Letter 12: Adams Broadwell Joseph & Cardozo on behalf of Citizens for Responsible Solar

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ADAMS BROADWELL JOSEPH & CARDOZO
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
601 GATEWAY BOULEVARD, SUITE 1000
SOUTH SAN FRANCISCO, CA 94080-7037
TEL: (650) 589-1660
FAX: (650) 589-5062
mquinn@adamsbroadwell.com

DANIEL L. CARDOZO
THOMAS A. ENSLOW
TANYA A. GULESSERIAN
MARC D. JOSEPH
RACHAEL E. KOSS
JAMIE L. MAULDIN
MEGHAN A. QUINN
ELLEN L. TRESCOTT

SACRAMENTO OFFICE
520 CAPITOL MALL, SUITE 350
SACRAMENTO, CA 95814-4721
TEL: (916) 444-6201
FAX: (916) 444-6209

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Via Overnight and Electronic Mail

Mr. Larry Ross, Principal Planner
Riverside County
Planning Department
4080 Lemon Street, 12th Floor
P.O. Box 1409
Riverside, CA 92502
Email: lross@rctlma.org

Frank McMenimen, Project Manager
Bureau of Land Management
Palm Springs South Coast Field Office
1201 Bird Center Drive
Palm Springs, CA 92262
Email: fmcmenimen@blm.gov

Re: Comments on the Draft Environmental Impact Report/Environmental Assessment for the Blythe Mesa Solar Project (SCH No. 2011111056)

Dear Mr. Ross and Mr. McMenimen:

On behalf of Citizens for Responsible Solar, we submit these comments on the Draft Environmental Impact Report/Environmental Assessment ("DEIR/EA") for Renewable Resource Group's ("Applicant") 485-megawatt ("MW") Blythe Mesa Solar Project ("Project"), prepared pursuant to the California Environmental Quality Act ("CEQA").[1] The solar photovoltaic ("pv") array will occupy approximately 3,587 acres, with a 230 kilovolt ("kV") transmission line ("gen-tie line") on another approximately 73 acres in the Palo Verde Mesa region of Riverside County. The proposed Project is located approximately five miles west of the City of Blythe, north and south of Interstate 10 ("I-10"), west of Neighbors Boulevard and Arrowhead Boulevard, and south and east of Blythe Airport.[2]

[1] Pub. Resources Code § 21000 et seq.
[2] Riverside County Planning Department, Blythe Mesa Solar Project, Drat Environmental Impact Report/Environmental Assessment, p. p1 - 2 (June 2014) [*hereinafter* DEIR/EA].

I. INTRODUCTION

The Project is proposed for construction on approximately 3,660 acres, including 3,253 acres under the County's jurisdiction, 334 acres under the City of Blythe's jurisdiction, and 73 acres under Bureau of Land Management's ("BLM") jurisdiction. Project components include:

- Solar array field;
- System of interior collection power lines between inverters and substations;
- Up to three on-site substations;
- Up to two operations and maintenance buildings (3,500 square feet each);
- Associated communication facilities and site infrastructure;
- Two primary off site access roads and several interior access roads;
- Approximately 3.6 miles of transmission lines located within the solar facility, which would connect all on-site substations; and
- Approximately 4.8 miles of transmission line outside of the solar facility within a 125-foot-wide ROW on 73 acres.[3]

The Project is located in the Bureau of Land Management's Riverside East Solar Energy Zone ("SEZ"), which encompasses areas covered by the Northern and Eastern Colorado Desert Coordinated Management Plan ("NECO Plan"), and the California Desert Conservation Area ("CDCA").[4] Three solar power plants in the SEZ have already been approved for development on 8,590 acres in the SEZ, and seven applications are still pending.[5] As each Project is developed the needs of each individual project will unavoidably tax limited water and land resources to a potentially significant cumulative extent. Furthermore, the lack of sufficient mitigation measures associated with each individual project will inevitably have cumulative impacts as they encroach upon special status species habitat. The final toll taken by this historic energy boom on California's desert environment, public health and natural resource base may not be known for several years or longer, but the mounting evidence of detrimental impacts shows that the effects may be severe.

Information is now available regarding the impacts that solar pv projects have on sensitive desert mammals and bat and avian species, the strains that project development is having on the state's limited water and agriculture

[3] DEIR/EA, p. 2-2.
[4] *Id.*
[5] http://blmsolar.anl.gov/sez/ca/riverside-east/; *see also* http://blmsolar.anl.gov/sez/ca/riverside-east/monitoring/.

resources, and the impacts associated with mitigation measures once believed to reduce impacts. The Mojave Desert in and around Blythe has been approved for approximately 8,590 acres of solar development with little regard for the cumulative impacts these projects will have on the fragile desert ecosystem. Now, more than ever, it is essential that the County and BLM adequately identify and analyze the Project's foreseeable direct, indirect and cumulative impacts. It is also imperative that any and all feasible mitigation measures be presented and discussed. Indeed, CEQA and NEPA require nothing less.

As explained below, the Project will generate a multitude of significant, unmitigated impacts on several resources, including biological resources and water resources, among others, and from hazardous materials. The DEIR/EA either mischaracterizes, misanalyzes, underestimates or fails to identify many of these impacts. The DEIR/EA, for example, fails entirely to identify the Project's impacts to the fully adjudicated Colorado River. Furthermore, many of the mitigation measures described in the DEIR/EA will not mitigate impacts to the extent claimed. In some instances, the mitigation measures may generate additional impacts that are not evaluated. For example, the DEIR/EA proposes the passive relocation of burrowing owls to mitigate significant impacts to the birds. However, the DEIR does not evaluate known, potentially significant impacts associated with owl translocation. The DEIR/EA must be revised to resolve its inadequacies and must be recirculated for public review and comment.

CEQA requires recirculation of a DEIR/EA for public review and comment when significant new information is added to the DEIR following public review, but before certification.[6] 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."[7]

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.[8] As explained more fully below, the DEIR/EA does not comply with the requirements of CEQA because the DEIR/EA (1) fails to set forth a stable and finite project description, (2) fails to set forth the environmental baseline for hazardous materials, biological and hydrological resources, among other resources, (3) fails to

[6] Pub. Resources Code § 21092.1.
[7] CEQA Guidelines § 15088.5.
[8] *Save Our Peninsula Comm. v. Monterey County Bd. of Supervisors* (1981) 122 CalApp3d 813, 822.

identify, analyze and mitigate to the extent feasible, all the impacts that the Project will have on public health and the state's limited hydrological, biological and other resources, and (4) defers formulation of mitigation measures to post approval studies. The County and BLM may not approve the Project until an adequate DEIR/ draft environmental impact statement ("DEIR/DEIS") is prepared and circulated for public review and comment.

We have reviewed the DEIR/EA and its technical appendices with assistance from technical consultants, whose comments and qualifications are attached as follows: Scott Cashen (**Attachment A**), Matt Hagemann (**Attachment B**), and Anders Sutherland (**Attachment B**). The County must respond to these consultants' comments separately and individually.

II. STATEMENT OF INTEREST

Citizens for Responsible Solar is an unincorporated association of individuals and labor organizations that may be adversely affected by the potential public and worker health and safety hazards and environmental and public service impacts of the Project. The association includes Blythe resident George Ellis, Riverside County resident James Hennegan, and California Unions for Reliable Energy ("CURE") and its members and families and other individuals that live and/or work in the City of Blythe and Riverside County (collectively, "Riverside Residents").

The individual members of Riverside Residents and the members of the affiliated labor organizations live, work, recreate and raise their families in Riverside County, including the City of Blythe. They would be directly affected by the Project's environmental and health and safety impacts. Individual members may also work constructing the Project itself. They will be first in line to be exposed to any health and safety hazards that may be present on the Project site. They each have a personal interest in protecting the Project area from unnecessary, adverse environmental and public health impacts.

The organizational members of Riverside Residents also have an interest in enforcing environmental laws that encourage sustainable development and ensure a safe working environment for the members that they represent. Environmentally detrimental projects can jeopardize future jobs by making it more difficult and more expensive for businesses to locate and people to live there. This, in turn, jeopardizes future development by causing construction moratoriums and otherwise reduces future employment opportunities for construction workers. The labor organization members of Riverside Residents therefore have a direct interest in

enforcing environmental laws to minimize the adverse impacts of projects that would otherwise degrade the environment. Finally, the organizational members of Riverside Residents are concerned about projects that risk serious environmental harm without providing countervailing economic benefits. The CEQA and NEPA processes allow for a balanced consideration of a project's socioeconomic and environmental impacts, and it is in this spirit that we offer these comments.

III. THE DEIR/EA FAILS TO ADEQUATELY DESCRIBE THE PROJECT

The DEIR/EA does not meet CEQA's and NEPA'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]."[9] CEQA requires that a project be described with enough particularity that its impacts can be assessed.[10] Accordingly, a lead agency may not hide behind its failure to obtain a complete and accurate Project description.[11]

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…."[12] 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."[13] Without a complete project description, the environmental analysis under CEQA is impermissibly limited, thus minimizing the project's impacts and undermining meaningful public review.[14]

Under NEPA, a complete project description is necessary for the public and decision makers to understand the effects of the proposed action and its

[9] *County of Inyo v. City of Los Angeles* (3d Dist. 1977) 71 Cal.App.3d 185, 193.
[10] *Id.* at 192.
[11] *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 311 (hereinafter, "Sundstrom").
[12] *Id.* at 192-193.
[13] *Id.* at 197-198.
[14] *See, e.g., Laurel Heights Improvement Assn. v. Regents of the Univ. of Cal.* (1988) 47 Cal.3d 376.

alternatives.[15] It follows that information in an EA that is incomplete will skew the environmental consequences analysis and prevent informed public input. Courts have held that "[w]here the information in the initial EIS was so incomplete or misleading that the decisionmaker and the public could not make an informed comparison of the alternatives, revision of an EIS may be necessary to provide a reasonable, good faith, and objective presentation of the subjects required by NEPA."[16]

An accurate and complete project description is necessary to perform an adequate evaluation of the potential environmental effects of a proposed project. In contrast, an inaccurate or incomplete project description renders the analysis of environmental impacts inherently unreliable. Without a complete project description, the environmental analysis under CEQA and NEPA will be impermissibly narrow, thus minimizing the project's impacts and undercutting public review.[17]

A. The DEIR/EA Fails to Adequately Disclose the Extent of Grading at the Project Site

The DEIR/EA fails to provide a sufficiently detailed account of what areas will require grading and trenching and the extent of the grading and trenching. This project description information is critical to ensuring that the Project's impacts can be assessed. According to the DEIR/EA, "[s]ince most of the site has nearly level to gently sloping topography, no mass grading would be required. Some of the parcels where facilities and arrays would be located would require light grubbing for leveling and trenching."[18] This vague description is incorrect and insufficient to enable an adequate evaluation of impacts for three reasons.

