

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

eklebaner@adamsbroadwell.com

SACRAMENTO OFFICE

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

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

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

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By: Email and U.S. Mail

Nelson Miller, Contract Planner
County of San Bernardino
Land Use Services Department
Planning Division
15900 Smoke Tree Street, First Floor
Hesperia, CA 92345
Nelson.Miller@lus.sbcounty.gov

Re: Comments on the Initial Studies and Mitigated Negative Declarations ("IS/MNDs") Prepared for the Agincourt and Marathon Solar Projects

Dear Mr. Nelson:

We are writing on behalf of **San Bernardino County Citizens for Responsible Solar** ("Citizens") to provide comments on the IS/MNDs prepared by San Bernardino County for the Agincourt Solar Project and the Marathon Solar Project (collectively, "Projects"). Because the Projects are proposed by the same developer, would be located at a distance of less than one mile from each other, would utilize identical technology, are concurrently undergoing environmental review by the County in accordance with the California Environmental Quality Act ("CEQA")¹ and, therefore, are related and raise similar issues, we have elected to combine our comments on each IS/MND into one comment letter. For your convenience, we provide the County with two copies of our comments in order that they may be filed in each Project file.

Based upon our review of the IS/MNDs and supporting documentation, we conclude that the IS/MNDs fail to comply with CEQA's requirements. Each IS/MND fails to provide a complete and accurate Project description and to set forth an accurate and documented description of the environmental setting for biological

¹ Pub. Resources Code §§ 21000 et seq.
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resources. In addition, both IS/MNDs fail to disclose past uses on and in the vicinity of the Project sites, which are part of the environmental setting and highly relevant to the County's analysis of each Project's potentially significant environmental impacts. These uses include practice bombing exercises conducted by the military and agricultural production activities on and abutting the Project sites. These deficiencies in the IS/MNDs are fatal errors'. As a result, the IS/MND prepared for each Project fails to identify the Project's potentially significant environmental impacts and propose measures that can reduce those impacts to a less than significant level.

As described in these comments, there is more than a fair argument that each Project will result in potentially significant direct and indirect impacts on air quality, biological resources, hydrology, and worker health through exposure to hazards and toxic chemicals that may exist on each Project site. The County may not approve a Conditional Use Permit ("CUP") for either Project until it prepares an Environmental Impact Report ("EIR") that adequately analyzes the Projects' potentially significant direct, indirect and cumulative impacts, and incorporates all feasible mitigation measures to minimize these impacts.

The Projects' impacts must be considered in one EIR. The County violated CEQA by improperly segmenting environmental review of the Projects into two IS/MNDs. The Projects are clearly related, proximate and will result in cumulative impacts on biological, hydrological, and air quality resources, among other impacts.

We prepared these comments with the assistance of air quality, toxics and hydrology experts Matthew Hagemann P.G., C.Hg and Uma Bhandaram, biologist James Cornett B.A. M.S., and technical expert David Marcus. Their technical comments and qualifications are attached hereto and submitted to the County on the IS/MNDs in addition to the comments in this letter. We request that the County address and respond to the comments of Mr. Hagemann and Ms. Bhandaram, Mr. Cornett, and Mr. Marcus separately.

I. STATEMENT OF INTEREST

Citizens is an unincorporated association of individuals and labor unions that are concerned about public and worker health and safety risks and environmental and public service impacts from industrial development. Citizens supports environmentally sound land use and development in the County. Environmentally detrimental projects can jeopardize future jobs by making it more difficult and more

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expensive for business and industry to expand in the region, and by making it less desirable for businesses to locate and people to live there. This reduces future employment opportunities. Indeed, continued degradation can, and has, caused construction moratoria, eliminated protected species and their habitat, consumed limited water resources, and placed added stress on the public service and environmental carrying capacity of the State. Citizens is equally concerned about projects with adverse environmental impacts and which place demands on public service infrastructure without providing countervailing employment and economic benefits to local workers and communities.

Citizens includes Mark Rice, Duane Morris, Joshua Ast, and California Unions for Reliable Energy ("CURE") and its members and their families (collectively, "Members"). Citizens and Members have a strong interest in enforcing environmental laws such as CEQA. Members recognize the potential benefits of solar as a renewable energy source. However, Members are also cognizant of the health and safety and environmental risks associated with the industrial processes and development impacts associated with the Projects.

Members reside, recreate, and work in the Projects' vicinity and may themselves work on the Projects. Members breathe the air whose quality will be degraded by Project construction and enjoy the natural landscapes and biological resources that will be adversely impacted by Project development. Finally, Members who may work on the Project would be first in line to be exposed to any contaminated soils that have not been adequately tested, identified, and remediated, and would also be directly exposed to any other unmitigated safety hazards that may exist onsite. Accordingly, the Projects' environmental impacts will directly affect Citizens' and Members' interests.

II. THE AGINCOURT AND MARATHON SOLAR PROJECTS

The Projects are proposed by the same Project sponsor, WDG Capital Partners ("Applicant"). The Projects are proposed to be sited in the western Mohave Desert, in the southern Lucerne Valley region of San Bernardino County, along a one-mile stretch of Camp Rock Road lying south of State Route 245 and north of State Route 18. Fewer than 2,000 feet separate the Projects.²

² The Agincourt Project is located 1.8 miles north of the State Route 18 and the Marathon Project is located 2.2 miles north of State Route 18. The IS/MNDs do not state whether the distance is measured from the southern boundary of each Project site. Assuming, that the southern boundary of

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Both Projects will utilize photovoltaic ("PV") technology to generate electricity. The PV solar module arrays at each Project site would be mounted on fixed-tilted or single-axis trackers and a racking system supported by embedded piers. The panels at each site would be raised approximately 25 inches above the ground and tilted nearly parallel to the ground. The PV arrays would be aligned in rows in the north-south direction and separated by access ways. The generation facilities proposed as part of the Projects have a combined direct footprint of approximately 200 acres.

The internal site circulation at each Project site would include a 25-foot-wide perimeter gravel road and maintenance roads with access to the solar panels. The primary facility access point for each Project is from Camp Rock Road. Both Projects are proposed to interconnect to a 33 kV distribution line, which runs along Camp Rock Road and connects to the electrical grid at SCE's Cottonwood Substation. The Cottonwood Substation is located approximately two miles south of the Agincourt Solar Project, at the junction of Camp Rock Road and State Route 18. Both Projects are designed to have a useful life of 20 to 30 years, although according to the IS/MNDs, their life span could be extended by upgrades and refurbishments.

A. The Agincourt Solar Project

The Agincourt Solar Project is expected to generate 10 MW (net) and is proposed to be sited on a 79.9-acre site abutting Camp Rock Road, approximately 1.8 miles north of State Route 18. The PV modules proposed as part of the Project are estimated to have a direct footprint of 65 acres. The Project includes the construction of approximately 10 inverters on concrete pads, a switching station, an unmanned communications enclosure, an equipment storage enclosure, and underground collector lines, and site access roads.

B. The Marathon Solar Project

The Marathon Solar Project is expected to generate 20 MW (net) and is proposed to be sited on a 152-acre site abutting Camp Rock Road, approximately 2.2 miles north of State Route 18. The PV modules proposed as part of the Project are

each Project site is located at a distance of .4 miles (2.2-1.8 miles = 0.4 miles), the southern boundary of each site is at a distance of 2,112 feet. Accordingly, the northern boundary of the Agincourt site is less than 2,112 feet from the southern boundary of the Marathon site.

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estimated to have a direct footprint of 130 acres. The Project includes the construction of approximately 20 inverters on concrete pads, a switching station, an unmanned communications enclosure, an equipment storage enclosure, and underground collector lines, and site access roads.

1-11

III. THE PROJECT DESCRIPTION IN EACH IS/MND IS INADEQUATE

The IS/MNDs do not meet CEQA's requirements because they fail to include a complete and accurate project description, rendering the entire impact analysis inherently unreliable. An accurate and complete project description is necessary to perform an evaluation of the potential environmental effects of a proposed project.³ Without a complete project description, the environmental analysis will be impermissibly narrow, thus minimizing the project's impacts and undercutting public review.⁴ The 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]."⁵ Only through an accurate view of the project may affected outsiders and public decision makers balance the proposal's benefit against its environmental costs.⁶

1-12

The IS/MNDs are inadequate because they fail to identify all components of each Project. In particular, each IS/MND excludes from the project description the infrastructure that will be necessary to interconnect each Project to the 33 kV Camp Rock Road distribution line and the transmission upgrades that are necessary to bring the Projects online. As a result, the disturbance acreage identified in each IS/MND is understated. The omission skews the impact analysis for each Project because the IS/MNDs fail to address the biological resources that may be impacted or the additional air pollutant emissions that will be generated during construction of these linear facilities.

