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January 11, 2017

Via Email and Hand Delivery

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c/o Tom Engels
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Re: Comments on Draft Environmental Impact Report for Suncrest Dynamic Reactive Power Support Project

Dear Mr. Peterson and Mr. Engels:

On behalf of California Unions for Reliable Energy ("CURE"), Ronald Bauers, Cory Moore, Kellen Weldy, and Jimmy Young (collectively "Commenters"), we submit these comments on the Draft Environmental Impact Report ("DEIR") for the Suncrest Dynamic Reactive Power Support Project ("Project"). The Project, proposed by NextEra Energy Transmission West, LLC ("NEET West"), would construct a dynamic reactive device, known as a Static Var Compensator ("SVC") facility, and an approximately one-mile-long transmission line interconnecting with the existing Suncrest Substation, in San Diego County. The SVC facility would provide voltage regulation and support for the existing transmission system in accordance with the California Independent System Operator Corporation's ("CAISO") 2013-2014 Transmission Plan.

The Project is proposed to be located on private lands in unincorporated south-central San Diego County, approximately 3.75 miles southeast of the community of Alpine, on the eastern end of the Suncrest Substation, and within the administrative boundary of the Cleveland National Forest ("CNF").¹ Project

¹ DEIR, p. 2-1.
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construction will take approximately 11 months, which obstructs NEET West from meeting CAISO's required in-service date of June 1, 2017 for the SVC facility.²

We have reviewed the DEIR and its technical appendices with the assistance of Commenters' expert consultants, whose comments and qualifications are attached.³ Based on our review of the DEIR, Commenters concur with the California Public Utilities Commission's ("CPUC") conclusion that the Suncrest Substation Alternative is the environmentally superior alternative to the Project, and urge the CPUC to select the Suncrest Substation Alternative as the Project. The Suncrest Substation Alternative is reflective of San Diego Gas & Electric's ("SDG&E") original bid proposal to CAISO in which SDG&E proposed to construct the SVC within SDG&E's existing Suncrest Substation boundary ("SDG&E Project"), thereby eliminating the need for the 1-mile transmission line proposed by the NEET West Project.⁴ As explained in the DEIR, the Suncrest Substation Alternative would have a substantially smaller environmental footprint than the Project, "would be a cost-effective alternative that does not require construction of the proposed mile-long 230-kV underground transmission line,"⁵ and "would avoid virtually all of the potential environmental impacts of the Proposed Project."⁶ By contrast, CAISO's 2015 selection of the NEET West Project as the preferred bidder over the SDG&E Project during its own competitive bid selection process was based solely on narrow cost-related issues, and did not consider the environmental impacts of the two proposals.⁷

Commenters further conclude that there is substantial evidence that the Project's potentially significant environmental impacts are far more extensive than disclosed in the DEIR. Commenters and their expert consultants have identified numerous potentially significant impacts that the DEIR either mischaracterizes, underestimates, or fails to identify. Moreover, many of the mitigation measures

² NEET West CPUC Application, p. 4. CAISO intended the SVC facility to be service by June 1, 2017 to facilitate compliance with the 33 percent California Renewables Portfolio Standard ("RPS"), which requires the deliverability of 1,000 MW of renewable electricity generating capacity within the Imperial Valley area.

³ The attached expert comments require separate response under CEQA.

⁴ See **Exhibit A**, January 6, 2015, California ISO, Suncrest Reactive Power Project Sponsor Selection Report ("CAISO Selection Report"), p. 3, available at <http://www.caiso.com/Documents/SuncrestProjectSponsorSelectionReport.pdf>.

⁵ DEIR, p. 20-8.

⁶ DEIR, p. 20-12.

⁷ See CAISO Selection Report, p. 1; **Exhibit B**, David Marcus, Suncrest Project Sponsor Selection (January 5, 2017), p. 1.

described in the DEIR will not, in fact, mitigate impacts to the extent claimed. For example, Commenters' air quality experts from Soil, Water, Air Protection Enterprise ("SWAPE") reviewed the Air Quality Report prepared for the Project, and performed an independent analysis of the Project's construction emissions.⁸ SWAPE found that the DEIR underestimated construction emissions of nitrogen oxides ("NOx") and diesel particulate matter ("DPM"), a toxic air contaminant ("TAC"). SWAPE concluded that Project emissions will exceed applicable significance thresholds set by the San Diego Air Pollution Control District ("SDAPCD") requiring mitigation under the California Environmental Quality Act⁹ ("CEQA"). The DEIR fails to adequately disclose, quantify, and mitigate these significant impacts.

The Project will also have significant, unmitigated impacts on biological and water resources, and from construction traffic, which the DEIR fails to adequately disclose and mitigate. Expert biologist Scott Cashen, M.S., concludes that the Project will have potentially significant and unmitigated indirect impacts to special-status plants and the Hermes copper butterfly resulting from construction of the transmission line; potentially significant impacts to wildlife due to noise, vibration, and night lighting; and significant, unquantified cumulative impacts on biological resources due to habitat loss and other Project impacts.¹⁰

Expert hydrologic consultant Tom Myers, Ph.D.¹¹ concludes that construction of the transmission line may cause potentially significant groundwater pollution problems from unmitigated nitrogen and nitrates deposited by Project blasting, and may adversely impact wetlands, including the recently created Lightner Wetland Mitigation Site, a wetland mitigation area required by the CPUC to be set aside as mitigation for the Sunrise Powerlink Project.¹²

⁸ See **Exhibit C**, Soil, Water, Air Protection Enterprise, Comments on the Suncrest Transmission Line Project (January 6, 2017) ("SWAPE Comments"), pp. 10-13.

⁹ Pub. Resources Code ("PRC") §§ 21000 et seq.; 14 Cal. Code Regs. ("CCR") §§ 15000 et seq.

¹⁰ See **Exhibit D**, Scott Cashen, M.S., Comments on the Draft Environmental Impact Report Prepared for the Suncrest Dynamic Reactive Power Support Project (January 6, 2017) ("Cashen Comments").

¹¹ See **Exhibit E**, Tom Myers, Ph.D., Suncrest Dynamic Reactive Power Support Project, Draft Environmental Impact Report (January 5, 2017).

¹² *Id.*, p. 7.

Finally, expert traffic engineer Daniel T. Smith Jr., P.E.¹³ concludes that the Project construction traffic will have potentially significant, unmitigated impacts on the residential communities along the only Project access roads of Bell Bluff Truck Trail and Avenida de los Arboles. The DEIR's traffic analysis fails to include the baseline traffic count for these roads and residential data for these communities, which are both necessary to fully evaluate the extent of these impacts.

CEQA prohibits a lead agency from approving a project if feasible alternatives or mitigation measures exist which would substantially lessen a project's significant environmental effects.¹⁴ As discussed herein, there is substantial evidence demonstrating that adoption of the Suncrest Substation Alternative as the Project is feasible, would substantially lessen the Project's previously disclosed significant environmental effects, and would meet all Project objectives. Commenters' experts present additional substantial evidence demonstrating that additional mitigation measures are necessary to mitigate the Project's numerous potentially significant environmental effects.

CEQA requires recirculation of a DEIR for public review and comment when significant new information must be added to the DEIR following public review, but before certification.¹⁵ The CEQA Guidelines clarify that new information is significant if "the DEIR is changed in a way that deprives the public of a meaningful opportunity to comment upon a substantial adverse environmental effect of the Project or a feasible way to mitigate or avoid such an effect."¹⁶ The purpose of recirculation is to give the public and other agencies an opportunity to evaluate the new data and the validity of conclusions drawn from it.¹⁷

The CPUC is tasked with ensuring that Californians receive safe, reliable utility service and infrastructure at reasonable rates, with a *commitment to environmental quality* and a prosperous California economy.¹⁸ In order to comply

¹³ See **Exhibit F**, Daniel T. Smith Jr., P.E., Subject: Suncrest Dynamic Reactive Power Support Project DEIR (January 5, 2017).

¹⁴ PRC §21002; *CCEC v. Woodland*, 225 Cal. App. 4th at 203; 14 CCR §15126.6.

¹⁵ Pub. Resources Code § 21092.1.

¹⁶ CEQA "Guidelines," 14 Cal. Code Regs. § 15088.5.

¹⁷ *Save Our Peninsula Comm. v. Monterey City Bd. of Supervisors* (1981) 122 CalApp3d 813, 822.

¹⁸ California Public Utilities Commission. 2016 Jan 26. 2015 Annual Report. Cover letter to Honorable Edmund G. Brown Jr., Governor of the State of California, and distinguished members of the California State Legislature. Available at:

<http://www.cpuc.ca.gov/uploadedFiles/CPUC_Public_Website/Content/About_Us/Annual_Reports/2015%20CPUC%20Performance%20and%20Accountability%20Annual%20Report_v004.pdf>.

with this mandate, and the mandates of CEQA, the DEIR must be revised to resolve its inadequacies and recirculated for public review and comment.

I. STATEMENT OF INTEREST

CURE is a coalition of labor organizations whose members encourage sustainable development of California's energy and natural resources. CURE's members help solve the State's energy problems by building, maintaining, and operating conventional and renewable energy power plants and transmission facilities. Since its founding in 1997, CURE has been committed to building a strong economy and a healthier environment. CURE has helped cut smog-forming pollutants in half, reduced toxic emissions, increased the use of recycled water for cooling systems, and pushed for groundbreaking pollution control equipment as the standard for all new power plants, all while helping to ensure that new power plants and transmission facilities are built with highly trained, professional workers who live and raise families in nearby communities.

CURE has an interest in enforcing environmental laws that encourage sustainable development and ensure a safe working environment for the members that they represent. Environmental degradation destroys cultural and wildlife areas, consumes limited fresh surface and ground water resources, causes water pollution, and imposes other stresses on the environmental carrying capacity of the state. This in turn jeopardizes future development by causing construction moratoriums and otherwise reducing future employment opportunities for CURE's members. Additionally, the organizations' members live, recreate and work in the communities and regions that suffer the impacts of projects that are detrimental to human health and the environment. CURE therefore has a direct interest in enforcing environmental laws to minimize the adverse impacts of projects that would otherwise degrade the environment. Finally, CURE members are concerned about projects that risk serious environmental harm without providing countervailing economic benefits. For these reasons, CURE's mission includes improving California's economy and the environment by ensuring that new conventional and renewable power plants and their related transmission facilities use the best practices to protect our clean air, land and water and to minimize their environmental impacts and footprint.

Commenters Ronald Bauers, Cory Moore, Kellen Weldy, and Jimmy Young live, work, and recreate in the vicinity of the Project. Mr. Bauers, Mr. Moore, and Mr. Young are residents of Alpine, California, located less than 4 miles from the

Project site. Mr. Weldy is a resident of nearby Campo, California. These individuals will be directly impacted by the Project's unmitigated environmental impacts, and therefore have a direct interest in enforcing environmental laws to minimize the adverse impacts that the Project would otherwise have on the environment.

II. LEGAL BACKGROUND

CEQA requires that an agency analyze the potential environmental impacts of its proposed actions in an environmental impact report ("EIR") (except in certain limited circumstances).¹⁹ The EIR is the very heart of CEQA.²⁰ "The foremost principle in interpreting CEQA is that the Legislature intended the act to be read so as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language."²¹

CEQA has two primary purposes. First, CEQA is designed to inform decision makers and the public about the potential, significant environmental effects of a project.²² "Its purpose is to inform the public and its responsible officials of the environmental consequences of their decisions before they are made. Thus, the EIR 'protects not only the environment but also informed self-government.'"²³ The EIR has been described as "an environmental 'alarm bell' whose purpose it is to alert the public and its responsible officials to environmental changes before they have reached ecological points of no return."²⁴

Second, CEQA requires public agencies to avoid or reduce environmental damage when "feasible" by requiring "environmentally superior" alternatives and all feasible mitigation measures.²⁵ The EIR serves to provide agencies and the public with information about the environmental impacts of a proposed project and to "identify ways that environmental damage can be avoided or significantly reduced."²⁶ If the project will have a significant effect on the environment, the

¹⁹ See, e.g., PRC § 21100.

²⁰ *Dunn-Edwards v. BAAQMD* (1992) 9 Cal.App.4th 644, 652.

²¹ *Comtys. for a Better Env. Cal. Res. Agency* (2002) 103 Cal. App.4th 98, 109 ("*CBE v. CRA*").

²² 14 CCR § 15002(a)(1).

²³ *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal. 3d 553, 564.

²⁴ *Berkeley Keep Jets Over the Bay v. Bd. of Port Comm'rs.* (2001) 91 Cal. App. 4th 1344, 1354 ("*Berkeley Jets*"); *County of Inyo v. Yorty* (1973) 32 Cal.App.3d 795, 810.

²⁵ 14 CCR § 15002(a)(2) and (3); see also *Berkeley Jets*, 91 Cal.App.4th at 1354; *Citizens of Goleta Valley*, 52 Cal.3d at 564.

²⁶ 14 CCR § 15002(a)(2).

agency may approve the project only if it finds that it has “eliminated or substantially lessened all significant effects on the environment where feasible” and that any unavoidable significant effects on the environment are “acceptable due to overriding concerns.”²⁷

While the courts review an EIR using an “abuse of discretion” standard, “the reviewing court is not to ‘uncritically rely on every study or analysis presented by a project proponent in support of its position. *A clearly inadequate or unsupported study is entitled to no judicial deference.*”²⁸ As the courts have explained, “a prejudicial abuse of discretion occurs “if the failure to include relevant information precludes informed decision making and informed public participation, thereby thwarting the statutory goals of the EIR process.”²⁹

III. THE CPUC SHOULD SELECT THE SUNCREST SUBSTATION ALTERNATIVE AS THE PROJECT BECAUSE IT IS THE ENVIRONMENTALLY SUPERIOR ALTERNATIVE TO THE PROJECT AND MEETS ALL PROJECT OBJECTIVES

An EIR must identify the environmentally superior alternative.³⁰ In cases when the No Project Alternative is the environmentally superior alternative, an EIR must also identify an environmentally superior alternative from among the other alternatives.³¹ CEQA prohibits a lead agency from approving a project if feasible alternatives or mitigation measures exist which would substantially lessen a project’s significant environmental effects.³² Here, there is substantial evidence in the DEIR demonstrating that adoption of the Suncrest Substation Alternative as the Project is both feasible and would substantially lessen or eliminate almost all of the Project’s significant environmental effects, while at the same time meeting all Project objectives. Therefore, Commenters urge the CPUC to select and approve the Suncrest Substation Alternative as the Project.

²⁷ PRC § 21081; 14 CCR § 15092(b)(2)(A) & (B).

²⁸ *Berkeley Jets*, 91 Cal. App. 4th 1344, 1355 (emphasis added), quoting, *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 391 409, fn. 12.

²⁹ *Berkeley Jets*, 91 Cal.App.4th at 1355; *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 722; *Galante Vineyards v. Monterey Peninsula Water Management Dist.* (1997) 60 Cal.App.4th 1109, 1117; *County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, 946.

³⁰ 14 CCR § 15126.6(a), (e)(2).

³¹ *Id.*

³² PRC §21002; *CCEC v. Woodland*, 225 Cal. App. 4th at 203; 14 CCR §15126.6.