First, Project construction and operation will require installation of electrical equipment, which necessitates grading and trenching. Indeed, the DEIR/EA states, "[i]nstallations of electrical collection system would require excavations to a depth of about three feet for underground electrical circuits."[19] Furthermore, during

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[15] See 40 C.F.R. § 1502.15; see also *Laguna Greenbelt v. U.S. Dept. of Transportation* (1994) 42 F.3d 517, 528-29 [reviewing plaintiff's claim that inconsistent definition resulted in misleading analysis of project's positive and negative effects].
[16] *Natural Resources Defense Council v. U.S. Forest Service* (2005) 421 F.3d 797, 811 [citing Animal Defense Council v. Hodel (1988) 840 F.2d 1432, 1439].
[17] *See*, *e.g.*, *Laurel Heights Improvement Assn. v. Regents of the Univ. of Cal.* (1988) 47 Cal.3d 376.
[18] DEIR/EA, p. 2 – 12.
[19] *Id.*, p. 2-6.

Project construction, "the array assembly would include up to 25 small gas-powered generators, support piles for which will be driven approximately eight to twelve feet into the ground."[20] However, no information is given as to where any of these installations will be located. This is especially disconcerting given the potential presence of hazardous materials, ephemeral streams, special status plants, burrowing owls, and Mojave fringe-toed lizards at the Project site.

Second, the Project description includes the construction of up to two 3,500 square foot operations and maintenance ("O&M") buildings at the Project site.[21] The O&M buildings would require excavations to a depth of approximately three feet.[22] However, again, the DEIR/EA fails to set forth the location of these buildings, rendering any analysis impermissibly narrow. The impact from construction of O&M buildings on biological and hydrological resources cannot be determined without more information as to where the buildings will be located in relation to jurisdictional features and biological resources identified on the Project site. The DEIR/EA states only that, "[c]onstruction of the proposed Project would not permanently alter the course of any of the drainages."[23] However, without any information as to the location of the O&M buildings in relation to the ephemeral streams onsite, the validity of this statement cannot be fully evaluated.

Lastly, the Project will require construction of a significant number of access roads. The DEIR/EA states, "[w]ithin the solar field, 12-foot-wide access roads would also be constructed approximately every 200 to 400 feet."[24] Although the Project description states that minimal grading for roads would be required, the Project will be constructed over approximately 3,660 acres. This amounts to a significant amount of ground disturbing activity for roads alone. Furthermore, the DEIR/EA fails to describe the number of roads, the length of each road, and the extent of grading associated with access road creation. The DEIR/EA only explains that the access road for the O&M building will be approximately 100 feet in length.[25] This is insufficient. The DEIR/EA's failure to describe the proposed grading and existing topographical setting renders the DEIR/EA's conclusory statement of little worth in analyzing the potential impacts the Project may have on the environment.

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[20] *Id.*, p. 2 – 17.
[21] *Id.*, p. 2-2.
[22] *Id.*, p. 2 – 12.
[23] *Id.*, p. 4-232.
[24] DEIR/EA, p. 2 – 17.
[25] *Id.*, p. 2 – 232.

B. The DEIR/EA Fails to Identify a Water Supply that Can be Used for Construction and Operation of the Project

The DEIR/EA fails to identify a water source that may be used for the Project's non-potable water needs, and assumes the existence of an entitlement not in existence. According to the DEIR/EA, Project construction will require approximately 1,345 acre-feet ("AF") of water (451 AF per year) for dust control,[26] and operational non-potable water requirements would be approximately up to 345 AF/year."[27] However, the Project has not secured a water source.

The DEIR/EA continues, "[t]he Project ***would*** coordinate with Gila Farm Land, LLC (landowner) and the Palo Verde Irrigation District ["PVID"] to secure water service and supply during operation."[28] After stating that water service must still be secured, the DEIR/EA proceeds to assume the existence of an entitlement not in effect: "Water for the Project would be taken from existing PVID water entitlements that support the agricultural operations currently on the proposed solar facility site."[29] However, no supporting evidence is provided in the DEIR/EA.

Although the DEIR/EA claims that the surface delivery system from the PVID would be available to serve the proposed solar facility, no information is provided to substantiate their claim to PVID water.[30] PVID water is to be used for irrigation purposes and potable uses.[31] Construction and operation of a solar facility does not constitute either of these permissible uses of Colorado River water, which is fully adjudicated under a system of treaties, agreements, and contracts with the Department of Interior, and other Colorado River Basin states.[32] The County is required to produce and circulate a DEIR/EA that adequately sets forth and describes a water source that may legally satisfy the Project's non-potable water needs.

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[26] *Id.*, p. 2 – 12.
[27] *Id.*, p. 2- 19.
[28] *Id.*
[29] *Id.*, p. 4 – 234 *emphasis added.*
[30] DEIR/EA, p. 3 – 21.
[31] EIR/EA, p. 3 – 179; *see also* http://pvid.org/history.html. **Attachment C.**
[32] *See* 43 U.S.C. §§ 617 *et al.*; *see also Arizona v. California*, 373 U.S. 546 (1963).

IV. THE DEIR/EA FAILS TO ADEQUATELY ESTABLISH THE EXISTING ENVIRONMENTAL SETTING AGAINST WHICH ENVIRONMENTAL IMPACTS SHOULD BE MEASURED

The DEIR/EA describes the existing environmental setting inaccurately and incompletely, thereby skewing the entire impact analysis. The existing environmental setting is the starting point from which the lead agency must measure whether a proposed project may cause a significant environmental impact.[33] Both CEQA and NEPA require the lead agencies to include a description of the physical environmental conditions in the vicinity of a project, as they exist at the time environmental review commences.[34] CEQA defines the environmental setting as the physical environmental conditions in the vicinity of the project, as they exist at the time the notice of preparation is published, from both a local and regional perspective.[35]

Describing the environmental setting accurately and completely for each environmental condition in the vicinity of the Project is critical to an accurate, meaningful evaluation of environmental impacts. The importance of having a stable, finite, fixed environmental setting for purposes of an environmental analysis was recognized decades ago.[36] Today, the courts are clear that, "[b]efore the impacts of a Project can be assessed and mitigation measures considered, an [environmental review document] must describe the existing environment. It is only against this baseline that any significant environmental effects can be determined."[37] In fact, it is:

> a central concept of CEQA, widely accepted by the courts, that the significance of a Project's impacts cannot be measured unless the DEIR first establishes the actual physical conditions on the property. In other words, baseline determination is the first rather than the last step in the environmental review process.[38]

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[33] *See, e.g.*, *Communities for a Better Env't v. S. Coast Air Quality Mgmt. Dist.* (March 15, 2010) 48 Cal.4th 310, 316; *Fat v. County of Sacramento* (2002) 97 Cal.App.4th 1270, 1278 ("*Fat*"), citing Remy, et al., Guide to the Calif. Environmental Quality Act (1999) p. 165.
[34] CEQA Guidelines, § 15125(a); *see also Communities for A Better Environment v. South Coast Air Quality Management Dist.* (2010) 48 Cal.4th 310, 321; *see also,* 40 C.F.R. § 1502.15.
[35] CEQA Guidelines §15125(a) (emphasis added); *Riverwatch v. County of San Diego* (1999) 76 Cal.App.4th 1428, 1453 ("*Riverwatch*").
[36] *County of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185.
[37] *County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, 952.
[38] *Save our Peninsula Comm. v. Monterey County Bd. of Supervisors* (2001) 87 Cal.App.4th 99, 125.

The DEIR/EA must also describe the existing environmental setting in sufficient detail to enable a proper analysis of Project impacts.[39] Section 15125 of the CEQA Guidelines provides that "[k]nowledge of the regional setting is critical to the assessment of environmental impacts."[40] This level of detail is necessary to "permit the significant effects of the Project to be considered in the full environmental context."[41]

The description of the environmental setting in the DEIR/EA is inadequate because it omits highly relevant information regarding biological resources, hazardous materials and water resources. The County and the BLM must gather the relevant data and provide an adequate description of the existing environmental setting in a revised and recirculated DEIR/DEIS.

A. The County Failed to Establish the Existing Environmental Setting for Hazards

The DEIR/EA failed to accurately establish the existing environmental setting because it failed to rely on a Phase I Environmental Site Assessment ("ESA") to establish the setting for hazards at the Project site. According to former Environmental Protection Agency ("EPA") scientist, Matt Hagemann, a Phase I ESA is the customary due diligence investigation used to establish the baseline setting for potential hazards at a project site.[42] However, instead of abiding by this industry standard, the DEIR/EA includes a misleading account of hazards in a Data Map Area Study, which includes "a summary of environmentally affected sites," derived from agency databases. This information fails to adequately set forth the existing environmental setting, which is required for an adequate analysis of impacts under CEQA and NEPA, for two reasons.