1-13

A. The Project Description In Each IS/MND Improperly Excludes The Projects' Interconnecting Transmission

The Project description in each IS/MND is incomplete because it fails to identify the gen ties that will interconnect each Project to SCE's 33 kv line. The

1-14

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

⁴ See *id.*

⁵ *County of Inyo v. County of Los Angeles* (1977) 71 Cal.App.3d 185, 193.

⁶ *Id.* at 192-193.

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pole sites, laydown areas, and pull-sites that will be required to install these facilities will cause ground disturbance, dust generation and noise. As described by James Cornett in his comments, these activities, as well as the operation of the transmission line after construction, have the potential to significantly impact biological resources.⁷ The gen tie line is part of each Project's environmental footprint and must be analyzed as such in an EIR.

1-14

B. The Project Description In Each IS/MND Improperly Excludes the Projects' Downstream Transmission Upgrades

The IS/MNDs fail to identify and analyze the downstream transmission upgrades necessary to support each Project. As described by David Marcus, the Projects require upgrades to the Camp Rock Road line.⁸ The upgrades are part of each Project description because the Projects cannot deliver their generation to the grid absent the upgrades and the upgrades would not be necessary but for the Projects.⁹ The upgrades will result in new physical impacts to the environment, including but not limited to, potential impacts to biological resources and temporary criteria pollutant emissions during construction.¹⁰ The transmission upgrades are part of each Project's environmental footprint and must be analyzed as such in an EIR.

1-15

IV. BOTH IS/MNDS FAIL TO ADEQUATELY DOCUMENT OR DESCRIBE THE ENVIRONMENTAL SETTING

An Initial Study must include a description of the project's environmental setting.¹¹ The description of the environmental setting constitutes the baseline physical conditions by which a lead agency may assess the significance of a project's impacts.¹² As a general matter, the IS/MND must also "disclose the data or evidence upon which person(s) conducting the study relied. Mere conclusions simply provide no vehicle for judicial review."¹³ The IS/MNDs are inadequate because their description of the environmental setting with respect to biological

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⁷ James Cornett Comments (Attachment 1).

⁸ David Marcus Comments (Attachment 2).

⁹ See *id.*

¹⁰ *Ibid.*

¹¹ Cal. Code Regs., §15063 subd. (d)(2) (hereafter "CEQA Guidelines").

¹² CEQA Guidelines, §15125, subd. (a).

¹³ *Citizens Association for Sensible Development of Bishop Area v. County of Inyo* (1985) 172 Cal.App.3d 151, 171.

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resources, existing land uses and hazards is either, incomplete, unsupported, or inaccurate.

A. The Description of the Environmental Setting for Biological Resources in Each IS/MND is Incomplete

Although the existing setting includes natural communities within the vicinity of the Projects, the IS/MNDs improperly limit their description of the existing setting to the immediate Project footprints. The County is required to evaluate the direct, indirect, and cumulative effects of each Project.¹⁴ Indirect effects are changes in the physical environment that occur later in time or farther removed in distance than direct effects.¹⁵ Here, the Project impact area includes lands beyond the immediate Project footprint. As explained by James Cornett in his comments, the natural communities that surround both Projects will be severely impacted by construction and operation activities at each site.¹⁶ Such activities may include noise, dust generation from construction vehicles, and the downslope movement of toxic chemicals, such as fuel and oil.¹⁷ However, the IS/MNDs fail to provide a legally adequate description of existing natural communities, including biological resources, in areas potentially impacted by the Projects. The survey data for each Project site is limited to the immediate Project footprints.

It is a standard practice to conduct surveys at least 100 meters beyond a project site's boundaries, since important biological resources may lie immediately off site.¹⁸ Protocol surveys for special status species, such as the burrowing owl and the desert tortoise, require that surveys be conducted from 150 to 200 meters beyond the site's boundary.¹⁹ Absent survey data for the entirety of the Project impact area, including areas where indirect effects are likely, the County cannot conclude that the Projects' impacts to biological resources have been mitigated to a less than significant level. The Applicant should be required to provide biological baseline data for the entire impact area for each Project site.

¹⁴ See CEQA Guidelines, §15126.2(a).

¹⁵ CEQA Guidelines, §15358(a)(2).

¹⁶ James Cornett Comments at p. 2 (Attachment 1).

¹⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ *Ibid.*

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B. The Descriptions of the Environmental Setting for Special Status Species in the IS/MNDs are Unsupported

“An initial study may rely upon expert opinion supported by facts, technical studies or other substantial evidence to document its findings.”²⁰ The CEQA Guidelines define “substantial evidence” as “enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion.”²¹ “Substantial evidence shall include facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts.” “[U]nsupported opinion or narrative [and] evidence which is clearly inaccurate or erroneous . . . is not substantial evidence.”²²

The County cites to the Biological Resource Reports, Burrowing Owl Surveys, and Desert Tortoise Surveys prepared by the Applicant for each Project site as support for its conclusions regarding the environmental setting for special status species at each site. Relying on this documentation, the Agincourt IS/MND states that no special status species plants or wildlife, except one burrowing owl, were observed during biological surveys.²³ The IS/MND further concludes that impacts to the Desert tortoise are unlikely.²⁴ The County provides a nearly identical analysis in the Marathon IS/MND.^{25, 26}

The County’s description of the environmental setting for special status species at each Project site is inadequate, because it is unsupported. As explained by James Cornett, the Applicant’s studies are so flawed that they do not rise to the level of substantial evidence under CEQA. We provide a brief summary of those errors here.

As an initial matter, it appears that the Applicant’s surveys are false and that protocol tortoise surveys have not been conducted. A comparison of the field surveys conducted for the Agincourt and Marathon sites reveals that the surveys

²⁰ CEQA Guidelines, §15063 subd. (a)(3).

²¹ CEQA Guidelines, §15384.

²² Pub. Resources Code, § 21082.2 subd. (c).

²³ Agincourt IS/MND, at p. 31.

²⁴ *Id.* at p. 32.

²⁵ See Marathon IS/MND, at pp. 30-34.

²⁶ With the exception that a burrowing owl pair and single loggerhead shrike were detected on the Marathon site during site reconnaissance.

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are alleged to have been conducted by the same people and at the same time, at the two Project sites.²⁷ Conflicting field times were given on six different occasions.²⁸

A comparison of the Applicant's biological studies also shows that the same people are alleged to have been conducting different surveys on different sites at the same time. For example, surveyors allegedly conducting Desert tortoise surveys on the Marathon site were, at the same time, conducting native plant surveys on the Agincourt site, and vice versa.²⁹ The data provided in the Applicant's studies is clearly erroneous and does not constitute substantial evidence. It is apparent that if surveys were conducted at all, they were not conducted to protocol, and that insufficient time was dedicated to survey efforts to yield reliable results.³⁰

It also appears that, contrary to at the Applicant's supporting documentation, plant surveys were not conducted for least one of the two Project sites. As explained by James Cornett, the plant tables for each Project site are identical.³¹ It is nearly impossible for two sites to have identical flora.³² Combined with the impossibility that the surveys were conducted by the same people at the same time on different sites, it can reasonably be assumed that one site was not surveyed for plants. As a result, the County lacks substantial evidence to concludes that the Projects will not adversely affect special status plants.

Finally, as described by James Cornett in his comments, the Applicant's biological studies cannot be relied upon as expert analyses. The studies exclude information regarding the academic training and relevant experience of the individuals conducting the fieldwork and are riddled with technical errors.³³ For example, the species assessments included in the studies fail to identify extremely common resident species, including protected species and species that are candidates for listing.³⁴ In addition, the supporting documentation suggests that no snakes, almost no rodents, and no bats occur at either Project site.³⁵ Yet, these animal groups are among the most abundant groups of desert animals. The

²⁷ James Cornett Comments, at p. 4 (Attachment 1).

²⁸ See *ibid.*

²⁹ *Id.* at pp. 4-5.

³⁰ See *id.* at p. 5.

³¹ *Id.* at p. 5.

³² See *id.*

³³ *Id.* at p. 3.

³⁴ *Id.* at p. 6.

³⁵ *Ibid.*

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significant errors and omissions in the Applicant's supporting documentation place the conclusions in the IS/MNDs at issue, strongly suggest that Project sites' value for special status species may be understated and easily raise a fair argument that the Project may result in potentially significant impacts on biological resources.³⁶

1-27

C. The Conclusions in the IS/MNDs Regarding the Project Sites' Potential to Serve as Wildlife Movement Corridors are Unsupported

The Agincourt IS/MND concludes that the Agincourt site is not within an identified wildlife movement corridor and the site's location on the floor of the Lucerne Valley makes the site suboptimal as a regional travel route.³⁷ The County reached the identical conclusions in the Marathon IS/MND.³⁸ However, the conclusions in the IS/MNDs rely on a theoretical model not performed for the Projects.³⁹ Also, no attempt is made in the IS/MNDs, or the underlying documentation, to substantiate the model's applicability to the Project sites in question.