In addition to the No Project Alternative, the DEIR correctly identified the Suncrest Substation Alternative as the environmentally superior alternative to the Project.³³ As the DEIR explains, the Suncrest Substation Alternative would avoid virtually all of the environmental impacts of the Proposed Project.³⁴ Because this alternative would be located within an existing substation, the majority of the Project significant construction impacts to biological and other resources would simply not occur. Likewise, the DEIR concludes that the Suncrest Substation Alternative would have *no* substantial impact on aesthetics, hydrology and water quality, and would avoid the need for a transmission line entirely.³⁵ While the Suncrest Substation Alternative would still generate some construction-related emissions from transport of equipment and materials to the site and use of construction equipment to install the SVC, the DEIR concludes that these emissions would be “substantially less than under the Proposed Project or any of the other alternatives.”³⁶

In addition to having significantly less environmental impacts than the Project, the DEIR contains substantial evidence demonstrating that the Suncrest Substation Alternative would produce reactive power at the same level as the Proposed Project and would meet all of the stated objectives of the Project.³⁷

Moreover, the DEIR notes that “the Proposed Project *is not environmentally superior to the Suncrest Substation Alternative* because it would have a number of environmental impacts that could be avoided by the Suncrest Substation Alternative.”³⁸ Those impacts include significant impacts that are already disclosed in the DEIR, such as biological and potential cultural resources impacts from ground-disturbing activities; aesthetic impacts from the SVC and associated facilities; and stormwater/water quality impacts from development of a new impervious surface.³⁹ These comments, and the comments of our expert consultants, provide further substantial evidence demonstrating that the Project will have numerous other potentially significant impacts associated with the transmission line that would not occur if the Suncrest Substation Alternative were

³³ DEIR, p. 20-13.

³⁴ DEIR, p. 20-13.

³⁵ *Id.*

³⁶ DEIR, p. 20-13.

³⁷ DEIR, p. 20-17.

³⁸ *Id.*

³⁹ *Id.*

built. Because the Suncrest Substation Alternative would construct the SVC facility within the existing Suncrest Substation, there would be no need for a transmission line, thereby eliminating the potential for most of these impacts.⁴⁰

Where, as here, a project is found to have significant adverse impacts, CEQA directs the lead agency to adopt feasible alternatives that meets most of the project objectives but result in fewer significant impacts.⁴¹ A “feasible” alternative is one that is capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, legal, social and technological factors.⁴² In this case, the DEIR acknowledges both that the Project will have significant adverse impacts, and that the Suncrest Substation Alternative would have virtually *no* significant adverse impacts while at the same time meeting not just some, but *all*, of the Project’s objectives. The CPUC should therefore select the Suncrest Substation Alternative as the Project

Furthermore, as discussed below, the CPUC may not reject the Suncrest Substation Alternative simply because a version of the same alternative was rejected by CAISO for economic reasons during its competitive bidding process for the SVC facility. An environmentally superior alternative may not be rejected simply because it is more expensive or less profitable. As the Court explained in *Citizens of Goleta Valley*:

The fact that an alternative may be more expensive or less profitable is not sufficient to show that the alternative is financially infeasible. What is required is evidence that the additional costs or lost profitability are sufficiently severe as to render it impractical to proceed with the project.⁴³

A. The CPUC Should Not Be Influenced by CAISO’s Selection of NEET West as its Project Sponsor Because CAISO’s Competitive Bid Selection Was Based Solely on Cost Factors that Did Not Consider the Environmental Impacts of the Project.

The version of the Project that is currently before CPUC was proposed by NEET West, and selected by CAISO, as part of the ISO Tariff selection process. As

⁴⁰ *Id.*

⁴¹ *Citizens of Goleta Valley v. Bd. of Supervisors* (1988) 197 Cal.App.3d 1167, 1180-81; see also, *Burger v. County of Mendocino* (1975) 45 Cal.App.3d 322.

⁴² PRC § 21061.1; 14 CCR § 15364.

⁴³ *Citizens of Goleta Valley*, 197 Cal.App.3d at 1180-81; see also *Burger* 45 Cal.App.3d 322. 3448-014acp

the DEIR explains, CAISO identified a need for the SVC facility component of the Suncrest Project in its 2013-14 Transmission Plan.⁴⁴ CAISO thereafter conducted a competitive bid solicitation to determine which project proponent it would select as the "Project Sponsor" responsible for actually building the SVC facility.⁴⁵

NEET West was one of two bidders. NEET West proposed the Project. SDG&E proposed the SDG&E Project. Like the Suncrest Substation Alternative, the SDG&E Project proposed to construct the SVC within SDG&E's existing Suncrest Substation boundary, thereby eliminating the need for the 1-mile transmission line proposed for the NEET West Project.⁴⁶ The SDG&E Project was identical to the Suncrest Substation Alternative considered in the DEIR, except that SDG&E would operate the SVC facility rather than NEET West.⁴⁷

The CAISO published its Selection Report in January 2015, describing how it had selected the Project Sponsor.⁴⁸ CAISO ultimately selected the NEET West proposal.⁴⁹ As required by the ISO Tariff, CAISO undertook a comparative analysis of the degree to which each potential project sponsor and its proposal met the qualification criteria set forth in ISO Tariff Section 24.5.3.1 and the selection factors set forth in ISO Tariff Section 24.5.4.⁵⁰ The CAISO Selection Report provides a list of these 11 factors.⁵¹ None of the factors involve any analysis or comparison of the environmental impacts of the respective bid proposals. Of the factors considered, SDG&E and NEET West fared evenly, with SDG&E's proposal being equal to or better than the NEET West proposal in most areas save narrow cost-containment respects.⁵² A summary of the CAISO findings is below:

<u>CAISO Selection Factor</u>	<u>Bidder Selected by</u>	<u>Basis for Selection</u>
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⁴⁴ DEIR, p. ES-1.

⁴⁵ See CAISO, Suncrest 230 kV 300 MVar Dynamic Reactive Power Support Description and Functional Specifications for Competitive Solicitation (April 15, 2014), available at <http://www.caiso.com/Documents/Description-FunctionalSpecificationsSuncrest230ReactivePowerSupport.pdf>.

⁴⁶ *Ibid.*

⁴⁷ See CAISO Selection Report, p. 3.

⁴⁸ *Id.*

⁴⁹ See CAISO Selection Report.

⁵⁰ *Ibid.*, p. 1.

⁵¹ See CAISO Selection Report, p. 1.

⁵² *Ibid.*, p. 7.

⁵³ *Id.* p. 42.

	<u>CAISO</u>	
Overall Capability to Finance, License, Construct, Operate, and Maintain the Facility ⁵³	NEET West	NEET West “slight advantage” with regard to its SVC-related construction and maintenance experience.
Existing Rights-of-Way and Substations that Would Contribute to the Project ⁵⁴	SDG&E	SDG&E’s proposal included all of the property rights necessary for the project, while NEET West’s proposal includes no contribution of pre-existing rights-of-way or substation property.
Experience in Acquiring Rights-of-Way ⁵⁵	Equally qualified	No material difference between the proposals because NEET West’s proposal demonstrates sufficient rights-of-way acquisition experience, and SDG&E has no need for rights-of-way acquisition because it already possesses the necessary property rights.
Proposed Schedule and Demonstrated Ability to Meet Schedule ⁵⁶	SDG&E	NEET West’s need to obtain a CPCN presents increased risk of delay in completing the project on schedule.
The Financial Resources of the Project Sponsor and Its Team ⁵⁷	Equally qualified	Both applicants have adequate financial capabilities.
Technical (Environmental Permitting) and Engineering Qualifications and Experience ⁵⁸	Equally qualified	Both applicants have adequate technical experience.
Previous Record Regarding	NEET West	NEET West has more experience

⁵³ *Id.*, p. 11, Selection Factor 24.5.4(a).

⁵⁴ *Id.*, p. 11, Selection Factor 24.5.4(b).

⁵⁵ *Id.*, p. 12, Selection Factor 24.5.4(c).

⁵⁶ *Id.*, p. 14, Selection Factor 24.5.4(d).

⁵⁷ *Id.*, p. 18, Selection Factor 24.5.4(e).

⁵⁸ *Id.*, p. 23, Selection Factor 24.5.4(f).

Construction and Maintenance of Transmission Facilities ⁵⁹		with construction and maintenance of substations and reactive support devices.
Adherence to Standardized Construction, Maintenance, and Operating Practices ⁶⁰	Equally qualified	Both applicants have adequate knowledge and background to meet this requirement.
Ability to Assume Liability for Major Losses ⁶¹	Equally qualified	Both project sponsors have sufficient financial resources, insurance coverage, and operational incentives.
Cost Containment Capability, Binding Cost Cap, and Siting Authority Cost Cap Authority ⁶²	NEET West	SDG&E's O&M costs will be lower than NEET West's. However, CAISO found NEET West's proposal to be "better than SDG&E's proposal because of the amount of the difference between the two cost caps and NEET West's more robust measures to limit potential cost increases." ⁶³

As explained by expert utility economist David Marcus, the CAISO Selection Report turned on a comparative analysis of the cost-containment proposals presented by SDG&E and NEET West,⁶⁴ which analysis (1) did not lead to a strong, or even a moderate, preference for NEET West over SDG&E, and (2) did not consider the different environmental impacts of the two proposals in choosing between them.⁶⁵ Mr. Marcus concludes, based on the factors considered by CAISO,

⁵⁹ *Id.*, p. 27, Selection Factor 24.5.4(g).

⁶⁰ *Id.*, p. 30, Selection Factor 24.5.4(h).

⁶¹ *Id.*, p. 33, Selection Factor 24.5.4(i).

⁶² *Id.*, p. 34, Selection Factor 24.5.4(j).

⁶³ Commenters note that Senate Bill 350 (Clean Energy and Pollution Reduction Act of 2015) ("SB 350") created a requirement that all construction of transmission line projects in California must compensate workers at prevailing wage. See SB 350, Section 4, amending Labor Code § 1720(e). NEET West's 2014 cost bid proposal to CAISO predated SB 350 and did not account for prevailing wage, whereas SDG&E's proposal did include prevailing wage. Because SB 350 now mandates that prevailing wage be applied to the NEET West Project, it is likely that the cost of the NEET West Project will be higher than initially proposed to CAISO. It is also possible that NEET West's cost containment provisions (which CAISO relied upon for its bid selection), will no longer be applicable.

⁶⁴ See Marcus Comments, pp. 1-2.

⁶⁵ Marcus Comments, p. 2.

that CAISO's selection of NEET West was for purely economic reasons, and that the Selection Report contains no overriding non-environmental reasons to choose the NEET West Project over the SDG&E Project.⁶⁶

Indeed, it is likely that, had environmental considerations been taken into account in the CAISO bid process, the significant environmental impacts of the NEET West Project would have swayed CAISO's decision to instead select the SDG&E Project.

IV. THE DEIR FAILS TO ADEQUATELY DESCRIBE THE PROJECT

The DEIR does not meet CEQA's requirements because it fails to include an accurate, complete and stable Project description, rendering the entire analysis inadequate. California courts have repeatedly held that "an accurate, stable and finite project description is the *sine qua non* of an informative and legally sufficient [CEQA document]."⁶⁷ CEQA requires that a project be described with enough particularity that its impacts can be assessed.⁶⁸ Accordingly, a lead agency may not hide behind its failure to obtain a complete and accurate project description.⁶⁹

It is impossible for the public to make informed comments on a project of unknown or ever-changing description. "A curtailed or distorted project description may stultify the objectives of the reporting process. Only through an accurate view of the project may affected outsiders and public decision-makers balance the proposal's benefit against its environmental costs...."⁷⁰ As articulated by the court in *County of Inyo v. City of Los Angeles*, "a curtailed, enigmatic or unstable project description draws a red herring across the path of public input."⁷¹ Without a complete project description, the environmental analysis under CEQA is impermissibly limited, thus minimizing the project's impacts and undermining meaningful public review.⁷²

⁶⁶ Marcus Comments, p. 2.

⁶⁷ *County of Inyo v. City of Los Angeles* (3d Dist. 1977) 71 Cal.App.3d 185, 193.

⁶⁸ *Id.* at 192.

⁶⁹ *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 311 ("*Sundstrom*").

⁷⁰ *Id.* at 192-193.

⁷¹ *Id.* at 197-198.

⁷² *See, e.g., Laurel Heights Improvement Assn. v. Regents of the Univ. of Cal.* (1988) 47 Cal.3d 376. 3448-014acp

A. The DEIR Fails to Adequately Describe Night Lighting, Which May Adversely Impact Biological Resources.

The Project proposes to include night lighting that would cause ecological light pollution.⁷³ While the DEIR acknowledges that the Project's night lighting could impact bats or other nocturnally active species such as the northwestern San Diego pocket mouse and Dulzura pocket mouse,⁷⁴ it fails to provide sufficient details about the nature of the proposed lighting to effectively evaluate the extent of these impacts.

The DEIR indicates lighting at the Project site "shall be the lowest illumination allowed for human safety and security, selectively placed, shielded, and directed downward to the maximum extent practicable."⁷⁵ It further indicates: "lighting at the SVC facility would conform to National Electric Safety Code (NESC) requirements and applicable San Diego County outdoor lighting codes. NESC recommends illuminating substation facilities to a *minimum* of 22 lux or 2 foot-candles."⁷⁶ However, as Mr. Cashen explains, this information is inadequate to evaluate impacts on wildlife.

Ecological light pollution has demonstrable effects on the behavioral and population ecology of organisms, with potentially serious implications on community ecology.⁷⁷ As Mr. Cashen explains, impacts on wildlife due to night lighting are dependent on the illumination (light incident per unit area), intensity (the number of photons per unit area), and spectral content (expressed by wavelength). Thus, to enable an accurate evaluation of Project impacts from night lighting, Mr. Cashen concludes that the CPUC must identify: (a) the height and abundance of the lights; (b) the types of lights that will be installed; (c) the *maximum* luminosity of the bulbs; and (d) the location and orientation of light fixtures that would be installed at the Project site.⁷⁸ The DEIR fails to provide this critical information, thus failing to describe this component of the Project in a manner adequate to enable an evaluation of its impacts.

⁷³ DEIR, pp. 2-16, 7-45.

⁷⁴ DEIR, p. 7-45.

⁷⁵ DEIR, p. 7-47.

⁷⁶ DEIR, p. 2-16. [emphasis added].

⁷⁷ Exhibit D, p. 3.

⁷⁸ *Id.*

B. The DEIR Fails to Adequately Describe the Project's Construction Water Supply.

The DEIR fails to describe the storage tanks proposed to be used as one of two potential water supply sources during Project construction. The DEIR explains that the Project would require approximately 2,600,000 gallons (8 af) of water spread over 196 workdays,⁷⁹ from one of two potential sources. The first would be a water services agreement with Padre Dam Municipal Water District ("PDMWD"), which is located about 19 miles away from the Project site and would require three truck loads per day.⁸⁰ The second water source is simply described as a neighbor's storage ponds.⁸¹

The DEIR does not explain how the storage ponds are filled, the existing uses of the neighbor's ponds, the current water balance, if the neighbor's ponds are currently used, or what impact Project water use would have on the ponds.⁸² The DEIR similarly fails to describe the impact a lower water volume in the pond would have on the local hydrogeology.⁸³ Although the DEIR asserts that there would be no groundwater used to recharge the ponds, Mr. Myers concludes that adding the Project's water use to the neighbor's ponds would decrease the amount of time the ponds are full, thereby decreasing the average water level in the ponds.⁸⁴ Because the DEIR fails to describe the characteristics of this potential water source, the DEIR contains no analysis of the potential impacts of using the storage ponds. The DEIR's conclusion that the Project would have a less than significant impact on water supply resulting from use of the ponds is therefore entirely unsupported because the DEIR provides insufficient information about either the water balance or the hydrogeology of the ponds.