First, the DEIR/EA itself explains that the Data May Area Study cannot be relied on to establish existing environmental conditions and to evaluate environmental and public health risks from hazards. [43] According to the DEIR/EA:

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[39] *Galante Vineyards v. Monterey Peninsula Water Mgmt. Dist.* (1997) 60 Cal.App.4th 1109, 1121-22.
[40] CEQA Guidelines § 15125(d).
[41] *Id.*
[42] SWAPE comments, p. 2.
[43] *Id.*

> Any analyses, estimates, ratings, environmental risk levels or risk codes provided in this Report are provided for illustrative purposes only, and are not intended to provide, nor should they be interpreted as providing any facts regarding, or prediction or forecast of, any environmental risk for any property. Only a Phase I Environmental Site Assessment performed by an environmental professional can provide information regarding the environmental risk for any property.[44]

Mr. Hagemann agrees and explains that "[i]n no way does the EDR Data Map Study Area constitute a Phase I ESA which is routinely conducted to support the analysis of project impacts in the Hazards and Hazardous Waste analysis in Environmental Impact Report prepared under CEQA."[45] Despite this, the DEIR/EA improperly and solely relies on the Data Map Area Study to set forth existing conditions and as evidence that the impacts associated with hazardous materials are less than significant.[46]

Second, the Data Map Area Study fails to adequately set forth the existing environmental setting because it is inconsistent with the standard industry protocol for determining existing hazards on a particular site. According to Mr. Hagemann, "[t]he failure to conduct a Phase I ESA for the Project disregards an environmental due-diligence process that is routine for CEQA and NEPA documentation."[47] Solar projects already under development in the area, such as McCoy, Rio Mesa and the Blythe Solar Power Project have all used an ESA to "identify hazardous waste issues that may pose a risk to the public, workers, or the environment and which may require further investigation, including environmental sampling and cleanup."[48] Therefore, reliance on a Data Map Area Study is inconsistent with the industry standard.

The DEIR/EA failed to accurately establish the existing environmental setting because it relies on a Data Map that the DEIR/EA admits cannot be relied upon for an analysis of risks and does not rely on an industry-standard Phase I ESA to establish the setting for hazards at the Project site. A Phase I ESA is required to establish the baseline for hazards at the Project site. This information must be included in a revised DEIR/DEIS that is circulated to the public for review.

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[44] DEIR/EA Appendix F, Data Map.
[45] *Id.*
[46] *See e.g.* DEIR/EA, p. 4 – 206.
[47] SWAPE comments, p. 3.
[48] *Id.*, p. 2.

i. *The DEIR/EA Fails to Identify the Project Site as a Formerly Used Defense Site and Disclose the Extent of Military Operations that Have Occurred on Site*

The County and BLM failed, but are required to, identify the Project site as a Formerly Used Defense Site ("FUDS") and describe any associated hazardous materials that may be present at the Project site. During World War II ("WWII"), the Blythe Airport was used by the military, as the Blythe Army Airfield ("BAAB").[49] In addition, the surrounding areas, including portions of the Project site, were used for gunnery practice to prepare troops for the North African campaign. Although the DEIR/EA acknowledges that military training exercises were conducted in the desert near the California – Arizona border, and that "[a] portion of the BAAB extends into the Project [Area of Potential Effects] APE,"[50] the DEIR/EA fails to describe with any particularity the extent and nature of the training exercises, and any machinery, ammunition, supplies or other hazards that may be left, and encountered or disturbed, at the Project site.

According to hazards expert, Matt Hagemann, there are two particular areas of concern with regards to establishing the existing environmental setting for hazardous materials found at FUDS. First, a former practice bombing area lies just adjacent to the Project site. This is of particular concern because seven instances of unexploded ordnance ("UXO") were discovered at the adjacent Blythe Solar Power Project, left there from the same military training exercises that may have impacted the Project site. Further, UXO is associated with various sites of military training. For instance, "[a] Phase I conducted for the Rice Solar Project identified UXO used in conjunction with the Rice Army Airfield to be a REC."[51] According to Mr. Hagemann, "[p]otential contaminants associated with that part of the BAA[B] that is within the Project APE…should also be evaluated in a Phase I ESA to be included in the DEIR/EA."[52] The DEIR/EA fails to disclose the extent of former military use of the Project site and the surrounding area. As a result, the DEIR/EA downplays the likely presence of UXO on the site.

Second, an "'Air to Ground Gunnery Range' generally underlies an area that is proposed for a 73-acre portion of the 4.8 mile gen-tie line corridor that extends

[49] *Id.*, p. 6.
[50] DEIR/EA, pp. 3 – 87; 3 - 44.
[51] SWAPE comments, pp. 7-8.
[52] *Id.*, p. 7.

west of the solar arrays."[53] According to Mr. Hagemann, "[b]ullets, which may contain lead, and other munitions used in the air to ground gunnery range, including incendiary devices, may also pose a hazard to construction crews who may disturb soil in that area when installing the gen-tie line."[54] However, the DEIR/EA fails to identify the Gunnery Range, or any potential UXO that may be present at the Project site. Accordingly, the County and the BLM must develop a Phase I ESA so that the environmental baseline for hazards may be adequately set forth and the impact analysis revised in an updated and recirculated DEIR/DEIS.

ii. *The DEIR/EA Fails to Identify Pesticide Use Associated with Agricultural Activity at the Project Site*

The County and the BLM failed to, but must, disclose what pesticides were used for the cultivation of crops at the Project site. The Project site is currently occupied by active agricultural cultivation. "Active agricultural uses include a citrus grove and wheat and alfalfa fields."[55] Accordingly, the DEIR/EA states, "there is a potential for residual, low-level concentrations of pesticides and other agricultural chemicals to be present in soil and/or groundwater."[56] However, the DEIR/EA completely fails to describe with any particularity the types of pesticides which may be present at the Project site, preventing any meaningful analysis of the impacts those chemicals may have on the environment and public health.

Farming in the Blythe area began in the 1970s, when the use of organochlorine pesticides, such as dichlorodiphenyldichloroethylene ("DDE"), dichlorodiphenyltrichloroethane ("DDT"), and chlordane, were widely used.[57] Since that time, the U.S. EPA has determined that these pesticides are human carcinogens, which also pose impacts to the human nervous system.[58] The California Department of Toxic Substances Control ("DTSC") has noted the prevalence and relative persistence of these harmful pesticides throughout the state:

[53] *Id.*, p. 6.
[54] *Id.*, 7.
[55] DEIR/EA, p. 1-3.
[56] *Id.*, p. 4 – 206.
[57] SWAPE comments, p. 4.
[58] *Id.*

> DDT is ubiquitous to California soil due to heavy agricultural usage prior to cancellation in 1972. Therefore, agricultural land which is currently being developed or considered for new uses … frequently contains DDT.[59]

Despite the prevalence of DDT in the state, the DEIR/EA fails to conduct the necessary studies of the Project site to fully disclose the hazardous materials that may be present. Matt Hagemann points out in his comments, "there has been no sampling to indicate if soils are 'chemically impacted' and therefore, there is no way to know when and where those soils may be contacted by construction crews and risks that would result from dermal contact or inhalation."[60] However, the DEIR/EA relies upon the Data Map Area Study to determine that no impacts will occur. The DEIR/EA states,

> Should there be chemically impacted soils (i.e., fuels, pesticides, herbicides) be [*sic*] present in the Project area, the risk of exposure to human health is not believed to be a significant concern (refer to Environmental Data Resources, Inc. [EDR] report in Appendix F of this Draft EIR/EA). The construction of the proposed Project would require minimal grading for the foundations of the substations and O&M buildings; therefore, it is anticipated that workers' exposure to impacted soils would be at low-level concentrations.[61]

Given the prevalence of these cancer-causing substances, the DEIR/EA's failure to describe with any particularity the types of pesticides which may be present at the Project site prevents any meaningful analysis of the impacts those chemicals may have on the environment and public health. According to Mr. Hagemann, it is crucial that a Phase I ESA be conducted to determine the environmental setting for hazardous materials, and soil testing and further investigation of the site be performed, if necessary.[62] The County and the BLM are required to obtain this information and disclose it in an updated and recircualted DEIR/DEIS.

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[59] SWAPE comments, p. 4, *see also* Office of the Science Advisor, DDT in Soil: Guidance for the Assessment of Health Risks to Humans. http://www.dtsc.ca.gov/AssessingRisk/upload/chap8.pdf, p. 11.
[60] *Id.*, p. 5.
[61] DEIR/EA, p. 4 – 206.
[62] SWAPE comments, pp. 5-6.

B. The DEIR/EA Fails to Discuss the Environmental Setting Against Which Project Impacts to Water Supply Should be Measured

The Project describes two sources of water that may be used for Project construction and operation, yet fails to set forth the environmental setting for either of the sources. The DEIR/EA states,

> The proposed Project would use existing water infrastructure that currently delivers irrigation water from the PVID. Riverside County Community Service Area #122 (CSA #122) has substantiated its intention to provide this potable supply by issuing a will-serve letter (October 26, 2012 c/o Steve H. Jones – Manager) for the Project's limited potable water needs. CSA #122 has provided a will-serve letter for the small amount (up to 150 gallons per day) of potable water for the two O&M buildings.[63]

However, the DEIR/EA stops there. No further information, data, or reasoning as to how much water is available for the Project, what the current uses of these water sources are, or the recharge rates of the water bodies is provided. Thus, the County and BLM have provided none of the essential information necessary to establish the environmental setting for water supply. Without more it is impossible to determine what impact the Project will have on hydrological resources. The County and the BLM are required to rectify this inadequacy in an updated and sufficient DEIR/EIS.

C. The DEIR/EA Fails to Adequately Discuss the Environmental Setting Against Which Project Impacts to Water Quality Should be Measured

The County and the BLM are required to set forth a full and adequate description of water quality in the area so that impacts to those water bodies may be adequately assessed and mitigated. According to the DEIR/EA, the ephemeral streams at the Project site eventually drain to the Colorado River.[64] However, no information as to Colorado River water quality is provided in the DEIR/EA. The only water quality information provided in the DEIR/EA is information regarding a nearby outfall drain. "Within the Project region, one water body is listed as impaired on the Section 303(d) list. The Palo Verde Outfall Drain and Lagoon are

[63] DEIR/EA, p. 3 – 179.
[64] *Id.*, pp. 3 – 126 – 129.

listed as impaired by dichlorodiphenyltrichloroethane (DDT) and pathogens, both from unknown sources."[65] Elsewhere, in the DEIR/EA appendices, it states, "[s]heet flow eventually reaches the edge of the Mesa and flows into the canal and drain system of the Palo Verde Valley south of 10th Street. This system eventually returns water to the Colorado River via the Outfall Drain…"[66]

There is no information as to whether the Project's ephemeral streams feed directly to the Colorado River,[67] or, in the alternative, flow into the degraded water body lying at the end of the Palo Verde Outfall drain with the sheet flow from the Palo Verde Mesa. More information is required so that impacts to water quality may be determined. This is especially important because the Palo Verde Outfall Drain and Lagoon are impaired for DDT. The DEIR/EA readily admits, "[g]round disturbance related to construction of the Project could potentially degrade water quality through the inadvertent release of residual pesticides from former agricultural lands."[68] Without more it is impossible to assess the direct, indirect and cumulative impacts to water quality that will result from Project construction. The County is required to fully and adequately describe the environmental setting for water quality so that decision makers and the public are fully informed of any associated impacts.