1-28

No attempt was made by the Applicant's consultants to gather evidence that may expose the existence of wildlife corridors at the Project sites. Such investigation should have, at a minimum, included wash sweeping to reveal recent animal tracks.⁴⁰ Ephemeral washes can serve as valuable wildlife movement corridors in the desert, since they are often the only source of water long after a rain event. As a result, the IS/MNDs lack any evidence supporting their claim that the existing conditions do not include wildlife movement corridors.

1-29

Absent data regarding existing conditions at the Project sites, the County lacks substantial evidence to determine the Projects' impacts on wildlife corridors. Furthermore, because the Project sites have washes, which are often used as wildlife corridors, a fair argument can be made that the Projects may result in a significant impact to wildlife corridors.

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³⁶ See *id.* at p. 3.

³⁷ Agincourt IS/MND, at p. 34.

³⁸ See Marathon IS/MND, at p. 34.

³⁹ See James Cornett Comments at p. 7(Attachment 1).

⁴⁰ *Ibid.*

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D. The IS/MNDs Fail to Address the Environmental Setting With Respect to Creosote Rings

The creosote bush enjoys special protection under the County General Plan and Development Code. The San Bernardino County Code prohibits the removal of creosote rings that are 10 feet or greater in diameter.⁴¹ The San Bernardino County General Plan's Conservation Element policies for the County's Desert Region requires "retention of existing native vegetation for new development projects . . . particularly creosote rings."⁴² Although creosote bushes produce large numbers of fuzzy seeds at each flowering, few of them are able to germinate. It takes decades for creosote bushes to return to areas that have been cleared of native shrubs.⁴³ In a few areas of the Mojave Desert, clonal creosote rings have been found that are several yards in diameter. Near Lucerne Valley, "King Clone" has an average diameter of 45 feet.⁴⁴ Using radiocarbon dating and known growth rates of creosote, scientists have estimated the age of "King Clone" as 11,700 years.⁴⁵ King Clone is located less than ten miles east of the Project sites.

The County summarily concluded in the Agincourt IS/MND that because the Project would disturb "less than 80 acres on the floor of the Lucerne Valley," regionally abundant plants would not be substantially affected by the Project.⁴⁶ Similarly, the County summarily concluded in the Marathon IS/MND that regionally abundant plants would not be substantially affected by the Marathon Project, because the Marathon Project would disturb "less than 160 acres on the floor of the Lucerne Valley."⁴⁷ The conclusions are invalid because they are unsupported. Although the creosote bush is protected by County ordinance and the General Plan and the Projects are located in proximity to "one of the most spectacular examples of the phenomenon,"⁴⁸ the IS/MNDs fail to address the presence of creosote rings on the Project sites. A review of the Applicant's documentation confirms that the Applicant made no attempt investigate the presence of creosote rings on the Project sites.

⁴¹ San Bernardino County Code, § 88.01.060 subd. (c)(3).

⁴² San Bernardino County General Plan, Conservation Element, Desert Region Goals and Policies of the Conservation Element, Policy D/CO 1.3.

⁴³ <http://www.nps.gov/jotr/naturescience/creosote.htm>

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*

⁴⁶ Agincourt IS/MND, at p. 31.

⁴⁷ Marathon IS/MND, at p. 31.

⁴⁸ James Cornett Comments, at p. 6 (Attachment 1).
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E. The Agincourt IS/MND Fails to Describe the Environmental Setting With Respect to the Presence of Residual Pesticides at the Project Site

An Initial Study must include a description of the project's environmental setting.⁴⁹ According to the Phase I ESA prepared for the Agincourt Project, the Project site was previously used for agriculture and residual pesticides may be present in the Project site soils.⁵⁰ As explained in the comments of Matt Hagemann and Uma Bhandaram, residual pesticides may pose a serious health risk to workers and site personnel who may be exposed to these substances through dermal contact with the soil and through dust inhalation.⁵¹

The County's failure to disclose past agricultural activities at the Project site and the potential for pesticides to be present in Project soils renders the IS/MND inadequate under CEQA. "A prejudicial abuse of discretion occurs if the failure to include relevant information precludes informed decision making and informed public participation."⁵² The County's failure to identify these potential on-site hazards precludes decision makers and the public from considering the Agincourt Project in its environmental context.

F. The Marathon IS/MND Fails to Disclose the Land Uses In the Vicinity of the Project Site

An Initial Study must include a description of the project's environmental setting.⁵³ The Marathon IS/MND fails to identify the Victorville Precision Bombing Range No. 8 ("Victorville PBR"), which is located approximately 1,000 feet northwest of the Project site.⁵⁴ The Victorville PBR was acquired by the Department of Defense in 1945 and used for bombing practice.⁵⁵ Munitions, including 100-lb practice bombs, spotting charges, and high explosive bombs, were

⁴⁹ CEQA Guidelines, § 15063 subd. (d)(2).

⁵⁰ See Hagemann Comments, at p. 6 (Attachment 3).

⁵¹ *Id.*, at p. 7.

⁵² *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 712; see also *City of Fremont v. San Francisco Bay Area Rapid Transit Dist.* (1995) 34 Cal.App.4th 1780, 1790.

⁵³ CEQA Guidelines, § 15063 subd. (d)(2).

⁵⁴ See Matt Hagemann Comments, at p. 1 (Attachment 3).

⁵⁵ *Id.* at p. 2.

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used at the site from 1942 to 1944.⁵⁶ A 1995 Archive Search Report found a 4,000 pound AN-M56 case and a 100 pound AN-M30 general purpose bomb at the site. As explained in the comments of Matt Hagemann and Uma Bhandaram, although the Victorville PBR is located outside of the Marathon Project site footprint, munitions debris may be found within the Project boundary.⁵⁷ In the case of the Victorville PBR No. 3, munitions debris was found outside of the 3,000-foot range.⁵⁸

The Marathon IS/MND's failure to disclose the Victorville PBR as part of the environmental setting renders the IS/MND inadequate under CEQA. "A prejudicial abuse of discretion occurs if the failure to include relevant information precludes informed decision making and informed public participation."⁵⁹ The County's failure to identify the Victorville PBR in the IS/MND precludes decision makers and the public from considering the Project in its environmental context.

G. The Marathon IS/MND Fails to Identify the Presence of Aboveground Storage Tanks, Electric Transformers, Fuel Containers, and Other Debris at the Project Site

An Initial Study must include a description of the project's environmental setting.⁶⁰ According to the Phase I ESA prepared for the Marathon Project, the Project site contains an aboveground storage tank, electrical transformers, fuel containers, and residential and storage structures among other debris.⁶¹ As described in the comments of Matt Hagemann and Uma Bhandaram, potential risks from the conditions identified in the Marathon Phase I ESA include exposure to chemicals, which are harmful to human health.⁶²

The County's failure to disclose the debris and associated toxics found on the Marathon Project site renders the IS/MND inadequate under CEQA. "A prejudicial abuse of discretion occurs if the failure to include relevant information precludes

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*

⁵⁹ *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 712; see also *City of Fremont v. San Francisco Bay Area Rapid Transit Dist.* (1995) 34 Cal.App.4th 1780, 1790.

⁶⁰ CEQA Guidelines, § 15063 subd. (d)(2).

⁶¹ Marathon Phase I ESA, at p. 4-1.

⁶² Hagemann Comments, at p. 4 (Attachment 3).
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informed decision making and informed public participation.”⁶³ The County’s failure to identify these potential on-site hazards precludes decision makers and the public from considering the Marathon Project in its environmental context.

V. AN ENVIRONMENTAL IMPACT REPORT IS REQUIRED TO SATISFY CEQA’S PURPOSES AND GOALS

CEQA has two basic purposes, neither of which the IS/MNDs satisfy. First, CEQA is designed to inform decision makers and the public about the potential, significant environmental effects of a project.⁶⁴ CEQA requires that lead agencies analyze any project with potentially significant environmental impacts in an environmental impact report (“EIR”).⁶⁵ The purpose of the EIR is to “inform the public and its responsible officials of the environmental consequences of their decisions *before* they are made. Thus, the EIR protects not only the environment, but also informed self-government.”⁶⁶ The EIR has been described as “an environmental ‘alarm bell’ whose purpose it is to alert the public and its responsible officials to environmental changes before they have reached ecological points of no return.”⁶⁷

Second, CEQA directs public agencies to avoid or reduce environmental damage when possible by requiring alternatives or mitigation measures.⁶⁸ The EIR serves to provide public agencies and the public in general, with information about the effect that a proposed project is likely to have on the environment, and to “identify ways that environmental damage can be avoided or significantly reduced.”⁶⁹ If a project has a significant effect on the environment, the agency may approve the project only upon a finding that it has “eliminated or substantially lessened all significant effects on the environment where feasible,” and that any unavoidable significant effects on the environment are “acceptable due to overriding concerns” specified in CEQA section 21081.⁷⁰ The IS/MNDs fail to satisfy the basic

⁶³ *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 712; see also *City of Fremont v. San Francisco Bay Area Rapid Transit Dist.* (1995) 34 Cal.App.4th 1780, 1790.