V. THE DEIR FAILS TO ADEQUATELY ESTABLISH THE ENVIRONMENTAL SETTING FOR THE PROJECT

The DEIR fails to adequately describe the environmental setting against which the Project's environmental impacts are to be measured for several critical aspects of the Project. This contravenes the fundamental purpose of the

⁷⁹ DEIR, p 2-24.

⁸⁰ Id.

⁸¹ DEIR p 2-24, -25.

⁸² Id.

⁸³ Id.

⁸⁴ Exhibit E, p. 3.

environmental review process, which is to determine whether there is a potentially substantial, adverse change compared to the existing setting. CEQA requires that a lead agency include a description of the physical environmental conditions, or “baseline,” in the vicinity of the project as they exist at the time environmental review commences.⁸⁵ As the courts have repeatedly held, the impacts of a project must be measured against the “real conditions on the ground.”⁸⁶ The description of the environmental setting constitutes the “baseline” physical conditions against which the lead agency assesses the significance of a project’s impacts.⁸⁷

A. The DEIR Fails to Adequately Establish the Environmental Setting for Biological Resources.

The DEIR fails to provide sufficient information to establish the environmental setting for an accurate assessment of the Project’s impacts on biological resources, particularly as to the potentially significant impacts posed by the transmission line component of the Project. For example, the DEIR does not discuss: (a) the relative rarity, (b) population status (i.e., increasing, decreasing, or stable), or (c) primary threats associated with each special-status species that occurs, or could occur, in the Project area.⁸⁸ This lack of information on existing bioresources precludes the public and decision makers from understanding the relative severity of the Project’s impacts on numerous sensitive biological resources that will be affected by the Project.

1. Golden Eagle

The DEIR purports to analyze and mitigate potentially significant impacts to golden eagles to less than significant levels.⁸⁹ However, the DEIR fails to disclose basic, readily available information about the deteriorated status of golden eagle populations in San Diego County that is necessary to fully evaluate and mitigate the Project’s impacts on golden eagles. For example, public data indicate the golden eagle population in San Diego County has experienced a precipitous decline in

⁸⁵ 14 CCR § 15125(a); *Comtys. for a Better Env't v. So. Coast Air Qual. Mgmt. Dist.* (2010) 48 Cal. 4th 310, 321 (“*CBE v. SCAQMD*”).

⁸⁶ *CBE v. SCAQMD*, 48 Cal. 4th at 321; *Save Our Peninsula Com. v. Monterey County Bd. of Supervisors* (2001) 87 Cal.App.4th 99, 121-22; *City of Carmel-by-the-Sea v. Bd. of Supervisors of Monterey County* (1986) 183 Cal.App.3d 229, 246.

⁸⁷ 14 CCR § 15125(a); *CBE v. SCAQMD*, 48 Cal. 4th at 321.

⁸⁸ See Cashen Comments, p. 3.

⁸⁹ DEIR, p. 7-44.

recent years, primarily due to the loss of foraging habitat.⁹⁰ Current statistical data demonstrates that less than 50 pairs remain within the County, and that, by 2030, the County's golden eagle population is predicted to drop to 25 pairs.⁹¹ Consequently, Mr. Cashen explains that each additional pair (territory) that is eliminated from the County has significant implications on conservation of the species.

This information demonstrates that the baseline against which to measure impacts on golden eagles is that of a declining species, not a healthy species. That information is not disclosed in the DEIR. As a result, the DEIR's golden eagle analysis incorrectly assumes that the Project's impacts on golden eagles will be effectively mitigated by the simple survey and avoidance techniques proposed in Mitigation Measures BIO-5 and BIO-6.⁹² However, those measures fail entirely to address loss of foraging habitat, which is one of the principal factors causing the decline of the species within the San Diego County geographical area.

2. Vegetation Communities

The DEIR contains inaccurate baseline information regarding the vegetation communities at the Project site. The DEIR classifies 1.7 acres of the Project site as "ruderal" vegetation, but fails to identify specific plant species that are present in this portion of the Project site.⁹³ Neither the San Diego Regional Holland code classification system, nor the Manual of California Vegetation, recognizes "ruderal" as a vegetation type.⁹⁴ The DEIR's inaccurate designation of on-site vegetation precludes an accurate application of the mitigation requirements established in San Diego County's Biological Mitigation Ordinance ("Biological Ordinance"). The Biological Ordinance's mitigation measures are determined based on classification of the vegetation community as defined under the San Diego Regional Holland code

⁹⁰ Cashen Comments, p. 3, citing Unitt PA. 2004. San Diego County Bird Atlas. Proceedings of the San Diego Society of Natural History, No. 39.

⁹¹ *Id.*

⁹² DEIR, p. 7-44.

⁹³ DEIR, Figure 7-1 and Table 7-1.

⁹⁴ Oberbauer T, M Kelly, J Buegge. March 2008. Draft Vegetation Communities of San Diego County. Based on "Preliminary Descriptions of the Terrestrial Natural Communities of California", Robert F. Holland, Ph.D., October 1986. *See also* Sawyer JO, T Keeler-Wolf, JM Evens. 2009. A Manual of California Vegetation. Second edition. California Native Plant Society, Sacramento. 1300 pp.

classification system.⁹⁵ Consequently, circumventing the classification system by classifying a portion of the Project site as “ruderal” precludes the ability to determine compliance with the Biological Ordinance.

3. *Special-Status Plants*

The DEIR fails to identify all plant taxa at the Project site to the taxonomic level necessary to determine rarity and listing status. For example, the DEIR did not identify the specific species within the following genera detected at the Project site: (1) *Amsinckia*, (2) *Crytantha*, (3) *Cuscuta*, and (4) *Ribes*.⁹⁶ Each of these genera contains special-status species known to occur in San Diego County.⁹⁷ The DEIR’s failure to identify plants to the appropriate taxonomic level precludes a thorough understanding of the environmental setting for impacts to sensitive and special-status plant species, and consequently, the potential for significant impacts to these resources.

4. *Hermes Copper Butterfly*

The DEIR indicates the proposed Project site does not contain suitable habitat for the Hermes copper butterfly because the site does not have spiny redberry shrubs (the host plant) within 15 feet of California buckwheat (the preferred nectar source).⁹⁸ As a consequence, the baseline surveys performed for the butterfly were limited to overly narrow searches for those two plants within 15 feet of each other, which did not detect the butterfly.⁹⁹ However, the DEIR fails to cite any scientific evidence to substantiate the statement that suitable habitat for the species is limited to sites where spiny redberry shrubs are within 15 feet of California buckwheat, nor is this conclusion scientifically supported.¹⁰⁰ Indeed, the DEIR’s statement that the Project site lacks suitable habitat for the butterfly is inconsistent with the Applicant’s own PEA, which states the proposed Project site provides suitable habitat, and that the species has moderate potential to occur at

⁹⁵ San Diego County Code, Title 8, Division 6, Chapter 5. Ordinance No. 10039 (N.S.); Cashen Comments, p. 4.

⁹⁶ PEA, Appendix D: Biological Resources Technical Report, Appendix A.

⁹⁷ Cashen Comments, p. 8, citing Rebman JP, MG Simpson. 2014. Checklist of the Vascular Plants of San Diego County, 5th ed. San Diego Natural History Museum, San Diego (CA).

⁹⁸ DEIR, p. 7-34.

⁹⁹ *Id.*

¹⁰⁰ Cashen Comments, p. 9.
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the Project site.¹⁰¹ Thus, the parameters underlying the DEIR's description of the baseline for the butterfly were overly narrow and flawed, resulting in an inaccurate impact assessment.

5. Dulzura Pocket Mouse and Northwestern San Diego Pocket Mouse

The Dulzura pocket mouse and northwestern San Diego pocket mouse are California Species of Special Concern.¹⁰² The DEIR acknowledges that both species have the potential to occur at the Project site.¹⁰³ However, the DEIR failed to conduct the trapping surveys necessary to determine whether either species is present.¹⁰⁴ This makes it impossible for the CPUC or the public to conclude whether the pocket mouse species are, in fact, present at the Project site, which in turn makes it impossible to determine the extent of Project's impacts on these species and whether mitigation is required. The DEIR does not include any mitigation measures directed at impacts to the pocket mouse species. This omission may be due to the DEIR's failure to accurately assess the Project's impacts on pocket mouse in the first place. Thus, as proposed, the Project may result in potentially significant, unmitigated impacts on the pocket mouse species that result in illegal take. The DEIR must be revised to conduct adequate surveys and analysis for the pocket mouse species.

6. Special-Status Bats

Several special-status bat species have the potential to occur in the Project area.¹⁰⁵ While the DEIR correctly determined that bats are unlikely to roost within the Project footprint, the DEIR failed to assess whether bat roosts are present in the trees and rock outcrops immediately adjacent to the Project boundary footprint.¹⁰⁶ Mr. Cashen explains that the trees and rock outcrops provide suitable habitat for bats, and concludes that the outcroppings adjacent to the Project site are likely to host bats. These outcroppings will be subject to the same noise, vibration, and other

¹⁰¹ PEA, Appendix D: Biological Resources Technical Report, p. 43.

¹⁰² See California Department of Fish and Wildlife, Natural Diversity Database, January 2017, Special Animals List, available at <https://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=109406&inline>.

¹⁰³ DEIR, Table 7-2.

¹⁰⁴ *Id.*, Cashen Comments, p. 9.

¹⁰⁵ DEIR, Table 7-2.

¹⁰⁶ Cashen Comments, p. 9, Figure 4.
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disturbance activities associated with the Project.¹⁰⁷ Mr. Cashen concludes that these areas should have been surveyed as part of the DEIR's biological baseline assessment.

B. The DEIR Fails to Adequately Establish the Environmental Setting Against Which to Measure the Project's Traffic Impacts.

The DEIR's traffic analysis omits critical details about the existing uses along the Project's access road, and fails entirely to include current traffic data for the thoroughfares surrounding the Project site. These deficiencies render the DEIR inadequate as an informational document because the DEIR fails to set forth the baseline traffic conditions that will be impacted or exacerbated by the Project.

1. The DEIR Fails to Adequately Describe the Residential Access Locations That Will be Impacted by Project Construction

The Project site is located off of Bell Bluff Truck Trail, a narrow, secured road which provides the only direct access to the Project site, as well as the only direct access to numerous private residences located along the road.¹⁰⁸ Bell Bluff Truck Trail is approximately 30 feet wide from the proposed SVC site west to the intersection with the access road to the existing Suncrest Substation, and approximately 12 feet wide west of the intersection with the substation access road.¹⁰⁹ Bell Bluff Truck Trail provides the only direct access to the Project site.

Project construction will last approximately 11 months, will generate approximately 403 haul truck trips, up to 6 water truck trips per day, daily travel trips for up to 64 construction workers, and will require road blockage to accommodate construction activities.¹¹⁰ The DEIR and its accompanying traffic study omit critical details regarding the locations and driveway access points of the residences along Bell Bluff Truck Trail that will be impacted by these construction activities.

DEIR Figure 19-1, entitled "Roadways in the Project Vicinity," provides the DEIR's principal description of roadways in the Project vicinity. However, Figure

¹⁰⁷ *Id.*

¹⁰⁸ DEIR, p. 19-4; Smith Comments, p. 1.

¹⁰⁹ DEIR, p. 19-4.

¹¹⁰ DEIR, p. 19-9; Smith Comments, p. 2.
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19-1 contains little detail, and fails to show the location of the gate that divides the portion of Bell Bluff Truck Trail to which the public has access from the portion to which access is restricted.¹¹¹ Figure 19-1 also fails to show the locations of driveways to private residences accessed from Bell Bluff Truck Trail or Avenida de los Arboles, and does not show sufficient detail of the roadway network to disclose the fact that these residences have no alternate access routes.¹¹² Although the DEIR explains that Bell Bluff Trail Road provides access to some residences and trails,¹¹³ it fails to pinpoint the locations of the residences or residence access to the road. These missing details are critical to the DEIR's analysis of the Project's impacts on residential and emergency road access. Without this baseline information, there is inadequate information from which to analyze the extent to which residential access conditions, and emergency vehicle access to those residents, will be impacted by the Project.

2. The DEIR's Baseline Traffic Count and Residential Data is Deficient

The DEIR presents no traffic data for Bell Bluff Truck Trail or Avenida de los Arboles. Instead, the DEIR simply states that "no traffic data are available."¹¹⁴ This omission demonstrates a failure to collect the relevant data necessary to perform a meaningful analysis of traffic impacts.

It is incumbent upon the lead agency to obtain accurate data on the traffic using the roads that will be impacted by the Project. As Mr. Smith explains, if no current data is available from the public agencies that ordinarily maintain traffic count records, then due diligence requires that the lead agency retain a traffic counting service to make the traffic counts necessary to perform the traffic impact analysis required under CEQA. The DEIR's failure to include this threshold information regarding existing traffic in the Project area is inexcusable.

The DEIR next relies on outdated 2008 traffic counts on Japatul Valley Road, erroneously contending that reliance on the 2008 counts is remedied by citation to more recent 2009 and 2013 counts taken on different roads located several miles away from the Project's roads of concern. Traffic data from roads that are not near the Project site, and are unlikely to be impacted by the Project, is irrelevant to the

¹¹¹ Smith Comments, p. 1.

¹¹² Smith Comments, p. 1.

¹¹³ DEIR, p. 19-4.

¹¹⁴ DEIR, p. 19-6.

DEIR's analysis of impacts to the roads adjacent to the Project site. Because the DEIR omits this information from the traffic baseline analysis, the DEIR's traffic impact analysis is similarly unsupported.

VI. THE DEIR FAILS TO ADEQUATELY ANALYZE, QUANTIFY, AND MITIGATE ALL POTENTIALLY SIGNIFICANT IMPACTS

The failure to provide information required by CEQA is a failure to proceed in the manner required by CEQA.¹¹⁵ Challenges to an agency's failure to proceed in the manner required by CEQA, such as the failure to address a subject required to be covered in an EIR or to disclose information about a project's environmental effects or alternatives, are subject to a less deferential standard than challenges to an agency's factual conclusions.¹¹⁶ In reviewing challenges to an agency's approval of an EIR based on a lack of substantial evidence, the court will "determine de novo whether the agency has employed the correct procedures, scrupulously enforcing all legislatively mandated CEQA requirements."¹¹⁷

Even when the substantial evidence standard is applicable to agency decisions to certify an EIR and approve a project, reviewing courts will not 'uncritically rely on every study or analysis presented by a project proponent in support of its position. A clearly inadequate or unsupported study is entitled to no judicial deference.'¹¹⁸

A. The DEIR Fails to Accurately Quantify Potentially Significant Impacts on Air Quality and Public Health.

Under CEQA a project has significant impacts if it "[v]iolate[s] any air quality standard or contribute[s] substantially to an existing or projected air quality violation" or "[e]xpose[s] sensitive receptors to substantial pollutant concentrations."¹¹⁹ The San Diego County Air Pollution Control District ("SDAPCD") maintains thresholds of significance for criteria air pollutants that are to be used in determining the significance of a project's air quality impacts under

¹¹⁵ *Sierra Club v. State Bd. Of Forestry* (1994) 7 Cal.4th 1215, 1236.

