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March 9, 2016

**VIA E-MAIL AND HAND DELIVERY MAIL**

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**Re: Comments on the Final Consolidated Environmental Impact Report  
for the Willow Springs Solar Array Project (PP10232) (State  
Clearinghouse No. 2010031023)**

Dear Commissioners and Mr. Fehrman :

On behalf of **Kern County Citizens for Responsible Solar**, we submit these comments on the Final Consolidated Environmental Impact Report ("FCEIR") prepared by the County of Kern ("County") for the Willow Springs Solar Array Project ("Project") proposed by Willow Springs Solar, LLC. The Project requires County Zoning Changes, a Specific Plan Amendment and a Conditional Use Permit to allow development of a photovoltaic ("PV") solar power plant with a capacity of 150 megawatts ("MW"), located on a 1,401 acre site over nine parcels. We previously provided comments dated April 13, 2015 on the Project's Draft Environmental Impact Report ("Draft EIR"), comments dated June 24, 2015 on the Project's (uncertified) Final Environmental Impact Report ("Final EIR"), comments

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dated October 19, 2015 on the Project's first Partially Recirculated Draft EIR ("1<sup>st</sup> RDEIR")<sup>1</sup>, and comments dated January 19, 2016 on the Second Partially Recirculated Draft Environmental Impact Report ("2<sup>nd</sup> RDEIR").

While the FCEIR corrects a number of significant errors that were contained in the prior versions of this EIR (such as the failure to disclose evidence of contaminated soils, reliance on another Project's air quality modeling and the failure to acknowledge or mitigate impacts to agricultural resources), it still fails to disclose or meaningfully evaluate significant Project impacts related to biological resources and air quality. It also continues to rely on inadequate mitigation measures to reduce potentially significant impacts to less than significant levels, fails to evaluate feasible mitigation for impacts determined to be significant and unavoidable, fails to support many of its findings with substantial evidence, and fails to adequately respond to comments.

We have reviewed the FCEIR and its appendices with assistance from technical consultants, whose comments and qualifications are attached as follows: Scott Cashen (**Attachment A**) and Petra Pless (**Attachment B**). We incorporate by reference all comments included in these attached expert comments. We also incorporate by reference the comments we submitted on the prior versions of this EIR.

## **I. STATEMENT OF INTEREST**

Kern County Citizens for Responsible Solar is a coalition comprised of individuals (including Rosamond residents, Gary Wilcox and Daniel Wilbour, Mojave residents Gaston Moore, Lorreta Moore and Emilio Pino, and Tehachapi residents Josh Hernandez and Neal Herman), and groups, including California Unions for Reliable Energy and its members and their families. Kern County Citizens for Responsible Solar was formed to advocate for responsible and sustainable solar development that protects the environment where the coalition members and their families live, work, and recreate.

Individual members of Kern County Citizens for Responsible Solar live in and recreate in and around eastern Kern County. They have a personal interest in protecting the Project site from unnecessary, adverse impacts to the area's plants,

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<sup>1</sup> On November 6, 2016, we submitted errata to our comments on the 1<sup>st</sup> RDEIR.



wildlife, air and water resources. These individuals appreciate and enjoy the ecosystem in and around the Project area.

**California Unions for Reliable Energy ("CURE")** is a coalition of labor unions whose members encourage sustainable development of California's energy and natural resources. Environmental degradation destroys cultural and wildlife areas, consumes limited fresh water resources, causes water and air pollution, and imposes other stresses on the environmental carrying capacity of the state. This in turn jeopardizes future development by causing construction moratoriums and otherwise reducing future employment opportunities for CURE's members.

Additionally, union members live, recreate and work in the communities and regions that suffer the impacts of projects that are detrimental to human health and the environment. CURE therefore has a direct interest in enforcing environmental laws to minimize the adverse impacts of projects that would otherwise degrade the environment. Finally, CURE members are concerned about projects that risk serious environmental harm without providing countervailing economic benefits. The CEQA process allows for a balanced consideration of a project's socioeconomic and environmental impacts, and it is in this spirit that we offer these comments.

## **II. THE FINAL EIR FAILS TO DISCLOSE OR ADEQUATELY MITIGATE SIGNIFICANT IMPACTS TO SPECIAL STATUS SPECIES AND FAILS TO SUPPORT ITS FINDINGS WITH SUBSTANTIAL EVIDENCE**

### **A. FCEIR Fails to Adequately Disclose, Evaluate and Mitigate Impacts To Swainson's Hawk**

The County fails to correct in the FCEIR the inaccurate and scientifically unsupported statement that the proposed Project area contains "low-quality foraging habitat for Swainson's hawk."<sup>2</sup> The FCEIR's characterization of the Project site as "low-quality" habitat is highly misleading and conceals the importance of this foraging habitat to the affected Swainson's hawk population.<sup>3</sup> The observation of 15 Swainson's hawks on or within a mile of the Project site

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<sup>2</sup> FCEIR, p. 4.4-16.

<sup>3</sup> Cashen RDEIR Comments, p.4; Ironwood Consulting, Biological Resources Technical Report Willow Springs Solar Array (December 2011) at pp. 20-21.

within the last five years directly contradicts the County's assertion.<sup>4</sup> The County's own consultants identified six active Swainson's hawk nests almost immediately adjacent to the Project site in their focused surveys.<sup>5</sup> These same consultants observed eight Swainson's hawks nesting near and foraging on the Project site.<sup>6</sup> The presence of multiple Swainson's hawk nests adjacent to the Project site confirms that the Project site provides "critical *breeding* resources" for this species, not low quality habitat.<sup>7</sup> Moreover, the known foraging preference for the Swainson's hawks includes exactly the type of land present on the Project site.<sup>8</sup>

In the Response to Comments, the County now attempts to claim that its designation of this habitat as "low quality" did not mean that this habitat was unsuitable or that these species did not utilize the Project site for foraging. Rather, the County states that it only meant that the "land is not as valuable for foraging purposes as actively farmed land and Joshua tree woodlands." This response is inadequate for several reasons.

First, the baseline condition for this Project is "actively farmed land." CEQA guidelines require the baseline to be the environmental setting as it exists at the time the Notice of Preparation ("NOP") is published.<sup>9</sup> The Supreme Court has stated that the reason for looking at conditions at the time of the NOP is so that a "temporary lull or spike in operations that happens to occur at the time environmental review for a new project begins should not depress or elevate the baseline."<sup>10</sup> Otherwise applicants would be encouraged to suspend or increase operations artificially, simply in order to establish a more favorable baseline.<sup>11</sup> Thus, according to established CEQA case law, the proper baseline in this case is the environmental setting as it existed in 2010 when the NOP was issued. In 2010, the property contained actively farmed land, which the FCEIR acknowledges

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<sup>4</sup> RDEIR, p. 4.4-14.

<sup>5</sup> RDEIR, p. 4.4-14.

<sup>6</sup> RDEIR, p. 4.4-14.

<sup>7</sup> Cashen RDEIR Comments, p. 4.

<sup>8</sup> California Energy Commission and Department of Fish and Game, Swainson's Hawk Survey Protocols, Impact Avoidance, and Minimization Measures for Renewable Energy Projects in the Antelope Valley of Los Angeles and Kern Counties, California (June 2, 2010); see also Ironwood Consulting, Biological Resources Technical Report Willow Springs Solar Array (December 2011) at p. 21.

<sup>9</sup> CEQA Guidelines section 15125, subd. (a).

<sup>10</sup> *Communities for a Better Environment v. South Coast Air Quality Management District* (2010) 48 Cal.4th 310, 328.

<sup>11</sup> *Id.*



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provides high quality habitat. Accordingly, the FCEIR characterization of the Project habitat as low quality is not supported and is inconsistent with CEQA baseline review requirements.

Second, the characterization of the habitat as low quality conceals from the public and the decisionmakers that the Project provides foraging habitat that is of high importance to the affected Swainson's hawk population due to its proximity to numerous active nests.<sup>12</sup> The Response to Comments acknowledges that its characterization of the habitat as low quality is not a characterization of whether the habitat provides primary or secondary foraging value for Swainson's hawks. It is precisely the FCEIR's failure to disclose that the Project provides primary foraging habitat for the affected population of Swainson's hawks that conceals the true impacts of the Project and violates CEQA's requirements to disclose the Project setting and the scope of Project impacts.

The FCEIR also lacks substantial evidence to support its characterization of the Project's desert scrub habitat as "low-quality." The FCEIR supports this characterization on two grounds, neither of which is supported by substantial evidence.

First the FCEIR claims that the desert scrub habitat is low quality because it has little shrub or plant diversity and was likely previously disturbed due to agricultural or other purposes in the past based on topography, historical photos and absence of creosote bush or Joshua trees. The claim that this habitat was previously disturbed due to agricultural or other purposes in the past is purely speculative and not supported by any substantial evidence. Our office requested the historical photos referenced by this comment, but the photos provided did not show agricultural or other use of this land. Furthermore, there is no dispute that this habitat is now desert scrub habitat. Even if it did contain low plant diversity, no studies support the claim that low plant diversity results in low quality foraging habitat for Swainson's hawks. To the contrary, Mr. Cashen cites studies showing that Swainson's hawks forage in numerous types of disturbed habitats, including habitats with no plant diversity (e.g., monocultures).<sup>13</sup>

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<sup>12</sup> Briggs CW, B Woodbridge, MW Collopy. 2011. Correlates of Survival in Swainson's Hawks Breeding in Northern California. *Journal of Wildlife Management* 75(6):1307-1314.

<sup>13</sup> Estep JA. 1989. Biology, movements, and habitat relationships of the Swainson's Hawk in the Central Valley of California, 1986-87. Calif. Dept. Fish and Game, Nongame Bird and Mammal Section Report. See also Estep JA. 2013. The Distribution, Abundance, and Habitat Associations of the Swainson's Hawk in the Antelope Valley.

Second, the FCEIR claims that the scrub habitat on the Project site is too dense to provide suitable habitat for Swainson's hawk. As we noted previously, the Applicant's consultant, Ironwood, did not provide any data to suggest the scrub community on-site is too dense for Swainson's hawks to access prey, nor did it provide evidence that scrub density was even measured. An expert's opinion, unsupported by data or facts, does not constitute substantial evidence under CEQA.<sup>14</sup> Moreover, Ironwood's claim is contradicted by the evidence in the record. Photographs provided in the Applicant's 2015 wetland delineation and 2014 BRTR show sparse scrub growth, not dense scrub growth.<sup>15</sup> In addition, Ironwood's biologists observed Swainson's hawks foraging in the desert scrub communities on the Project site – contradicting the claim that they are too dense to provide quality foraging habitat.<sup>16</sup> Furthermore, this claim is directly contradicted by Ironwood in a subsequent portion of its letter. Specifically, Ironwood claimed that transects 30 meters apart (the maximum spacing allowed under the protocol) were sufficient to provide 100% visual coverage of the ground surface for burrowing owls due to the "low shrub density."<sup>17</sup> This contradicts Ironwood's claim that the scrub community provides low quality habitat for Swainson's hawks because it "over grown and very dense"<sup>18</sup>

The Response to Comments did not identify any data or photographs to address these comments. Instead, it simply responded with the statement that "[p]lant density is different for Swainson's hawk and burrowing owl. A biologist can traverse dense vegetation on the ground and be able to detect burrowing owl in a shrub because the burrowing owl does not typically utilize areas of very dense vegetation."<sup>19</sup> The County's response is illogical and does not address the contradiction in Ironwood's reasoning. The scrub community is either dense, and burrowing owl survey transects were spaced too far apart; or the scrub community is not dense, and thus it does not provide low quality habitat for Swainson's hawks.