D. The DEIR/EA Fails to Set Forth the Existing Biological Setting Against Which Impacts Should Be Measured

i. *The DEIR/EA Fails to Adequately Describe the Environmental Setting for Endangered Flora on the Project Site*

The DEIR/EA fails to fully and completely set forth the environmental setting for special species plants located on the Project site. The DEIR/EA points out that Harwood's woollystar occurs within the Project gen-tie line, and Harwood's milk-vetch occurs within the Project site and gen-tie line. According to Scott Cashen, a field biologist with over 20 years of experience, the DEIR/EA's description of the setting for special species plants is inadequate. According to Mr. Cashen, the DEIR/EA, "fails to establish the ecological context of the populations in the Project area relative to other extant populations in the region."[69] This

[65] *Id.*, p. 3 – 130.
[66] DEIR/EA, Appendix C5, Review of Federal Waters, p. 7.
[67] *See* DEIR/EA, p. 3 – 129.
[68] DEIR/EA, p. 4-232.
[69] Cashen comments, p. 2.

oversight, Mr. Cashen states, "precludes the public and decision makers from being able to evaluate the relative severity of Project impacts of these two species."[70]

According to Mr. Cashen's research, "Harwood's woollystar has a Rare Plant Rank of 1B.2, which indicates it is rare throughout its range and fairly endangered in California."[71] Furthermore, Harwood's woolystar "has a global rank of G2 and a state rank of S2, which indicates it is 'at high risk of extinction due to very restricted range, very few populations (often 20 or fewer), steep declines, or other factors' at both the statewide and global scale."[72] This information is essential in making an informed decision as to Project impacts.

The same is true of Harwood's milkvetch. The plant has "a Rare Plant Rank of 2.2, which indicates it is rare or endangered in California, but more common elsewhere."[73] Given the relative scarcity of the special status plants occurring on the Project and gen-tie line site, an accurate environmental baseline is essential for informed decision-making. The County and the BLM must recirculate a DEIR/EIS that adequately portrays the context of ratings for flora rarity so the public and decisionmakers are informed as to the existing baseline and the agencies may conduct an adequate analysis of actual impacts.

ii. *The DEIR/EA Fails to Accurately Set Forth the Environmental Setting for Couch's Spadefoot*

The DEIR/EA fails to identify the potential presence of Couch's spadefoot, a listed BLM Sensitive Species and California Species of Special Concern, in the Project area, and underestimates its potential for occurrence. According to Table 3.2.4-3 of the DEIR/EA, there is a low probability of Couch's spadefoot occurrence. However, Mr. Cashen points out, "[t]he Couch's spadefoot is an extremely rare species in California," and "[t]he Project site is within the geographic range of the species."[74] Indeed, the California Natural Diversity Database has documented only six occurrences of Couch's spadefoot. The species was detected in flooded alfalfa fields and desert scrub near agricultural fields.[75] According to the

[70] *Id.*
[71] *Id.*
[72] *Id.*
[73] *Id.*
[74] *Id.*
[75] *Id.*

DEIR/EA, the Project site contains just this type of habitat. Accordingly, Mr. Cashen opines that, "the DEIR/EA has inappropriately concluded that the Couch's spadefoot has a 'low' potential of occurring in the Project area."[76] The County and the BLM must remedy this oversight and set forth the appropriate baseline for Couch's spadefoot, so species impacts may be fully disclosed, analyzed and mitigated.

iii. *The DEIR/EA Fails to Adequately and Consistently Describe the Jurisdictional Features on the Project Site*

The DEIR/EA presents inconsistent information with regards to the two ephemeral streams located on the Project site. According to the DEIR/EA,

> A hydrology study was performed in 2012 to review potential jurisdictional waters (provided in Appendix C5, *Review of Federal Waters,* of this Draft EIR/EA). POWER found that there are two discontinuous ephemeral channels within the Project area.[77]

The DEIR/EA continues, "[b]ased on the data collected the two discontinuous ephemeral channels are considered potential federal waters."[78]

Presumably, the DEIR/EA determined that there are federal waters under the jurisdiction of the Army Corps of Engineers ("USACE") on the Project site because the ephemeral streams at the Project site drain to the Colorado River.[79] However, the DEIR/EA's *Review of Federal Waters* comes up with a contradictory conclusion: "POWER concludes that the two discontinuous ephemeral channels on the Project site do not meet the criteria for regulable waters of the U.S. provided in the USACE Jurisdictional Determination Form Instruction Guidebook."[80] The reason that POWER drew their conclusion was because the consultants allege that the Project waters did not flow into the Colorado River. The County must address this direct contradiction between the appendices and information in the DEIR/EA and recirculate a DEIR/DEIS with an accurate and consistent environmental baseline determination.

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[76] Cashen comments, p. 3.
[77] DEIR/EA, p. 3-58.
[78] *Id.*
[79] *Id.*, pp. 3 – 126 – 129.
[80] *Review of Federal Waters,* DEIR/EA Appendix C5, p. 15 [hereinafter *Appendix C5*].

iv. *The DEIR/EA Fails to Adequately and Consistently Describe Burrowing Owl Habitat at the Project Site*

The DEIR/EA includes a completely misleading account of the presence of burrowing owls present on the Project site. The wildlife inventory results map depicted by Figure 3.2.4-3 fails to depict the full extent of burrowing owl sign and habitat on the Project site.[81] The map indicates that no burrowing owls were detected during reconnaissance surveys. However, according to the Burrowing Owl Survey in Appendix C3, six owls were detected during the first survey, and eight in a subsequent survey. Furthermore, burrowing owl sign was identified in five separate locations at the Project site, along with nine suitable burrows that may be used by single, or paired owls.

In addition, the DEIR/EA fails to disclose that some of these owls may be nesting. The field biologists conducting the surveys noted they "were unable to determine if the owls were two separate pairs or one pair with two juveniles" in one location, and whether a pair of owls residing in another area of the Project site was nesting.[82] This information is imperative, as nesting burrow owls require additional and enhanced mitigation.

Despite the abundance of owl presence and sign at the Project site, Figure 3.2.4-3 only depicts two locations for burrowing owl burrows. This is completely misleading, and fails to fully and consistently describe burrowing owl habitat at the Project site. The DEIR/EA must set forth the full extent of burrowing owls, burrowing owl habitat, and known active burrowing owl burrows at the Project site so impacts may be fully known, analyzed and mitigated. This information must be included in a revised DEIR/DEIS that is circulated for public review.

v. *The DEIR/EA Fails to Adequately Describe Desert Kit Fox Habitat at the Project Site*

The DEIR/EA fails to set forth an accurate and consistent description of the environmental setting for desert kit foxes at the Project site. According to the DEIR/EA, "[a] kit fox den was detected on the southern [gen-tie line] alternative."[83] However, the DEIR/EA then proceeds as though there are no kit foxes present in the Project APE. The DEIR/EA fails to set forth any further information regarding

[81] *See* DEIR/EA, Figure 3.2.4-3.
[82] *Burrowing Owl Survey*, DEIR/EA Appendix C3, p. 10 [*hereinafter* Appendix C3].
[83] DEIR/EA, p. 3 – 70.

the presence of kit fox at the Project site, aside from the information presented in Figure 3.2.4-3, which presents inconsistencies in the data. According to Figure 3.2.4-3, there are various burrows, which presumably belong to either desert kit foxes or coyotes along the northern gen-tie route, which is the proposed alternative for interconnection. Further, the Habitat Assessment Report for the gen-tie line indicates that desert kit fox sign and scat were also found in this area.[84]

The DEIR/EA must fully set forth the environmental setting for desert kit foxes, given their high potential to occur on the Project site.[85] The Western Burrowing Owl Survey included as Appendix C3 states, "[b]urrows observed in the southern half of the site belonged to either kit fox (Vulpes macrotis) or kangaroo rat (Dipodomys sp.). No burrowing owl sign was observed near the kit fox burrows. Several of the kit fox burrows were recent and active kit fox sign was documented."[86] The Biological Technical Report, Appendix C1, is consistent with this data: "[p]otential desert kit fox scat and tracks were found scattered throughout the proposed solar array disturbance area."[87] Given the high potential for kit fox presence at the Project site, the County and the BLM must produce and recirculate a DEIR/DEIS that contains accurate information on desert kit fox so that impacts to biological resources may be fully and completely assessed.

V. THE COUNTY LACKS SUBSTANTIAL EVIDENCE TO SUPPORT ITS CONCLUSIONS IN THE DEIR/EA REGARDING THE PROJECT'S SIGNIFICANT IMPACTS, THE DEIR/EA FAILS TO INCORPORATE ALL FEASIBLE MITIGATION MEASURES NECESSARY TO REDUCE SUCH IMPACTS TO A LEVEL OF INSIGNIFICANCE

CEQA has two basic purposes, neither of which the DEIR/EA satisfies. First, CEQA is designed to inform decision makers and the public about the potentially significant environmental impacts of a Project before harm is done to the environment.[88] The DEIR is the "heart" of this requirement.[89] The DEIR has been described as "an environmental 'alarm bell' whose purpose it is to alert the public

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[84] *Blythe Mesa Solar Project: 230 kV Transmission Line Alternatives Habitat Assessment Report,* Appendix E: Observed Wildlife Table.
[85] *Biological Resources Technical Report*, DEIR/EA Appendix C1, p. 60 [*hereinafter* Appendix C1].
[86] Appendix C3, p. 10.
[87] AppendixC1, p. 55.
[88] CEQA Guidelines § 15002(a)(1); *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.
[89] *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 84.

and its responsible officials to environmental changes before they have reached ecological points of no return."[90]

To fulfill this function, the discussion of impacts in a DEIR must be detailed, complete, and "reflect a good faith effort at full disclosure."[91] An adequate DEIR must contain facts and analysis, not just an agency's conclusions.[92] CEQA requires a DEIR to disclose all potential direct and indirect, potentially significant environmental impacts of a project.[93]

Second, if a DEIR identifies potentially significant impacts, it must then propose and evaluate mitigation measures to minimize these impacts.[94] CEQA imposes an affirmative obligation on agencies to avoid or reduce environmental harm by adopting feasible project alternatives or mitigation measures.[95] Without an adequate analysis and description of feasible mitigation measures, it would be impossible for agencies relying upon the DEIR to meet this obligation.