⁶⁴ CEQA Guidelines, § 15002, subd. (a)(1).

⁶⁵ See Pub. Resources Code, § 21000; CEQA Guidelines, § 15002.

⁶⁶ *Citizens of Goleta Valley v. Bd. of Supervisors* (1990) 52 Cal.3d 553, 564 (citations omitted).

⁶⁷ *County of Inyo v. Yorty* (1973) 32 Cal.App.3d 795, 810.

⁶⁸ CEQA Guidelines, § 15002, subd. (a)(2)-(3); *Berkeley Keep Jets Over the Bay Com. v. Bd. of Port Comrs.* (2001) 91 Cal.App.4th 1344, 1354.

⁶⁹ CEQA Guidelines, § 15002, subd. (a)(2).

⁷⁰ *Ibid.*; CEQA Guidelines § 15092, subd. (b)(2)(A)-(B).

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purposes of CEQA by failing to inform the public and decision makers of the Projects' potentially significant impacts and to propose mitigation measures that can reduce those impacts to a less-than-significant level. The County is required to evaluate the Projects in an EIR.

CEQA's purpose and goals must be met through the preparation of an EIR, except in certain limited circumstances.⁷¹ CEQA contains a strong presumption in favor of requiring a lead agency to prepare an EIR. This presumption is reflected in the "fair argument" standard. Under that standard, a lead agency must prepare an EIR whenever substantial evidence in the whole record before the agency supports a fair argument that a project may have a significant effect on the environment.⁷² The fair argument standard creates a "low threshold" favoring environmental review through an EIR, rather than through issuance of a negative declaration or notices of exemption from CEQA.⁷³ An agency's decision not to require an EIR can be upheld only when there is no credible evidence to the contrary.⁷⁴

A mitigated negative declaration may be prepared instead of an EIR only when, after preparing an Initial Study, a lead agency determines that a project may have a significant effect on the environment, but:

- (1) Revisions in the project plans or proposals made by, or agreed to by, the applicant before the proposed negative declaration and initial study are released for public review would avoid the effects or mitigate the effects to a point where *clearly no significant effect* on the environment would occur; and

⁷¹ See Pub. Resources Code, § 21100.

⁷² Pub. Resources Code § 21082.2; CEQA Guidelines, § 15064(f), (h); *Laurel Heights Improvement Ass'n v. Regents of the University of California* (1993) ("Laurel Heights II") 6 Cal. 4th 1112, 1123; *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal. 3d 68, 75, 82; *Stanislaus Audubon Society, Inc. v. County of Stanislaus* (1995) 33 Cal.App.4th 144, 150-151; *Quail Botanical Gardens Foundation, Inc. v. City of Encinitas* (1994) 29 Cal.App.4th 1597, 1601-1602.

⁷³ *Citizens Action to Serve All Students v. Thornley* (1990) 222 Cal.App.3d 748, 754.

⁷⁴ *Sierra Club v. County of Sonoma*, (1992) 6 Cal.App.4th, 1307, 1318; see also *Friends of "B" Street v. City of Hayward* (1980) 106 Cal.App.3d 988, 1002 ["If there was substantial evidence that the proposed project might have a significant environmental impact, evidence to the contrary is not sufficient to support a decision to dispense with preparation of an [environmental impact report] and adopt a negative declaration, because it could be 'fairly argued' that the project might have a significant environmental impact"].

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- (2) There is no substantial evidence in light of the whole record before the public agency that the project, as revised, may have a significant effect on the environment.⁷⁵

Substantial evidence can be provided by technical experts or members of the public.⁷⁶ “If a lead agency is presented with a fair argument that a project may have a significant effect on the environment, the lead agency shall prepare an EIR even though it may also be presented with other substantial evidence that the project will not have a significant effect.”⁷⁷ The CEQA Guidelines provides that “if there is disagreement among expert opinion supported by facts over the significance of an effect on the environment, the Lead Agency shall treat the effect as significant and shall prepare an EIR.”⁷⁸

As detailed in the following sections, there is a fair argument, supported by substantial evidence that the Projects may result in significant impacts to air quality, biological resources, water resources, and worker safety through exposure to on-site hazards including, but not limited to, unexploded ordnance, residual pesticides and petroleum hydrocarbons. Therefore, the County is required to prepare an EIR to evaluate the Projects’ impacts and propose all mitigation measures that are necessary to reduce those impacts to a less than significant level.

A. Substantial Evidence Supports a Fair Argument That the Marathon Project May Result In Significant, Unmitigated Impacts to Air Quality

An MND is appropriate only where a project’s significant impacts have been avoided or mitigated to a point where “clearly no significant effect on the environment would occur” and there is no substantial evidence in light of the whole

⁷⁵ Pub. Resources Code, § 21064.5.

⁷⁶ See, e.g., *Citizens for Responsible and Open Government v. City of Grand Terrace* (2008) 160 Cal.App.4th 1323, 1340 [substantial evidence regarding noise impacts included public comments at hearings that selected air conditioners are very noisy]; see also *Architectural Heritage Ass’n v. County of Monterey* () 122 Cal.App.4th 1095, 1117-1118 [substantial evidence regarding impacts to historic resource included fact-based testimony of qualified speakers at the public hearing]; *Gabric v. City of Rancho Palos Verdes* (1977) 73 Cal.App.3d 183, 199.

⁷⁷ CEQA Guidelines, § 15062 subd. (f).

⁷⁸ CEQA Guidelines, § 15062 subd. (g).

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record that the Project may have a significant effect on the environment.⁷⁹ The County cannot make either of these findings with respect to the Marathon Project's air quality impacts because the Project will result in significant, unmitigated emissions of oxides of nitrogen ("NOx"), an ozone precursor and regulated air pollutant.

Ozone is also a criteria pollutant, regulated under the state and federal Clean Air Acts.⁸⁰ Ozone is a potential carcinogen and is linked to several adverse health effects:

Exposure to ozone can reduce the respiratory system's ability to remove inhaled particles, increase pulse rate, decrease blood pressure and reduce the body's ability to fight infection. After six hours of exposure a healthy person can have significant reduction of lung function.⁸¹

Short-term exposure to ozone may also lead to temporary irritation of the skin, eyes, upper respiratory system, and mucous membranes.⁸²

In 2012, the U.S. Environmental Protection Agency ("EPA") classified the Western Mohave Desert in severe -15 nonattainment of the federal eight-hour ozone standard.⁸³ The Western Mohave Desert is also classified in non-attainment of state ozone standards by the California Air Resources Board.⁸⁴ The Marathon Project is proposed to be sited in the vicinity of the highest recorded concentrations of ozone within the Western Mohave Desert Ozone Nonattainment Area.⁸⁵

⁷⁹ Pub. Resources Code, § 21064.5.

⁸⁰ Mojave Desert Air Quality Management District Federal 8-Hour Ozone Attainment Plan (Western Mojave Desert Non-Attainment Area), June 9, 2008, at p. 7 (hereafter "2008 Ozone Attainment Plan") (**Attachment 5**).

⁸¹ *Ibid.*

⁸² *See ibid.*

⁸³ District CEQA Guidelines, at p. 3, Table 1; *see also* 77 Fed. Reg. 2,6950 (May 8, 2012); *see also* 40 C.F.R. §81.305 and 2008 Ozone Attainment Plan at p. E-3, Fig. 1.

⁸⁴ District CEQA Guidelines, at p. 3, table 1 (**Attachment 4**).

⁸⁵ The highest historical ozone concentrations within the District were recorded within the southeast portion of the Western Mojave Desert planning area, near the border with the South Coast Air Basin 2008 Ozone Attainment Plan, at p. 8 (hereafter "2008 Ozone Attainment Plan") (**Attachment 5**). The District does not record ozone emissions in Lucerne Valley, however ozone emission are monitored within approximately 35 miles of the Marathon Project site in Hesperia and Victorville. *See* District CEQA Guidelines, at p. 5.

