental to adjacent agriculture.

On similar projects, the Imperial County Agricultural Commissioner has found that the aerial application of certain pesticides would likely be prohibited on all adjacent fields during the construction phase of the Project, which could result in increased costs for farmers or a higher risk of crop pestilence.<sup>236</sup> The increased risk of pests and crop disease and the increase in pesticide costs are a potentially significant impact of the Project that was neither disclosed, nor evaluated in the EIR. In addition, the Imperial County Agricultural Commissioner has found that glare from the solar panels could create visual hazards during day and evening aerial applications.<sup>237</sup> The potential glare impact on aerial application of pesticides is also not disclosed or evaluated in the EIR. The failure to evaluate the potential impacts of the Project on aerial applications of pesticides is a violation of CEQA.

The DEIR also fails to consider whether the Project will adversely impact neighboring agricultural parcels due to lack of weed or rodent control. Land under the solar panels could harbor pests including noxious weeds, plant diseases, insects, and vertebrates, which are detrimental to agriculture and could cause damage to

---

<sup>234</sup> House Comments at p. 16.

<sup>235</sup> House Comments at p. 16.

<sup>236</sup> Letter from Connie L. Valenzuela, Imperial County Agricultural Commissioner (Nov. 9, 2010).

<sup>237</sup> *Id.*

adjacent field and crops.<sup>238</sup> The DEIR, however, has not provided plans for weed and rodent control on the proposed project. The failure to evaluate and mitigate the risk that pests and weeds could spread from the project site to neighboring parcels is a violation of CEQA.

### **VIII. THE EIR MUST REVISED AND RECIRCULATED**

CEQA requires a lead agency to recirculate an EIR when significant, new information is added to the EIR following public review, but before certification.<sup>239</sup> The CEQA Guidelines clarify that new information is significant if “the EIR is changed in a way that deprives the public of a meaningful opportunity to comment upon a substantial adverse environmental effect of the project” including, for example, “a disclosure showing that ... [a] new significant environmental impact would result from the project.”<sup>240</sup>

In view of the many inadequacies in the DEIR, it must be revised to reflect any new analysis that is required. This analysis will almost certainly result in the identification of new significant impacts. In addition, some of the impacts that the DEIR failed to identify as significant are in fact significant. To comply with CEQA’s mandate that all of the potentially significant impacts of a project and feasible mitigation measures to be subject to public comment and agency response, the DEIR must be revised and recirculated for public review.

---

<sup>238</sup> House Comments at pp. 20-21.

<sup>239</sup> Pub. Resources Code § 21092.1.

<sup>240</sup> CEQA Guidelines § 15088.5.

**IX. CONCLUSION**

Imperial Citizens for Responsible Industry thanks the County for providing the opportunity to comment on this matter. We urge the County to ensure that the Project's impacts are fully disclosed, evaluated and mitigated before the Project is considered for approval.

Sincerely,

A handwritten signature in blue ink that reads "Thomas A. Enslow". The signature is written in a cursive style with a long horizontal line extending to the right.

Thomas A. Enslow

TAE:ljl

Attachments