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<sup>14</sup> *Rominger v. County of Colusa*, 229 Cal. App. 4th 690, 721 (2014).

<sup>15</sup> RDEIR, Appendix M, Exhibit 4 and Appendix A. See also RDEIR, Appendix N.

<sup>16</sup> Cashen Comments, p. 5.

<sup>17</sup> RDEIR, Appendix K, p. 13. [emphasis added].

<sup>18</sup> RDEIR, Appendix R, p. 1.

<sup>19</sup> FCEIR, p. 7.5-353.

For the above stated reasons, the FCEIR fails to adequately disclose the environmental setting of the Project's Swainson's hawk habitat and fails to adequately disclose the scope of the Project's impact on Swainson's hawks.

**B. The FCEIR Lacks Substantial Evidence for Its Conclusion that Direct Impacts to Swainson's Hawk Will Be Mitigated Below a Level of Significance and Fails to Follow Department of Fish & Game Mitigation Protocol**

The incorrect characterization of the Project habitat as providing low quality Swainson's hawk habitat also directly impacts its finding that the proposed mitigation is sufficient to reduce direct impacts to the Swainson's hawk below a level of significance and its finding that the greater mitigation recommended by the California Department of Fish and Wildlife ("CDFW") is not necessary. In 2010, the CDFW and the California Energy Commission ("CEC") evaluated the impacts to the Antelope Valley population of Swainson's hawk from renewable energy projects and issued the following guidance document to mitigate these impacts: *Swainson's Hawk Survey Protocols, Impact Avoidance, and Minimization Measures for Renewable Energy Projects in the Antelope Valley of Los Angeles and Kern Counties, California* ("Swainson's Hawk Protocol").<sup>20</sup> The *Swainson's Hawk Protocol* requires mitigating the loss of Swainson's Hawk foraging habitat due to the conversion of land to solar power plants by providing appropriate compensatory habitat management lands within the Antelope Valley and the Swainson's Hawk breeding range, "at a *minimum* 2:1 ratio."<sup>21</sup>

As our previous comments explained, by use of the term minimum, CDFW has determined that suitable foraging habitat of any quality must be mitigated at a 2:1 ratio, but provides that a higher ratio may be appropriate for habitat that is of particular importance to the Antelope Valley population of Swainson's hawk. The 0.5:1 ratio proposed by Mr. Estep is insufficient and fails to comply with CDFW guidelines for *minimum* replacement ratios – even if they were correct regarding the quality of habitat that will be converted (which, as discussed above, they are not). Likewise, the FDEIR's proposed compensatory mitigation of 1:1 for Project impacts to Swainson's hawk foraging habitat fails to comply with CDFW guidelines

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<sup>20</sup> California Energy Commission and Department of Fish and Game, *Swainson's Hawk Survey Protocols, Impact Avoidance, and Minimization Measures for Renewable Energy Projects in the Antelope Valley of Los Angeles and Kern Counties, California* (June 2, 2010).

<sup>21</sup> *Id.* at p. 8 (emphasis added).



and is not supported by any substantial evidence that would support a finding that it is sufficient to reduce impacts below a level of significance.

The conclusion of the applicant's consultant, Ironwood, that compensatory mitigation at a 0.5:1 ratio is sufficient does not constitute substantial evidence because it is based upon a number of unsupported and incorrect assumptions. These unsupported assumptions include: (1) there are active alfalfa fields and/or other grain fields within the home range of the current hawks' nests; (2) the site is made up of fallow fields and its source of water for agricultural production is severely limited; (3) minimization measures for direct and indirect impacts to the individual birds and their nests are being proposed; and (4) Swainson's hawk in this region are not currently accepted as genetically distinct or completely isolated from the rest of the state's hawk populations. An expert's opinion, unsupported by data or facts, does not constitute substantial evidence under CEQA.<sup>22</sup>

The claim that there are sufficient active alfalfa fields and/or other grain fields within the home range of the current hawks' nests to make the foraging opportunities on the Project site unnecessary is not supported by any evidence or analysis. The Response to Comments repeats this claim but, again, fails to cite to any substantial evidence or analysis in support of this statement. The Response to Comments failure to respond regarding the lack of evidence to support this claim violates CEQA.

The claim that the site is "made up of fallow fields" is incorrect.<sup>23</sup> One-third of the solar facility site is comprised of desert saltbrush scrub, not fallow fields. Furthermore, the baseline condition of the rest of the solar facility site is active agricultural lands – not fallow fields.

Ironwood provides no evidence that the minimization measures for direct and indirect impacts to the individual birds and their nests that are being proposed are sufficient to justify reduction of compensatory mitigation land below the CDFW 2:1 ratio minimum. CDFW guidance requires minimization measures for direct and indirect impacts *in addition to* compensatory mitigation. Furthermore, the FCEIR allows the applicant to remove nest trees as long as removal does not occur between

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<sup>22</sup> *Rominger v. County of Colusa*, 229 Cal. App. 4th 690, 721 (2014).

<sup>23</sup> Cashen RDEIR Comments, p. 27.

October 1 and February 28.<sup>24</sup> This constitutes an indirect impact under CEQA for which no analysis or mitigation measure is proposed.

In addition, MM 4.4-9 fails to protect the threatened population of Swainson's hawk that will be directly impacted by the Project because it allows the replacement habitat to be located within the Central Valley, rather than in Antelope Valley.<sup>25</sup> Although the FCEIR indicates priority should be provided to "replacement habitat" in the Antelope Valley, the FCEIR allows replacement habitat to be located in the Central Valley if compensatory habitat in the Antelope Valley is not available at "commercially reasonable prices." The County provides no parameters identifying what the County considers a "commercially reasonable price" and fails to investigate whether any compensatory habitat would likely be available in Antelope Valley at this undefined price.

Accordingly, the County's proposed mitigation measure is vague and not enforceable. An applicant can choose the Central Valley simply on the grounds that the Antelope Valley prices were slightly more expensive. Mitigation measures providing replacement habitat in the Central Valley do not mitigate significant impacts to Swainson's hawks living in the Antelope Valley, and no evidence has been provided to show otherwise. Even if replacement habitat were found in Antelope Valley, the FCEIR does not require that it be located near enough the affected Swainson's hawk population to offset the loss of foraging habitat on the Project site. The FCEIR thus provides no evidence to support its finding that this mitigation will reduce impacts below a level of significance.<sup>26</sup>

Ironwood also lacks substantial evidence for its assumption that the geographical isolation of the affected Swainson's hawk population is not significant and does not need to be taken into account when determining the appropriate mitigation measures. According to the CEC and CDFW, there is geographical isolation of the Antelope Valley Swainson's hawk population from other breeding populations.<sup>27</sup> This is consistent with information provided in Estep's letter and the FCEIR.<sup>28</sup> The FCEIR cites to no evidence to dispute the findings that the small

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<sup>24</sup> FCEIR, p. 1-67.

<sup>25</sup> FCEIR, p. 1-66.

<sup>26</sup> Cashen RDEIR Comments, p. 27.

<sup>27</sup> State of California, California Energy Commission and Department of Fish and Game. 2010 Jun 2. Swainson's Hawk Survey Protocols, Impact Avoidance, and Minimization Measures for Renewable Energy Projects in the Antelope Valley of Los Angeles and Kern Counties, California.

<sup>28</sup> RDEIR, Appendix P and p. 4.4-13.

number of breeding Swainson's hawks in the Antelope Valley and the potential isolation from other Swainson's hawk populations makes the Antelope Valley population particularly susceptible to "extirpation."<sup>29</sup> To the contrary, Mr. Estep acknowledges the Project would "possibly accelerate the likely abandonment of some of these nesting territories" (i.e., heighten the susceptibility of Swainson's hawks extirpation from the Antelope Valley).<sup>30</sup> Because the Antelope Valley constitutes the southernmost breeding range for the species in California, extirpation would substantially reduce the breeding range in California and have significant implications on recovery of the species.<sup>31</sup>

Compensatory mitigation is only a viable mitigation option if it addresses the impact of concern, which in this case is the abandonment of nesting territories that encompass the Project site.<sup>32</sup> The applicant's own consultant, Mr. Estep, thus expressly recommends compensatory mitigation *in the Antelope Valley*.<sup>33</sup> Because the FCEIR allows the compensatory mitigation to be located in the Central Valley, it does not address the impact of concern raised by Mr. Estep (i.e., territory abandonment in the Antelope Valley).

The FCEIR and Response to Comments also rely on an assessment of how impacts to the species are currently being mitigated by other similar projects in California. While a lead agency may look to mitigation adopted by other projects to help determine what feasible mitigation is available; the fact that other projects use a particular mitigation measure is not substantial evidence that the mitigation would reduce impacts below a level of significance.

In its Response to Comments, the County also claims that the 1:1 ratio is sufficient to reduce impacts below a level of significance because the requirement that the protected management lands consist of native desert scrub, agricultural areas, grasslands with scattered trees, juniper-sage flats, or riparian areas ensures that the land protected is of greater value to the Swainson's hawk than the land being converted. This claim is not supported by substantial evidence.

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<sup>29</sup> State of California, California Energy Commission and Department of Fish and Game. 2010 Jun 2. Swainson's Hawk Survey Protocols, Impact Avoidance, and Minimization Measures for Renewable Energy Projects in the Antelope Valley of Los Angeles and Kern Counties, California.

<sup>30</sup> RDEIR, Appendix P.

<sup>31</sup> Cashen RDEIR Comments.

<sup>32</sup> Cashen RDEIR Comments, p. 29.

<sup>33</sup> Cashen RDEIR Comments, p. 30.



First, the baseline land being converted consists of active agricultural lands, and thus the compensatory management land does not protect higher quality foraging habitat. The same issue exists with the unsupported characterization of the Project's desert scrub habitat as low quality habitat.

Second, the compensatory management land is not required to be in the foraging range of the affected Swainson's hawk population and thus will not protect more important habitat for these hawks. The more important habitat for these hawks is the habitat nearby their active nests.

Even if the proposed mitigation were to protect habitat of greater value to the Swainson's hawk, this would only *reduce* the cumulative impacts to Swainson's hawk. While mitigation easements are helpful to reduce overall cumulative impacts, they only provide partial mitigation since they are only protecting existing habitat, not creating new habitat. The result is still a net loss of habitat adjacent to existing Swainson's hawk nests. In this case the mitigation proposed not only won't create new habitat for the affected hawks, it also is likely it won't even protect any existing habitat within the affected hawk's foraging range since it allows compensatory mitigation to be acquired in the Central Valley. Accordingly, the FCEIR lacks substantial evidence to support its finding that the proposed mitigation would reduce direct impacts to Swainson's hawk below a level of significance.

**C. The FCEIR Lacks Substantial Evidence to Support its Finding that the Project Site Is Not Important Foraging Habitat for the Northern Harrier and Prairie Falcon**

The County fails to correct in the FCEIR the inaccurate and scientifically unsupported statement that the proposed Project area contains low-quality foraging habitat for the northern harrier and prairie falcon. Furthermore, there is no substantial evidence in the record to support a "low-quality determination" for these species. The County's biological consultants never attempted to measure the quality of the habitat for these species.<sup>34</sup> The assertions that the Project site provides low quality habitat are purely speculative, grounded neither in fact nor scientific data.

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<sup>34</sup> Cashen RDEIR Comments, p. 4.