¹¹⁶ *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 435.

¹¹⁷ *Id., Madera Oversight Coal., Inc. v. County of Madera* (2011) 199 Cal. App. 4th 48, 102.

¹¹⁸ *Berkeley Jets*, 91 Cal.App.4th at 1355.

¹¹⁹ CEQA Appendix G.

CEQA.¹²⁰ The DEIR acknowledges that the proposed project would result in a significant impact if it exceeds the SDAPCD construction and operational significance thresholds,¹²¹ but concludes that Project emissions would not exceed any of these thresholds.¹²²

SWAPE reviewed the DEIR's air quality analysis and performed an independent model of the Project's construction emissions.¹²³ SWAPE concludes that the DEIR underestimates the Project's construction NO_x emissions from construction haul vehicles and other equipment, fails to analyze the significant carcinogenic risk posed to nearby sensitive receptors from exposure to TACs during Project construction, and fails to substantiate the DEIR's reliance on Tier 3 construction equipment to reduce construction emissions. SWAPE's modeling demonstrates that the Project's NO_x and DPM emissions will exceed applicable SDAPCD thresholds.

1. *The DEIR Underestimates Construction Emissions*

The DEIR estimates the Project's air pollution emissions using the "CalEEMod" modeling program, which allows users to input project-specific information supported by substantial evidence.¹²⁴ The modeling program's calculations for the Project are generated as "output files" that reveal what inputs and parameters were used. Any deviations from the "default values" in the model must include a written description to justify why a different value was selected.¹²⁵

When reviewing the Project's CalEEMod output files, SWAPE found that the DEIR failed to account for emissions generated by material import and export from the Project site, and relied on input values that were inconsistent with information disclosed in the DEIR. As a result, the Project's nitrogen oxide ("NO_x") emissions associated with Project construction were underestimated.

a. The Air Quality Analysis Fails to Account for All Material Import and Export

¹²⁰ DEIR, p. 6-6, 6-14; County of San Diego CEQA Guidelines, (2009), available at <http://www.sandiegocounty.gov/pds/docs/CEQAGDLN.pdf>

¹²¹ DEIR, p. 6-14.

¹²² DEIR, p. 6-15.

¹²³ SWAPE Comments, pp. 2-13.

¹²⁴ SWAPE Comments p. 2.

¹²⁵ *Id.*

The DEIR states that approximately 2,500 cubic yards (“cy”) of gravel would need to be imported and installed at the SVC site for grounding purposes.¹²⁶ Additionally, grading for construction of the SVC will require the removal of approximately 4,000 cy of excess material, and construction of the transmission line would require the removal of an additional 3,000 cy of excess material, for a total of 9,500 cy of material to be hauled to or from the Project site.¹²⁷ All excavated material will require off-site removal and disposal at a landfill.”¹²⁸ However, the DEIR failed entirely to include emissions from the imported material in its emissions model, and included just 3,600 cy of excavated material in the model,¹²⁹ using a total of just 450 hauling trips.¹³⁰

The DEIR also fails to state whether the emissions model accounts for bulking – the swell of excavated materials to a greater size than the size of the hole or holes that were dug. Bulking can cause excavated materials to swell anywhere from 20-80 percent beyond their excavated volume.¹³¹ If bulking is not accounted for, then the DEIR is likely to have substantially underestimated the number of construction trucks required to haul excavated materials off-site.

By failing to account for the total amount of material import and export that will be needed during Project construction, the Project’s fugitive PM10 and PM2.5 emissions and mobile-source emissions are also greatly underestimated. These errors and omissions of basic input data from the DEIR’s air quality model render the results of the DEIR’s air quality analysis artificially low and inaccurate.

b. The Air Quality Analysis Uses the Incorrect Number of Vendor Trips

The DEIR further underestimated the Project’s construction emissions by failing to account for truck trips required to supply water to the Project site during construction.

Pursuant to the CalEEMod User’s Guide, water trucks required for construction activities are considered “vendor trips” and must be incorporated in the

¹²⁶ DEIR, p. 2-19.

¹²⁷ DEIR, p. 2- 19, p. 2-21

¹²⁸ *Id.*

¹²⁹ DEIR Appendix E, pp. 4.

¹³⁰ Appendix E, pp. 12, p. 10 of 46.

¹³¹ SWAPE Comments, p. 3.

CalEEMod model in one of two ways: (1) “use the Off-Highway Trucks category” in the Off-Road Equipment screen; or (2) “add these as additional vendor trips in the Trips and VMT screen.”¹³² The DEIR failed to include water truck trips in either category.

According to the DEIR, approximately 2,600,000 gallons (~ 8 acre feet) of water will be required during Project construction.¹³³ The DEIR explains that “all water to be used during Project construction would be supplied by water truck” if an existing PVC pipe cannot be used to transport the water to the construction site.¹³⁴ Water deliveries would require an average of 3 water truck trips per day, with a peak of up to 6 water trucks per day.¹³⁵ Based on this information, the DEIR should have accounted for the truck trips required to import 2,600,000 gallons of water over the course of Project construction (in-and-out trips for each of approximately 650 4,000-gallon trucks or 1,300 2,000-gallon trucks) by including these truck trips as vendor trips or as Off-Highway Trucks in the CalEEMod model’s equipment list. The DEIR failed to include any of these truck trips in its emissions model.

By failing to account for these additional truck trips, the Project’s fugitive dust and mobile-source emissions were significantly underestimated. The omission of water trucks from the DEIR’s air quality model therefore renders the results of the DEIR’s air quality analysis artificially low and inaccurate. This analysis must be revised to reflect accurate input data.

c. The DEIR Improperly Applies Mitigation Measures to Unmitigated Construction Emissions

The DEIR incorrectly applies two construction-related mitigation measures, Applicant Proposed Measures (“APMs”) AIR-1 and AIR-2, to the Project’s unmitigated construction emissions in order to conclude that Project emissions are less than significant prior to mitigation. This violates CEQA’s requirement that the lead agency must first determine the extent of a project’s impacts before it may apply mitigation measure to reduce those impacts.¹³⁶

¹³² SWAPE Comments, p. 4.

¹³³ DEIR, p. 2-24.

¹³⁴ *Id.*

¹³⁵ DEIR, p. p. 19-9.

¹³⁶ 14 CCR s 15370; *Lotus v. Dep't of Transp.* (2014) 223 Cal. App. 4th 645, 651-52. 3448-014acp

APM AIR-1 requires the use of water or non-toxic soil stabilizers to control fugitive dust during Project construction. APM AIR-2 requires vehicle speeds to be limited to 15 miles per hour on unpaved roads and work areas.¹³⁷ The DEIR acknowledges that these APMS are intended to “reduce air pollutant emissions,”¹³⁸ and both measures are included as mitigation measures in the Project’s MMRP.¹³⁹ Nevertheless, the DEIR applies AIR-1 and AIR-2 to the Project’s construction emissions without disclosing the actual emissions prior to mitigation.¹⁴⁰ The DEIR then attempts to label the mitigation measures as design features in order to remedy its mistake.¹⁴¹

This approach is prohibited by CEQA. As described under CEQA Guidelines Section 15370, “Mitigation” includes:

- (a) Avoiding the impact altogether by not taking a certain action or parts of an action.
- (b) Minimizing impacts by limiting the degree or magnitude of the action and its implementation.
- (c) Rectifying the impact by repairing, rehabilitating, or restoring the impacted environment.
- (d) Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action.
- (e) Compensating for the impact by replacing or providing substitute resources or environments.¹⁴²

*Lotus v. Department of Transportation*¹⁴³ recently clarified the requirements of CEQA Guideline 15370. In *Lotus*, the court held that “avoidance, minimization and/or mitigation measures,” are not “part of the project.”¹⁴⁴ Rather, they are mitigation measures designed to reduce or eliminate environmental impacts of the Project, and must be treated as such. Mitigation measures cannot be incorporated

¹³⁷ See DEIR, p. 2-27, MMRP, p. L-10.

¹³⁸ DEIR P. 6-13.

¹³⁹ DEIR, p. L-10.

¹⁴⁰ DEIR, p. 6-15 (“the uncontrolled emissions estimate shown in Table 6-6 assumes the application of APMS AIR-1 and AIR-2, but not APMS AIR-3 and AIR-4”).

¹⁴¹ *Id.*

¹⁴³ *Lotus v. Dept. of Transportation* (2013) 223 Cal.App.4th 650.

¹⁴⁴ *Id.* at 656.

in an EIR’s initial calculation of the Project’s unmitigated air pollutant emissions because the analysis of unmitigated emissions, by definition, must quantify emissions before any mitigation measures to reduce those emissions are applied.¹⁴⁵ An EIR that compresses the analysis of impacts and mitigation measures into a single issue disregards the requirements of CEQA.

In this case, the DEIR admits that the APMs are designed to reduce emissions, not produce them. They therefore belong in the mitigation section, not the emissions calculation. By including these mitigation measures in the Project’s initial CalEEMod modeling, the Project’s construction emissions are therefore artificially and inaccurately reduced. As a result, the DEIR fails to disclose the Project’s actual unmitigated construction emissions, and underestimates the severity of the Project’s air quality impacts.

2. Project Construction Will Generate Significant NOx Emissions that Exceed San Diego Air Pollution Control District Thresholds

SWAPE recalculated the Project’s construction emissions using the same CalEEMod program used in the DEIR, but with the corrected input values for the factors described above.¹⁴⁶ When correctly calculated, SWAPE found that the Project’s construction NOx emissions would be 250.2 lbs/day. This exceeds the San Diego Air Pollution Control District (“SDAPCD”) regional significance threshold for NOx of 250 lbs/day, and is therefore a significant impact.¹⁴⁷ SWAPE’s modeling results are set forth below:¹⁴⁸

Model	Construction Emissions (lbs/day)			
	NOx	Fugitive PM10	PM10	PM2.5
DEIR	246.2	10.9	16.7	10.1
SWAPE	250.2	13.6	19.5	10.6
Percent Increase	1.62%	24.77%	16.77%	4.95%
Significance Threshold	250	250	100	55
Threshold Exceeded?	Yes	<i>No</i>	<i>No</i>	<i>No</i>

¹⁴⁵ *Id.* at 651-52.

¹⁴⁶ See Exhibit A, SWAPE Comments, pp. 7-8.

¹⁴⁷ 14 CCR § 15064.7(a).

¹⁴⁸ SWAPE Comments, p. 10.

The CPUC must disclose these impacts as significant. The CPUC must also prepare an EIR which includes an updated air quality analysis and identifies mitigation measures to reduce these emissions to less than significant levels.

3. *Construction Emissions Will Cause a Significant Cancer Risk that the DEIR Impermissibly Fails to Disclose and Mitigate*

The DEIR fails to analyze the health risks associated with exposure of sensitive receptors to TACs during Project construction by failing to include a construction-related health risk analysis (“HRA”) to determine whether construction emissions of toxic diesel particulate matter (“DPM”) will increase the cancer risk to nearby sensitive receptors. Nevertheless, the DEIR concludes that the Project’s construction emissions would have a less than significant impact on nearby sensitive receptors.¹⁴⁹

The DEIR attempts to justify the omission of an HRA by stating that “due to the limited construction duration, the limited construction emissions, and the sparsely populated area surrounding the project site, there is very low potential for fugitive dust or DPM to impact sensitive receptors during construction.”¹⁵⁰ This approach is both inaccurate and prohibited by CEQA.

CEQA imposes a duty on agencies to analyze the health risks posed by a project. In particular, CEQA requires lead agencies to prepare risk analyses to evaluate the nature and extent of the health hazards posed by exposure to toxic materials released by a project.¹⁵¹ Numerous cases have held that CEQA must analyze human health impacts. For example, in *Communities for a Better Environment v. South Coast Air Quality Management Dist.*,¹⁵² the Supreme Court held that an MND for a refinery was inadequate for failure to analyze nitrogen oxide emissions, pollutants known to have significant effects on human health.¹⁵³ The Court of Appeal has made clear that a CEQA document must analyze impacts of projects on human health. In *CBE v. Richmond*, the court held that a CEQA document is inadequate where it “does not address the public health or other

¹⁴⁹ DEIR, p. 6-18.

¹⁵⁰ DEIR, p. 6-17.

¹⁵¹ 14 CCR § 15126.2(a) requires a CEQA document to discuss the “health and safety problems caused by the physical changes” that a project will precipitate.

¹⁵² (2010) 48 Cal. 4th 310, 317.

¹⁵³ 48 Cal.4th at 317.

environmental consequences of processing heavier crude [thereby emitting TACs], let alone analyze, quantify, or propose measures to mitigate those impacts.”¹⁵⁴

Here, there is no dispute that the Project will generate TAC emissions during construction, and that the DEIR does not include an HRA to analyze the health risks associated with that exposure. The DEIR explains that Project construction will take up to 11 months, that construction equipment will generate diesel emissions, and that numerous daily truck trips per day are expected during the Project’s construction phase.¹⁵⁵ The Project site is located near several sensitive receptors in the form of local residences.¹⁵⁶ Thus, there is no reasonable question that an HRA is required for the Project.

The DEIR’s conclusion is also inconsistent with the Office of Environmental Health Hazard Assessment’s (“OEHHA”) most recent guidance. The OEHHA guidance provides that all short-term projects lasting longer than two months be evaluated for cancer risks to nearby sensitive receptors.¹⁵⁷ Here, Project construction will take 11 months, which is significantly longer than the two-month short-term threshold set by OEHHA to trigger the requirement for a HRA. Because Project construction will last more than six months, the OEHHA guidance specifies that cancer exposure from Project construction “should be evaluated for the duration of the project.”¹⁵⁸ Therefore, the CPUC must prepare a HRA that quantifies and evaluates the health risk from Project construction.

SWAPE prepared an independent health risk screening assessment for the Project using the AERSCREEN model, the construction emission estimates from SWAPE’s updated CalEEMod model, and OEHHA and SDAPCD guidance. SWAPE found that: (1) construction activities will generate approximately 2,652 pounds of DPM over a 316 day (approximately 11 month) construction period;¹⁵⁹ and (2) the excess cancer risk to infants at a sensitive receptor located 805 meters away, over

¹⁵⁴ *Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70, 82 (“*CBE v. Richmond*”). See also *Californians for Alternatives to Toxics v. Cal. Dep’t of Food & Agric.* (2006) 136 Cal.App.4th 1, 16, (EIR on statewide application of pesticide was inadequate when it failed to independently evaluate risks of toxic exposure).

¹⁵⁵ DEIR, pp. ES 5 to 6, 6-15.

¹⁵⁶ DEIR, p. 2-5.

¹⁵⁷ “Risk Assessment Guidelines Guidance Manual for Preparation of Health Risk Assessments.” OEHHA, February 2015, available at: http://oehha.ca.gov/air/hot_spots/hotspots2015.html.

¹⁵⁸ See OEHHA Guidance, p. 8-18.