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Ozone can form through a complex system of reactions of hydrocarbons and NO_x in the presence of sunlight.⁸⁶ In order to control ozone emissions, the Mojave Desert Air Quality Management District ("District") also regulates the emission of ozone precursors, including NO_x.⁸⁷ The vast majority of NO_x emissions source from cars, heavy duty trucks, and large off-road vehicles, such as those typically used during construction.⁸⁸

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In the Marathon IS/MND, the County relies on the air quality significance thresholds recommended in former Appendix G of the State CEQA Guidelines.⁸⁹ To determine whether these qualitative significance thresholds may be exceeded, it is common practice for lead agencies to compare project emissions to quantitative significance thresholds developed by local air districts as a screening tool for CEQA review. Thresholds of significance for construction emissions are typically expressed on a short-term basis, i.e., daily or hourly basis to adequately capture impacts due to the high variability of emissions during different construction stages. Here, the County relied on the significance thresholds that were adopted by the District to determine the significance of Project construction emissions.⁹⁰

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Contrary to IS/MND, the Project's construction emissions are significant.⁹¹ Under the District's adopted significance thresholds, any project that emits NO_x at a rate of 137 lbs/day will result in a significant air quality impact.⁹² As demonstrated by Matt Hagemann and Uma Bhandaram, the Marathon Project will exceed District significance threshold for NO_x, with emissions at a rate of 148 lbs/day.⁹³ As such, the Marathon Project's short-term NO_x emissions are significant. The Marathon IS/MND fails to identify the Project's significant emissions of NO_x or propose feasible mitigation measures to reduce the Project's significant emissions of ozone precursors to a less than significant level.

Substantial evidence supports a fair argument that the Marathon Project may result in significant, unmitigated impacts to air quality. The County is

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⁸⁶ 2008 Ozone Attainment Plan, p. 7.

⁸⁷ See *id.* at p. 20.

⁸⁸ See *id.* at pp. 20-21.

⁸⁹ See Marathon IS/MND, at p. 24.

⁹⁰ *Id.* at p. 26.

⁹¹ See Marathon IS/MND, at pp. 25, 27.

⁹² District CEQA Guidelines, at pp. 9-10, Table 6.

⁹³ Matt Hagemann Comments, at p. 11 (Attachment 3).
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required to address the Project's NOx emissions, together with mitigation measures that will reduce emissions to a less than significant level, in an EIR. As described in the comments of Matt Hagemann and Uma Bhandaram, feasible mitigation measures include, but are not limited to, the use of alternative fuels with a lower nitrogen content and implementation of a NOx emission reduction plan for the Project's construction fleet.⁹⁴

1-49

B. Substantial Evidence Supports a Fair Argument That the Marathon Project May Result In Significant, Unmitigated Cumulative Emissions of NOx

As shown by Matt Hagemann and Uma Bhandaram, the Marathon Project is NOx emissions during construction will be cumulatively considerable. The Marathon Project and the Agincourt Project are proposed to be sited less than 2,000 feet apart with potentially simultaneous construction schedules. The Projects' combined NOx emissions exceed the District's daily and annual significance thresholds for NOx.⁹⁵ Because the Marathon Project's contribution to total NOx emissions during construction is significant, the Project's emissions are also cumulatively considerable. The Marathon IS/MND fails to identify the Project's significant emissions of NOx and to propose measures that can reduce emissions to a less than significant level. Substantial evidence supports a fair argument that the Marathon Project may result in cumulatively considerable, unmitigated impacts to air quality. The County is required to address the Project's NOx emissions, together with mitigation measures that will reduce emissions to a less than significant level, in an EIR.

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C. Substantial Evidence Supports a Fair Argument That the Projects May Result in Significant Impacts to the LeConte's Thrasher

The Le Conte's thrasher inhabits some of the hottest and driest habitats in the arid southwest, including the deserts of southeastern California where they occur year-round. Preferred habitats include sparse desert scrub, alkali desert scrub, and desert succulent scrub habitats with open desert washes. This species requires areas with an accumulated leaf litter under most plants as cover for its preferred arthropod prey; they also feed on seeds, insects, small lizards, and other

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⁹⁴ *Id.* at p. 12.

⁹⁵ *Id.* at pp. 12-13.

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small vertebrates. The Le Conte's thrasher population densities are among the lowest of passerine (perching) birds, estimated at less than five birds per square kilometer in optimal habitats.⁹⁶ This low population density decreases the probability of their detection during field surveys.⁹⁷ The population is declining due in part to the conversion of habitat to agriculture and urbanization.⁹⁸ LeConte's thrasher is one of the focal bird species identified by The Desert Bird Conservation Plan that is vulnerable to habitat loss and fragmentation.⁹⁹

As described in the comments of James Cornett, the Project sites provide suitable habitat and the Project's will pose potentially significant impacts to this species.¹⁰⁰ The Applicant's biological consultants failed to adequately address the LeConte's thrasher, erroneously concluding that the thrasher is absent because "saltbush scrub habitat is not present on-site."¹⁰¹ However, as explained by James Cornett, this information relates only to the San Joaquin Valley population of LeConte's thrasher, not populations living in the Mohave Desert. Populations of this species in the Mohave Desert are typically found in "the creosote bush association," plant associations of "mostly cholla and creosote bush" and normally "under creosote bushes."¹⁰² The latter vegetation communities occur on both Project sites.

James Cornett concludes that, based on the known habitat characteristics of the Project sites, it should be assumed that the LeConte's thrasher is present on the Project sites and will be impacted by Project development. Substantial evidence supports a fair argument that the Projects may result in significant, unmitigated impacts to air quality. The County is required to address the Projects' impacts on the LeConte's thrasher, together with mitigation measures that will reduce emissions to a less than significant level, in an EIR.

⁹⁶ Imperial Valley SA/DEIS, p. C.2-27 (Attachment 6).

⁹⁷ *Ibid.*

⁹⁸ *Ibid.*

⁹⁹ *Ibid.*

¹⁰⁰ James Cornett Comments (Attachment 1).

¹⁰¹ *Id.*

¹⁰² *Id.*

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D. Substantial Evidence Supports a Fair Argument That the Projects Will Result in Potentially Significant, Unmitigated Impacts to the Desert Tortoise

The desert tortoise occurs in the Mohave and Sonoran deserts of southeastern California and southern Nevada, and south through Arizona and Mexico. The desert tortoise was listed by the State of California as threatened in 1989 and federally listed as threatened in 1990. Desert tortoises occur in creosote bush scrub, saltbrush scrub, and Joshua tree woodland.¹⁰³ In California, desert tortoises are most often found on level ground, especially adjacent to washes.

In their respective IS/MND, each Project site is described as characterized by creosote bush-white burr sage scrub.¹⁰⁴ The Marathon Project site contains 5.31 acres of unnamed ephemeral washes.¹⁰⁵ The Agincourt Project contains twelve ephemeral washes, totaling approximately 9.15 acres in size.¹⁰⁶ It is undisputed that the acreage comprising both Project sites is suitable habitat for the federally- and state-listed threatened desert tortoise.¹⁰⁷ In addition, evidence of a tortoise carcass found on the Agincourt Project sites suggests that the species has been or still is resident on the site.¹⁰⁸ Indeed, prior surveys conducted within the vicinity of the Project sites have revealed burrows and other tortoise, suggesting the presence of live desert tortoises.¹⁰⁹

The County proposes to mitigate impacts to the tortoise at both Project sites through the implementation of mitigation measures BIO-2, BIO-3 and BIO-7. These measures require the Applicant to implement a worker environmental awareness program, retain a qualified biologist to monitor construction activities, and utilize tortoise exclusion fencing if no live tortoises are found during preconstruction surveys. However, as explained by James Cornett in his comments,

¹⁰³ Lilburn Corporation, Habitat Conservation Plan for the Federally Threatened Desert Tortoise Cushenbury Sand and Gravel Quarry, San Bernardino, California, July 1995, at p. 3 (hereafter "Cushenbury HCP") (**Attachment 7**).

¹⁰⁴ Marathon IS/MND, at p. 30; Agincourt IS/MND, at pp. 30-31.

¹⁰⁵ Marathon IS/MND, at p. 34.

¹⁰⁶ Agincourt IS/MND, at p. 33.

¹⁰⁷ See James Cornett Comments at p. 7 (**Attachment 1**); Marathon Biological Resources Assessment Report, at p. 4-28; Agincourt Biological Resources Assessment Report, at p. 4-32.

¹⁰⁸ See Cushenbury HCP, at p. 3 (**Attachment 7**) and Agincourt Desert Tortoise Survey, at p. ES-1.

¹⁰⁹ *Id.* at p 5.

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the above measures will not reduce impacts to the tortoise to a less than significant level because they fail to compensate for loss of habitat and are otherwise inadequate.¹¹⁰ Habitat compensation is a standard mitigation measure for impacts to lands that are suitable for the tortoise. On past energy projects considered by the Energy Commission and the U.S. Bureau of Land Management, state and federal resource agencies have required a compensation ratio of as much as 3:1 to meet the California Endangered Species Act's full mitigation standard for good quality habitat.¹¹¹ Here too, habitat compensation is required to reduce the Projects' impacts to a less than significant level.¹¹²

Substantial evidence supports a fair argument that the Project may result in significant, unmitigated impacts to the tortoise through loss of suitable habitat. To offset the loss of tortoise habitat, the Applicant should be required to purchase mitigation habitat at a ratio of at least one to one.¹¹³ The County is required to prepare an EIR to address the Projects' impacts on the desert tortoise and its habitat and require the Applicant to secure compensation lands as appropriate.