First, this conclusion is inconsistent with the FCEIR's statement that the Project site contains a prey base for raptors.<sup>35</sup> The northern harrier and prairie falcon are raptors.

Second, the evidence in the record demonstrates that the Project site provides exactly the type of habitat associated with northern harrier and prairie falcon foraging activities.<sup>36</sup> Foraging activities for the prairie falcon is associated primarily with perennial grasslands, savannahs, rangeland, some agricultural fields, and desert scrub areas; the very habitat this Project site provides. Northern harriers breed and forage in a variety of open habitats that provide adequate vegetative cover, an abundance of suitable prey, and scattered hunting, plucking, and lookout perches such as shrubs or fence posts.<sup>37</sup> In California, such habitats include grasslands, weed fields, some croplands, sagebrush flats, and desert sinks; again, the very habitat present at the Project site.<sup>38</sup> According to the biological resources consultants for the Antelope Valley Solar Project, just 5 miles west of the Project site, the northern harrier "has a high potential to nest in the tall vegetation in fallow agricultural areas."<sup>39</sup>

Accordingly, the County's conclusion that the site lacks good foraging habitat for these two species is not supported by any scientific data or other substantial evidence.

In its Response to Comments, the FCEIR responds by stating:

[T]he preferred habitat for northern harrier is open habitats that provide adequate vegetative cover, suitable prey base, and scattered perches. Prairie falcons can be found in treeless habitats near high structures such as mountain cliffs or buildings next to grassy parks in cities. Because none of these conditions are found on the project site, the habitat was determined to be low-quality.<sup>40</sup>

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<sup>35</sup> FCEIR, p. 4.4-58.

<sup>36</sup> Cashen RDEIR Comments, p. 11.

<sup>37</sup> Cashen RDEIR Comments, p. 11.

<sup>38</sup> Cashen RDEIR Comments, p. 11.

<sup>39</sup> Kern County. 2012. Addendum to the Environmental Impact Report for the Antelope Valley Solar Project, Appendix A, p. 30.

<sup>40</sup> FCEIR, p. 7.5-352.

The statement that none of these conditions are found on the Project site is not correct. The Project site contains "open habitats that provide adequate vegetative cover, suitable prey base, and scattered perches." The assumption that prairie falcons foraging habitat needs to be near "high structures" is also not supported by substantial evidence and is incorrect.<sup>41</sup> Prairie falcons will travel several kilometers to forage on cultivated or fallow land (a prairie falcon can fly 10 km in less than 7 minutes).<sup>42</sup> Therefore, there is no basis for the County to conclude the Project site provides low quality habitat for prairie falcons.

The finding that the Project will not destroy important foraging habitat for northern harrier and prairie falcon further lacks evidentiary support because these species have, in fact, been found present on the Project site by the County's own biological consultants.<sup>43</sup> The eBird database also contains numerous records of northern harriers and prairie falcons occurring in the Project area, including on the Project site.<sup>44</sup> The failure to disclose and evaluate potential impacts to these species violates CEQA.

**D. The FCEIR Lacks Substantial Evidence to Support its Finding that the Project Site Is Not Important Foraging Habitat for the Ferruginous Hawk**

The FCEIR states the Project site is not important foraging habitat for ferruginous hawks because the species typically uses the majority of California as a non-breeding wintering range. This claim is speculative and not supported by substantial evidence. The fact that the wintering range for ferruginous hawks encompasses the majority of California does not mean ferruginous hawks exist, or are even likely to exist, in the majority of California according to Cashen.<sup>45</sup> The FCEIR fails to take into account that this area of the Antelope Valley has been recognized as providing particularly important foraging habitat to ferruginous

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<sup>41</sup> California Wildlife Habitat Relationships System. 2005 [update]. California Department of Fish and Game. California Interagency Wildlife Task Group. CWHR version 8.1 personal computer program. Sacramento (CA).

<sup>42</sup> Beauvis G, JH Enderson. 1992. Home Range, Habitat Use and Behavior of Prairie Falcons Wintering in East-Central Colorado. *Journal of Raptor Research* 26(1):13-18.

<sup>43</sup> Cashen RDEIR Comments, p.4; Ironwood Consulting, Biological Resources Technical Report Willow Springs Solar Array (December 2011) at pp. 20-21.

<sup>44</sup> eBird. 2015. eBird: An online database of bird distribution and abundance [web application]. eBird, Ithaca, New York. Available at: <<http://www.ebird.org>>. (Accessed: 2016 Mar 8).

<sup>45</sup> Cashen RDEIR Comments, p. 9.



hawks. While ferruginous hawks may be found at times throughout most of California, they are considered by the CDFW to be an "uncommon winter resident and migrant at lower elevations and open grasslands in the Modoc Plateau, Central Valley, and Coast Ranges."<sup>46</sup> In contrast, CDFW designates the ferruginous hawk as "a fairly common winter resident of grasslands and agricultural areas in southwestern California."<sup>47</sup>

The FCEIR also lacks substantial evidence to support its assumption that "there is no evidence to suggest that the [Project] site provides important foraging habitat to ferruginous hawk."<sup>48</sup> To the contrary, twenty-three ferruginous hawk sightings were recorded during the 2010 surveys despite the majority of these surveys being conducted *after* the species had departed California for its breeding grounds.<sup>49</sup> The FEIR attempts to dismiss the significance of these sightings by stating that Ironwood's data was "likely" multiple observations of the same individuals.<sup>50</sup> Ironwood's BRTR, however, provides a brief description of the ferruginous hawks detected during its surveys.<sup>51</sup> Based on that description, Ironwood detected *at least* eight different ferruginous hawks (2 adults and 6 juveniles). It does not matter whether 23 hawks were observed one time each, or if several hawks were observed several times. The relative frequency of ferruginous hawk observations at the Project site - *after* the species had departed California for its breeding grounds - provides evidence that the site provides important foraging habitat.

The importance of this habitat is further confirmed by the eBird database, which has numerous records of ferruginous hawks occurring at the Project site.<sup>52</sup> Cashen concludes that the data derived from the eBird database, in conjunction with data collected by Ironwood, are evidence that there may be a communal roost at the Project site.<sup>53</sup> In its Response to Comments, the FCEIR attempts to dismiss

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<sup>46</sup> California Department of Fish and Game, California Interagency Wildlife Task Group. 1999 [update]. California Wildlife Habitat Relationships version 8.1 personal computer program. Sacramento, California.

<sup>47</sup> California Department of Fish and Game, California Interagency Wildlife Task Group. 1999 [update]. California Wildlife Habitat Relationships version 8.1 personal computer program. Sacramento, California.

<sup>48</sup> FCEIR at p. 7-305; FEIR at p. 7-305.

<sup>49</sup> Cashen RDEIR Comments, p. 10.

<sup>50</sup> FCEIR, p. 7.5-355.

<sup>51</sup> RDEIR, Appendix K, pp. 38 and 39.

<sup>52</sup> Cashen RDEIR Comments, p. 10.

<sup>53</sup> Cashen RDEIR Comments, p. 10.

these sightings by claiming that eBird data are unreliable because the database does not correct for multiple observations. This ignores the fact that many of the database records are of multiple hawks *occurring together as a group*, sometimes up to twenty-five, as reported by a single observer at a distinct location and point in time.<sup>54</sup> Ferruginous hawk clusters of this size are unusual because ferruginous hawks are usually solitary and widely spaced during foraging, and thus there is strong evidence supporting Cashen's expert testimony that this area provides important winter foraging habitat.<sup>55</sup> Accordingly, the FCEIR's dismissal of the significance of these sightings is not supported by substantial evidence.

Further supporting Cashen's conclusion is the expert testimony of Dr. Peter Bloom that the portion of the Antelope Valley where the Project site is located is probably the *single most important* wintering area for ferruginous hawks in all of southern California.<sup>56</sup> Dr. Bloom's opinion is based on data, field observations, and more than 45 years of experience studying raptors in California. Dr. Bloom established his qualifications in Comment 7-Z9 and the curriculum vitae attached to his comment letter. Contrary to the claim made in the Response to Comments, Dr. Bloom's conclusion is not speculative, but rather is based on his extensive expertise and founded on the species account in the BLM's West Mojave Plan. According to the species account provided in the BLM's West Mojave Plan, the Antelope Valley contains the *highest* number and density of wintering ferruginous hawks in southern California.<sup>57</sup> The BLM's West Mojave plan also states that the "conversion of agricultural lands in the Antelope Valley to urban uses could result in loss of wintering habitat in two important localities within the WMPA [West Mojave Plan Area]."<sup>58</sup>

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<sup>54</sup> eBird. 2015. eBird: An online database of bird distribution and abundance [web application]. eBird, Ithaca, New York. Checklist S7622806. Available at: <<http://www.ebird.org>>. (Accessed: 2016 Mar 7). See also Checklists S7795596 and S7887883. For example, an observer reported the following observation of ferruginous hawks at Gaskell and 100<sup>th</sup> Street West on February 16, 2011: "This is very near (across Gaskell) where a 15 FEHA [ferruginous hawks] were found a few years ago, so perhaps it is a traditional stopover or roosting spot. Most but not all of the FEHA were standing in the field, which was weedy short alfalfa. Some were still hunting, a couple were on power poles. These were counted individually, not an estimate. Of the 25, two of them were dark phase. I did not try for a count of adult vs. immature."

<sup>55</sup> Cashen RDEIR Comments, p. 10.

<sup>56</sup> Cashen RDEIR Comments, p. 10.

<sup>57</sup> Cashen RDEIR Comments, p. 10 (emphasis added).

<sup>58</sup> Bureau of Land Management. 2005. Final environmental impact report and statement for the West Mojave Plan: a habitat conservation plan and California desert conservation area plan

The County's response concludes with the statement that Mitigation Measures 4.4-2 through 4.4-4, 4.4-9, and 4.4-10 will reduce impacts to ferruginous hawks to a less-than-significant level.<sup>59</sup> Mitigation Measure 4.4-2 requires a Lead Biologist to oversee compliance with protection measures. Mitigation Measure 4.4-3 is the Construction Worker Environmental Awareness Program. Mitigation Measure 4.4-4 entails construction monitoring. None of these mitigation measures address the impact, which is the fragmentation and loss of ferruginous hawk foraging habitat.

Mitigation Measure 4.4-10 requires avian nest surveys. This measure provides no benefit, because ferruginous hawks do not nest in the Antelope Valley. Moreover, Mitigation Measure 4.4-10 states no preconstruction surveys or additional measures are required for non-listed species if construction is scheduled to occur during the non-nesting season (which is when ferruginous hawks are present at the Project site).<sup>60</sup>

Mitigation Measure 4.4-9 requires compensation for loss of Swainson's hawk foraging habitat. This measure could benefit ferruginous hawks if compensation habitat is located in the Antelope Valley, but this is not required. Even if it were required, it would not necessarily mitigate the loss of a communal roost (if one exists).

The FCEIR must be revised to evaluate the evidence that the Project may destroy important wintering habitat for ferruginous hawks and to identify mitigation to address this impact.

**E. The FCEIR Lacks Substantial Evidence to Support its Finding that Mountain Plovers Have A Low Potential To Forage on the Project Site**

The mountain plover is a federal and state listed Species of Special Concern that has previously been considered for listing under the federal Endangered Species Act.<sup>61</sup> The special-status listing associated with mountain plovers in

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amendment. Moreno Valley (CA): U.S. Dept. of the Interior, Bureau of Land Management, California Desert District.

<sup>59</sup> FCEIR, p. 7.5-356.

<sup>60</sup> FCEIR, p. 1-68.