¹⁵⁹ SWAPE Comments, p. 11; DEIR Appendix E, pp. 5, 7.
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the course of Project construction, is 27.4 in one million.¹⁶⁰ This risk is well above the SDAPCD significance threshold for cancer of 1 in a million, and is therefore a significant impact that must be identified in the DEIR.¹⁶¹ The DEIR must be revised to disclose this significant impact, and to incorporate appropriate mitigation measures to reduce this impact to less than significant levels.

B. The DEIR Fails to Accurately Disclose and Mitigate Potentially Significant Impacts on Biological Resources.

The DEIR fails to adequately analyze and mitigate the Project's significant hazards to wildlife and on several sensitive species. The DEIR must be revised to provide a legally and factually adequate impact analysis.

1. Special-Status Plants

Felt-leaved monardella, a special-status species, occurs immediately adjacent to the proposed Project site.¹⁶² Several additional special-status plant species have the potential to occur within, or immediately adjacent to, the Project site.¹⁶³ The DEIR fails to provide any analysis of, or mitigation for, potentially significant *indirect* impacts to special-status plants. As a result, the DEIR lacks substantial evidence supporting its finding that Project impacts on special-status plants would be less than significant.

2. Hermes Copper Butterfly

The DEIR's analysis of impacts to the Hermes copper butterfly is limited to the following statements:

Suitable habitat for Hermes copper butterfly may develop within the project footprint prior to construction. If this occurs, the Proposed Project could have

¹⁶⁰ *Id.*, p. 13.

¹⁶¹ See County of San Diego Guidelines for Determining Significance, Air Quality, p. 25, available at <http://www.sandiegocounty.gov/content/dam/sdc/pds/ProjectPlanning/docs/AQ-Guidelines.pdf> ("The following Guidelines for Determining Significance must be used for determining whether or not the project will expose sensitive receptors to substantial pollutant concentrations:...Project implementation will result in exposure to TACs resulting in a maximum incremental cancer risk greater than 1 in 1 million without application of Toxics-Best Available Control Technology or a health hazard index greater than one would be deemed as having a potentially significant impact.")

¹⁶² DEIR, p. 7-40.

¹⁶³ *Ibid.*; Cashen Comments, p. 10.

a substantial adverse effect on the species. This would be a significant impact.¹⁶⁴

The DEIR fails to provide any analysis of the extent of the admittedly potentially significant impacts, and fails to include any analysis of the potentially significant *indirect* impacts to the Hermes copper butterfly and its habitat.

Mr. Cashen identifies several potentially significant indirect impacts that the Project may have on the Hermes copper butterfly, including vehicle strikes, application of herbicides, and Project activities that indirectly alter vegetation in the Project area.¹⁶⁵ The DEIR fails to analyze any of these indirect impacts, and fails to incorporate mitigation for potentially significant indirect impacts to the Hermes copper butterfly and its habitat. As a result, the DEIR has not provided substantial evidence supporting its conclusion that impacts to the species would be less than significant.¹⁶⁶

3. *Noise and Vibration*

The DEIR fails to adequately disclose and analyze the potentially significant adverse effects that the Project's construction and operational noise and vibration will have on wildlife. As explained by Mr. Cashen, noise can cause major disruption of animals' most basic habits. Animals rely on hearing to avoid predators, obtain food, and communicate.¹⁶⁷ Noise and vibration have the potential to disrupt these activities, and otherwise reduce fitness through injury (e.g., hearing loss), energy loss (from movement away from noise source), reduction in food intake, and habitat avoidance and abandonment.¹⁶⁸ Given this broad spectrum of impacts, Mr. Cashen concludes that almost all animal species in the vicinity of the Project site may be adversely affected by the noise and vibrations generated by the Project.¹⁶⁹

¹⁶⁴ *Ibid.*

¹⁶⁵ Cashen Comments, p. 11.

¹⁶⁶ DEIR, p. 7-44.

¹⁶⁷ Cashen Comments, p. 12, citing Francis CD, JR Barber. 2013. A framework for understanding noise impacts on wildlife: an urgent conservation priority. *Frontiers in Ecology and the Environment* 11:305-313. *See also* Rabin LA, B McCowan, SL Hooper, DH Owings. 2003. Anthropogenic Noise and its effect on Animal Communication: An Interface Between Comparative Psychology and Conservation Biology. *International Journal of Comparative Psychology* Vol. 16(2/3):172-193.

¹⁶⁸ *Id.*, citing National Park Service, 1994. Report to Congress, Report on effects of aircraft overflights on the National Park System.

¹⁶⁹ *Id.*

a. Construction Noise

The DEIR's analysis of construction noise is limited to a single statement suggesting that the only wildlife that may be adversely affected are nesting birds.¹⁷⁰ The DEIR thus fails to provide any analysis of construction noise on other wildlife (e.g., the special-status reptiles and mammals that occur in the Project area). Moreover, as explained by Mr. Cashen, even the adverse effects of noise on birds are not limited to those that are "nesting."¹⁷¹ Mr. Cashen explains that commonly accepted bird science identifies nine ways in which noise pollution affects birds, including: (1) physical damage to ears; (2) stress responses; (3) fright-flight responses; (4) avoidance responses; (5) changes in other behavioral responses, such as foraging; (6) changes in reproductive success; (7) changes in vocal communication; (8) interference with the ability to hear predators and other important sounds; and (9) potential changes in populations.¹⁷² The DEIR provides no analysis of any of these noise factors, or any noise impacts at all on any other species.

The DEIR's omission of a biological noise impact analysis is particularly egregious given the high levels of noise that will be generated by Project construction. Construction of the proposed Project requires blasting and entails use of a rock drill, which would generate a noise level of 98 dBA at a distance of 50 feet.¹⁷³ There is substantial evidence demonstrating that this noise level is high enough to significantly impact wildlife.¹⁷⁴ For example, Mojave fringe-toed lizards experience hearing loss when exposed to 95-dB dune buggy sounds, even when the lizards were buried beneath shallow layers of sand.¹⁷⁵

¹⁷⁰ DEIR, p. 7-43 ("Construction of the proposed Project could disturb nesting birds by generating noise.").

¹⁷¹ Cashen Comments, p. 13.

¹⁷² *Id.*, citing Ortega CP. 2012. Effects of Noise Pollution on Birds: A Brief Review of Our Knowledge. Ornithological Monographs 74:6-22.

¹⁷³ DEIR, p. 15-10.

¹⁷⁴ Cashen Comments, p. 13.

¹⁷⁵ *Id.*, citing Bondello MC, AC Huntley, HB Cohen, BH Brattstrom. 1979. The effects of dune buggy sounds on the telencephalic auditory evoked response in the Mojave fringe-toed lizard, *Uma scoparia*. Pages 58-89 in MC Bondello and BH Brattstrom, eds. The experimental effects of off-road vehicle sounds on three species of desert vertebrates. U.S. Dept. Inter., Bur. Land Manage., Washington, DC.

The DEIR must be revised to include a meaningful analysis of these potentially significant impacts from construction noise on biological resources.

b. Operational Noise

The DEIR's analysis of operational noise is similarly limited to a single statement that "operation of the proposed Project is not anticipated to greatly increase noise compared to current conditions at the site."¹⁷⁶ This statement is inconsistent with data provided in the DEIR. According to the DEIR, the baseline Leq and CNEL noise levels at the site proposed for the SVC were 49.8 dBA and 52.1 dBA, respectively.¹⁷⁷ The noise level would increase to approximately 90 dB during operation of the SVC.¹⁷⁸ (As a frame of reference, a noise level of 90 dB is equivalent to a road with approximately 50,000 cars per day.¹⁷⁹) Because the decibel (dB) is a logarithmic unit, an increase of 10 dB represents a doubling of loudness.¹⁸⁰ Therefore, the proposed Project would generate noise that is approximately 16 times louder than existing conditions.

Mr. Cashen explains that noise generated during operation of the Project (90 dB) will far exceed levels that have been shown to have adverse effects on wildlife.¹⁸¹ Consequently, Mr. Cashen concludes that noise generated by operation of the Project will undoubtedly have adverse effects on wildlife. The distances over which these effects occur depend on the species, but could extend more than 3 km (1.9 mi).¹⁸²

¹⁷⁶ DEIR, p. 7-44.

¹⁷⁷ DEIR, p. 15-7.

¹⁷⁸ DEIR, p. 15-12. The sound pressure level from two equal sources is 3 dB greater than the sound pressure level of just one source. Therefore, the transformer and HVAC unit would combine to produce 90 dB. See DEIR, Appendix J.

¹⁷⁹ Cashen Comments, citing Bayne EM, BC Dale. 2011. Effects of Energy Development on Songbirds. Chapter 6 *in*: Energy Development and Wildlife Conservation in Western North America. DE Naugle (ed). Island Press, Washington, D.C. pp. 95-114.

¹⁸⁰ Cashen Comments, p. 13.

¹⁸¹ Kaseloo PA, KO Tyson. 2004. Synthesis of Noise Effects on Wildlife Populations. US Department of Transportation, Federal Highway Administration. Publication No. FHWA-HEP-06-016. Available at: <https://www.fhwa.dot.gov/environment/noise/noise_effect_on_wildlife/effects/effects.pdf>.

¹⁸² *Ibid.*

c. Golden Eagles

The DEIR concludes that blasting noise will not significantly impact golden eagles unless they are within 500 feet of the Project construction footprint.¹⁸³ As Mr. Cashen explains, this analysis is deficient because there is substantial evidence that blasting may significantly impact golden eagles located up to 2 miles from the Project site.¹⁸⁴

To avoid “take” of golden eagles, the United States Fish and Wildlife Service (“USFWS”) recommends avoidance of blasting and other activities that produce extremely loud noise within two miles of active eagle nests.¹⁸⁵ Because the proposed Project would not adhere to USFWS recommendations, and because the DEIR fails to provide any evidence that a 500-foot buffer would be sufficient to avoid impacts to nesting eagles, the DEIR lacks substantial evidence to support its conclusion that the Project would not adversely affect golden eagles. By contrast, Mr. Cashen presents substantial evidence demonstrating that the Project may have a significant, unmitigated impact on golden eagles.

4. *Soil Stabilizers*

The DEIR lacks substantial evidence to conclude that the chemical soil stabilizers proposed for fugitive dust control will not be toxic to vegetation and wildlife. NEET West proposes the use of “non-toxic” soil stabilizers (also known as soil binders, dust suppressants, or dust palliatives) to control fugitive dust at the Project site.¹⁸⁶ Most soil stabilizers, including varieties that are “non-toxic” to humans, can have adverse effects on the environment.¹⁸⁷ Because the DEIR and PEA fail to identify the specific type of soil stabilizer that would be used at the Project site, it is impossible to evaluate the potentially significant adverse effects associated with the use of soil stabilizers at the Project site.

¹⁸³ DEIR, p. 7-44.

¹⁸⁴ Cashen Comments, p. 14.

¹⁸⁵ *Id.*, citing Legal Protections for the Golden Eagle. 24 Jun 2015 email communication to Scott Cashen from Heather Beeler, Eagle Permit Coordinator, USFWS.

¹⁸⁶ DEIR, p. 2-27.

¹⁸⁷ Cashen Comments, p. 14, citing US Army Corps of Engineers. 2007. Environmental Evaluation of Dust Stabilizer Products. Vicksburg, Miss: US Army Corps of Engineers, Engineer Research and Development Center, Environmental Laboratory. 58 pp.

5. *Lightner Mitigation Site*

If the CPUC approves the Project as currently proposed, it will be authorizing the elimination of a portion of the Lightner Mitigation Site, a wetland mitigation site that the CPUC itself mandated as compensatory mitigation for the Sunrise Powerlink Project. This would cause a violation of an existing mitigation measure, and would be a significant impact under CEQA.

The DEIR fails to adequately disclose and mitigate this significant impact. The Lightner Mitigation Site was acquired by SDG&E as a mitigation measure imposed by the CPUC to off-set permanent impacts to Waters of the U.S. and Waters of the State caused by the Sunrise Powerlink Project.¹⁸⁸ The land surrounding the Project's proposed transmission line is part of the Lightner Mitigation Site. The Project would impact 0.4 acres of Chamise Chaparral within the Lightner Mitigation Site, thus effectively reducing the size of the Lightner Mitigation site by 0.4 acres, and potentially impacting jurisdictional waters.¹⁸⁹ Pursuant to the Sunrise Powerlink Project's MMRP, all lands within the Lightner Mitigation Site are to be transferred from SDG&E to the U.S. Forest Service to be protected in perpetuity for resource conservation purposes.¹⁹⁰ Therefore, any impacts to the Lightner Mitigation Site caused by the Project would result in a violation of the terms of the Sunrise Powerlink mitigation agreement and compromise SDG&E's ability to satisfy its various permit obligations.¹⁹¹ Disturbance of the mitigation lands may also result in disturbance of jurisdictional waters, which would require a Section 404 permit from the U.S Army Corps of Engineers ("USACE").

The DEIR acknowledges that the Lightner Mitigation Site surrounds Bell Bluff Truck Trail on both sides of the area in which the transmission line would be constructed, and that construction of the transmission line would disturb the mitigation lands.¹⁹² However, the DEIR incorrectly dismisses this impact as insignificant, stating that "[w]hile these impacts would not be consistent with the

¹⁸⁸ DEIR, p. 13-4 and Table 7-1.

¹⁸⁹ DEIR, pp. 13-4 and Table 7-1, p. 2-9; Cashen Comments, p. 27; Myers Comments, pp. 6-7.

¹⁹⁰ See http://www.cpuc.ca.gov/environment/info/aspensunrise/mmcrrp/mmcrrp_all.pdf; DEIR, p. 2-9; Myers Comments, pp. 6-7.

¹⁹¹ San Diego Gas & Electric. 2011. Final Habitat Mitigation and Monitoring Plan: Lightner Mitigation Site, Sunrise Powerlink.

¹⁹² DEIR, p. 13-7.
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intent and goals of the mitigation site, the conflicts from the Proposed Project would be temporary and would not be anticipated to be substantial.”¹⁹³ This approach is incorrect and contrary to law.

An EIR must identify all potentially significant environmental effects. Significant effects may be “both short-term and long-term.”¹⁹⁴ Thus, even temporary Project impacts may have significant effects on the environment that require mitigation.¹⁹⁵

Furthermore, violation of a mitigation measure is a per se significant impact under CEQA.¹⁹⁶ In *Katzeff*, the Department of Forestry (“DPF”) approved permits allow a timber owner to cut down a wind buffer tree zone that had been previously adopted as a mitigation measure under a timber harvesting plan, without first conducting CEQA review for the removal of the buffer zone. The court held that the condition could not be eliminated on a ministerial basis, and instead required full CEQA review to justify its elimination. The court explained that “where a public agency has adopted a mitigation measure for a project, it may not authorize destruction or cancellation of the mitigation . . . without reviewing the continuing need for the mitigation, stating a reason for its actions, and supporting it with substantial evidence.”¹⁹⁷ Otherwise, “any mitigation required by CEQA . . . could be nullified simply by the passage of time . . .”¹⁹⁸

Here, there is substantial, uncontroverted evidence in the DEIR demonstrating that the Project will impact wetlands set aside as mitigation for the Sunrise Powerlink Project.¹⁹⁹ This interference with a previously approved mitigation measure is a per se significant impact that the DEIR must disclose as significant and mitigate before the Project can be approved. The DEIR must also disclose whether the Project’s disturbance of the Lightner Mitigation Site will require a Section 404 permit from USAE before the Project may proceed.