E. Substantial Evidence Supports a Fair Argument That the Projects Will Result in Potentially Significant, Unmitigated Impacts to the Burrowing Owl

Burrowing owls are a California Species of Special Concern. One nesting pair of owls was detected within the Marathon site¹¹⁴ and two individual owls were detected at the Agincourt site.¹¹⁵ The County proposes to mitigate impacts to burrowing owls through mitigation measures BIO-2 (Worker Environmental Awareness Program), BIO-3 (biological monitor during construction), BIO-9 (pre-construction surveys), BIO-9 (passive relocations), and BIO-10 (implementation of a Burrowing Owl Management Plan). The mitigation proposed in the MND fails to mitigate the Projects impacts to burrowing owls to a less than significant level.

Substantial evidence supports a fair argument that the Projects will result in significant, unmitigated impacts to the owl. The preconstruction surveys required

¹¹⁰ See James Cornett Comments, p. 9.

¹¹¹ See, e. g., California Energy Commission, Staff Environmental Assessment for the Calico Project, (2010) p. C.2-3 (Attachment 8).

¹¹² James Cornett Comments, at p. 7 (Attachment 1).

¹¹³ *Id.*

¹¹⁴ Marathon IS/MND, at p. 32.

¹¹⁵ Agincourt IS/MND, at p. 32.

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by mitigation measure BIO-9 fail to avoid impacts to the owl because the measure allows grading to begin prior to the disposition of owls on-site.¹¹⁶ Additionally, as explained by James Cornett, the measure allows owls to be relocated regardless of breeding status in contravention of the Migratory Bird Act.¹¹⁷ Mitigation measure BIO-10 does not ensure that impacts to owls will be reduced to a less than significant level because it fails to require the acquisition of suitable habitat for off-site mitigation.¹¹⁸ The County is required to prepare an EIR to evaluate the Projects' impacts to burrowing owls and proposes all feasible avoidance and mitigation measures that reduce Project impacts to a less than significant level.

F. Substantial Evidence Supports a Fair Argument That the Projects Will Result in Potentially Significant Impacts to Creosote Bush Rings

Conflicts with any local policies or ordinances protecting biological resources are a potentially significant impact under CEQA.¹¹⁹ Substantial evidence supports a fair argument that the Projects are in conflict with local policies and ordinances regarding the protection of ancient creosote rings. The San Bernardino County Code prohibits the removal of creosote rings that are 10 feet or greater in diameter.¹²⁰ The San Bernardino County General Plan's Conservation Element policies for the Desert Region requires "retention of existing native vegetation for new development projects . . . particularly creosote rings."¹²¹

As described by James Cornett in his comments, creosote rings are known to occur in the Projects' vicinity and there is a possibility that protected creosote rings exist on site.¹²² Indeed, the Projects are proposed to be located in the vicinity of one of the oldest known specimens of this species; the 11,400-year old King Clone.¹²³ If present, these biologically significant features could be lost during grading operations.¹²⁴ The loss of creosote rings would conflict with local ordinances and

¹¹⁶ See James Cornett Comments, at p. 10 (**Attachment 1**).

¹¹⁷ *Ibid.*

¹¹⁸ *Ibid.*

¹¹⁹ CEQA Guidelines, Appendix G; see also Marathon IS/MND, at p. 30; Agincourt IS/MND, at p. 30.

¹²⁰ San Bernardino County Code, § 88.01.060 subd. (c)(3).

¹²¹ San Bernardino County General Plan, Conservation Element, Desert Region Goals and Policies of the Conservation Element, Policy D/CO 1.3.

¹²² James Cornett Comments at pp. 8 (**Attachment 1**).

¹²³ See Citizens Comments, *supra* at § IV.D. We provide an aerial image of King Clone at **Attachment 9**.

¹²⁴ *Ibid.*

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policies protecting biological resources and result in a potentially significant impact under CEQA. The County should require the Applicant to survey the Project sites for creosote rings and the results of the Applicant's surveys, along with all proposed feasible mitigation measures, should be disclosed in an EIR.

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G. Substantial Evidence Supports a Fair Argument That the Projects Will Result in Potentially Significant, Unmitigated Impacts to Desert Native Plants

Conflicts with any local policies or ordinances protecting biological resources are a potentially significant impact under CEQA.¹²⁵ Contrary to IS/MNDs, the Projects are in conflict with local policies and ordinances regarding the protection Joshua trees. The San Bernardino County Code identifies Joshua trees as a regulated tree and plant¹²⁶ and requires transplanting or stockpiling Joshua trees that will be significantly damaged by development wherever possible.¹²⁷ Desert Region Policy 1.3 of the Conservation Element of the San Bernardino County General Plan "require[s] retention of existing . . . Joshua trees" through transplantation standards that follow best nursery practices, among other methods.¹²⁸

The Projects is in conflict with the local ordinances and the County General Plan because proposed mitigation measure BIO-6 will result in the death of the majority of the Joshua trees on the Project sites. Substantial evidence supports a fair argument that the Projects will result in potentially significant impacts to biological resources. As described by James Cornett in his comments, most Joshua trees that are transplanted die.¹²⁹ Mass Joshua tree mortality following transplantation has been recorded at various sites.¹³⁰ For example, 75% of transplanted Joshua trees at a Caltrans project in Yucca Valley were determined to be dead or dying upon inspection.¹³¹

1-67

The low success rate of Joshua tree transplantation efforts is attributed to too much root material being damaged or destroyed during transplantation, as well as

¹²⁵ CEQA Guidelines, Appendix G; *see also* Marathon IS/MND, at p. 30; Agincourt IS/MND, at p. 30.

¹²⁶ San Bernardino County Code §§ 88.01.060 subd. (a) and 88.01.060 subd. (c)(4).

¹²⁷ San Bernardino County Code § 88.01.050 subd. (f)(3)(A).

¹²⁸ San Bernardino County General Plan, Conservation Element, pp. V-44-45.

¹²⁹ James Cornett Comments, at p. 6 (**Attachment 1**).

¹³⁰ *Ibid.*

¹³¹ *Ibid.*

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to translocation to sites where soils are too well drained.¹³² Mitigation measure BIO-6 fails to reduce impacts to Joshua trees because the measure fails to ensure that best nursery practices are followed during transplantation, or to specify criteria for appropriate transplantation sites. Absent these safeguards, the County cannot conclude that the Projects are consistent with local policies and ordinances protecting biological resources and that the Projects' potentially significant impacts to biological resources have been mitigated to a less than significant level.

An EIR is required to address the Projects' impacts on desert native plants, including Joshua trees, as well as the mitigation measures that may reduce to impacts to a less than significant level. In addition to identifying the methods by which Joshua trees are to be transplanted and the appropriate transplantation sites, the mitigation measures proposed in the EIR should require a preconstruction inspection to determine the presence of regulated trees and plants on the Project sites, certification from a Desert Native Plant expert that the proposed tree removal replacement or revegetation activities are appropriate and the posting of a performance bond to ensure the Applicant's completion of the mitigation obligations. These additional measures are consistent with the San Bernardino County Native Tree or Plant Removal Permit Ordinance.¹³³ The EIR should also consider more effective Joshua tree mitigation techniques, such as germinating replacement trees from seed and then planting them at appropriate locations in the vicinity of the Project sites.¹³⁴ This method is reported to have a much higher Joshua tree survival rate than transplantation.¹³⁵

H. Substantial Evidence Supports a Fair Argument That the Projects Will Result in Potentially Significant, Unmitigated Impacts to Water Quality

Both Projects involve construction activities that will impact the ephemeral channels on each Project site, as well as the quality of those waters. The intensive construction activities proposed for each Project site will remove and otherwise impact waters of the State through fill, dust generation, and other activities. These activities include the placement of numerous support structures within ephemeral channels, trenching and road construction.¹³⁶ According to the Marathon IS/MND,

¹³² *Ibid.*

¹³³ See San Bernardino County Code §§ 88.01.050 subds. (c)-(b), (e)(1)-(3).

¹³⁴ See James Cornett Comments, at p. 9 (**Attachment 1**).

¹³⁵ See *ibid.*

¹³⁶ Matt Hagemann Comments, at pp. 9-10 (**Attachment 3**).