<sup>61</sup> Cashen RDEIR Comments, p. 8.



California applies to birds on their wintering grounds. Notably, the Antelope Valley is one of four critical wintering areas for mountain plovers in California.<sup>62</sup>

Although the FCEIR acknowledges the Project site provides suitable habitat for mountain plovers, the County ultimately found a "low" potential for the species to occur on the Project site because it was absent during the surveys.<sup>63</sup> This conclusion lacks foundation, however, because focused surveys for mountain plovers were never conducted on the Project site. The Project's biological surveys were conducted for other species and did not coincide with the time of year mountain plovers are even present in California.<sup>64</sup> Consequently, the FCEIR lacks any evidence to support its claim that the species has a low potential to occur at the Project site and will not be impacted by the loss of foraging habitat.<sup>65</sup>

The Response to Comments claims that researchers do not know for sure whether mountain plovers require desert saltbush scrub or fallow field habitat for their wintering needs, especially within the Antelope Valley. However, the FCEIR fails to cite any evidence that mountain plovers do not use this habitat. In light of the failure to conduct a field survey during the time the mountain plover is present in Antelope Valley, the FCEIR lacks any evidence to support its claim that the species has a low potential to occur at the Project site and will not be impacted by the loss of foraging habitat. We also note that the Project proponents have had over five years to conduct a study during the plover's wintering season in Antelope Valley, but have chosen not to perform such a study. The continued refusal to conduct a survey for the presence of the mountain plover enlarges the scope of what is considered substantial evidence under CEQA.

#### **F. Failure to Mitigate Cumulative Impacts to Bird Species other than Swainson's Hawk and Burrowing Owl**

In addition to Swainson's hawk and burrowing owls, the Final EIR concludes that Cooper's hawk, ferruginous hawk, loggerhead shrike, northern harrier, prairie falcon, and yellow-headed blackbird would suffer significant and unavoidable impacts from the cumulative loss of habitat due to this Project and the other renewable energy projects in the area. The Final EIR, however, fails to propose any

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<sup>62</sup> Audubon California. 2012. 2012 Mountain Plover Winter Survey. Report to the U.S. Fish and Wildlife Service Region 8-Migratory Bird Program. Audubon California, Sacramento (CA).

<sup>63</sup> RDEIR, p. 4.4-16; Appendix K, Table 2; and Appendix N, Figure 2.

<sup>64</sup> Cashen RDEIR Comments, p. 8.

<sup>65</sup> *Id.*

mitigation for these impacts. CEQA requires an EIR to identify potential mitigation measures for each significant effect described in the EIR.<sup>66</sup> The Final EIR fails to comply with this requirement and thus fails to comply with CEQA.

**G. The FCEIR Lacks Substantial Evidence to Support Its Finding that the Project Will Not Have a Significant Impact on the Silvery Legless Lizard**

The FCEIR lacks substantial evidence to support its findings that the silvery legless lizard has a low potential to occur onsite that the Project will not have a significant impact on the silvery legless lizard. The FCEIR bases these claims on the grounds that the silvery legless lizard "is usually found near sources of water in the desert" and on the grounds that it was not observed during the biological surveys of the site.

The statement that the silvery legless lizard "is usually found near sources of water in the desert" is not supported by any substantial evidence.<sup>67</sup> Mr. Cashen reviewed several sources of scientific information, and although those sources indicate legless lizards are often found where substrates are slightly moist, none support the statement that the species is usually found near sources of water in the desert.<sup>68</sup> The FEIR does not provide scientific evidence to resolve this issue.

In its response to comments, the FCEIR acknowledges that a silvery legless lizard was found during a burrowing owl survey on the Del Mar Solar Project, located approximately 6.25 miles from the Project site.<sup>69</sup> However, it argues the habitat conditions at the Del Mar Solar site are not similar to the Willow Springs project site, especially because the Del Mar Solar site contains sandy dunes that have a higher potential to have the silvery legless lizard. As shown by Figure A, however, the Willow Springs Project site also contains sandy soils suitable for the silvery legless lizard.

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<sup>66</sup> CEQA Guidelines, § 15126.4, subd. (a)(1).

<sup>67</sup> FCEIR at p. 4.4-10.

<sup>68</sup> Jennings MR, MP Hayes. 1994. Amphibian and Reptile Species of Special Concern in California. Final Report to the California Department of Fish and Game. *See also* California Department of Fish and Game, California Interagency Wildlife Task Group. 2000 [update]. California Wildlife Habitat Relationships version 8.1 personal computer program. Sacramento, California. *See also* Jones, L.C., and R.E. Lovich, eds. 2009. Lizards of the American Southwest: A Photographic Field Guide. Rio Nuevo Publishers, Tucson (AZ). 567 pp.

<sup>69</sup> FCEIR, pp. 7.5-356 and -357.

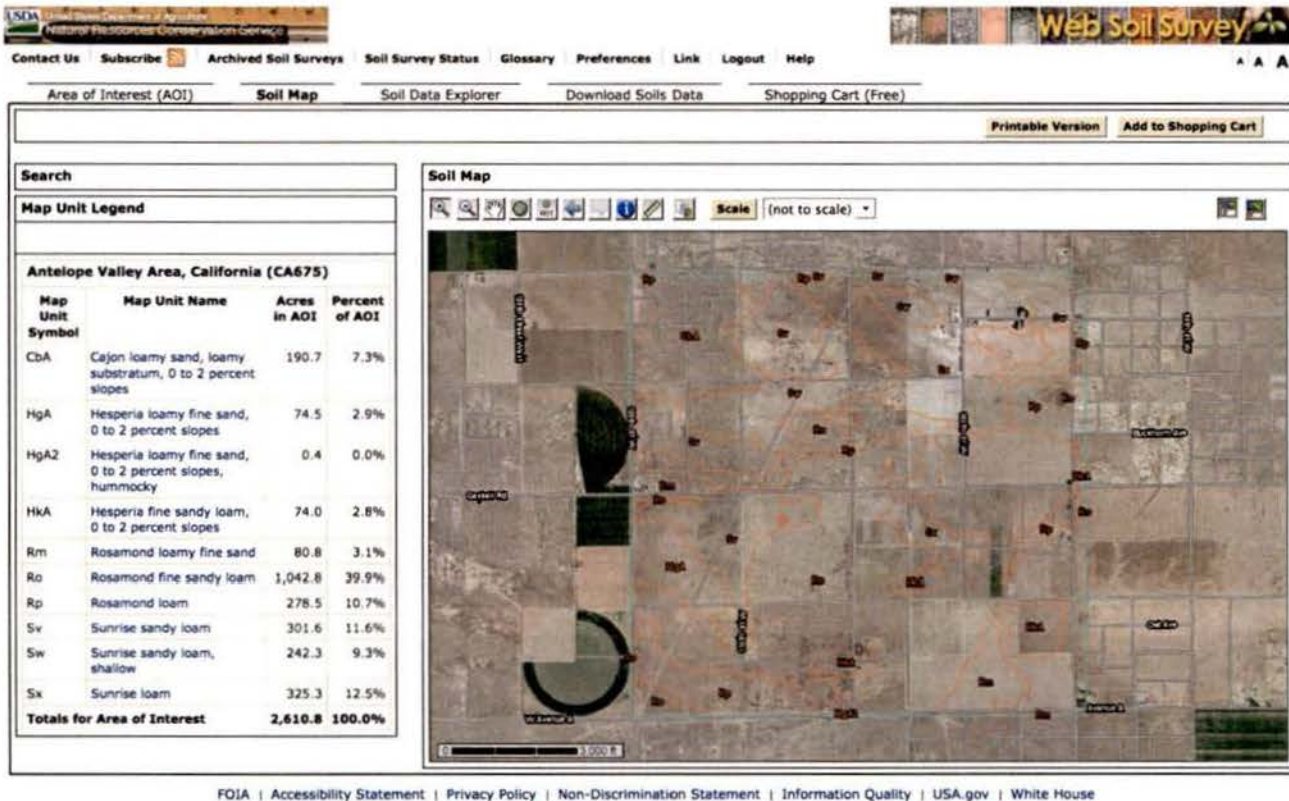


Figure A. Soil types present on the Project site.<sup>70</sup>

In any case, differences in habitat conditions between the two sites is irrelevant because: (a) both the BRTR and RDEIR acknowledged the Project site contains suitable habitat for the species; and (b) the basis for concluding a “low” potential for the species to occur at the Project site was incorrect (i.e., association with water and proximity to closest known habitat).<sup>71</sup>

<sup>70</sup> Soil Survey Staff, Natural Resources Conservation Service, United States Department of Agriculture. Web Soil Survey. Available online at <http://websoilsurvey.nrcs.usda.gov/>. Accessed [03/08/2016].

<sup>71</sup> RDEIR, p. 4.4-36 and Appendix K, Table 2. See also FCEIR, Comment 7-Z7 and Response to Comment 7-O3.



As noted in our previous comment letters, specialized techniques (e.g., raking suitable substrates) are required to identify presence of the silvery legless lizard. Because the Project biologists did not implement those techniques, the County has no basis for using the “results of the various biological surveys” as justification for its determination that the silvery legless lizard has a low potential to occur onsite. More importantly, the County has no basis for concluding Mitigation Measure 4.4-5 adequately reduces potential impacts to this species to a less-than-significant level because Mitigation Measure 4.4-5 does not require the specialized techniques needed to identify presence of the species so that it can be moved before ground disturbance activities.

**H. The FCEIR Lacks Substantial Evidence to Support Its Finding that Project Will Not Impact Important Desert Kit Fox Foraging Habitat**

The FCEIR violates CEQA’s requirement to disclose the Project setting by continuing to claim that the desert kit fox has not been detected on the Project site.

The FCEIR Response to comments claims:

Commenter is incorrect that desert kit fox was detected during biological surveys. As stated in the RDEIR on page 4.4-19, the species prefers grasslands, open desert scrub, and occasionally farmland for denning and foraging. No desert kit fox or sign were found during biological surveys in 2010, 2011 and 2014.

Commenter is correct that surveys were not conducted at night; however, no sign of desert kit fox was been found on the site. Nocturnal surveys are warranted only where sign of the species is detected; typically, a camera is positioned to observe a burrow to confirm presence, for instance.<sup>72</sup>

Contrary to this response, the BRTR lists the desert kit fox as one of the wildlife species observed on the Willow Springs Solar Array Site.<sup>73</sup> The FCEIR provides no explanation why the County continues to deny detection of this species on the Project site.

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<sup>72</sup> FCEIR, p. 7.5-357.

<sup>73</sup> RDEIR, Appendix B to Appendix K, p. 60.

The County also provides no justification for the statement that “[n]octurnal surveys are warranted only where sign of the species is detected.” Nocturnal surveys are a primary means of detecting kit fox. The USFWS does not have a survey protocol for the desert kit fox because it is not a federally listed species. However, the USFWS has issued a survey protocol for the San Joaquin kit fox, a closely related subspecies. That survey protocol states: “[s]potlighting of the project vicinity must be conducted for a minimum of 10 nights within a 15 day period (weather permitting).”<sup>74</sup> The survey methods needed to detect the San Joaquin kit fox are also applicable to the desert kit fox. In any case, nocturnal surveys were required even under the County’s erroneous assumption that they are only warranted only where sign of the species is detected because the desert kit fox was, in fact, detected on the Project site according to the developer’s own consultants.

The FCEIR must be revised to correct this error and to disclose to the public and the decisionmakers that the desert kit fox has been detected on the Project site.