Under CEQA, an EIR must not only discuss measures to avoid or minimize adverse impacts, but must ensure that mitigation conditions are fully enforceable through permit conditions, agreements, or other legally binding instruments.[96] A CEQA lead agency is precluded from making the required CEQA findings unless the record shows that all uncertainties regarding the mitigation of impacts have been resolved; an agency may not rely on mitigation measures of uncertain efficacy or feasibility.[97] This approach helps "insure the integrity of the process of decision by precluding stubborn problems or serious criticism from being swept under the rug."[98]

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[90] *County of Inyo v. Yorty* (1973) 32 Cal.App.3d 795, 810.
[91] CEQA Guidelines § 15151; *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 721-722.
[92] See *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 568.
[93] Pub. Resources Code § 21100(b)(1); CEQA Guidelines § 15126.2(a).
[94] Pub. Resources Code §§ 21002.1(a), 21100(b)(3); CEQA Guidelines § 15002(a)(2) and (3); *Berkeley Jets,* 91 Cal.App.4th at 1354; *Laurel Heights Improvement Ass'n v. Regents of the University of Cal.* (1998) 47 Cal.3d 376, 400.
[95] Pub. Resources Code §§ 21002-21002.1.
[96] CEQA Guidelines, § 15126.4, subd. (a)(2).
[97] *Kings County Farm Bur. v. County of Hanford* (1990) 221 Cal.App.3d 692, 727-28 (a groundwater purchase agreement was inadequate mitigation because there was no record evidence that replacement water was available).
[98] *Concerned Citizens of Costa Mesa, Inc. v. 32nd Dist. Agricultural Assn.* (1986) 42 Cal.3d 929, 935.

NEPA requires a full and fair discussion of every significant impact, as well as disclosure to the decision-makers and the public of reasonable alternatives which would avoid or minimize adverse impacts.[99] The impacts analysis must include a discussion of the relationship between short-term uses of the environment and the maintenance and enhancement of long-term productivity, and any irreversible or irretrievable commitments of resources which would be involved in the proposal should it be implemented.[100] The discussion of impacts must include both "direct and indirect effects (secondary impacts) of a proposed project."[101] The agency need not speculate about all conceivable impacts, but it must evaluate the reasonably foreseeable significant effects of the proposed action.[102] In this context, reasonable foreseeability means that "the impact is sufficiently likely to occur that a person of ordinary prudence would take it into account in reaching a decision."[103] NEPA also requires a discussion regarding possible conflicts between the proposed action and the objectives of Federal, regional, State, and local land use plans, policies and controls for the area concerned.[104]

In this case, the DEIR/EA fails to satisfy the basic purposes of CEQA and NEPA. The DEIR/EA's conclusions regarding impacts to biological and hydrological resources, public health impacts and cumulative impacts are not supported by substantial evidence. In preparing the DEIR/EA, the County and BLM: (1) failed to provide sufficient information to inform the public and decision-makers about potential environmental impacts; (2) failed to accurately identify and adequately analyze all potentially significant environmental impacts; (3) failed to incorporate adequate measures to mitigate environmental impacts to a less than significant level; and (4) failed to analyze impacts associated with mitigation measures. The County and the BLM must correct these shortcomings and recirculate a revised DEIR/DEIS for public review and comment.

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[99] 40 C.F.R. § 1502.
[100] *Id.* at § 1502.16.
[101] *Id.* at § 1502.16(b); *see also Sierra Club v. Marsh*, 976 F.2d 763, 767 (1st Cir. 1992).
[102] *Sierra Club v. Marsh*, 976 F.2d at 767.
[103] *Ibid; see also Dubois v. Dept. of Agriculture*, 102 F.3d 1273, 1286 (1st Cir. 1996).
[104] *Id.*

A. The DEIR/EA Lacks Substantial Evidence to Support its Conclusion that the Project Will Have Less Than Significant Impacts on Water Quality due to the Implementation of Mitigation Measures

The DEIR/EA lacks substantial evidence to support its conclusion that the Project will not further degrade water quality in the Project region. According to the DEIR/EA, "[g]round disturbance related to construction of the Project could potentially degrade water quality through the inadvertent release of residual pesticides from former agricultural lands."[105] Mr. Hagemann explains that, "[t]he release of residual pesticides from construction could further degrade water quality in the region of the Project."[106] Currently, the Palo Verde Outfall Drain and Lagoon are listed as impaired water bodies, pursuant to section 303(d) of the Clean Water Act ("CWA").[107] Reflecting the historical agricultural uses prevalent in the Colorado River Region, the "US EPA has stated a Total Maximum Daily Load ("TMDL") is needed to reduce loading of DDT to the Palo Verde Outfall Drain."[108] Although the disturbance of contaminated soil may result in the release of pesticides, the DEIR/EA does not address any mitigation related to the DDT contamination that may be present at the Project site due to prolonged agricultural use.

The DEIR/EA proposes mitigation measures that are completely unrelated to the water quality degradation from inadvertent releases of pesticides.[109] The DEIR/EA points to Best Management Practice ("BMP") – 9 for the conclusion that water quality at the Project site will not be degraded during construction, stating "it is not anticipated that construction activities for the proposed Project would release hazardous materials, substances, or waste."[110] However, BMP-9 relates to the maintenance of vehicles. The stated purpose of BMP-9 is to ensure that no oil or petroleum products leak from vehicles at the Project site. Though this mitigation measure may prevent the contamination of stormwater runoff during construction, it is unclear how vehicle maintenance would address the release of residual pesticides during ground disturbing activities. The DEIR/EA lacks substantial evidence to support its determination that releases of pesticides related to ground disturbing activity will be mitigated to a less than significant level. A revised DEIR/EIS is required to fully identify the impacts the Project may have on the Palo

[105] DIER/EA, p. 4-232.
[106] SWAPE comments, p. 15.
[107] *Id.*
[108] *Id.*
[109] *Id.*, p. 16.
[110] DIER/EA, p. 4-233.

Verde Outfall Drain and Lagoon, and propose mitigation measures sufficient to reduce those impacts to a level of insignificance.

B. The DEIR/EA Fails to Adequately Disclose and Mitigate Public Health Impacts Associated with Project Construction

The DEIR/EA fails to fully disclose the extent of potential impacts associated with Valley Fever, and fails to implement measures sufficient to mitigate associated impacts to public health. According to the DEIR/EA, "[w]hile the potential for a direct impact could occur during construction in association with exposure of workers to Valley Fever spores, a dust abatement plan as required by the [Mojave Desert Air Quality Management District] MDAQMD would minimize the spread of fungal spores, thereby reducing potential for contracting Valley Fever during construction."[111] The DEIR/EA's analysis and conclusion are misleading and insufficient for reasons.

First, the DEIR/EA assumes, without substantial evidence, that only construction workers will be exposed to Valley Fever spores during construction. However, "[t]he potentially exposed population is much larger than construction workers on or adjacent to the Project site because dust generated during Project construction will carry the very small spores – 0.002 – 0.005 millimeters in diameter – into other areas, potentially exposing large non-Project related populations."[112] Given that Riverside County is an area in which Valley Fever is endemic, no known cure for this debilitating disease exists, and the disease is presumed to be significantly more active during drought periods, such as the one California is currently facing, [113] sufficient mitigation measures are essential to ensure the safety of the public.

Second, the DEIR/EA proposes insufficient mitigation measures to address the impacts associated with Valley Fever. Mr. Hagemann points out that the Dust Management Plan envisioned by MDAQMD Rule 403 is insufficient to address impacts related to Valley Fever because of the difference in particle size between the Valley Fever Spores and dust that would be released during Project construction.[114] Due to this difference, even if the air at the Project site appears to be clear of dust, Valley Fever spores, which are so small that they are undetectable

[111] *Id.*, p. 4 – 215.
[112] SWAPE comments, p. 10.
[113] *Id.*, pp. 8 - 12.
[114] *Id.*, p. 10.

by the human eye, may likely be present.[115] Accordingly, specific mitigation measures that are designed to prevent the contraction of Valley Fever are required.

Third, "[i]n the past few years, several incidences of severe dust storms and reported cases of Valley Fever occurred during construction of photovoltaic energy projects."[116] A dust storm during the construction of Antelope Valley Solar Ranch One in Kern County, "led to complaints of respiratory distress by local residents and a concern of Valley Fever."[117] Furthermore, during the construction of Topaz Solar Farm and California Valley Solar Ranch, 28 construction workers contracted Valley Fever.[118] The County and the BLM must disclose these Project-specific aspects of development, and implement sufficient mitigation measures to protect construction workers and nearby residents.

Fourth, the DEIR/EA fails to disclose and evaluate the disproportionate impact the Project may have on prison inmates. The Project is located approximately 10 miles from Chuckwalla State Penitentiary.[119] Mr. Hagemann states, "Valley Fever has been blamed for 62 deaths among California prison inmates statewide. Annually, 200 prisoners are hospitalized 5,000 days for treatment of Valley Fever conditions at an estimated care cost of about $23.4 million."[120] Last year, 103 corrections facility personnel suffered Valley Fever related illnesses, and three corrections workers were killed by the epidemic.[121] The County and the BLM are required to fully identify the significant public health impacts associated with Valley Fever, and to propose mitigation measures specific to preventing Riverside County residents, local prison populations and construction workers at the Project site from contracting Valley Fever.

