

Comment Letter O2

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May 27, 2015

Via Email and U.S. Mail

Mr. Mark Wardlaw, Director of Planning and Development Services
Ms. Ashley Gungle, Land Use Environmental Planner
County of San Diego
Planning and Development Services
5510 Overland Avenue, Suite 110
San Diego, CA 92123
Email: Mark.Wardlaw@sdcounty.ca.gov
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Re: Request to Extend the Public Review Period for the Jacumba Solar Project Draft Environmental Impact Report -- (PDS2014-MUP-14-041) (SCH No. 2014091034)

Dear Mr. Wardlaw, Ms. Gungle:

On behalf of California Unions for Reliable Energy ("CURE") we respectfully request that the County extend the public review and comment period for the Jacumba Solar Energy Project Draft Environmental Impact Report ("DEIR"). On May 19, 2015, we requested *immediate access* to any and all documents referenced or relied upon in the DEIR. To date, the County has failed to provide us with access to the requested records, as required by State law. Therefore, we request that the DEIR comment period be extended until at least forty-five (45) days from the date that the County makes available all documents referenced in the DEIR.

This request is made pursuant to the California Environmental Quality Act, Pub. Resources Code ("PRC") §§ 21000 et seq. ("CEQA") Section 21092(b)(1) which requires that "all documents referenced in the draft environmental impact report or negative declaration" be available for review and be "readily accessible" during the entire comment period.¹ Section 21092(b)(1) also requires that the CEQA notice of availability for an EIR must include "the address where copies of the proposed EIR

¹ PRC §§ 21092(b)(1) (emphasis added); 14 Cal. Code Regs. ("CCR") § 15072(g)(4), 3144-0020v.

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Response to Comment Letter O2

Adams Broadwell Joseph and Cardozo
Christina Caro
May 27, 2015

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This comment requests an extension of the public review period because certain documents referenced or relied upon in the DEIR were allegedly not made available for public review. However, the County made all documents available for public review required by CEQA. The County published a Notice of Availability of the DEIR on April 16, 2015 that specifically stated the DEIR could be reviewed at http://www.sdcounty.ca.gov/pds/ceqa_public_review.html, at the Planning & Development Services (PDS), Project Processing Counter, 5510 Overland Avenue, Suite 310, San Diego, California 92123 and at the Jacumba public library, located at 44605 Old Highway 80, Jacumba, CA 91934. The Draft EIR document includes a complete list of all referenced documents to allow for public access. Indeed, many documents referenced in the DEIR, such as the County's Biological Guidelines were available for review at the PDS (and readily available on the County's website as well at <http://www.sandiegocounty.gov/pds/procguid.html>.) In addition, the Draft EIR document included the 13 appendices where the majority of Project specific analysis was derived. Further, the County provided all references to the Draft EIR to

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and all documents referenced therein are available for review and readily accessible during the agency's normal working hours.²

This request is based on the County's failure to make the documents referenced in the DEIR available for the statutorily required 45 days, and the complexity of the Project. The County's Notice of Availability for the Jacumba Project DEIR is dated April 16, 2015 and states that comments are due by June 1, 2015.³ The State Clearinghouse webpage for the Project states that the public review and comment period began on April 20, 2015 and ends on June 3, 2015.⁴ However, neither notice identifies a location where documents referenced in the DEIR are available for review, in violation of CEQA Section 21092(b)(1). And, as of the date of this writing, numerous documents that are referenced in the DEIR have not been made available to the public despite our prior written request for them.

On May 19, 2015, we submitted a letter to the County requesting "immediate access to any and all documents referenced or relied upon" in the DEIR.⁵ On May 20, 2015, I received a telephone call from a staff person at the County's Public Records Act department requesting clarification on the scope of documents requested in the May 19 request. On the call, I clarified that we requested all documents referenced or relied upon in the DEIR for the Jacumba Solar Project, as required under PRC Section 21092, and that the list may include both documents identified in DEIR Chapter 5.0, References, as well as any other documents or studies referenced elsewhere in the DEIR that were relied upon by the EIR preparer. As of the date of this letter, the County has not responded further to our request. The County has not provided documents or web-links to documents; nor has the County identified a location at which we may review the documents.

CEQA's procedural requirements are strictly applied to lead agencies like the County.⁶ The courts have held that the failure to provide even a few pages of a

² *Id.*

³ County of San Diego, Notice of Availability of a Draft Environmental Impact Report for the Jacumba Solar Energy Project (April 16, 2015), available at <http://www.sandiegocounty.gov/content/dam/sdopds/regulatory/docs/Jacumba%20Solar/EIR/PDS2014-MUP-14-041-Legal%20Ad.pdf>.

⁴ <http://www.ceqa.net/ca.gov/DocDescription.asp?DocPK=690557>.

⁵ Letter from Adams, Broadwell, Joseph & Cardozo re Request for Immediate Access to Documents Referenced in Draft Environmental Impact Report – Jacumba Solar Project (PDS2014-MUP-14-041) (May 19, 2015).

⁶ See, e.g., *Resource Def. Fund v. Loc. Agency Formation Com.*, (1987) 191 Cal. App. 3d 886, 898, disapproved of on other grounds by *Voices of the Wetlands v. State Water Resources Control Bd.*, 3144-0985.

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Adams Broadwell Joseph and Cardozo on May 29, 2015, and all references for appendices were provided on June 5, 2015.