Because of this error, the FCEIR also lacks support for its conclusion that the Project does not contribute to the loss of foraging or breeding habitat for the desert kit fox. The FCEIR bases this conclusion on the claim that the potential for desert kit fox to occur on the site is limited.<sup>75</sup> As discussed above, the desert kit fox has, in fact, been detected on the Project site, and thus the claim that potential for it to occur is limited lacks support.

The RDEIR initially supported this conclusion based on the inaccurate statements that the “project site does not contain suitable foraging or breeding habitat for these species” and that the project habitat was “not associated with foraging or breeding” for these species. The FCEIR now deletes these incorrect statements, but offers no new explanation to support the conclusion that the Project does not contribute to the loss of foraging or breeding habitat for the desert kit fox. Accordingly, the conclusion continues to lack any evidentiary support.

The RDEIR’s mitigation for desert kit fox occurrences also remains inadequate. In the Response to Comments, the FCEIR states that CDFW has commented on another project that a 100 foot buffer may not be sufficient to avoid a take of desert kit fox depending on den specifics. The FCEIR amends its mitigation

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<sup>74</sup> U.S. Fish and Wildlife Service. 1999. San Joaquin Kit Fox Survey Protocol for the Northern Range. p. 5. Available at: <[http://www.fws.gov/sacramento/es/Survey-Protocols-Guidelines/es\\_survey.htm](http://www.fws.gov/sacramento/es/Survey-Protocols-Guidelines/es_survey.htm)>.

<sup>75</sup> FCEIR at p. 4.4-59.

to prohibit construction activities within 100 feet of active natal or pupping dens.<sup>76</sup> The CDFW comment, however, states that 100 feet "*may not be sufficient.*" Accordingly, the FCEIR lacks substantial evidence to support its assumption that a 100 foot buffer zone from active natal or pupping dens is sufficient to reduce impacts below a level of significance.

**I. The FCEIR Lacks Substantial Evidence to Support Its Finding that the Project Will Not Have a Significant Impact on the Tehachapi Pocket Mouse**

The FCEIR lacks substantial evidence to support its findings that the Tehachapi pocket mouse has a low potential to occur onsite that the Project will not have a significant impact on the Tehachapi pocket mouse. The FCEIR bases these claims on the grounds that suitable habitat is not present within the Project site and that the Tehachapi pocket mouse has not been found within Kern County since 1998, and that historical populations have been limited to the foothills of the Tehachapi Mountain range. These claims are incorrect and not supported by substantial evidence.

Contrary to this claim, the CNDDB database reports that the Tehachapi pocket mouse has been detected at two locations approximately five miles northwest of the Project site as recently as 2011.<sup>77</sup> This evidence directly contradicts the County's determination that the mouse has not been found within Kern County since 1998. Furthermore, habitats at those locations were very similar to the habitat found on much of the Project site - "desert scrub, creosote, and non-native grassland."<sup>78</sup> Neither location was within the foothills.

In its Response to Comments, the FCEIR acknowledges the CNDDB occurrences, but attempts to dismiss their validity. It states:

Commenter is correct that there are observations of the Tehachapi pocket mouse in the California Natural Diversity Database (CNDDB); however, these accounts are from unknown observers. Accordingly, it is not possible to determine if the observers had the skills necessary to

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<sup>76</sup> FCEIR at 7.5-397.

<sup>77</sup> California Natural Diversity Database. 2015 Sep 1. RareFind 5 [Internet]. California Department of Fish and Wildlife.

<sup>78</sup> *Id.*

determine if the species was actually Tehachapi pocket mouse or another species. It is unclear if the sightings were from trapping and in-the-hand identifications or from just spotting them and determining the species.<sup>79</sup>

Had the County made any attempt to validate the authenticity of the CNDDDB occurrences, it would have realized that its response was incorrect. The database details who it was that detected the species and how it was identified. According to the CNDDDB, the species was detected through trapping surveys conducted by Debra De La Torre, a biologist with over 13 years conducting wildlife surveys and monitoring in California and surrounding states.<sup>80,81</sup> Ms. De La Torre's surveys were conducted for the Catalina Renewable Energy Project. Kern County was the Lead Agency for that project, and similar to the Willow Springs Project, the County incorrectly assumed the species was absent from the project site before trapping surveys were conducted.<sup>82</sup>

The FEIR further attempts to dismiss the validity of the CNDDDB data by suggesting the BLM's West Mojave Plan ("WMP") did not recognize these recent CNDDDB occurrences. Specifically, the FEIR cites the WMP, which states: "[t]here are no recent (i.e., since 1990) CNDDDB occurrences of Tehachapi pocket mouse in the Plan Area."<sup>83</sup> The occurrences referenced above, however, were not entered into the CNDDDB until 2014. Whereas the statements in the WMP may have been correct when it was published over 11 years ago, it no longer provides reliable information on the current distribution of the Tehachapi pocket mouse.<sup>84</sup>

The County's response concludes by stating:

Further, the types of habitat that are considered primary for the Tehachapi pocket mouse are not the types of habitat on the site. As

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<sup>79</sup> FCEIR, p. 7.5-358.

<sup>80</sup> California Natural Diversity Database. 2015 Sep 1. RareFind 5 [Internet]. California Department of Fish and Wildlife. Occurrence #20 and #21.

<sup>81</sup> See also (<https://www.linkedin.com/in/debra-de-la-torre-b702b313?authType=name&authToken=nmIA>)

<sup>82</sup> County of Kern. 2011. Draft Environmental Impact Report: Catalina Renewable Energy Project. Appendix C.1, p. 5-64.

<sup>83</sup> FCEIR, p. 7.5-358.

<sup>84</sup> The FCEIR incorrectly cites 2012 as the publication date of the West Mojave Plan. The Final Environmental Impact Statement and Environmental Impact Report for the West Mojave Plan was published in January 2005.



described in the RDEIR on page 4.4-18, suitable habitat is not present within the project site and the site is outside of the known range of this species. In addition, this species could enter and leave the site at will if it were present due to the required wildlife-friendly fencing.<sup>85</sup>

The County fails to provide evidence substantiating the statement that “suitable habitat is not present within the project site and the site is outside of the known range of this species.” In 2011 the species was detected at two locations approximately five miles northwest of the Project site.<sup>86</sup> Therefore, the Project site could be within the range of the species. Furthermore, the CNDDDB defines suitable habitat as including desert shrub communities and fallow grain fields – such as found on the Project site.<sup>87</sup>

The best available information indicates the Tehachapi pocket mouse could occur on the Project site. Grading and other activities associated with construction of the Project site would result in mortality of the species if it is present. This would be a significant impact given the imperiled status of the species. The ability of the species to “enter and leave the site at will” does not address the impact, and thus small mammal trapping surveys must be conducted prior to ground disturbance to determine whether additional mitigation is necessary.

By failing to determine whether the Tehachapi pocket mouse occurs on the Project site, the FCEIR fails to support its determination for this species with substantial evidence. This inadequate and unsupported determination precludes a thorough understanding of existing conditions and the relative severity of Project impacts to sensitive biological resources, and precludes finding that proposed mitigation is sufficient to reduce potential impacts below a level of significance.

**J. The FCEIR Fails to Adequately Describe the Project Setting by Incorrectly Describing the Project Site as Containing “Low Quality” Burrowing Owl Habitat and by Deferring Burrowing Owl Surveys**

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<sup>85</sup> FCEIR, p. 7.5-358.

<sup>86</sup> California Natural Diversity Database. 2015 Sep 1. RareFind 5 [Internet]. California Department of Fish and Wildlife.

<sup>87</sup> California Natural Diversity Database. 2015 Sep 1. RareFind 5 [Internet]. California Department of Fish and Wildlife; see also Laabs D. n.d. Tehachapi Pocket Mouse (*Perognathus alticola inexpectatus*). Species account for the West Mojave Plan. Available at: [http://www.blm.gov/ca/pdfs/cdd\\_pdfs/tehachpktmse1.PDF](http://www.blm.gov/ca/pdfs/cdd_pdfs/tehachpktmse1.PDF).

The FCEIR violates CEQA by incorrectly describing the Project site as containing “low quality” burrowing owl habitat. CEQA requires an accurate description of the Project setting.

Despite our prior comments, the FCEIR continues to describe the Project site as containing “low quality” burrowing owl habitat.<sup>88</sup> This characterization of the environmental setting, repeated throughout the FCEIR is not supported by any substantial evidence. The County’s biological consultants never attempted to measure the quality of the habitat.<sup>89</sup> Their assertions that the Project site provide low quality habitat are purely speculative, grounded neither in fact nor scientific data.

Furthermore, biological experts Scott Cashen and Pete Bloom provide and identify substantial evidence in the record that directly contradicts the FCEIR’s unsubstantiated and unsupported assertion regarding the quality of this site. The characterization of the Project site as “low-quality” habitat is also contradicted by the numerous burrowing owls that have been found present on the Project site by the County’s own biological consultants.<sup>90</sup> The Response to Comments also fails to provide any justification for this description.

Habitat quality is defined by the ability of the area to provide conditions appropriate for individual and population persistence.<sup>91</sup> Measuring habitat quality requires collecting data on critical resources (e.g., food and nest sites) and demographic variables (e.g., reproductive output and survival), followed by analyses of those variables to determine how they affect individual and population persistence.<sup>92</sup> Data collected by Ironwood demonstrate the Project site provides critical resources (e.g., food and nest sites) for the burrowing owl. Ironwood’s data also demonstrate the burrowing owls at the Project site are successfully reproducing. Therefore, all available information on habitat quality for burrowing

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<sup>88</sup> FCEIR at p. 4.4-59.

<sup>89</sup> Cashen RDEIR Comments, p. 4.

<sup>90</sup> Cashen RDEIR Comments, p.4; Ironwood Consulting, Biological Resources Technical Report Willow Springs Solar Array (December 2011) at pp. 20-21.

<sup>91</sup> Cashen FCEIR Comments; Morrison ML, BG Marcot, and RW Mannan. 2006. Wildlife-Habitat Relationships: Concepts and Applications. 3<sup>rd</sup> ed. Washington (DC): Island Press. p. 448.

<sup>92</sup> Cashen FCEIR Comments; Johnson MD. 2007. Measuring Habitat Quality: A Review. The Condor 109:489-504.

owls indicates the Project site provides high quality habitat, and refutes the claim that the Project site provides "low quality" habitat.

The FCEIR'S incorrect and unsupported description of the Project site as containing "low quality" burrowing owl habitat violates CEQA. CEQA requires an accurate description of the Project setting. Moreover, by falsely describing the habitat that will be converted by the Project as "low quality," the FCEIR conceals the true scope and impact of this conversion. This incorrect description falsely suggests to the public and the decisionmakers that the proposed mitigation ratio of 10 acres of foraging habitat per passively relocated pair of owls is sufficient even though it is on the low end of the range recommended by CDFW in prior guidance documents (which are no longer accepted by the CDFW).

The impact of the FCEIR'S incorrect and unsupported description of the Project site as containing "low quality" burrowing owl habitat is further heightened by the failure to conduct the surveys necessary to establish the abundance and distribution of burrowing owls across the Project site. As discussed in our prior comments, the FCEIR improperly defers protocol burrowing owl surveys until after the CEQA review process concludes. This further prevents the public and the decisionmakers from accurately assessing the potential scope of impact on this species and from accurately assessing the sufficiency of the proposed mitigation. That is, without information on the abundance and distribution of burrowing owls at the Project site, it is impossible for the public and decisionmakers to know whether the Project is likely to affect one pair of owls or 10 pairs of owls, which is a significant difference with respect to the total impact of the Project on the local burrowing owl population.