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channels located on the Marathon site will be filled and their flows redirected.¹³⁷ According to the Agincourt IS/MND, several washes on the Agincourt Project site will be filled and their flows redirected to larger drainages located on the Project site, and these drainages will be “narrowed and straightened.”¹³⁸

1-70

Substantial evidence supports a fair argument that the aforementioned activities at each Project site will result in potentially significant impacts through unregulated discharges of waste. As described in the comments of Matt Hagemann and Uma Bhandaram, surface waters at each site would be impacted through filling of ephemeral washes, dust generation, and discharge of contaminants, all of which are considered discharges of waste under state law.¹³⁹ As further described in the comments of Matt Hagemann and Uma Bhandaram, residual pesticides and petrochemicals may also become entrained in stormwater runoff and flow offsite.¹⁴⁰ Erosion and runoff of site contaminants will be greatest during construction when soil is disturbed by grading, which is estimated to involve a total of 450,000 cubic yards between the two Projects.¹⁴¹ The IS/MNDs fail to identify these potentially significant impacts and to specify mitigation measures that will reduce these impacts to a less than significant level.

1-71

The County relies on a Draft Water Quality Management Plan, prepared by the Applicant’s consultant, for the conclusion that neither Project will violate water quality standards or waste discharge requirements.¹⁴² The conclusion is unsupported. The Plan does not address the potential soil contaminants that may become entrained in stormwater runoff and flow offsite, including but not limited to residual pesticides, as described in the comments of Matt Hagemann and Uma Bhandaram.¹⁴³ Although each IS/MND assumes that waste discharge will be mitigated to a less than significant level through the Applicant’s conformance with applicable permit requirements under the federal Clean Water Act, the IS/MNDs fail to address fill and other waste discharges that are regulated under state law.¹⁴⁴

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¹³⁷ Marathon IS/MND, at p. 34.

¹³⁸ Agincourt IS/MND, at p. 33.

¹³⁹ Water Code §13050 subd. (d); *see also Lake Madrone Water Dist. v. State Water Resources Control Board* (1989) 209 Cal.App. 3d 163, 169.

¹⁴⁰ *See* Matt Hagemann Comments (Attachment 3).

¹⁴¹ *Ibid.*

¹⁴² *See* Agincourt IS/MND, at p. 55; Marathon IS/MND, at p. 56.

¹⁴³ *See* Citizens Comments, *infra*, §§ V.I-V.K.

¹⁴⁴ *See* Agincourt IS/MND, at p. 55; Marathon IS/MND, at p. 56.

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The California Water Code requires any person discharging waste that could affect the waters of the state to file an application for waste discharge with the relevant regional water board.¹⁴⁵ Individual discharges of waste are regulated by waste discharge requirements, issued by the regional boards based upon mandatory reports filed by dischargers.¹⁴⁶ Reports of waste discharge must specify information regarding the character, location, and volume of the discharge.¹⁴⁷ The waste discharge requirements issued by the regional boards ensure implementation of relevant water quality control plans and the prevention of nuisance conditions.¹⁴⁸

The Agincourt and Marathon IS/MNDs acknowledge that “approval[s]” from the Colorado River Regional Water Quality Control Board (“Board”) are required, but fail to identify the required permits.¹⁴⁹ Contrary to the IS/MNDs, the Applicant’s Jurisdictional Determination Reports for each Project claim that the Board approval will not be necessary if appropriate stream avoidance measures are implemented.¹⁵⁰ The IS/MNDs are unclear as to whether the County is relying on the Jurisdictional Determination Reports or not and whether the Project will obtain the required permits or not. What is clear is that neither IS/MND adequately analyzes the Projects’ development of a power plant in ephemeral washes and other State waters. It is also clear that neither IS/MND proposes mitigation measures addressing discharge of waste into surface water at each Project site. The IS/MNDs simply lack any assurance that at water of the State will not be significantly impacted.

Substantial evidence supports a fair argument that the Projects will result in potentially significant, unmitigated impacts to water quality through unregulated discharge of waste. The County is required to prepare an EIR to address these impacts. The EIR should address potential impacts from hazards and contaminants existent at each Project site, including those associated with past agricultural activities and military training exercises. Finally, the EIR should specify the mitigation measures that will be implemented to ensure that the Projects will not result in potentially significant impacts to water resources through unregulated discharge of waste during construction and operation activities.

¹⁴⁵ See Water Code §§ 13260 et seq.

¹⁴⁶ See Water Code § 13260 subd. (a).

¹⁴⁷ Water Code § 13260 subd. (a); 23 Cal. Code Reg. § 2205.

¹⁴⁸ Water Code § 13263 subd. (a).

¹⁴⁹ See Agincourt IS/MND, at p. 11; Marathon IS/MND, at p. 11.

¹⁵⁰ Agincourt Jurisdictional Determination, at p. 5-1; Marathon Jurisdictional Determination, at p. 5-1.

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I. Substantial Evidence Supports a Fair Argument That the Marathon Project Will Result in Potentially Significant Impacts Due To Worker Exposure to Munitions Debris

Substantial evidence supports a fair argument that the Marathon Project will result in potentially significant, unmitigated impacts to worker health. The Marathon Project site is located approximately 1,000 feet from the Victorville PBR, which was used by the military for bombing practice exercises.¹⁵¹ As described in the comments of Matt Hagemann and Uma Bhandaram, munitions debris is likely to be found within the Project site boundaries.¹⁵² Prior site investigation conducted by the U.S. Army Corps of Engineers at the Victorville PBR concluded that 31 separate instances of munitions debris were found on the Victorville PBR site and high explosives are suspected to have been used.¹⁵³ Although to date no remedial investigation has been conducted at the Victorville PBR and the vicinity, such studies were recommended by both state and federal regulators.¹⁵⁴

1-75

The Marathon IS/MND fails to identify the Victorville PBR or the potential for workers to be exposed to munitions in the Project site soils. The Phase I ESA prepared for the Marathon Project also fails to identify the regulatory history of the Victorville PBR and the potential for past activities to have impacted the Project site.¹⁵⁵ Substantial evidence supports a fair argument that munitions may be found on the Project site¹⁵⁶ and that munitions pose a significant health and safety hazard to workers and onsite personnel.

1-76

The bombs that were found on the Victorville PBR site utilize chemicals such as trinitrotoluene ("TNT") and nitroglycerine.¹⁵⁷ TNT is classified by the EPA as a possible human carcinogen.¹⁵⁸ Primary routes of exposure to TNT are through inhalation and dermal sorption of TNT particulates.¹⁵⁹ Hagemann and Bhandaram conclude that at the Project site, the likely route of exposure would be through

1-77

¹⁵¹ Citizens Comments, *supra*, § IV.F; *see also* Hagemann Comments at p. 2 (Attachment 3).

¹⁵² Hagemann Comments, at p. 2 (Attachment 3).

¹⁵³ *Ibid.*

¹⁵⁴ *Id.* at pp. 1-2.

¹⁵⁵ *See id.* at p. 3.

¹⁵⁶ *See* Citizens Comments, *supra*, § IV.F.

¹⁵⁷ Matt Hagemann Comments at p. 3 (Attachment 3).

¹⁵⁸ *Ibid.*

¹⁵⁹ *Id.* at p. 3.

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contact with contaminated soils.¹⁶⁰ Workers that may be exposed to these toxins can suffer serious adverse health effects, including anemia and abnormal liver function.¹⁶¹

In addition, the munitions debris and unexploded ordnance that may exist on the Marathon Project site may also pose a significant health and safety risk to workers on personnel.¹⁶² The California Department of Toxic Substances Control has found that practice bombs can cause burns and fatal injuries if picked up or otherwise disturbed.¹⁶³ Project construction requires earthmoving activities such as trenching, grading, and excavating. If munitions debris is present on the Project site, it is highly likely that these hazards will be disturbed during construction.

The County is required to prepare an EIR that addresses the Project's potentially significant impacts to workers through exposure to munitions debris in the Project site soils. The County should further require the Applicant to conduct a geophysical and visual survey of the Project site to assess the potential for munitions debris to exist on site and to conduct all necessary remediation before construction activities are commenced. The results of the survey and any sampling should be disclosed in an EIR.

J. Substantial Evidence Supports a Fair Argument That the Marathon Project Will Result in Potentially Significant Impacts Due to Worker Exposure to Residual Toxic Chemicals

The Phase I ESA prepared for the Marathon Project identifies the presence of debris at the Project site, including but not limited to, aboveground storage tanks, electric transformers, fuel containers and an abandoned car.¹⁶⁴ Substantial evidence supports a fair argument that residual chemicals on the Marathon Project site will pose a potentially significant, unmitigated hazard for workers. As detailed in the comments of Matt Hagemann and Uma Bhandaram, potential risks from these conditions include worker exposure to total petroleum hydrocarbons ("TPH") in the Project soils.¹⁶⁵ TPH may affect the central nervous system and can cause

¹⁶⁰ *Id.* at p. 2.

¹⁶¹ *Ibid.*

¹⁶² *Id.* at p. 3.

¹⁶³ *Ibid.*

¹⁶⁴ *See id.*, at pp. 3-4.