¹⁹³ *Id.*

¹⁹⁴ 14 CCR § 15126.2(a).

¹⁹⁵ *Id.*

¹⁹⁶ See *Katzeff v Dep’t of Forestry & Fire Protection* (2010) 181 Cal.App.4th 601, 614; *Lincoln Place Tenants Ass’n v City of Los Angeles* (2005) 130 Cal. App. 4th 1491.

¹⁹⁷ *Id.* at 611.

¹⁹⁸ *Id.* This same result was reached in *Lincoln Place Tenants v. City of Los Angeles* (2005) 130 Cal.App.4th 1491, 1507 n22, which holds that “it cannot be argued CEQA does not apply to the . . . demolition on the ground the demolition permits are ministerial acts.”

¹⁹⁹ DEIR, pp. 13-4 and Table 7-1, p. 2-9; Cashen Comments, p. 27; Myers Comments, p. 1.
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Furthermore, the DEIR lacks evidence to support its assertion that the impacts on the Lightner Mitigation Site will be temporary, and therefore insignificant. Any disturbance of wetlands, even if temporary, may have significant impacts and require a Section 404 permit. Additionally, Mr. Myers explains that Project's impacts on the Lightner Mitigation Site are likely to be permanent, because the increased impervious area and graded drainages that will be constructed for the Project would decrease both shallow groundwater flow and overland sheet flow, which are both necessary for wetland ecosystems in the Project area, including the Lightner Mitigation Site.²⁰⁰ Mr. Myers' comments present substantial evidence that the Project may have potentially significant permanent impacts on the mitigation site.

Finally, the County of San Diego has determined that compensatory mitigation is required for impacts to Chamise Chaparral.²⁰¹ Thus, the Project's disturbance of Chamise Chaparral within the Lightner Mitigation Site requires mitigation pursuant to the County's CEQA guidelines in addition to any legal duty under *Katzeff*. In cases like the instant Project, where impacts to sensitive vegetation communities occur on lands already in use as mitigation for other projects, the County requires compensatory mitigation *and* that the mitigation ratios be doubled.²⁰² The DEIR fails to incorporate any compensatory mitigation for Project impacts to Chamise Chaparral within the Lightner Mitigation Site, thus compounding the DEIR's error in failing to disclose and mitigate the Project's impacts to the Lightner Mitigation Site.

C. The DEIR Fails to Accurately Disclose and Mitigate Potentially Significant Impacts on Water Resources.

The DEIR fails the adequately analyze and mitigate the Project's impacts on water quality, surface water features, and wetlands. The DEIR must be revised to provide a legally and factually adequate impact analysis.

²⁰⁰ Myers Comments, p. 7.

²⁰¹ County of San Diego, Department of Planning and Land Use, Land Use and Environment Group. 2010. Guidelines for Determining Significance for Biological Resources. Table 5.

²⁰² USDA Forest Service. 2010. Record of Decision: Sunrise Powerlink Project. Forest Service Clarifications and Revisions to Mitigation Measures. p. 2. Available at: <http://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb5320679.pdf>

1. *Project Blasting*

Project construction would require underground blasting to excavate the sites for both the SVC facility and the transmission line, which would be mostly buried. The SVC facility would require excavation up to 15 feet below ground surface, with a need for minor blasting in areas of shallow bedrock.²⁰³ The DEIR fails to describe the full depth to bedrock at all locations within the Project site. The total amount of blasting that will be required to excavate the area needed for the SVC facility is therefore not known, not described in the DEIR, and not analyzed for potential impacts.²⁰⁴

The transmission line would also require excavation. NEET West anticipates that 10 percent of the trench alignment, or approximately 530 linear feet of trench, would require blasting to install the transmission line.²⁰⁵ The DEIR describes the blasting as “low-energy, localized rock blasting, which is also referred to as micro-blasting.”²⁰⁶ The intent is to fracture rock so that it can be excavated.

As explained by Mr. Myers, blasting would deposit the pollutants nitrogen and nitrates into the fractured rock material. The nitrogen and nitrates would then be available for leaching into the groundwater, which may cause significant groundwater pollution problems.²⁰⁷ Mr. Myers explains that unmitigated nitrogen and nitrates deposited by project blasting would cause potentially significant impacts on the Lower Sweetwater River, which is on the Clean Water Act Section 303d impaired water bodies list.²⁰⁸ Water bodies listed on the Section 303d list are waters that are too polluted or otherwise degraded to meet State or Federal water quality standards.²⁰⁹ Increased percolation of these pollutants into groundwater through the explosive-fractured bedrock would increase the nitrogen loading in groundwater and to the River where the groundwater discharges.²¹⁰ This will, in turn increase the River’s total nitrogen concentration. Excess nitrogen is one of the principal causes of the River’s 303d listing. Mr. Myers concludes that the Project’s

²⁰³ DEIR, Table 2-1.

²⁰⁴ DEIR, p 2-19.

²⁰⁵ DEIR, p 2-20.

²⁰⁶ *Id.*

²⁰⁷ See Exhibit E, p. 2.

²⁰⁸ DEIR Table 12-1

²⁰⁹ Federal Clean Water Act Section 303d.

²¹⁰ Smith Comments, p. 2.

blasting deposits are therefore likely to increase the existing nitrogen pollution in the River, resulting in increased violations of water quality standards.²¹¹

There is no discussion of this potentially significant impact in the DEIR, and no plan to mitigate the potentially significant groundwater pollution that may be caused by the Project's blasting activities. The DEIR must be revised to analyze the potential for nitrogen pollution leaching from explosive fractured debris, and the effects of percolation through explosive-fractured rock that would discharge to the Sweetwater River and increase the total nitrogen load in the Lower Sweetwater River.

2. Drainages

The DEIR inappropriately dismisses the potential for the Project to reduce groundwater recharge into nearby drainages, thereby causing potentially significant impacts to both the surface water drainages and groundwater recharge.

The Project would be located in the Upper Sweetwater River Hydrologic Area of the Sweetwater River Hydrologic Unit of the San Diego Basin.²¹² The Project will permanently pave over approximately 2.6 acres.²¹³ Mr. Myers explains that this new impervious area would decrease existing recharge.²¹⁴ The DEIR minimizes the significance of this impact by claiming there are no groundwater basins in the project area and by suggesting that "due to its relatively high position in the watershed, limited catchment areas contributing (sic) runoff."²¹⁵ However, as Mr. Myers explains, this statement is unsupported, because substantial evidence demonstrates that the fractured bedrock and topography of the Project site enables groundwater recharge to occur at this location.²¹⁶

The topographic maps and photographs of the Project site included in the DEIR indicate that small drainages contribute runoff to the proposed project site, but the DEIR fails to analyze the extent of this runoff or provide an estimate of drainage area.²¹⁷ The Project site is relatively flat. This causes runoff to slow as it

²¹¹ *Id.*

²¹² DEIR, Figure 12-1.

²¹³ DEIR, p. 12-22.

²¹⁴ DEIR, p 12-23.

²¹⁵ *Id.*

²¹⁶ Myers Comments, p. 4.

²¹⁷ DEIR, p. 12-9.

crosses the area, providing a greater opportunity for precipitation and runoff to percolate to the fractured bedrock than if the site were slanted.²¹⁸ Mr. Myers explains that recharge passing through this area of the Project site flows through bedrock pathways and discharges into the base of alluvial aquifers near the rivers, thus replenishing groundwater supplies close to the river.²¹⁹

The DEIR notes that depth to groundwater ranges from 44 to 60 feet at least at the Suncrest Substation,²²⁰ but fails to discuss the source of this groundwater. As a result, the DEIR fails to identify the Project site's contribution to groundwater recharge, and as a result, fails to disclose that the Project may have a potentially significant impact on local groundwater resources.

3. Potential Contamination from Transformer Oil

The DEIR does not consider the fate of contaminants spilled on the Project site. In particular, the DEIR fails to address or provide mitigation for potential releases of transformer oil from spills or leakage from the SVC during Project operation. Each SVC transformer would need 10,000 to 13,000 gallons of oil to operate.²²¹ The DEIR explains that the Project would have "transformer oil containment basins" intended to contain the oil volume and 25-year 24-hour storm event.²²² This contaminated runoff would then be released from the stormwater ponds and contaminate down gradient aquifers or the Sweetwater River.²²³

Mr. Myers explains that spills or leaks on the newly-developed paved areas could contaminate runoff from the Project site, which could in turn contaminate down gradient aquifers if not contained.²²⁴ Mr. Myers concludes that this is a potentially significant impact, although the DEIR fails to mention it. The DEIR should be revised to include a plan to prevent the release of water from detention basins until the quality of that water can be verified to not violate permits in the stormwater discharge permit.

²¹⁸ Myers Comments, p. 4.

²¹⁹ *Id.*

²²⁰ DEIR, p. 12-18.

²²¹ DEIR, p 2-15.

²²² DEIR, p 2-15.

²²³ *Id.*

²²⁴ Myers Comments, p. 5; DEIR, p 12-24, -25.

4. *Potential Jurisdictional Waters*

The DEIR failed to conduct an adequate analysis to determine whether the Project site and adjacent areas may include wetlands and/or may have potentially significant impacts on other jurisdictional waters.

A wetlands delineation completed for the Sunrise Powerlink (San Diego Fish and Game (SDFG) 2009) identified a wetland in the proposed SVC site.²²⁵ The wetlands delineation performed for the DEIR did not identify a wetland.²²⁶ The Sunrise Powerlink delineation did not dig test pits because of “high potential for archaeological sites to be located throughout the Project right of way (ROW).”²²⁷ Instead, SDFG used other observational indicators to detect the presence of hydric soils, such as soil saturation of sufficient duration to cause anaerobic conditions sufficient to exert a controlling influence on the plant species, as well as indicators such as the presence of wetland-dependent species, which indicate the presence of a wetland.²²⁸ Based on this analysis, SDFG determined that there is substantial evidence that these areas are wetlands and did not rely solely on showing there were hydric soils.²²⁹

By contrast, the wetland delineation performed for the DEIR relied solely on test pits to determine the presence of wetlands on the Project site.²³⁰ The DEIR may not rely solely on a perceived absence of hydric soils to claim the project area is not a wetland. By omitting the other components of the wetland delineation analysis used by SDFG, it is possible that the DEIR overlooked the same critical factors which led SDFG to conclude just a few years prior to the DEIR that wetlands exist on the Project site.

The DEIR contains additional evidence supporting a conclusion that the Project site and adjacent areas may include wetlands or may have potentially significant impacts on other jurisdictional waters. The DEIR notes that the transmission line would cross two jurisdictional waters under CDFW jurisdiction.²³¹ The Project area is part of the Peninsular Mountain Range between the arid desert

²²⁵ DEIR, p 12-12.

²²⁶ *Id.*

²²⁷ SDFG 2009, p 8; Myers Comments, p. 6.

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ DEIR, p. 12-12.

²³¹ DEIR, Figure 7-2.

of the Imperial Valley to the east and the dry South Coast Basin to the west toward the ocean.²³² SDFG notes that the area is significantly wetter than the surrounding areas and “due to the wetter climate and more watershed vegetative cover, there is more potential for dry-season flow.”²³³ Mr. Myers notes that the topography of the site suggests that the Project area could occasionally be saturated due to runoff reaching the area.²³⁴ The Project site is also relatively flat. Mr. Myers observes that water flowing onto the site from the ridge south of the Project area could therefore easily pond or provide runoff in ephemeral washes for a substantial period of time.²³⁵ Mr. Myers concludes that these factors demonstrate that the Project site is likely to contain wetland areas.²³⁶

The DEIR should be revised to include a water balance analysis for the Project area to determine the potential for soils being saturated sufficiently to be considered a wetland. The DEIR should also be revised to provide a more complete survey of wetland conditions in the project area.

5. The DEIR Fails to Accurately Disclose and Mitigate Potentially Significant Impacts on Traffic and Emergency Vehicle Access.

The DEIR underestimates the amount of construction traffic that will be generated by the Project. This results in an unsupported conclusion that the Project will have less than significant traffic impacts with mitigation. However, as explained by Mr. Smith, Project construction is in fact likely to result in significant impacts to local roadways and residences that the DEIR fails to mitigate.

1. Haul Trips

The DEIR underestimates the number of trucks required for hauling operations. Approximately 4,030 cubic yards of excavated materials would need to be hauled from the site.²³⁷ The DEIR concludes that, over a 220-day construction period, this would only involve an average of 2 trips per day by trucks with a 10 cubic yard capacity.²³⁸ However, the DEIR ignores the fact that each load involves

²³² SDFG 2009, p 16, 17.

²³³ Myers Comments, p. 6; SDFG 2009, p 17.

²³⁴ *Id.*; DEIR, Figure 12-2.

²³⁵ Myers Comments, p. 6.

²³⁶ Myers Comments, p. 6.

²³⁷ DEIR, p. 19-9.

²³⁸ DEIR, p. 19-9.

both a trip in and a trip out (in other words, 2 loads means 4 total truck trips). The DEIR further assumes that excavation and related hauling would take place evenly over each day of the 220-day construction period, thus spreading the anticipated truck trips evenly over an 11-month period. There is no evidence in the DEIR's traffic analysis to support this assertion, nor is there any discussion of the basis for the DEIR's approach. Rather, the construction schedule described in the DEIR indicates the opposite to the contrary – that excavation, grading, and hauling activities are only scheduled for the first 6.5 months of the 11-month construction period, whereas activities such as “testing and commissioning” and “restoration and cleanup” will occupy the remaining 4.5 months.²³⁹

Finally, the DEIR's traffic analysis fails to account for bulking - the swell of excavated materials to a greater size than the size of the hole or holes that was or were dug.²⁴⁰²⁴¹ Since the DEIR discloses that some of the excavation might involve blasting, it is likely that much of the material hauled away will be rock materials that involve the highest swell factors. Bulking will increase the cubic yardage of the excavated material, which will in turn require more trucks to remove bulked material from the Project site. As a result, hauling activity would be more intense on those days than disclosed in the DEIR.²⁴²

2. Worker Trips

The DEIR assumes, without evidence, that construction worker trips will be consolidated. The DEIR states that 64 construction workers will travel to and from the Project site during the construction period, but discounts worker trips based on an unsupported assertion that “[t]ypically, construction workers travel together to the work site” and “[e]ven if each worker drove his or her own vehicle and traveled alone, based on the anticipated number of workers...the additional vehicle trips

²³⁹ See DEIR, p. ES-5 to 6.

²⁴⁰ Smith Comments, p. 3.

²⁴¹ The amount of bulking depends on the material excavated. For instance, ordinary soil or dry gravel swells to a volume 20 to 30 percent greater than the size of the excavation; dolomite swells to a 50 to 60 percent greater volume than the hole; limestone and sandstone swell to volumes 75 to 80 percent greater than the size of the hole. Smith Comments, p. 4.