It is for this reason that the CDFW, California Burrowing Owl Consortium ("CBOC"), and others have stressed the need for protocol surveys *during* the CEQA review process. CDFW's Staff Report on Burrowing Owl Mitigation ("Staff Report") states:

The following three progressive steps are effective in evaluating whether projects will result in impacts to burrowing owls. The information gained from these steps will inform any subsequent avoidance, minimization and mitigation measures. The steps for project impact evaluations are: 1) habitat assessment, 2) surveys, and 3) impact assessment....Adequate information about burrowing owls present in and adjacent to an area that will be disturbed by a project or activity will enable the Department, reviewing agencies and the public to effectively assess potential impacts and will guide

the development of avoidance, minimization, and mitigation measures...Detailed information, such as approximate home ranges of each individual or of family units, as well as foraging areas as related to the proposed project, will be important to document for evaluating impacts, planning avoidance measure implementation and for mitigation measure performance monitoring.<sup>93</sup>

Cashen also points to the California Burrowing Owl Consortium mitigation guidelines, which state:

There is often inadequate information about the presence of owls on a project site until ground disturbance is imminent. When this occurs there is usually insufficient time to evaluate impacts to owls and their habitat. The absence of standardized field survey methods *impairs adequate and consistent impact assessment during regulatory review processes, which in turn reduces the possibility of effective mitigation.*<sup>94</sup>

The FCEIR's failure to include CDFW compliant survey protocols for burrowing owls precludes the County from meaningfully evaluating Project impacts to this species and from meaningfully evaluating the ability of proposed mitigation measures to reduce impacts below a level of significance. The County must revise and recirculate the EIR and include survey protocols for burrowing owls.

**K. Preconstruction Surveys with a 150 Meter Buffer are Inadequate to Mitigate Project Impacts to Burrowing Owls to Less than Significant**

The FCEIR correctly determines that the Project will result in significant impacts on burrowing owls. To reduce these impacts below a level of significance, it relies on the implementation of MM 4.4-8. Among its requirements, MM 4.4-8 requires preconstruction surveys "of the permanent and temporary impact areas, plus a 150 meter (approximately 492 foot) buffer." The FCEIR lacks substantial evidence to support its finding that this mitigation will reduce impacts below a level of significance.

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<sup>93</sup> Cashen RDEIR Comments, p. 7; California Department of Fish and Game. 2012. Staff Report on Burrowing Owl Mitigation. Available at:

<<https://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=83843>>, pp. 5, 6 and 29.

<sup>94</sup> *Id.*; see also The California Burrowing Owl Consortium. 1993. Burrowing Owl Survey Protocol and Mitigation Guidelines. [emphasis added].



As a threshold matter, this condition is not consistent with CDFW guidelines, which recommend an initial pre-construction survey within the 14 days prior to ground disturbance, followed by a subsequent survey within 24 hours prior to ground disturbance.<sup>95</sup> As CDFW's Staff Report acknowledges, "burrowing owls may re-colonize a site after only a few days."<sup>96</sup> MM 4.4-8 fails to require this second subsequent survey within 24 hours prior to ground disturbance. The FCEIR lacks substantial evidence to support its assumption that a single pre-construction survey up to 14 days in advance of construction is sufficient to avoid and minimize take of burrowing owls.

Additionally, the CDFW's Staff Report makes clear that "take avoidance" surveys cannot be used as a substitute for the four "detection" surveys required to thoroughly assess Project impacts and formulate appropriate mitigation. The RDEIR does not require burrowing owl "detection" surveys prior to Project construction.<sup>97</sup> As a result, the FCEIR "does not ensure reliable information on the presence, abundance, and habitat use activities of burrowing owls on the Project site prior to construction."<sup>98</sup>

Furthermore, the FCEIR lacks substantial evidence to support its assumption that Mitigation Measure MM 4.4-8's 150 meter buffer zone surrounding Project impact areas is sufficient to avoid significant indirect impacts to burrowing owls.<sup>99</sup> As the RDEIR acknowledged, disturbance activities within 500 meters (1,640 feet) of an occupied burrow can indirectly impact burrowing owls.<sup>100</sup> Therefore, a 150 meter buffer zone is insufficient to reduce Project impacts to this species to less than significant levels. Burrowing owl buffer zones must extend 500 meters beyond all disturbance areas in order to both adequately minimize Project impacts and comply with CDFW guidance documents. The FCEIR Response to Comments does not dispute that disturbance activities within 500 meters of an occupied burrow can indirectly impact burrowing owls. Other than to state that a 150 meter buffer zone is common practice, it offers no explanation why the 150-

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<sup>95</sup> California Department of Fish and Game. 2012. Staff Report on Burrowing Owl Mitigation. Available at: <<https://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=83843>>, pp. 29-30.

<sup>96</sup> *Id.*, p. 30.

<sup>97</sup> *Id.*, Appendix D.

<sup>98</sup> Cashen RDEIR Comments, p. 32.

<sup>99</sup> Cashen RDEIR Comments, p. 32.

<sup>100</sup> RDEIR, p. 4.4-50.

meter buffer zone is sufficient to reduce impacts below a level of significance when occupied burrows may be disturbed if within 500 meters.

As discussed in our prior comments, the FCEIR also lacks substantial evidence to support its assumption that passive relocation of burrowing owls, as allowed under the proposed mitigation, would be not result in any significant impacts on the species. Indeed, the best available scientific information, including information recently presented at the 2015 Burrowing Owl Consortium Conference, indicates passive relocation almost always results in extirpation or other significant impacts to burrowing owls.

For these reasons, the mitigation measures proposed to reduce Project impacts to burrowing owls to less than significant is not supported by substantial evidence.

**L. The Proposed Habitat Compensation Mitigation is Inadequate to Reduce Impacts to Less Than Significant**

The previous DEIR and FEIR for the Project incorporated two measures to ascertain the appropriate amount of compensatory mitigation for Project impacts to burrowing owls and their habitat: (1) site-specific analysis, and (2) consultation with the CDFW.<sup>101</sup> The FCEIR now sets the required amount of compensatory mitigation, but has failed to support this amount by either a site specific analysis or consultation with the CDFW. The CDFW guidance identifies these two measures as "integral components of an effective mitigation strategy."<sup>102</sup> In the FEIR, the County acknowledged: "site-specific analysis allows for better protection of burrowing owl" and that consultation with the CDFW "would ensure that mitigation lands are provided sufficiently to mitigate project impacts to the species to a less than significant level."<sup>103</sup> The FCEIR's adoption of a mitigation ratio of just 10 acres of foraging habitat for each pair of owls that is passively relocated is arbitrary. Without a site-specific analysis and consultation with the CDFW, the FCEIR lacks substantial evidence to support this ratio and lacks substantial evidence to support its finding that this mitigation will reduce impacts below a level of significance.

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<sup>101</sup> DEIR, pp. 4.4-51 and -52; Cashen Comments, p. 34.

<sup>102</sup> California Department of Fish and Game. 2012. Staff Report on Burrowing Owl Mitigation. Available at: <<https://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=83843>>, pp. 8 through 12.

<sup>103</sup> FEIR, pp. 7-302 and -303.

The FCEIR fails to provide any scientific evidence justifying 10 acres as being sufficient to mitigate Project impacts to a less than significant level. The Response to Comments relies solely on the fact that it has applied this ratio in other projects and that 10 acres is within the range of CDFW's prior guidance documents (which have proven ineffective in conserving burrowing owl populations). No substantial evidence, however, is cited to show that this ratio would be sufficient to reduce impacts below a level of significance in this instance.

As indicated in CDFW's 2012 Staff Report: "the current scientific literature supports the conclusion that mitigation for permanent habitat loss necessitates replacement with an equivalent or greater habitat area," and that "offsite mitigation may not adequately offset the biological and habitat values impacted on a one to one basis."<sup>104</sup> The continued decline of the species in the Antelope Valley and the rest of the state, underscores the failure of compensatory mitigation requirements to protect burrowing owl habitat sufficiently to reduce habitat loss impacts below a level of significance.<sup>105</sup>

Furthermore, 10 acres is on the low end even under CDFW's prior guidance, which recommended protection of 6.5 to 19.5 acres of foraging habitat for each bird (or pair of birds) requiring translocation depending on the occupancy status of the mitigation site. CDFW's prior (1995) guidelines are no longer accepted by the CDFW because they have *proven ineffective* in the conservation of burrowing owls.<sup>106</sup> The FCEIR provides no rationale or evidence to support why the provision of 10 acres of compensatory habitat per pair of burrowing owls requiring translocation would be sufficient here. Given the rate of habitat conversion for solar projects in Antelope Valley and the continued decline of Antelope Valley's burrowing owl population, there is no reason to assume that compliance with the low end of out-of-date CDFW mitigation ratio recommendations would be sufficient to mitigate Project impacts to a less than significant level. Indeed, there is substantial scientific evidence that the County's proposal to provide 10 acres of

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<sup>104</sup> California Department of Fish and Game. 2012. Staff Report on Burrowing Owl Mitigation. Available at: <<https://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=83843>>, pp. 8 and 12.

<sup>105</sup> Wilkerson RL and RB Siegel. 2011. Distribution and Abundance of Western Burrowing Owls (*Athene Cunicularia Hypugaea*) in Southeastern California. The Southwestern Naturalist 56(3): 378-384. See also Wilkerson RL and RB Siegel. 2010. Assessing changes in the distribution and abundance of burrowing owls in California, 1993-2007. Bird Populations 10:1-36.

<sup>106</sup> California Department of Fish and Game. 2012. Staff Report on Burrowing Owl Mitigation. Available at: <<https://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=83843>>, p. 1.

compensatory habitat per pair of burrowing owls requiring translocation from the Project site would contribute to the ongoing decline of the burrowing owl population.

There is no evidence that basing the ratio solely on the number of burrowing owls that are passively located during construction activities is sufficient to reduce the direct, indirect, and cumulative impacts to burrowing owl habitat. Habitat loss, degradation, and fragmentation are the greatest threats to burrowing owls in California.<sup>107</sup> The proposed Project would eliminate, degrade, and fragment at least 1,402 acres of burrowing owl habitat. The Project site is known to be occupied by breeding burrowing owls. Nevertheless, the FCEIR only requires compensatory mitigation *if* burrowing owls are detected during the pre-construction survey, and then only *if* owls need to be relocated from their burrows. This condition ignores significant impacts to owls that will lose their habitat, but that do not require translocation (e.g., because they are on their wintering grounds at the time of construction). Significant impacts to burrowing owls due to habitat loss, degradation, and fragmentation is not limited to owls that are passively relocated.<sup>108</sup> Furthermore, the failure to locate burrowing owls during a pre-construction survey is not sufficient evidence that the site is no longer occupied.<sup>109</sup> The FCEIR lacks substantial evidence to support its assumption that it is sufficient to base the need for compensatory mitigation solely on the results of the pre-construction survey.

The proposed mitigation is also inadequate because it fails to ensure that the compensatory mitigation will mitigate impacts to the affected burrowing owl population, fails to ensure that mitigation land is actually utilized by burrowing owls, and fails to adequately identify success criteria for the mitigation measures. According to the FCEIR, mitigation land for passive relocation of burrowing owls may be combined with other off-site mitigation requirements of the Project. The FCEIR fails to provide evidence that compensatory habitat at a distant location (e.g., in the Central Valley) would mitigate impacts to owls that are displaced from the Project site. Furthermore, it fails to identify how compensatory habitat would be "deemed suitable to support the species" and that it "is comparable to or better than that of the impact area." The Response to Comments claims that mitigation land is available nearby the Project site, but it does not address the fact that the

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<sup>107</sup> California Department of Fish and Game. 2012. Staff Report on Burrowing Owl Mitigation. Available at: <<https://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=83843>>, p. 22.