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[115] *Id.*, p. 12.
[116] SWAPE, p. 11.
[117] *Id.*
[118] *Id.*
[119] *See* SWAPE comments, p. 11. *See also* Google Earth Image of Prison**. Attachment D**.
[120] *Id.*
[121] Don Thompson, *Study: Valley Fever has Killed 3 Prison Workers, 103 Sickened*, THE FRESNO BEE, (February 6, 2014). **Attachment E.**

C. The DEIR/EA Fails to Disclose and Mitigate Impacts to Ephemeral Streams that are Located on the Project Site and Transmission Line Route, and Impacts Associated with Project Construction

According to the DEIR/EA, "[c]onstruction of the proposed Project would not permanently alter the course of any of the drainages."[122] However, the DEIR/EA continues, "one gen-tie pole would be within the potential ordinary high water mark of the drainage."[123] Consequently, the placement of gen-tie pole will alter the flow of water at the Project site. The DEIR/EA not only fails to disclose the fact that this impact may be significant, but the DEIR/EA also fails to provide any information, evidence or data to support its conclusory determination that construction directly in an ephemeral stream will have no impacts on drainage at the Project site. The DEIR/EA's reasoning is faulty and inadequate.

Furthermore, the DEIR/EA discusses impacts associated with Project construction that may pose impacts to drainage at the site of the solar array. However, the DEIR/EA fails to address, analyze, mitigate, or provide any evidence at all for its conclusion that the Project will not have a significant impact on drainage. The DEIR/EA explains,

> Grading could potentially alter naturally occurring drainage patterns and result in soil erosion, sedimentation, long-term siltation, and increased stormwater runoff, which increases the potential for flooding off-site or downstream of the construction areas. However, the Project area is relatively flat and would not require mass grading for construction purposes. The majority of the existing topography at the Project area would be maintained and, therefore, no added storm drainage control would be required outside of the substations and switching station.[124]

Although the DEIR/EA states that the Project site is relatively flat, Project construction will require a significant amount of trenching and grading, as discussed previously in these comments. Roads will be located every 200 feet, and several of the Project components require excavation of approximately 3 feet in various areas that have not been disclosed. Until more is known and substantial evidence is produced to support the DEIR/EA's conclusions, the County and the

[122] DEIR/EA, p. 4 – 232.
[123] *Id.*, p. 4-233.
[124] DEIR/EA, p. 4 – 233.

BLM may not certify and approve the DEIR/EA. The County and the BLM must specify how the Project will avoid the washes and make these design features enforceable through the Project's conditions of approval.

D. The DEIR/EA Fails to Sufficiently Disclose, Analyze and Mitigate Impacts on Water Supply

The Project assumes the existence of an entitlement in existence for the use of PVID water. According to the DEIR/EA, "Project construction will require approximately 1,345 acre-feet ("AF") of water (451 AF per year) for dust control,[125] and operational non-potable water requirements would be approximately up to 345 AF/year."[126] However, the Project has not secured a water source.

The DEIR/EA continues, "[t]he Project ***would*** coordinate with Gila Farm Land, LLC (landowner) and the Palo Verde Irrigation District ["PVID"] to secure water service and supply during operation."[127] After stating that water service must still be secured, the DEIR/EA proceeds to assume the existence of an entitlement not in effect: "Water for the Project would be taken from existing PVID water entitlements that support the agricultural operations currently on the proposed solar facility site."[128] However, the DEIR/EA fails to provide evidence sufficient to support the claim that the Applicant has secured an entitlement to PVID water.

In the alternative, if the Applicant has received an entitlement to use PVID water, the water will be provided in violation of both state and federal law because PVID water is not approved for industrial uses.[129] The use of Colorado River water has been fully adjudicated under a system of treaties, agreements, and contracts with the Department of Interior, and other Colorado River Basin states.[130] Under this system of treaties, agreements, and contracts, PVID water is to be used for irrigation purposes and potable uses.[131] The Water Supply Assessment for the Project states,

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[125] *Id.*, p. 2 – 12.
[126] *Id.*, p. 2- 19.
[127] *Id.*
[128] *Id.*, p. 4 – 234 *emphasis added*.
[129] *See* 43 U.S.C. §§ 617 *et al. See also*, BOULDER CANYON PROJECT, Agreement: Requesting Apportionment of California's Share of the Waters of the Colorado River Among the Applicants in the State (August 18, 1931). **Attachment F.**
[130] *See* 43 U.S.C. §§ 617 *et al.*; *see also Arizona v. California*, 373 U.S. 546 (1963).
[131] EIR/EA, . P. 3 – 179; *see also* http://pvid.org/history.html.

> The PVID water supply is derived from its Colorado River contract. The PVID holds the Priority 1 rights to California's share of Colorado River water, and a shared portion of the Priority 3 rights, and their rights are not quantified by volume. Rather, the PVID's water use is defined by the irrigation water needed to serve a total of 104,500 acres in the Palo Verde Valley, and an additional 16,000 acres on the Palo Verde Mesa.[132]

Because the use of PVID water is limited to irrigation and potable uses, the water may not be used to support industrial development. The Project must obtain a water source sufficient to serve the Project, and identify, analyze and mitigate the impacts of the Project on that water body. The County is required to produce and circulate a DEIR/DEIS that adequately sets forth and analyzes Project impacts on a water source that may legally satisfy the Project's non-potable water needs.

E. The County and the BLM Lack Substantial Evidence to Support their Claim that Air Impacts Associated with Project Construction Will be Mitigated Below a Level of Significance

The DEIR/EA lacks substantial evidence to support its claim that Project construction will not have a significant impact on air quality. According to air quality expert, Anders Sutherland, the Project, "poses two potentially significant impacts to air quality: (1) generation of PM 10 emissions during construction are above the threshold (2) emissions of diesel particulate matter ["DPM"] during construction would pose health risks to nearby residents."[133] Because the DEIR/EA incorrectly determines that the Project will not pose a significant impact to air quality, a new DEIR/DEIS is required to address, analyze and significant air quality impacts.

i. *The DEIR/EA Bases its Determination that the Project Will Not Result in Significant Impacts Related to PM-10 Emissions on Faulty Data*

The DEIR/EA incorrectly estimates the daily fugitive dust emissions generated by Project construction to be below the threshold-of-significance for particulate matter ("PM").[134] According to MDQAMD thresholds, any emissions of

[132] Water Supply Assessment, DEIR/EA: Appendix G, p. 9.
[133] Swape comments, p. 16.
[134] DEIR/EA, p. 4- 71.

PM above 82 pounds per day (lb/day) are significant.[135] The conclusions reached in the Air Quality Technical Report ("AQTR") are faulty and not backed by substantial evidence.

The AQTR makes its determination of insignificance by misconstruing the results of a paper produced by Midwest Research Institute ("MRI"), nearly 15 years ago. In doing so, the AQTR anticipates that Project fugitive dust control measures, solely represented by watering the Project site three times daily, will have a 75% efficiency rating in fugitive dust reduction. Based on this conclusion, the AQTR sets PM construction emissions at 41.82 lb/day.[136] This conclusion is inaccurate and misleading.

The information in the MRI paper was based on a case study from Clark County, NV ("study"). The study estimated emissions from construction activities, track-out, and wind erosion. The study concluded that overall, control efficiency for PM emissions was at 50%, whereas, mitigation measures specifically applied to the "track-out" were higher, at 75%.[137] The DEIR/EA incorrectly applied the higher value to all construction emissions, rather than just "track-out".

The DEIR/EA evaluates emissions from numerous sources, and therefore, the 75% efficiency rating is inapplicable to the totality of emissions sources. The AQTR evaluates emissions associated with wrecking, excavation, grading, clearing of land, and solid waste disposal operations, as well as scraping, backfilling and compacting.[138] However, none of these activities are accounted for in the "track-out" efficiency emissions estimate of 75% that the AQTR applied to the whole of Project construction emissions. When correcting for this oversight by applying the 50% control efficiency rating actually used by the MRI study, air expert, Anders Sutherland calculated PM emissions at 83.64 lb/day. [139] The corrected value exceeds the MDAQMD threshold-of-significance of 82 lb/day. Accordingly, an updated DEIR/DEIS that corrects this miscalculation, identifies a significant impact and identifies further mitigation measures for PM abatement is required.

[135] SWAPE comments, p. 17.
[136] *Id.*, pp. 16 – 18.
[137] *Id.,* pp. 17-18.
[138] DEIR, p. 4 -20.
[139] SWAPE comments, pp. 17-18.

ii. *The DEIR/EA Failed to Evaluate DPM Emissions Impacts on Sensitive Receptors in Reaching its Determination of Significance*

The DEIR/EA's conclusion that the Project will not result in increased cancer rates to sensitive receptors is not supported by substantial evidence. The DEIR/EA fails to address impacts to childhood receptors, and therefore, reaches an inaccurate conclusion in the AQTR.

The AQTR in Appendix B to the DEIR/EA supposedly provides a "worst case analysis of the potential for TAC impacts to sensitive receptors."[140] However, as Mr. Sutherland points out, the "statement is unfounded because the screening health risk assessment ['HRA'] in the AQTR did not consider DPM exposures to children who inhabit nearby residences."[141] Because childhood receptors are more susceptible than adults, a heightened multiplier is used in estimating carcinogenic exposures to air pollutants.[142] Mr. Sutherland determined that a new calculation was required based on this oversight.

Accordingly, Mr. Sutherland reconstructed the HRA in accordance with what the worst case scenario would actually be, using the most recent version of screening methodologies recommended by the Federal EPA.[143] By applying AERSCREEN, which has been used since 2006 due to enhanced simulation models,[144] Mr. Sutherland determined that over the course of the three year construction period, the Project would result in an excess childhood cancer risk of 17.1 in one million. This vastly exceeds the applicable MDAQMD threshold-of-significance of 10 in one million. The County must produce and recirculate an updated DEIR/DEIS that identifies, analyzes and mitigates significant air quality and public health impacts to sensitive receptors.