²⁴² The DEIR also opines that the number of haul trips could be cut in half by using 20 cubic yard trucks instead of 10 cubic yard ones. However, Mr. Smith finds this conclusion unsupported and improbable because of the difficulty of maneuvering the larger trucks on the subject roadways, particularly where Bell Bluff Truck Trail will be significantly narrowed by the excavation itself. Smith Comments, p. 3.

generated by construction would be negligible considering the average daily traffic and existing LOS on I-8 and local roadways." Both assertions lack support.

There is no evidence presented in the DEIR to support the conclusion that construction workers travel together. Rather, construction workers are recognized by traffic professionals, such as Mr. Smith, as solo commuters because they tend to carry personally-owned tools to the work site.²⁴³ The DEIR also lacks evidence to conclude that construction vehicle trips would be negligible when compared to average daily traffic and existing levels of service ("LOS") since the DEIR never measured existing daily traffic or related LOS.

3. Impacts on Local Residential Access

The DEIR fails to address the impacts of Project construction on local neighborhoods by failing to disclose that Project construction traffic is likely to result in significant or complete blockage of access roads and general disturbance of use and access to residences located along Bell Bluff Truck Trail.²⁴⁴ These activities will not only cause potentially significant impacts on local residents, but would also obstruct emergency vehicle access to these residences.

The DEIR should be revised to address these fundamental errors and omissions in the DEIR's traffic analysis.

VII. THE DEIR'S CUMULATIVE IMPACTS ANALYSIS IS INADEQUATE

An EIR is required to discuss the cumulative impacts of a project "when the project's incremental effect is cumulatively considerable."²⁴⁵ An EIR is required to discuss significant impacts that the proposed project will cause in the area that is affected by the project.²⁴⁶ "This area cannot be so narrowly defined that it necessarily eliminates a portion of the affected environmental setting."²⁴⁷

The Guidelines specifically direct the CPUC to "define the geographic scope of the area affected by the cumulative effect and provide a reasonable explanation for

²⁴³ Smith Comments, p. 3.

²⁴⁴ Smith Comments, p. 3.

²⁴⁵ 14 CCR § 15130(a).

²⁴⁶ *Bakersfield Citizens*, 124 Cal.App.4th at 1216 (emphasis added); see 14 CCR § 15126.2(a).

²⁴⁷ *Bakersfield Citizens*, 124 Cal.App.4th at 1216.

the geographic limitation used.”²⁴⁸ The courts have held that it is vitally important that an EIR avoid minimizing the cumulative impacts. Rather, it must reflect a conscientious effort to provide public agencies and the general public with adequate and relevant detailed information about them.²⁴⁹ An EIR’s cumulative impacts discussion “should be guided by the standards of practicality and reasonableness,” but several elements are deemed “necessary to an adequate discussion of significant cumulative impacts” including “[a] list of past, present, and probable future projects producing related or cumulative impacts, including, if necessary, those projects outside the control of the agency.”²⁵⁰

A. The DEIR’s Analysis of Cumulative Impacts to Biological Resources is Inadequate.

1. *Geographic Scope*

The DEIR fails to clearly define the geographic scope of its cumulative impacts analysis for biological resources. The DEIR defines the geographic scope for cumulative impacts to biological resources as: “[w]etlands and other waters, riparian habitat, sensitive natural communities, and other habitats within the Project vicinity that might support special-status species.”²⁵¹ This description is too vague to enable an independent assessment of cumulative impacts because it leaves the lead agency and the public unable to evaluate how many acres of habitat fall within the designated geographic scope, and similarly, how many acres of habitat have been, or will be, impacted by past, present, and future projects.²⁵² The DEIR’s cumulative impact analysis for biological resources should be revised to quantify: (a) the geographic scope, (b) the total amount of each habitat type within the geographic scope, and (c) the total amount of each habitat type affected by cumulative impacts within that scope. Because the DEIR fails to provide this information, the DEIR lacks substantial evidence to support its conclusion that the Project’s incremental contribution to cumulative effects would not be cumulatively considerable.

²⁴⁸ 14 CCR § 15130(b)(3); *Bakersfield Citizens*, 124 Cal.App.4th at 1216.

²⁴⁹ PRC § 21061.; *San Franciscans for Reasonable Growth v. City and County of San Francisco* (1984) 151 Cal.App.3d 61, 79. See also *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 723.

²⁵⁰ 14 CCR § 15130(b); *Rialto Citizens for Responsible Growth v. City of Rialto* (2012) 208 Cal.App.4th 899, 928-29.

²⁵¹ DEIR, Table 21-2.

²⁵² Cashen Comments, p. 16.
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2. Noise

The DEIR concludes that the Project would have no cumulative impacts from construction noise and vibration because the geographic extent of any cumulative noise impacts “is generally within approximately 0.62 mile of the project work area” and the closest projects are located over 1 mile away from the instant Project.²⁵³ This statement overlooks substantial evidence that noise can adversely impact sensitive avian species, in particular golden eagles, up to 2 miles away from their nests.²⁵⁴ The DEIR should be revised to disclose construction noise as a cumulatively considerable impact on avian species, and incorporate mitigation measures to reduce this impact to less than significant levels.

3. *The DEIR Improperly Assumes that Other Projects Will Mitigate the Project’s Cumulative Impacts to Biological Resources*

Although the DEIR acknowledges that the Project, in conjunction with other reasonably foreseeable projects in the Project vicinity, may result in significant cumulative impacts to biological resources, it fails to provide a quantitative analysis of the Project’s impacts in conjunction with those of the other identified projects.²⁵⁵ The DEIR simply jumps to the unsupported conclusion that implementation of the Project’s biological resource mitigation measures (BIO-1 to BIO-18), along with mitigations imposed by the other projects identified in the DEIR’s cumulative projects list, would reduce the Project’s cumulative impacts to less than significant levels.²⁵⁶

This approach is improper. First, the DEIR fails to quantify the cumulative impacts it claims will be mitigated. The DEIR identifies six impact categories it believes will result in cumulatively considerable impacts:

- Temporary disturbance or permanent loss of special-status plants such as felt-leaved monardella, San Diego milk-vetch, delicate clarkia, and other plant species.

²⁵³ DEIR, p. 21-4.

²⁵⁴ Cashen Comments, p. 14.

²⁵⁵ DEIR, p. 21-8 to 21-10.

²⁵⁶ DEIR, p. 21-11 (“Through BMPs, mitigation measures contained in this EIR as well as other CEQA documents for nearby projects, and compliance with permit conditions, projects in the region would mitigate their contributions to biological resources impacts and thereby reduce cumulative impacts.”).

- Temporary construction-related impacts to nesting birds protected by the MBTA and special status birds including Golden Eagles.
- Temporary disturbance, loss of habitat, or direct mortality of special-status mammals and reptiles, including red-diamond rattlesnake, coastal whiptail, coast horned lizard, coast patch-nosed snake, pallid bat, Dulzura pocket mouse, northwestern San Diego pocket mouse, Townsend's big-eared bat, Stephens' kangaroo rat, western mastiff bat, and San Diego desert woodrat.
- Temporary and permanent loss of Engelmann Oak – Coast Live Oak/Poison Oak/ 34 Grass Association (a sensitive natural community).
- Temporary sediment-related impacts on nearby waters.
- Temporary barriers to wildlife movement and temporary construction-related impacts to wildlife breeding.²⁵⁷

The DEIR makes no attempt to determine whether any of the other eight cumulative projects identified in the project list in Table 21-3 will cause any of the same impacts, nor whether the lead agencies for projects which have already been approved have adopted mitigation measures to address those impacts. Thus, the DEIR provides no threshold determination of cumulative significance against which to measure the efficacy of the Project's mitigation measures in reducing cumulative impacts. The DEIR also fails to identify any biological mitigation measures adopted and implemented for the other projects, nor does it discuss whether those measures are effective to reduce the Project's own cumulative impacts.

Additionally, several of the cumulative projects identified in Table 21-3 are federal projects subject to NEPA, and are not subject to CEQA.²⁵⁸ It is error to rely on mitigation for these federal projects to reduce the Project's impacts, as required by CEQA, because mitigation measures imposed by other agencies on projects that are outside of CPUC's jurisdiction, and are subject to other laws, are not legally enforceable mitigation to address the Project's cumulative impacts.²⁵⁹ The DEIR's reliance on mitigation imposed by other Projects to reduce the Project's own cumulative impacts violates CEQA's requirements that mitigation measures be "fully enforceable."²⁶⁰ Moreover, unlike CEQA, NEPA regulations do not automatically require the lead agency to impose mitigation measures for an environmental impact. Therefore, the federal projects may not be required to

²⁵⁷ DEIR, p. 21-10.

²⁵⁸ DEIR, Table 21-3.

²⁵⁹ See *Tracy First v. City of Tracy* (2009) 177 Cal. App. 4th 912, 937.

²⁶⁰ PRC § 21004; 14 CCR § 15126.4(a)(2); *Tracy First* at 938.

mitigate impacts to the extent required by CEQA, or at all. The DEIR's reliance on mitigations imposed by these federal projects to reduce the Project's cumulative impacts is thus speculative and unsupported by substantial evidence.

The DEIR must be revised to correct these notable deficiencies in its cumulative impact analysis.

VIII. THE DEIR CONTAINS INADEQUATE MITIGATION MEASURES

The DEIR proposes several mitigation measures that fail to meet CEQA's standards because the measures are either vague, unenforceable, unsupported, or are inadequate to effectively mitigate impacts to less than significant levels.

CEQA requires the lead agency to adopt feasible mitigation measures that will substantially lessen or avoid a project's potentially significant environmental impacts.²⁶¹ A public agency may not rely on mitigation measures of uncertain efficacy or feasibility.²⁶² "Feasible" means capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, legal, social and technological factors.²⁶³ Mitigation measures must be fully enforceable through permit conditions, agreements or other legally binding instruments.²⁶⁴

Failure to include enforceable mitigation measures is considered a failure to proceed in the manner required by CEQA that is evaluated de novo by the courts.²⁶⁵ The court of appeal recently clarified that, to meet this requirement, mitigation measures must be incorporated directly into the MMRP to be enforceable.²⁶⁶

²⁶¹ CEQA §§ 21002, 21081(a)) and describe those mitigation measures in the EIR. (CEQA § 21100(b)(3); CEQA Guidelines section 15126.4

²⁶² *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 727 (finding groundwater purchase agreement inadequate mitigation measure because no record evidence existed that replacement water was available).

²⁶³ 14 CCR § 15364.

²⁶⁴ Id. at §15126.4(a)(2).

²⁶⁵ *San Joaquin Raptor Rescue Ctr. v. County of Merced* (2007) 149 Cal.App.4th 645, 672.

²⁶⁶ *Lotus v. Dept of Forestry* (2014) 223 Cal. App. 4th 645, 651-52.

A. Air Quality.

1. Mitigation Measure AQ-1 (Construction Equipment)

Measure AQ-1 requires all off-road construction equipment used for the Project that is 50 horsepower or greater to have engines that meet or exceed U.S. Environmental Protection Agency/California Air Resources Board Tier 3 emissions standards.²⁶⁷ The DEIR relies on implementation of Measure AQ-1 to conclude that the Project's construction emissions would remain less than significant, even if changes to the construction schedule or increased construction activity at the Project site cause unmitigated emissions to rise above SDAPCD thresholds of significance.²⁶⁸ However, this conclusion is unsupported for two reasons. First, the DEIR fails to include a feasibility analysis to evaluate the feasibility of obtaining an entirely Tier 3 construction fleet in the Project area. Second, the measure provides an exception by which NEET West may avoid the use of Tier 3 equipment entirely if it cannot be procured. Commenters support the use of Tier 3 equipment for the Project. However, Measure AQ-1 is inadequate to ensure that this requirement will be met.

a. The DEIR Failed to Conduct a Feasibility Analysis for Tier 3 Equipment

The DEIR's only discussion of the Tier 3 requirement includes a statement that, because Tier 3 equipment has been on the market since 2006, "this additional level of mitigation is not a burdensome requirement."²⁶⁹ While possibly true, the DEIR lacks underlying analysis to support this conclusion. As SWAPE explains, although off-road Tier 3 equipment is available for purchase, it is new technology that may not yet be readily available at all construction equipment vendors, may require special procurement by the Applicant, and is more costly than lower tier equipment.²⁷⁰ It is therefore unreasonable to presume, without analysis, that all construction equipment that will be used for the Project will automatically have Tier 3 engines simply because Measure AQ-1 calls for it.

b. Measure AQ-1 Fails to Bind NEET West to Using Tier 3 Equipment

²⁶⁷ DEIR, p. L-12.

²⁶⁸ DEIR, p. 6-16.

²⁶⁹ DEIR, p. 6-16.

²⁷⁰ See SWAPE Comments, p. 7.

Measure AQ-1 fails to include a binding requirement that NEET West demonstrate its ability to procure Tier 3 equipment prior to commencing construction. This could be achieved by requiring NEET West to provide contractor offer letters or contracts demonstrating that NEET West has procured access to the Tier 3 equipment required for each construction phase. Instead, Measure AQ-1 requires the opposite. It provides an exception by which NEET West may avoid the use of Tier 3 equipment entirely if it provides rejection letters from “at least three (3) appropriate equipment rental firms [that] could not procure the necessary equipment type with a Tier 3 compliant or better engine.”²⁷¹ This exception eviscerates the effectiveness of Measure AQ-1 because it could allow NEET West to escape the Tier 3 requirement entirely, thus rendering the mitigation measure wholly ineffective.

Until the feasibility of implementing Measure AQ-1 is further demonstrated through a meaningful feasibility analysis, and until the measure is revised to ensure that the Tier 3 requirement will be binding on NEET West, CPUC cannot rely on compliance with Measure AQ-1 to reduce the Project’s potentially significant construction emissions below levels of significance. Rather, CPUC must confirm, through a detailed analysis supported by fact, whether and how the Applicant will procure exclusively Tier 3 equipment for the Project. CPUC must also identify alternative mitigation measures that are technologically feasible in the event that the Applicant is unable to procure all Tier 3 equipment necessary to construct the Project.

B. Biological Resources.

1. Mitigation Measure BIO-4 (Compensation for Special-Status Plants)

Measure BIO-4 purports to mitigate impacts to special-status plants through compensatory measures.²⁷² However, Measure BIO-4 fails to require sufficiently protective measures to ensure that the Project’s significant impact to plants will be mitigated to less than significant levels.

First, Measure BIO-4 lacks supporting evidence to conclude that the proposed transplantation measures will be successful, and fails to include avoidance as a compensatory measure. As Mr. Cashen explains, relocation, salvage, and

²⁷¹ DEIR, p. L-12.

²⁷² DEIR, p. 7-42.

transplantation are generally not accepted techniques for mitigating impacts to special-status plants, because they generally result in plant mortality.²⁷³ The DEIR provides no supporting evidence for its conclusion that transplantation would be successful for the plants at the Project site. Before making a conclusion on the ability to use transplantation as a technique to mitigate significant Project impacts, the DEIR must first provide substantial evidence that potentially impacted plants can be transplanted and/or propagated successfully.