<sup>108</sup> Cashen RDEIR Comments.

<sup>109</sup> Cashen RDEIR Comments.



County is not requiring the Applicant to acquire this nearby available mitigation land.

The Response to Comments also now claims that loss of the site as foraging habitat will not result in significant impacts to burrowing owl and thus compensatory mitigation is not required for this loss of foraging habitat. This claim contradicts scientific knowledge and is not supported by any analysis or substantial evidence.

Due to the issues discussed above, the FCEIR lacks substantial evidence to support its conclusion that its proposed mitigation of burrowing owl impacts would be sufficient to reduce those impacts below a level of significance. Accordingly, the FCEIR must be revised to evaluate and mitigate impacts to burrowing owls in compliance with the requirements of CEQA.

**M. The FCEIR Lacks Substantial Evidence to Support its Findings Regarding the Absence of Special Status Plant Species Due to the Failure to Conduct Protocol-Level Rare Plant Surveys**

The FCEIR is inadequate under CEQA because Ironwood never conducted protocol-level rare plant surveys for the Project. Table 4.4-1 of the FCEIR identifies ten different special-status plant species that were identified in a literature review and database search as historically occurring in the vicinity of the project site. Focused surveys of the Project site identified only one of these plant species as present on the Project site – the alkali mariposa lily. The FCEIR concludes that the other plants are unlikely to be found on the Project site. For five of these species (chaparral sand verbena, Peirson's morning-glory, white pygmy-poppy, San Fernando Valley spineflower and short-joint beavertail), the FCEIR expressly based its conclusion on the fact that these plants were "not found during focused botanical surveys."<sup>110</sup>

The FCEIR's conclusion that the Project would not have significant impacts on the chaparral sand verbena, Peirson's morning-glory, white pygmy-poppy, San Fernando Valley spineflower and short-joint beavertail is not supported by substantial evidence because the surveys it relies upon to determine that they are not present on the Project site did not follow recommended protocols and thus are not sufficiently reliable to support the findings.

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<sup>110</sup> FCEIR at p. 4.4-4.

The FCEIR claims that the botanical surveys followed the guidelines set forth by: (1) Protocols for Surveying and Evaluating Impacts to Special Status Native Plant Populations and Natural Communities (CDFG, 2009); and (2) Guidelines for Conducting and Reporting Botanical Inventories for Federally Listed, Proposed and Candidate Plants (USFWS, 2000).<sup>111</sup> A review of the surveys, however, reveals that this is not correct.

First, contrary to the guidelines of both these documents, Ironwood failed to visit reference sites to confirm that the target special-status species were evident and identifiable at the time of the botanical surveys.<sup>112</sup> Without visiting reference sites, Ironwood's conclusion that certain plant species were not present was speculative since not all the target special-status species would have been identifiable at the time of the survey.<sup>113</sup>

In responding to our comments on this failure, the FCEIR claims: "[r]are plant surveys were conducted to the protocol survey requirements in effect at the time the surveys were conducted, which at the time did not require visits to reference sites."<sup>114</sup> This claim is incorrect. According to both the FCEIR and underlying biological reports, the botanical surveys adhered to the guidelines established in CDFG's 2009 rare plant survey protocol, and in the USFWS's 2000 rare plant survey protocol.<sup>115</sup> Both protocols direct surveyors to visit reference sites to confirm potentially occurring rare plant species are identifiable at the time of the surveys.<sup>116</sup> The FCEIR's claim that those protocols do not require visits to reference sites provides additional evidence that the biologists were not familiar with the protocols, and thus, that they were not qualified to collect baseline data on sensitive botanical resources present at the Project site.

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<sup>111</sup> FCEIR at p. 4.4-31.

<sup>112</sup> CDFG. 2009. Protocols for Surveying and Evaluating Impacts to Special Status Native Plant Populations and Natural Communities. Available at: [http://www.dfg.ca.gov/wildlife/nongame/survey\\_monitor.html#Plants](http://www.dfg.ca.gov/wildlife/nongame/survey_monitor.html#Plants).

<sup>113</sup> CASHEN RDEIR Comments.

<sup>114</sup> FCEIR, p. 7.5-358.

<sup>115</sup> Willow Springs RDEIR, Appendix K, pp. 8 and 9.

<sup>116</sup> California Department of Fish and Game. 2009. Protocols for Surveying and Evaluating Impacts to Special Status Native Plant Populations and Natural Communities. pp. 3 through 5. Available at: [http://www.dfg.ca.gov/wildlife/nongame/survey\\_monitor.html#Plants](http://www.dfg.ca.gov/wildlife/nongame/survey_monitor.html#Plants). See also U.S. Fish and Wildlife Service. 2000. Guidelines for Conducting and Reporting Botanical Inventories for Federally Listed, Proposed and Candidate Plants. p. 1. See also California Native Plant Society. 2001. CNPS Botanical Survey Guidelines. pp. 2 and 3.

Ironwood's plant surveys were also limited to a very narrow window of time, rendering them incapable of capturing the appropriate phenological stage of all potentially occurring rare plant species.<sup>117</sup> The Response to Comments incorrectly claims that the rare plant surveys were performed twice: once in 2010 and again in 2011.<sup>118</sup> This is misleading. The 2010 surveys covered the proposed solar facility and a 100-foot corridor of the gen-tie line routes east of 140<sup>th</sup> Street West, whereas the 2011 surveys covered the proposed and alternative gen-tie west of 140<sup>th</sup> Street West.<sup>119</sup> Thus, the 2011 surveys covered an entirely different area than the 2010 surveys; no portions of the Project area were surveyed twice for rare plants.

Because the surveyors failed to visit reference sites and ensure that surveys were conducted during appropriate time periods, the conclusion that the chaparral sand verbenas, Peirson's morning-glory, white pygmy-poppy, San Fernando Valley spineflower and short-joint beavertail are not present on the Project site and will not be impacted by Project activities is speculative and not supported by substantial evidence.

The FCEIR also lacks substantial evidence to support its findings that these plants are not present and will not be affected because the evidence in the record demonstrates that the surveyors failed to spend sufficient time and care conducting the surveys. Moreover, the evidence in the record demonstrates that the surveyors could not have actually conducted the survey in the manner claimed.

According to the Willow Springs BRTR: "[t]he 2010 Botanical Study Area consisted of the proposed solar facility [1,402 acres] and a 100-foot corridor of the gen-tie line routes east of 140<sup>th</sup> Street West (4 linear miles)."<sup>120</sup> The botanical surveys were conducted by Kent Hughes, Lehong Chow, and Brian Sandstrom between May 29 and June 1, 2010 (i.e., 12 person days).<sup>121</sup> The BRTR indicates that, on average, linear pedestrian transects were walked at 15-meter spacing, with the primary objective of identifying all plant species to the taxonomic level necessary to determine rarity status.<sup>122</sup>

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<sup>117</sup> Cashen RDEIR Comments, p. 15.

<sup>118</sup> FCEIR, p. 7.5-358.

<sup>119</sup> FCEIR at p. 4.4-31; Willow Springs RDEIR, Appendix K, p. 8.

<sup>120</sup> Willow Springs RDEIR, Appendix K, p. 8.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

However, the Willow Springs BRTR fails to disclose that the same surveyors conducted another survey for a different project at the exact same time they conducted this survey. According to the Rosamond Solar Array BRTR: "[t]he 2010 Botanical Study Area consisted of the western portion of the proposed solar facility [855 acres] and the 100-foot corridor of the 34.5-kV overhead collector line [2.5 miles] connecting the western and eastern portions of the Project site."<sup>123</sup> As was done for the Willow Springs Solar site, the botanical surveys were conducted by Kent Hughs, Lehong Chow, and Brian Sandstrom between May 29 and June 1, 2010 (i.e., 12 person days).<sup>124</sup> Similar to the Willow Springs Solar site, linear pedestrian transects were walked at 15-meter spacing, with the primary objective of identifying all plant species to the taxonomic level necessary to determine rarity status.<sup>125</sup>

Based on the information summarized above, the three biologists walked approximately 378 miles over 4 days, or each biologist walked an average of 32 miles per day. It is unreasonable to expect each biologist was capable of walking 32 miles per day, especially while also identifying plant species to the taxonomic level necessary to determine rarity status and recording the associated field data (which reduces the amount of ground covered per hour). Therefore, the existing evidence demonstrates the level of effort devoted to rare plant surveys at the Project sites was grossly insufficient to detect all potentially occurring rare plant species, especially because some of the target species are very cryptic and diminutive.

The FCEIR's Response to Comments fails to respond to this discrepancy and does not provide the number of hours that were spent surveying each project site. Instead, it simply reiterated the County's conclusory assertion that the rare plant surveys were "comprehensive."<sup>126</sup>

Without evidence of how many hours were spent surveying each project site, it is speculative to assume sufficient surveys were performed simply because surveys were conducted on multiple days. Based on the information provided in the two BRTRs (i.e., Rosamond and Willow Springs), it appears the Project biologists spent approximately 50% less time on the

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<sup>123</sup> Rosamond Solar Array RDEIR, Appendix I1, p. 8.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> FCEIR, p. 7.5-358. The FCEIR provided *no response* regarding the overlap of the survey dates for the desert tortoise, burrowing owl, and Swainson's hawk (i.e., between the Willow Springs and Rosamond Solar Array sites).



Project site (excluding the gen-tie corridors) than what was portrayed in their report. This makes its conclusions that certain species are not present on the Project site unreliable and unsupported by substantial evidence.

The FCEIR is also inadequate because it failed to disclose or evaluate the potential presence of three additional special-status species that were not identified in Table 4.4-1:

- Barstow woolly sunflower (*Eriophyllum mohavense*, CRPR 1B.2). This species is known to occur on disturbed habitat in the western Mojave. Ironwood's botanical survey effort was not rigorous enough to infer absence of this species, which is approximately the size of a quarter.
- Desert cymopterus (*Cymopterus deserticola*, CRPR 1B.2). This perennial herb species is known to occur in Mojavean desert scrub communities. Ironwood's botanical surveys were conducted too late in the year to detect this species.<sup>127</sup>
- Rosamond woolly star (*Eriastrum rosamondense*, CRPR 1B.1). This is a recently described species that didn't exist when Ironwood conducted its surveys in 2010. The species is known to occur between Lancaster and Rosamond, and it could occur on the Project site (especially because its overall distribution isn't completely understood).<sup>128</sup>

Because the biological surveys relied on a list approach that did not include the above plants and because the surveys failed to comply with relevant survey protocols, the FCEIR lacks substantial evidence to determine that these special status species plants are not present on the Project site. The Project's potential disturbance of these species is a significant impact that must be evaluated and mitigated in a revised EIR.

#### **N. The FCEIR Fails to Disclose and Analyze Significant Impacts to Sensitive Natural Communities**

The FCEIR fails to adequately disclose the Project setting by incorrectly claiming that "[n]o sensitive natural communities were observed on the Project site

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<sup>127</sup> Data provided by the participants of the Consortium of California Herbaria. Available at: [ucjeps.berkeley.edu/consortium/](http://ucjeps.berkeley.edu/consortium/). (Accessed 12 Oct 2015).