The comment letter suggests that CEQA requires that all documents referenced or relied upon in the DEIR must be provided by the County during the public review period because it is too burdensome for individuals to independently locate ancillary documents incorporated into the EIR by citation. However, CEQA imposes no such requirement. CEQA requires any information included in an appendix be made readily available for public examination. (CEQA Guidelines, §15147) Consistent with this requirement, all EIR appendices were available online and at PDS, as indicated in the Notice of Availability. CEQA also requires that documents incorporated by reference be made available to the public for inspection (CEQA Guidelines, §15150(b)). EIR documents that were incorporated by reference were made available to the commenter, as noted above. CEQA also permits an EIR to include a "citation" to technical information when an EIR is dependent upon information from many sources, including engineering project reports and many scientific documents relating to the environmental features. CEQA Guideline 15148 specifies "These documents should be cited but not included in the EIR," and there is no requirement to make cited documents available for public review. (see, *El Morro Community Assn. v. Cal.*

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CEQA documents for a portion of the CEQA review period invalidates the entire CEQA process, and that such a failure must be remedied by permitting additional public comment.⁷ An EIR may not rely on hidden studies or documents that are not provided to the public.⁸ By failing to make all documents referenced in the Jacumba Solar Project DEIR “readily available” during the comment period, the County has violated State law to the detriment of CURE and other members of the public who wish to meaningfully review and comment on the DEIR.

The County's failure to make the underlying DEIR documents available during the entire comment period makes public review particularly burdensome in this case because of the DEIR's reliance on missing documents for its significance determinations and mitigation measures. For example, the County's "Biological Report Format and Requirement Guidelines," referenced in Mitigation Measure M-BI-2, form the basis for mitigation proposed under Measure M-BI-2 to mitigate impacts to special status species.⁹ The Biological Guidelines are listed in the DEIR's References chapter, but no web-link or other information about the location of the document is provided.¹⁰ Similarly, the San Diego County Recommended Approach for Addressing Climate Change ("County GHG Guidelines") forms the basis for the DEIR's analysis of the applicable GHG significance threshold and conclusion that the Project's construction GHG emissions are insignificant because the Guidelines permit them to be amortized over the life of the Project.¹¹ The References chapter of the DEIR lists the County GHG Guidelines, but no web-link or other information about the location of the document is provided.¹² Without having access to these documents, commenters and other members of the public are unable to evaluate the accuracy of the County's biological and air quality impacts analysis, or the efficacy of the County's proposed mitigation measures, in the DEIR. Additionally, the size of the DEIR and the Project's complexity make it difficult to effectively comment on the DEIR without the referenced documents by next week.

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⁷ (2011) 52 Cal. 4th 299; *Ultramar v. South Coast Air Quality Man. Dist.* (1993) 17 Cal.App.4th 689, 702-03; see also *Scoville v. Anderson* (1901) 131 Cal. 590, 596.

⁸ *Ultramar v. South Coast Air Quality Man. Dist.* (1993) 17 Cal.App.4th 689, 699.

⁹ *Santiago County Water District v. County of Orange* (1981) 118 Cal.App.3rd 818, 831 ("Whatever is required to be considered in an EIR must be in that formal report; what any official might have known from other writings or oral presentations cannot supply what is lacking in the report.")

¹⁰ DEIR, p. S-11.

¹¹ DEIR, p. 5-5.

¹² DEIR AQ Appendix, pp. 76, 78, 79.

¹³ DEIR, p. 5-18.

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Dept. of Parks & Rec. (2004) 122 Cal.App.4th 1341, FN 5 [cited documents do not have to be made available for public review]; *Ebbetts v. Cal. Dept. of Forestry* (2008) 43 Cal.4th 936, p. 958.)

The commenter's reference to Section 21092(b)(1) of the CEQA Guidelines is misplaced as that section is in reference to the requirements of the public notice of preparation. Additionally, Section 21092(b)(2) notes that "this section shall not be construed in a manner that results in the invalidation of an action because of the alleged inadequacy of the notice content if there has been substantial compliance with the notice content requirements of this section." The County has complied with the notice contents requirements of Section 21092(b)(2). Hence, and respectfully, the County does not agree with the request to extend the DEIR comment period further than the established public review period from April 20, 2015 to June 3, 2015. The County acknowledges this comment; however it does not address the adequacy of the DEIR, therefore no further response is required.

This comment requests an extension of the public review period because certain documents cited, incorporated by reference, or attached as appendices, in the DEIR were allegedly not made available for public review. However, the County made all documents available for public review that were required by CEQA. The County

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In light of the County's failure to comply with CEQA, the 45-day DEIR review period must be restarted beginning the date on which the County makes these, and all other documents referenced or relied upon in the DEIR, available to the public.

Accordingly, we hereby request that:

- 1) the County re-open the public review and comment period on the DEIR for a minimum of 45 days from the date on which the County releases all documents referenced or relied upon in the DEIR for public review; and
- 2) the County immediately provide us with access to the documents requested in our May 19, 2015 document request.

Please feel free to call or email with any questions: Tel: (650) 589-1660, Email: ccaro@adamsbroadwell.com. Thank you for your prompt attention and response to this matter.

Sincerely,



Christina Caro

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published a Notice of Availability of the DEIR on April 16, 2015 that specifically stated the DEIR could be reviewed at http://www.sandiegocounty.gov/content/sdc/pds/regulatory/docs/jacumba_solar.html, at the Planning & Development Services (PDS), Project Processing Counter, 5510 Overland Avenue, Suite 310, San Diego, California 92123 and at the Jacumba Library, located at 44605 Old Highway 80, Jacumba, CA 91934. The DEIR document included the DEIR appendices made available for review in accordance with CEQA Guidelines 15147. Any documents specifically incorporated by reference were made available at these locations in accordance with CEQA Guidelines 15150(b). However, unlike CEQA Guidelines 15147 and 15150(b), 15148 does not require documents cited in the EIR to be made available for public review. The County provided all references to the DEIR to Adams Broadwell Joseph and Cardozo on May 29, 2015, and all references for appendices were provided on June 5, 2015.