The DEIR fails to establish the process for determining the appropriate compensation ratio (i.e., when > 1:1 would be required), and fails to provide evidence that there are approved mitigation banks for impacts to *felt-leaved monardella* and the other special-status plant species that might be impacted by the Project.²⁷⁴

Finally, the DEIR requires five years of monitoring of the compensatory mitigation site.²⁷⁵ However, the DEIR fails to establish a mechanism (e.g., conservation easement) that would ensure the mitigation site is protected in perpetuity after monitoring terminates. In addition, the DEIR fails to establish a funding mechanism (e.g., endowment) that ensures appropriate management of the mitigation site in perpetuity.²⁷⁶ The DEIR's conclusion that this measure would effectively reduce impacts to less than significant levels is therefore unsupported.

2. Mitigation Measure BIO-5 (Avoid Impacts on Nesting Birds)

Measure BIO-5 is vague and unenforceable. Measure BIO-5 provides that, “*whenever possible*, NEET West or their contractor(s) shall avoid impacts on native nesting birds by not initiating Proposed Project activities that involve clearing vegetation, generating mechanical noise, or ground disturbance during the typical breeding season from February 1 to August 31.²⁷⁷ The DEIR does not define any standards for what constitutes “whenever possible,” nor does it identify the circumstances that would make it impossible to avoid construction activities during the breeding season in the first place. This renders the proposed mitigation

²⁷³ Cashen Comments, p. 18-19.

²⁷⁴ Cashen Comments, p. 18.

²⁷⁵ DEIR, p. L-14 to L-15.

²⁷⁶ Cashen Comments, p. 19, citing Department of the Interior, Office of Policy Analysis. 2015. Department Manual, Part 600 (Public Land Policy), Chapter 6 (Implementing Mitigation at the Landscape-scale).

²⁷⁷ DEIR, p. 7-43 (emphasis added).
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measure relatively meaningless. The DEIR should be revised to incorporate USFWS guidelines for avoiding potential take of migratory birds.

3. *Mitigation Measure BIO-6 (Preconstruction Surveys for Birds)*

Measure BIO-6 requires pre-construction bird surveys within a 500-foot radius of the construction area if construction begins between February 1 and August 31. If the biologist determines that the area surveyed does not contain any active nests, then construction activities may commence without any further mitigation.²⁷⁸

Measure BIO-6 is impermissibly vague because it fails to establish any minimum standards for the pre-construction nesting bird survey(s), including the acceptable: (a) survey techniques, (b) level of effort, (c) weather conditions, and (d) time of day for the surveys. This results in unreliable mitigation. Measure BIO-6 also fails to define what should be considered an “active nest,” nor does it establish any minimum qualifications for the biologist retained to conduct them. As explained by Mr. Cashen, nest finding is labor intensive and can be extremely difficult due to the tendency of many species to construct well-concealed or camouflaged nests.²⁷⁹ As a result, it takes considerable experience for a biologist to be able to detect all bird nests, especially within a relatively large area.

Measure BIO-6 should be revised to incorporate enforceable standards to ensure its implementation.

4. *Mitigation Measures BIO-8 and BIO-9 (Hermes Copper Butterfly)*

Measure BIO-8 requires a survey for Hermes copper butterfly habitat within the Project footprint prior to vegetation clearing.²⁸⁰ If the surveys result in mapping of Hermes copper habitat within the Project footprint, then Measure BIO-9 is triggered.²⁸¹ Measure BIO-9 requires mitigation for permanent impacts to Hermes copper habitat at a 1:1 ratio for unoccupied habitat and 3:1 ratio for

²⁷⁸ DEIR, p. 7-43.

²⁷⁹ Cashen Comments, p. 20..

²⁸⁰ DEIR, p. 7-45.

²⁸¹ DEIR, p. 7-44.

occupied habitat.²⁸² Mr. Cashen concludes that these measures are insufficient to avoid and minimize potentially significant impacts to the Hermes copper butterfly.

First, Measure BIO-8 fails to require the Hermes copper survey to be a focused survey. Mr. Cashen explains that focused surveys are required to detect the butterfly or its habitat.²⁸³ As a result, Mr. Cashen concludes that Measure BIO-8 fails to provide a mechanism for determining occupancy, and thus, whether NEET West needs to provide compensatory mitigation at a 1:1 or 3:1 ratio.²⁸⁴ Second, the DEIR fails to identify the ways in which NEET West would be required to mitigate permanent impacts (e.g., habitat enhancement, habitat restoration, habitat acquisition, purchase of credits at a mitigation bank, etc.). Third, Measures BIO-8 and BIO-9 fail to establish: (a) any performance standards or success criteria for the mitigation site; (b) the timing habitat mitigation in relation to Project impacts; (c) monitoring and reporting requirements; and (d) a mechanism that ensures the long-term protection and management of the mitigation site. Fourth, the DEIR fails to incorporate any mitigation for potentially significant indirect impacts to the Hermes copper butterfly and its habitat.²⁸⁵ As a result, the DEIR lacks substantial evidence that Measures BIO-8 and BIO-9 would reduce impacts to the Hermes copper butterfly to a less than significant level.

5. Mitigation Measure BIO-15 (Night Lighting)

Mitigation Measure BIO-15 requires NEET West or their contractor(s) to minimize construction night lighting on adjacent habitats by reducing it to the lowest illumination allowed for human safety and security.²⁸⁶ However, Mr. Cashen provides substantial evidence demonstrating that reducing night lighting to acceptable levels for human use does not ensure that the impacts of night lighting on wildlife, which are more sensitive to light pollution, will be adequately mitigated.

6. Mitigation Measure BIO-18 (Restoration Plan for Engelmann Oak)

Measure BIO-18 requires NEET West to develop and implement a restoration plan for Engelmann oak.²⁸⁷ The measure proposes compensatory

²⁸² DEIR, p. 7-45.

²⁸³ Cashen Comments, p. 23.

²⁸⁴ *Id.*

²⁸⁵ *Id.*

²⁸⁶ DEIR, p. 7-47.

²⁸⁷ DEIR, p. L-22 to L-23.

mitigation at a 1.1:1 ratio (replacement to impact) for permanent Project impacts to the Engelmann Oak vegetation community. However, the proposed mitigation ratio fails to comply with San Diego County's Biological Mitigation Ordinance, which requires mitigation at a 2:1 or 3:1 ratio (depending on whether the mitigation site meets the criteria for a Biological Resource Core Area).²⁸⁸ In addition, because the DEIR fails to establish a mechanism that ensures the long-term protection and management of the mitigation site, there are no assurances that the compensatory mitigation site would mitigate impacts to Engelmann oak.

7. The DEIR Lacks Substantial Evidence to Support its Conclusion that Mitigation Measures for Impacts to Special-Status Mammals and Reptiles Will Be Effective

The DEIR acknowledges the Project may adversely affect several special-status mammals and reptiles through effects on their habitat (among other adverse effects), and concludes that those effects are potentially significant.²⁸⁹ The DEIR then lists several proposed mitigation measures, which according to the DEIR, would reduce impacts to special-status mammals and reptiles to a less than significant level.²⁹⁰ These include Mitigation Measures BIO-10 and BIO-11 (education of Proposed Project 22 personnel and employing a biological monitor to monitor construction activities); Mitigation Measure BIO-12 (restricting vehicles to existing roads and minimizing vehicle speed); Mitigation Measure BIO-14 (twice-daily monitoring and fencing/covering of excavations at the end of each workday); Mitigation Measure BIO-15 (minimizing nighttime lighting); Mitigation Measure BIO-16 (develop a Restoration and Revegetation Plan to restore temporarily affected areas that promotes locally appropriate native plant growth and eliminates non-native and invasive species); and Mitigation Measures HYD/WQ-1 and BIO-12 (watering for dust control, minimizing the area of soil 40 disturbance, and minimizing vehicle speed on roads).²⁹¹

Mr. Cashen explains that the DEIR's conclusion that these mitigation measures are adequate to mitigate impacts to special-status wildlife is not supported by substantial evidence because none of the measures mitigate the residual effects of the Project on habitat (i.e., habitat loss, fragmentation, and

²⁸⁸ Cashen Comments, p. 25.

²⁸⁹ DEIR, p. 7-45.

²⁹⁰ *Ibid.*

²⁹¹ DEIR, pp. 7-45; L-21.
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degradation).²⁹² As a result, Mr. Cashen concludes that the Project would continue to have a potentially significant, unmitigated impact on several special-status mammals and reptiles.²⁹³

C. Hazardous Materials.

1. Mitigation Measure HAZ-3 (Construction Fire Protection Plan)

Measure HAZ-3 improperly defers creation of a construction fire protection plan (“CFPP”) until after Project approval without adequate performance standards to ensure that the CFPP would be effective and comply with all applicable laws.

The DEIR includes a fire protection plan for the *operation* of the Project (Appendix K), but defers creation of a fire protection plan for the *construction* of the Project until after Project approval. Measure HAZ-3 requires NEET West to prepare CFPP to be approved by San Diego County Fire Authority (“SDCFA”) and California Department of Forestry and Fire Protection (“CAL FIRE”) a minimum of 45 days prior to commencement of construction activities. While Measure HAZ-3 requires the CFPP to be prepared “in accordance with applicable sections of the San Diego County Consolidated Fire Code,” it fails to require compliance with any other applicable State or Federal laws.²⁹⁴ Measure HAZ-3 therefore fails to ensure that the CFPP will comply with the requirements of the other agencies with jurisdiction for fire protection in the Project area, including the US Forest Service (“USFS”). Since the Project area is located within the USFS administrative boundary for the Cleveland National Forest, the CFPP must also be subject to review and approval by USFS.

Measure HAZ-3 constitutes improperly deferred mitigation. The DEIR should be revised to include a CFPP that meets standards set by the San Diego County Consolidated Fire Code, the California Fire and Building Code, and USFS fire regulations

²⁹² Cashen Comments, p. 10.

²⁹³ *Id.*

²⁹⁴ DEIR, p. L-31.
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D. Traffic and Emergency Vehicle Access.

1. Mitigation Measure TR-1 (Maintain Traffic Flow)

Measure TR-1 requires NEET West, “to the extent feasible,” to stage and conduct construction work in a manner that maintains two-way traffic flow on roadways in the vicinity of the work site, and to prohibit heavy equipment and haul traffic in residential areas “to the greatest extent feasible.”²⁹⁵

This measure is unenforceable and not likely to be implemented in any meaningful way. The only access to the Project site is via a single access road which passes through a residential neighborhood.²⁹⁶ It is therefore impossible for heavy equipment and haul traffic to be “prohibited in residential areas” as Measure TR-1 suggests, unless such equipment is eliminated from the Project altogether. Furthermore, inclusion of the phrases “to the extent feasible” and “to the greatest extent feasible” gut the effectiveness of the mitigation measure. They do not require any action if NEET West determines it is “infeasible” to perform the required tasks, nor does the measure provide any standards governing the determination of feasibility.

The measure must be revised to provide an enforceable mechanism to reduce impacts to the residential communities surrounding the Project site to the greatest extent feasible. Mr. Smith proposes alternative mitigation to reduce these impacts. Feasible alternatives would include requiring all worker vehicle parking to take place within the secured portion of Bell Bluff Truck Trail, and requiring all staging of heavy equipment and haul traffic to take place within the same secured portion of Bell Bluff Truck Trail. These measures would better allow the Project to avoid substantial interference with residential access and use.²⁹⁷

2. Mitigation Measure TR-2 (Minimize Effects of Temporary Roadway Disturbances)

Measure TR-2 requires NEET West to prepare and implement a Traffic Control Plan to describe procedures to guide construction traffic, including routes

²⁹⁵ DEIR, p. L-39.

²⁹⁶ DEIR, p. 19-4.

²⁹⁷ Smith Comments, p. 5.

and detour routes, and to provide 5 days advance notice to residents of complete road closures due to Project construction.²⁹⁸

Given that the Project site's sole access is via residential streets that also serve as the sole access to residential neighborhoods, compliance with the mitigation measure is infeasible, rendering the measure ineffective. First, there are no possible “detour routes” since the Project site may only be accessed by Bell Bluff Truck Trail and its extension, Avenida de los Arboles. Second, the DEIR fails to analyze, and Measure TR-2 fails to mitigate, the impacts that complete road closure would have on either SDG&E or local residents, given the fact that there are no alternative access routes available. For example, if an emergency vehicle were required to respond to an emergency along Bell Bluff Truck Trail or Avenida de los Arboles during a Project-related road closure, the emergency vehicle would have no alternate means of access to residences located along those roads. This is a significant impact to emergency services that Measure TR-2 not only fails to mitigate, but actually legitimizes.

Mr. Smith proposes alternative mitigation for Measure TR-2, including requiring that no road closure may occupy more than the half-width of the publicly accessible portions of Bell Bluff Truck Trail or Avenida de los Arboles, and that the remaining half-width will be maintained accessible to two-way traffic by alternating one-way movements controlled by radio-equipped flaggers.²⁹⁹

3. Mitigation Measure TR-3 (Emergency Coordination And Access Considerations)

Measure TR-3 purports to require NEET West to coordinate with local emergency service providers, as necessary, “to ensure that emergency vehicle access and response is not impeded” when work is conducted on roads and may have the potential to affect traffic flow.³⁰⁰ However, as with Measure TR-2 above, Measure TR-3 is infeasible and ineffective because any complete road closure on Bell Bluff Truck Trail will necessarily impede emergency vehicle access.

Measure TR-3 includes a contingency provision requiring NEET West to have staff available on-site at all times to place plates over open trenches or move

²⁹⁸ DEIR, p. L-39 to L-40.

²⁹⁹ Smith Comments, p. 6.

³⁰⁰ DEIR, p. L-40.

construction equipment to allow for emergency vehicle access. However, the DEIR provides no evidence demonstrating that this plan would be fast enough or effective enough to allow emergency vehicle access at the moment it is needed. By its nature, emergency response happens quickly and without prior notice. Measure TR-2 contains no requirement that the 24-hour NEET West personnel be in close enough proximity to the obstructing Project features to respond instantly to an emergency call, or adequately trained in emergency response to ensure that they move construction equipment in the manner needed to allow for the particular size of emergency vehicle at issue (e.g. a fire truck may be substantially larger than an ambulance, may require larger turning radius, etc).

Mr. Smith proposes that the DEIR adopt the mitigations discussed in Measure TR-2 above to ensure that Project construction blocks no more than half the road-width at any given time.³⁰¹

IX. CONCLUSION

Commenters concur with the CPUC conclusion that the Suncrest Substation Alternative is the environmentally superior alternative to the Project, and urge the CPUC to select the Suncrest Substation Alternative as the Project.

The Project presents significant environmental issues that are far more extensive than disclosed in the DEIR. Commenters urge the CPUC to address these significant issues in a revised CEQA document. The DEIR's Project description is improperly truncated. The DEIR fails to adequately establish the existing setting upon which to measure impacts to biological and water resources. The DEIR also fails to include an adequate analysis of and mitigation measures for the Project's potentially significant impacts. Finally, the DEIR's conclusions lack substantial evidence as required by CEQA. Due to these significant deficiencies in the DEIR, the CPUC cannot conclude that the Project's potentially significant impacts have been mitigated to a less-than-significant level. Therefore, the DEIR must be revised and recirculated for public review.

³⁰¹ Smith Comments, p. 6.
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Thank you for your attention to these comments. Please include these comments in the record of proceedings for the Suncrest Project.

Sincerely,

A handwritten signature in blue ink, appearing to read "Christina M. Caro". The signature is fluid and cursive, with the first name being the most prominent.

Christina M. Caro

CMC:acp