¹⁶⁵ *Id.* at p. 4.

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headaches and dizziness.¹⁶⁶ One TPH compound can cause peripheral neuropathy, which manifests in numbness in the feet and legs, while other TPH compounds can adversely affect the blood, the immune system, lungs, skin and eyes.¹⁶⁷

1-80

Based on identified debris at the Project site, Hagemann and Bhandaram also conclude that workers may also be exposed to polychlorinated biphenyls ("PCBs") and pentachlorophenyl.¹⁶⁸ Both chemicals are classified by the EPA as probable human carcinogens.¹⁶⁹ Exposure to PCBs and pentachlorophenyl result in serious, adverse health impacts. It is documented that worker exposure to PCBs has led to skin and eye irritation.¹⁷⁰ PCBs also adversely affect the immune, reproductive, nervous, and endocrine systems.¹⁷¹ Pentachlorophenyl can affect the cardiovascular system.¹⁷² As explained by Hagemann and Bhandaram, construction workers may be exposed to these chemicals through inhalation and dermal contact.¹⁷³ The IS/MND fails to identify the aforementioned hazards or to propose mitigation measures that may protect workers from exposure to hazardous chemicals.

1-81

The County is required to address the presence of residual chemicals at the Marathon Project site in an EIR. The County should further require the Applicant to conduct a Phase II ESA to assess the presence of contaminated soils at the Project site, determine whether the concentrations of hazardous substances exceed health-protective regulatory screening levels, and propose mitigation and avoidance measures to protect workers. The County should also require the Applicant to remove contaminated soils prior to commencing construction.

1-82

1-83

1-84

¹⁶⁶ *Ibid.*

¹⁶⁷ *Ibid.*

¹⁶⁸ *Id.* at p. 5.

¹⁶⁹ *See id.* at p. 5.

¹⁷⁰ *Ibid.*

¹⁷¹ *Ibid.*

¹⁷² *Ibid.*

¹⁷³ *Ibid.*

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K. Substantial Evidence Supports a Fair Argument That Residual Pesticides at the Agincourt Project Site Will Result in Potentially Significant Impacts to Worker Health

The Phase I ESA prepared by the Applicant's consultant for the Agincourt Project discloses that the site was historically used for agriculture.¹⁷⁴ The Phase I ESA further states that "chemical retention in subsurface soils could be of concern" and "based on the historical agricultural use of the property, there is the potential for residual pesticide concentrations in the surface and subsurface soils."¹⁷⁵ Although the Phase I ESA does not identify the types of crops that were grown on the Project site, it is possible that the Project site was used for alfalfa cultivation. Alfalfa has been historically grown in Lucerne Valley.¹⁷⁶ In fact, the region carries the crop's name – the word "lucerne" means "alfalfa" in French.¹⁷⁷

Substantial evidence supports a fair argument that residual pesticides at the Agincourt Project site will result in potentially significant impacts to workers. As described in the comments of Matt Hagemann and Uma Bhandaram, organochlorine pesticides, such as DDT, have been used in alfalfa cultivation.¹⁷⁸ The EPA has determined DDT to be a probable human carcinogen, and the chemical is known to affect the central nervous system.¹⁷⁹ Although DDT was banned in the 1970s, it can persist in the soil for hundreds of years.¹⁸⁰ Construction workers may be exposed to DDT and other residual pesticide at the Agincourt Project site through dermal contact with the soil and dust inhalation.¹⁸¹ Hagemann and Bhandaram conclude that residual pesticides at the Agincourt Project site pose a potentially significant hazard to workers and personnel.¹⁸²

The County is required to address the presence of residual pesticides at the Agincourt Project site in an EIR. The County should further require the Applicant to conduct a Phase II ESA to assess the presence of contaminated soils at the

¹⁷⁴ See Phase I ESA, at pp. 2-3.

¹⁷⁵ *Ibid.*

¹⁷⁶ Matt Hagemann Comments, at p. 6 (Attachment 3).

¹⁷⁷ <http://www.thefreedictionary.com/Lucerne>.

¹⁷⁸ Matt Hagemann Comments, at pp. 6-7 (Attachment 3).

¹⁷⁹ *Ibid.*

¹⁸⁰ *Ibid.*

¹⁸¹ *Ibid.*

¹⁸² See *ibid.*

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Project site, determine whether the concentrations of hazardous substances exceed health-protective regulatory screening levels, and propose mitigation and avoidance measures to protect workers. The County should also require the Applicant to implement all appropriate mitigation measures to reduce the potential for worker exposure to these substances.

1-88

VI. THE COUNTY IMPERMISSIBLY PIECEMEALING ENVIRONMENTAL REVIEW OF THE AGINCOURT AND MARATHON PROJECTS

CEQA prohibits lead agencies from piecemealing a larger project by reviewing portions of the larger project in separate and ostensibly unrelated environmental review documents.¹⁸³ CEQA mandates “that environmental considerations do not become submerged by chopping a large project into many little ones – each with a minimal potential impact on the environment – which cumulatively may have disastrous consequences.”¹⁸⁴ Before approving a project, a lead agency must, therefore, assess the environmental impacts of the whole of the project. This is precisely the error that the County committed in this case.

For example, in the case *Arviv Enterprises v. South Valley Area Planning Commission*, the court rejected an attempt by a housing developer to divide a 21-home development into several smaller pieces – first 5 homes, then 2 homes, then 14 homes, each with successive mitigated negative declarations. The court held that the applicant had improperly described the project and that a single EIR was required to analyze and mitigate the effects of the entire 21-home development. The court found that the significance of an accurate project description is “manifest” where environmental impacts “may be disguised or minimized by filing numerous, serial applications.”¹⁸⁵ Similarly here, the County must prepare an EIR to analyze the impacts of the Marathon and Agincourt Projects as a whole, rather than analyzing each individual facility in separately prepared IS/MNDs.

1-89

¹⁸³ CEQA Guidelines, § 15378, subd. (a); *Burbank-Glendale-Pasadena Airport Authority v. Hensler* (1991) 233 Cal.App.3d 577, 592.

¹⁸⁴ *Bozung v. Local Agency Formation Commission* (1975) 13 Cal.3d 263, 283-84; *City of Santee v. County of San Diego* (1989) 214 Cal.App.3d 1438, 1452; *Citizens Ass’n for Sensible Devel. of Bishop Area v. Inyo* (1985) 172 Cal.App.3d 151, 165-166.

¹⁸⁵ *Arviv Enterprises v. South Valley Area Planning Commission* (2002) 101 Cal.App.4th 1333, 1346; see also *Natural Resources Defense Council v. City of Los Angeles* (2002) 103 Cal.App.4th 268, 284. 2834-008cv

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VII. CONCLUSION

The IS/MNDs are inadequate because they fail to include complete and accurate Project descriptions, set forth the existing environmental setting and identify and mitigate the Projects' potentially significant impacts on air quality, biological resources and public health. Here, the County also lacks substantial evidence to assess the Projects' impacts because the Applicant failed to provide key data on baseline conditions with respect to biological resources at the Project sites, and the information that was provided with respect to hazards extant at each Project site is incomplete and inaccurate. Due to these significant deficiencies in the IS/MNDs and their supporting documentation, the County cannot conclude that the Projects' potentially significant impacts have been mitigated to a less than significant level.

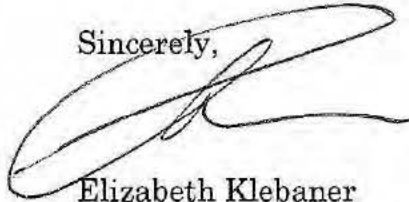
The CEQA Guidelines require that an EIR be prepared if there is substantial evidence supporting a fair argument that any aspect of a project, either individually or cumulatively, may cause a significant effect on the environment, regardless of whether the overall effect of the project is adverse or beneficial.¹⁸⁶ As discussed in detail above, there is substantial evidence that the Projects, collectively and individually would result in significant adverse impacts that were not identified in the IS/MNDs. These include: unmitigated, potentially significant impacts to air quality during construction; unmitigated, potentially significant impacts to special status birds and wildlife, such as the LeConte's thrasher and the desert tortoise; unmitigated, potentially significant impacts to desert native plants that are protected under County ordinances and the San Bernardino General Plan; unmitigated, potentially significant impacts to surface water quality through unregulated waste discharges; and unmitigated, potentially significant impacts to workers from exposure to hazards and toxins at each Project site.

¹⁸⁶ CEQA Guidelines § 15063 subd. (b)(1).
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We urge the County to fulfill its responsibilities under CEQA by withdrawing the IS/MNDs and preparing one EIR, as required, to addresses the issues raised in this comment letter. By complying with State law, the County and the public can ensure that the Projects' significant environmental impacts are mitigated to a less than significant level.

Sincerely,



Elizabeth Klebaner

EK:clv
Attachments (1-9)

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