[140] *Air Quality Technical Report*, DEIR/EA Appendix B, p. 46.
[141] SWAPE comments, p. 18.
[142] *Id.*
[143] *Id.*
[144] *Id.*

F. The County and the BLM Lack Substantial Evidence to Support their Conclusion that Impacts to Biological Resources Have Been Mitigated Below a Level of Significance

i. *The County Lacks Substantial Evidence to Support its Conclusion that Impacts to Burrowing Owls will Be Mitigated Below a Level of Significance and Fails to Evaluate Impacts Associated with Proposed Mitigation*

The DEIR/EA proposes mitigation in the form of buffers at burrowing owl burrows and translocation of burrowing owls to adjacent sites to compensate for impacts to burrowing owl habitat. However, as Scott Cashen, a field biologist with over 20 years of experience, points out, the DEIR/EA's mitigation measures and analysis falls short for four reasons.

First, the DEIR/EA incorrectly states that the 146 acres identified as compensatory habitat would fully mitigate Project impacts to burrowing owl habitat. Mr. Cashen finds the DEIR/EA's conclusion is unjustified, because the Project site will impact approximately 1,970 acres of burrowing owl habitat. He states, "[t]he minimum habitat replacement recommendations issued by the California Burrowing Owl Consortium over 20 years ago are no longer accepted by the CDFW because they have proven **ineffective** in the conservation of burrowing owls."[145] Accordingly, California Department of Fish and Wildlife ("CDFW") now recommends "replacement with an equivalent or greater habitat area."[146] Mr. Cahsen concurs with the CDFW's determination, "especially given the importance that the burrowing owl population in the Palo Verde Valley has to the statewide conservation of the species."[147]

Second, the compensatory habitat identified is wholly insufficient. Mr. Cashen's investigation of the identified parcels proposed for compensatory habitat demonstrates their glaring inadequacy for burrowing owl occupation. The sites identified appear to be barren land, road shoulder, or currently occupied by human residences.[148] "[T]hese sites do not have any value for the conservation of

[145] Cashen comments, pp. 11 – 12.
[146] CDFW 2012 Staff Report on Burrowing Owl Mitigation.
[147] Cashen comments, p. 13.
[148] *See* Cahsen comments, Figures 7 – 12.

burrowing owls," because they "appear to lack the attributes that would make them suitable for burrowing owl occupancy."[149]

Third, the DEIR/EA proposes reduced buffer distances, which contain "several flaws and do[] not ensure effective burrowing owl mitigation."[150] The DEIR/EA does not provide substantial evidence that reduced buffers will be effective at reducing impacts to burrowing owls. Mr. Cashen believes that "there is already evidence that the buffers should not be reduced."[151] He explains that whether a buffer is eligible for reduction is based on the level of disturbance and the sensitivity of the owls at the Project site.[152] The Burrowing Owl Study reported the relative sensitivity of the burrowing owls at the Project site. For example, the field biologist conducting surveys reported, "[t]he burrowing owls occupying Area 2 were easily distressed and would flush and call to one another whenever biologists entered the vicinity."[153] Furthermore, the noise associated with construction activity presents a high level of disturbance. Mr. Cashen concludes, "[t]he combination of these two factors makes it inappropriate for the County and BLM to experiment with reduced buffer distances."[154]

Finally, the DEIR/EA fails to identify and analyze any impacts associated with mitigation measures. The DEIR/EA indicates that the Project may involve the passive relocation of burrowing owls to compensatory mitigation habitat, or the eviction of burrowing owls. "Consistent with California Department of Fish and Wildlife guidelines, passive relation is a potentially significant impact under CEQA that must be analyzed."[155] The County and BLM are required to, but have not, identified or analyzed impacts, such as increased stress, reduced reproduction rates and increased depredation, associated with passive relocation. The County is required to disclose and analyze these impacts, and implement sufficient mitigation in an updated and recirculated DEIR/DEIS.

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[149] Cashen comments, p. 13.
[150] *Id.*, p. 11.
[151] *Id.*
[152] *Id.*
[153] Western burrowing Owl Survey, p. 10.
[154] Cashen comments, p. 11.
[155] *Id.*, p. 4.

ii. *The Mitigation Measures for Impacts to Avian and Bat Species are Vague, Voluntary, and Unenforceable*

The *Avian and Bat Protection Plan* ("ABPP") presents mitigation measures that are vague and unenforceable, in violation of CEQA. CEQA requires that all feasible mitigation measures be implemented, and "that measures to mitigate or avoid significant effects on the environment are fully enforceable through permit conditions, agreements, or other measures."[156] According to Mr. Cashen, "[t]he ABPP identifies various facility thresholds that *may* trigger adaptive management and additional mitigation."[157] Therefore, the ABPP, "has little, if any value in mitigating Project impacts to birds and bats" due to its untenable triggers and unenforceability.[158] The unmitigated levels of mortality that trigger the adaptive management strategy "equate[] to 1,940 native birds, 145.5 raptors, or 1,455 bats per year."[159] Mr. Cashen calls these levels "unacceptable," and has determined that the ABPP presents an approach that is "not scientifically acceptable."[160]

Mr. Cashen recommends that the Project applicant incorporate the United States Fish and Wildlife Service ("USFWS"), or the National Fish and Wildlife Forensic Laboratory monitoring methods to examine take at a solar facility. Monitoring of avian death at solar facilities is currently required by the California Energy Commission ("CEC"). Yet, as Mr. Cashen demonstrates in his comments, the applicant has failed to adopt sufficient monitoring. The ABPP requires only three years of post-construction fatality monitoring, but fails to identify any specific measures for determining Project-associated avian fatality.[161] Because the DEIR/EA fails to identify tenable triggers for the adaptive management strategy and includes vague and unenforceable mitigation measures, the County must produce an updated DEIR/EA, which incorporates the CEC required monitoring, and specific measures for mitigating impacts to avian species.

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[156] CEQA Guidelines, § 21081.6, subd. b.
[157] Cashen comments, p. 17.
[158] *Id.*
[159] *Id.*
[160] *Id.,* pp. 17-18.
[161] *See id.*

iii. *The DEIR/EA Lacks Sufficient Evidence To Support its Conclusion that Impacts to Mojave Fringe-Toed Lizard Have Been Mitigated and Failed to Identify, Analyze and Implement Mitigation Measures for Cumulative Impacts to Mojave Fringe Toed Lizards*

The DEIR/EA lacks substantial evidence to support its conclusion that the implementation of mitigation measures would reduce impacts to the Mojave fringe-toed lizard to a less than significant level.[162] Mr. Cashen concludes the Project has a considerable contribution to cumulative impacts on Mojave fringe-toed lizards. The "Project's gen-tie line and access road would fragment a relatively large population (or metapopulation) of Mojave fringe-toed lizards in the corner of the species range."[163] Therefore, the Project has the potential to increase the risk of "local extirpation."[164] Mr. Cahsen's conclusion is based on the fact that Mojave fringe-toed lizards have a metapopluation structure, which depends on: (1) the persistence of local populations, (2) the success immigration to and emigration from the popoulation, and (3) movements in and out of the metapopulation.[165]

The DEIR/EA fails to address, analyze and mitigate cumulative impacts to which the Project has a considerable contribution. Mr. Cashen points out in his comments that the proposed mitigation measures, "would be limited to attempts to reduce impacts to the Mojave fringe-toed lizard and its habitat; they do not offset the impacts identified in the DEIR/DEA's analyses (e.g., reduced population size, long-term predation vulnerability, and decreased dispersal opportunities)."[166] Accordingly, Mr. Cashen believes that the Project's incremental contribution to cumulative impacts would have a considerable and unmitigated impact on the persistence of Mojave fringe-toed lizards in the Chuckwalla Valley. The County is required to produce and recirculate the DEIR/DEIS that addresses, analyzes and mitigates cumulative impacts to the Mojave fringe-toed lizard persistence in the Chuckwalla Valley.

[162] *See* DEIR/EA, p. 4-129.
[163] Cashen, p. 5
[164] *Id.*
[165] *Id.*, p. 6.
[166] *Id.*, p. 7.

iv. *The County and the BLM Fails to Set Aside Habitat Compensation for Impacts to Desert Tortoise Habitat in Violation of the NECO Plan and Fails to Identify Impacts Associated with Raven Predation*

The DEIR/EA fails to identify and mitigate Project impacts to the Desert Tortoise for two reasons. First, the DEIR/EA fails to discuss and quantify habitat loss related to the Project. This information is essential to determine whether and what mitigation is required. The Project is located within the NECO Plan Area. "The NECO Plan requires project proponents to provide compensatory mitigation (through land acquisition or a mitigation fee) for impacts to desert tortoise habitat."[167] One acre of compensatory mitigation habitat is required for every one acre disturbed. Although the Project identifies desert tortoise burrows located in the Project APE,[168] the DEIR/EA fails to quantify what area of habitat will be disturbed. Because "[t]he DEIR/EA does not require the Applicant to provide compensatory mitigation for Project impacts to desert tortoise habitat…it does not adhere to the requirements of the NECO [p]lan."[169]

Second, the DEIR/EA does not require a Raven Management Plan, in violation of the USFWS *Renewable Energy Development in the California Desert: Common Raven Predation on the Desert Tortoise* ("Raven Predation Plan").[170] BLM addresses increased predation of tortoises by the common raven in the CDCA.[171] Indeed, "[t]he BLM's biological assessments and the [USFWS] biological opinions for the CDCA plan amendments reiterate the need to address this species and its potential impacts on desert tortoise populations."[172] Accordingly, in 2010, the Raven Predation Plan was developed to address the increase in common raven population and distribution resolution development of renewable energy resources.[173] The Plan includes conservation measures and "mitigation that may reduce or eliminate the opportunity for proliferation of ravens."[174] According to the USFWS and Mr. Cashen, the common raven is a predator of the desert tortoise.

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[167] *Id.*, p. 15.
[168] DEIR/EA, Figure 3.2.4-3
[169] Cashen, p. 15.
[170] *Id*, pp. 15-16.
[171] U.S. Fish and Wildlife, *Renewable Energy Development in the California Desert: Common Raven Predation on the Desert Tortoise*, p. 1 (November 2010). **Attachment G.**
[172] *Id.*
[173] *Id.*
[174] *Id.*

The DEIR/EA notes the following with regards to impacts to Mojave fringe-toed lizards,

> Long-term predation vulnerability may occur due to vegetation loss, which decreases dispersal and refuge opportunities from predators. In addition, increased perching opportunities resulting from construction of the proposed gen-tie line also increases this species' predation vulnerability.

However, the DEIR/EA fails to carry this analysis over to impacts on desert tortoise even though the common raven is a known desert tortoise predator. This oversight results in the DEIR/EA's "fail[ure] to require sufficient mitigation to address the Project's contribution to the local and regional raven population."[175] Therefore, "impacts to the desert tortoise remain potentially significant."[176] To address this issue, the County must require the Applicant to comply with both the NECO Plan and Raven Predation Plan so that issues related to desert tortoise habitat reduction and predation are reduced to a less than significant level, as required by CEQA and NEPA.

v. *The County and the BLM Failed to Disclose, Analyze and Mitigate Significant Impacts to Spade Foot Toad*

The DEIR/EA failed to identify any issues related to Couch's spadefoot. Couch's spadefoot is an extremely rare species, listed as a BLM Sensitive Species and a California Species of Special Concern. As discussed earlier in these comments, Couch's spadefoot has been known to occur in flooded alfalfa fields, and adjacent to irrigated agricultural sites, similar to the Project site. However, the DEIR/EA failed to address any impacts to the species.

According to Mr. Cashen, noise from Project construction has the potential to mimic rainfall, causing the Couch's spadefoot to seek refuge in highly unfavorable conditions that are hot, dry and fatal to adults.[177] Furthermore, "breeding sites used by the Couch's spadefoot are potentially vulnerable to Project disturbance that alters the percolation characteristics of the substrate in a manner that makes pools too short-lived for larvae to attain metamorphosis."[178] Throughout the Project site, there are irrigation ponds, the fate of which is not

[175] *Id.*
[176] *Id.*
[177] Cashen comments, p. 4.
[178] *Id.*

described in the DEIR/EA. If Couch's spadefoot are present near these water sources, or in one of the four ponds adjacent to the Project site, the Couch's spadefoot will be subject to potentially significant impacts that are neither identified, nor mitigated in the DEIR/EA. Accordingly, Mr. Cashen has determined that the Project may have unmitigated significant impacts to Couch's spadefoot, given its extreme rarity.

G. The County and the BLM Lack Substantial Evidence to Support their Conclusion that Project Visual Impacts Will be Less than Significant

The DEIR/EA lacks substantial evidence to support its conclusion that no substantial adverse effects to scenic resources will result from Project development for two reasons. First, the DEIR/EA admits, "I-10 has been identified by the County of Riverside as eligible for designation as a scenic corridor."[179] Indeed, the Riverside County General Plan requires that scenic vistas be preserved, and that distribution lines be relocated from eligible areas.[180] Based on this information, the County formulated Policy C-19.1, the stated purpose of which is to "[p]reserve scenic routes that have exceptional or unique visual features in accordance with Caltrans' Scenic Highways Plan."

The Palo Verde Valley Area Plan ("PVVAP"), which also covers the Project site, contains similar, consistent policies. For instance, PVVAP 10.2 was formulated to, "[e]ncourage the designation of Interstate 10 and US Highway 95 as eligible and subsequently Official Scenic Highways in accordance with the California State Scenic Highway Program." Accordingly, the DEIR/EA evaluated I-10 as a scenic highway.[181] However, "[m]otorists along I-10 would be the closest ground-based viewers" of the Project.[182] As a result, "[t]he public would primarily view the Project area from I-10."[183] Yet, the DEIR/EA concludes that no impacts to visual resources would occur. The DEIR/EA provides no rationale for its conclusion.

Second, the Project would violate the Riverside County General Plan Policy C-25.2. Policy C-25.2 requires that developments "locate new and relocated utilities underground when possible. All remaining utilities shall be located or screened in a

[179] DEIR/EA, p. 4 – 34.
[180] *Id.*, p. 3 – 16.
[181] *Id.*
[182] *Id.*
[183] *Id.*

manner that minimizes their visibility by the public."[184] The Project proposes the construction of an 8.4 mile – 230 kV gen-tie line. Furthermore, various 34.5 kV collection lines will be erected throughout the Project site, which will be above ground, and visible. The Project and its lines will be directly adjacent to and on both sides of I-10. The DEIR/EA provides no evidence for why this Project will not present a visual impact on this potential scenic corridor. The County and the BLM are required to produce and circulate a DEIR/DEIS that identifies significant impacts to scenic resources in Riverside County, and mitigates those impacts.

VI. THE COUNTY IMPERMISSIBLY DEFERS FORMULATING MITIGATION MEASURES FOR IMPACTS RELATED TO STORMWATER IN VIOLATION OF CEQA; THE BLM FAILS TO INCLUDE A REASONABLY COMPLETE DISCUSSION OF SUCH MITIGATION IN VIOLATION OF NEPA

The DEIR/EA defers preparation of a plan designed to minimize impacts to drainage and impacts from stormwater run-off until after Project approval. The DEIR/EA also fails to include a reasonably complete discussion of these mitigation measures. Without definite enforceable mitigation measures, the public and decision makers cannot assess whether impacts on drainage and hydrology will remain significant during the public review process. Deferral of the formulation of mitigation measures to post-approval studies is generally impermissible under CEQA.[185] An agency may only defer the formulation of mitigation measures when it "recognizes the significance of the potential environmental effect, commits itself to mitigating the impact, and articulates specific performance criteria for the future mitigation."[186] "A study conducted after approval of a project will inevitably have a diminished influence on decision making. Even if the study is subjected to administrative approval, it is analogous to the sort of post hoc rationalization of agency action that has been repeatedly condemned in decisions constructing CEQA."[187]

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[184] DEIR/EA, p. 3 – 16.
[185] *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 307 (hereafter *Sundstorm*); *see also* CEQA Guidelines, § 15126.4, subd. (a)(1)(B).
[186] G*entry v. Murietta* (1995) 36 Cal.App.4th 1359, 1411 citing *Sacramento Old County Assn. v. County Council* (1991) 229 Cal.App.3d 1011, 1028-1029.
[187] *Sundstrom,* 202 Cal.App.3d at 307.

NEPA requires "a reasonably complete discussion of possible mitigation measures."[188] Mitigation includes "avoiding the impact altogether by not taking a certain action or parts of an action."[189] It also includes "minimizing impacts by limiting the degree or magnitude of the action and its implementation."[190] The mandate to thoroughly evaluate all feasible mitigation measures is critical to NEPA's purposes.[191] Hence, a "perfunctory description" or a "mere listing" of possible mitigation measures is not adequate to satisfy NEPA's requirements.[192]

The DEIR/EA states that the construction and development of the Project may lead to disruption in drainage rates and drainage patterns.[193] There are two ephemeral streams that are located on the Project site, which may be impacted by pollutants contained in stormwater run-off, by impacts to drainage, or by disturbance of pesticides that contaminate the Project site. These ephemeral streams drain to the Colorado River, which also may be impacted in these same ways. Accordingly, the County and the BLM are requiring the implementation of multiple BMPs to address potential Project impacts.[194] However, the DEIR/EA's discussion is not reasonably complete, as required by NEPA. Also, none of these measures contain performance standards or make approval further contingent on meeting the performance standards, as required by CEQA.[195] The County and the BLM include the formulation of a Stormwater Pollution Prevention Plan ("SWPPP") that defers study of the Project site drainages.[196] The SWPPP BMP requires that the Applicant, "identify site surface water runoff patterns and include measures that prevent excessive and unnatural soil deposition and erosion throughout and downslope of the Project site and Project-related construction areas."[197] This is a blatant deferral of mitigation to post-approval studies in violation of CEQA. This deferral also fails to ensure that the mitigation measures are reasonably described and disclosed in the environmental review document in violation of NEPA. Because the information in the SWPP will only become available after Project approval, the

[188] *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 352 (1989).
[189] 40 C.F.R. § 1508.20(a).
[190] *Id.* § 1508.20(b).
[191] *Id.*, § 1500.1(c).
[192] *Neighbors of Cuddy Mountain*, 137 F.3d at 1380; *Idaho Sporting Cong. v. Thomas*, 137 F.3d 1146, 1151 (9th Cir. 1998).
[193] DEIR/EA, p. 4 – 233.
[194] *Id.*, pp. 2 – 28 – 31.
[195] *Endangered Habitats League v. County of Orange* (4th Dist. 2005), 131 Cal.App.4th 777, 793-94.
[196] DEIR/EA, p. 2 – 28.
[197] *Id.*

requirement to prepare a SWPPP fits the very definition of a post hoc rationalization of an agency action and violates CEQA and NEPA.

VII. CONCLUSION

The Project presents significant environmental impacts that the County and the BLM failed to address in the DEIR/EA, which must be disclosed, analyzed and mitigated in a revised DEIR/DEIS prior to Project approval. The DEIR/EA's Project description is improperly truncated. The DEIR/EA fails to adequately establish the existing setting upon which to measure impacts to biological and hydrological resources. The DEIR/EA also fails to include an adequate analysis of and mitigation measures for the Project's potentially significant impacts. The DEIR/EA's conclusions lack substantial evidence as required by CEQA and NEPA. Finally, the Project is inconsistent with the NECO Plan. The County and the BLM failed to include a reasonable discussion and improperly deferred the formulation of mitigation measures to post-approval studies for drainage and hydrological resources. Due to these significant deficiencies, a revised DEIR/DEIS that addresses these inadequacies must be recirculated.

Sincerely,

Meghan A. Quinn

MAQ:clv

Attachments	
Attachment A	Comments and Attachments, Scott Cashen
Attachment B	Comments and Attachments, SWAPE Consulting
Attachment C	PVID website
Attachment D	Map of Solar Array in Relation to Chuckwalla Prison
Attachment E	News Articles About Increased Valley Fever Rates in Prisons
Attachment F	Boulder Canyon Project Agreement and Boulder Canyon Project Act
Attachment G	U.S. Fish and Wildlife, *Renewable Energy Development in the California Desert: Common Raven Predation on the Desert Tortoise* (November 2010).