<sup>128</sup> See <http://www.rareplants.cnps.org/detail/3784.html>.

during focused surveys.”<sup>129</sup> This claim is incorrect. Desert Saltbush Scrub occurs across approximately one-third of the Project site.<sup>130</sup> Desert Saltbush Scrub has a natural heritage rank of S3.2, and thus it is considered a sensitive natural community.<sup>131</sup> The Response to Comments claims the FCEIR disclosed that desert saltbush scrub habitat is on-site and is described, but does not address the fact that the FCEIR expressly claims that no sensitive natural communities are on the project site.<sup>132</sup> The FCEIR violates CEQA by concealing the sensitive nature of this habitat and failing to evaluate impacts to this sensitive natural community.

### **III. FCEIR’S AIR QUALITY ANALYSIS IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE AND FAILS TO DISCLOSE SIGNIFICANT IMPACTS**

In our Draft EIR Comments, we noted that the emission estimates for the construction phase of the Project were prepared with an outdated computer model and that the air pollutant dispersion modeling for emissions of particulate matter equal to or smaller than 10 and 2.5 micrometers (“PM10” and “PM2.5,” respectively) appeared to be for the nearby Rosamond Solar Array Project, not the Willow Springs Solar Project. The County acknowledged that the dispersion modeling results disclosed and evaluated in the Draft EIR were, in fact, from the wrong project. The 1<sup>st</sup> RDEIR then provided revised emission estimates for construction of the Project prepared with the most current model version and also, for the first time, modeled and evaluated risks due to diesel particulate matter emissions during construction of the Project.

Unfortunately, the revised analysis and modeling contained significant flaws which rendered its conclusions unsupported by substantial evidence and it continues to rely upon inadequate mitigation to reduce construction air quality impacts below a level of significance. The FCEIR fails to address these inadequacies and continues to conceal and fail to mitigate the Project’s air quality impacts.

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<sup>129</sup> FCEIR at p. 4.4-9.

<sup>130</sup> Cashen RDEIR Comments, p. 15.

<sup>131</sup> Cashen RDEIR Comments, p. 15.

<sup>132</sup> FCEIR at pp. 7.5-359 - 7.5-360.

**A. The FCEIR Lacks Evidence to Support Its Claim that Construction Activities for the "Testing/Cleanup" Phase Was Included in Their Air Modeling**

The FCEIR lacks evidence to support its claim that construction activities for the "testing/cleanup" phase was included in their air modeling. The Response to Comments makes the conclusory claim that the modeling accounts for this work, but fails to identify where in the modeling this can be found.

**B. The FCEIR Lacks Substantial Evidence to Support Its Claim that It Accounted for All Fugitive Dust Emissions and Its Claim that the Project's Dust Emissions Will Be Below the Threshold of Significance**

The FCEIR lacks substantial evidence to support its claim that it accounted for all fugitive dust emissions during construction and its claim that the Project's PM10 emissions will be below the threshold of significance. The FCEIR Response to Comments claims that fugitive dust is analyzed in compliance with Kern County and the Eastern Kern Air Pollution Control District ("EKAPCD") guidance and thus is sufficient. This Response is not supported by substantial evidence because fugitive dust emissions from wind erosion have not been taken into account in the air quality modeling upon which this claim is based.

The grading of the Project site will increase the surface material available for entrainment and thereby increase the potential for windblown dust. The EIR estimates fugitive dust (and combustion exhaust) PM10 emissions with the California Emissions Estimator Model ("CalEEMod"),<sup>133</sup> a statewide land use emissions computer model designed to provide a uniform platform for government agencies, land use planners, and environmental professionals to quantify potential criteria pollutant and greenhouse gas emissions associated with both construction and operations from a variety of land use projects.<sup>134</sup> While CalEEMod calculates fugitive dust PM10 emissions from material handling, paved roads, and grading, it does not calculate fugitive dust PM10 emissions from wind erosion of graded areas. The supporting documentation CalEEMod states:

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<sup>133</sup> Pless FCEIR Comments; See, for example, FCEIR, p. 4.3-28 ("... fugitive PM10 and PM2.5 were calculated using the California Emissions Estimator Model (CalEEMod) computer model."), Footnote 1 to Tables 4.3-5 and 4.3-6, pp. 4.3-38 and 4.3-40 ("Emissions were calculated using the CalEEMod version 2013.2.2 Computer Model, as recommended by the EKAPCD.")

<sup>134</sup> Pless FCEIR Comments; California Emissions Estimator Model™, <http://www.caleemod.com/>.

**Wind-blown fugitive dust is not calculated in CalEEMod** because of the number of input parameters required such as soil type, moisture content, wind speed, etc. **This limitation could result in underestimated fugitive dust emissions if high wind and loose soil are substantial characteristics for a given land use/construction scenario.**<sup>135</sup>

Due to the size of the Project site, wind erosion from the graded surfaces will likely be substantial. This erosion will contribute to the very high PM10 concentrations frequently measured in the Project's airshed, and will contribute to exceedances of the EKAPCD's annual threshold of significance of 10 tons/year for PM10.

Contrary to the FCEIR's claims, these emissions are not included in the FCEIR's air modeling and these emissions would not be eliminated by the Project's dust suppression mitigation requirements or by any County or Air District limitations on the amount of Project land that may be disturbed at one time.

In her submitted comments, Dr. Pless estimated fugitive dust emissions for various amounts of disturbed site acreage, acknowledging that not the entire Project site may be disturbed for the entire construction period. These estimates were based on a methodology developed by the Maricopa County Air Quality Department ("MCAQD") in Arizona, another desert area whose air quality is suffering from the effects of wind erosion.<sup>136</sup> (The MCAQD methodology estimates fugitive dust emissions based on emission factors for disturbed soil, the disturbed project acreage, and information about the amount of time during a year certain wind speeds are exceeded in the area.) The FCEIR Response to Comments does not dispute the validity of the methodology *per se* but instead maintains:

Contrary to commenter's suggestion, wind-blown fugitive dust is properly taken into account in the air quality analysis. Fugitive dust is analyzed in compliance with Kern County and EKAPCD guidance, as

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<sup>135</sup> Pless FCEIR Comments; CalEEMod, Technical Paper, Methodology Reasoning and Policy Development of the California Emission Estimator Model, July 2011, p. 4, *emphasis added*; <http://www.aqmd.gov/docs/default-source/caleemod/techpaper.pdf?sfvrsn=2>.

<sup>136</sup> Pless FCEIR Comments; MCAQD, 2008 PM10 Periodic Emissions Inventory for the Maricopa County, Arizona, Nonattainment Area, Revised June 2011, Appendix 4. Windblown Dust Emission Estimation Methodology.



noted on RDEIR p. 4.3-28 (see discussion of wind speed data from Edwards Air Force Base). *CalEEMod uses wind speed data* supplied by the EKAPCD and nearby weather stations (data from the Western Regional Climate Center and Desert Research Institute) *as well as soil moisture content and construction activity rate to calculate wind-blown dust from grading, demolition, truck loading, and road-work.* CalEEMod calculates these emissions using the methodology described in Section 13.2, Introduction to Fugitive Dust Sources, of U.S. EPA AP-42. AP-42 is the U.S. EPA's compilation of air pollutant emissions factors. The results of this analysis are presented at RDEIR pages 4.3-37 to 4.3-40.<sup>137</sup>

The County's response deliberately ignores that wind-blown fugitive dust is not calculated in CalEEMod. Instead, the County claims, without any factual support whatsoever, that "CalEEMod uses wind speed data supplied by the EKAPCD... as well as soil moisture content and construction activity rate to calculate *wind-blown dust* from grading, demolition, truck loading, and road-work." This claim is wrong and not supported by the CalEEMod documentation. Review of the *CalEEMod User's Guide* and supporting appendices as well as the *CalEEMod Technical Paper* providing the methodology reasoning and policy development for the model shows that the model calculates "[f]ugitive dust associated with grading, demolition, truck loading, and roads."<sup>138</sup>

As explained by the U.S. Environmental Protection Agency ("EPA") in its *Compilation of Air Pollutant Emission Factors* ("AP-42"), the fugitive dust-generation process is caused by two basic physical phenomena:

1. Pulverization and abrasion of surface materials by application of mechanical force through implements (wheels, blades, etc.); and
2. Entrainment of dust particles by the action of turbulent air currents, such as wind erosion of an exposed surface.<sup>139</sup>

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<sup>137</sup> RTC 7-A2, *emphasis added*.

<sup>138</sup> Pless FCEIR Comments; CalEEMod User's Guide, *op. cit.*, p. 3, *emphasis added*. ("Specifically the model aids the user in the following calculations: ... Fugitive dust associated with grading, demolition, truck loading, and roads (Fugitive dust from wind blown sources such as storage piles are not quantified in CalEEMod which is consistent with approaches taken in other comprehensive models.)")

<sup>139</sup> Pless FCEIR Comments; EPA, AP-42, 13.2 Fugitive Dust Sources, p. 13.2-1; <https://www.epa.gov/ttn/chieff/ap42/ch13/final/c13s02.pdf>. (The full citation is "Entrainment of dust

The *CalEEMod Technical Paper*, Section 4.3, shows that the model calculates *fugitive dust* associated with the following activities relevant to Project construction based on equations for emission factors from EPA's AP-42:

**Grading equipment passes** (dust from dozers moving dirt around and dust from graders or scrapers leveling the land) based on AP-42 Section 11.9, Western Surface Coal Mining. This equation calculates emission factors based on mean wind speed, vehicle miles travelled, the acreage of the site, and the blade width of the grading equipment. Emission factors based on this equation are proportional to mean vehicle speed.<sup>140</sup>

**Bulldozing** based on AP-42 Section 11.9, Western Surface Coal Mining. This equation calculates emission factors based on material moisture content, material silt content, and the hours of operation. Emission factors based on this equation are inversely proportional to material moisture content and proportional to silt content.<sup>141</sup>

**Truck loading** based on AP-42 Section 13.2, Introduction to Fugitive Dust Sources. This equation calculates emission factors based on material moisture content, mean wind speed, and the amount of loaded and unloaded materials. Emission factors based on this equation are inversely proportional to material moisture content and proportional to wind speed.<sup>142</sup>

**Paved roads** based on AP-42 Section 13.2.1, Paved Roads. This equation calculates emission factors based on road surface silt loading, average weight of vehicles traveling the road, number of "wet" days with at least 0.01 inches of precipitation (zero for daily emissions), and vehicle miles traveled. Emission factors based on this equation are inversely proportional to road surface silt loading proportional to surface material silt content, average weight of vehicles traveling the road, number of wet days.<sup>143</sup>

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particles by the action of turbulent air currents, such as wind erosion of an exposed surface by wind speeds over 19 kilometers per hour (km/hr) (12 miles per hour [mph])."

<sup>140</sup> Pless FCEIR Comments; CalEEMod, User's Guide, *op. cit.*, Appx. A, pp. 7-9.

<sup>141</sup> Pless FCEIR Comments; CalEEMod, User's Guide, *op. cit.*, Appx. A, pp. 9-10.

<sup>142</sup> Pless FCEIR Comments; CalEEMod, User's Guide, *op. cit.*, Appx. A, pp. 10-11.

<sup>143</sup> Pless FCEIR Comments; CalEEMod, User's Guide, *op. cit.*, Appx. A, pp. 24-25

**Unpaved roads** based on AP-42 Section 13.2.2, Unpaved Roads. This equation calculates emission factors based on surface material silt content, surface material moisture content, mean vehicle speed, and vehicle miles traveled. Emission factors based on this equation are inversely proportional to surface material moisture content and proportional to surface material silt content and vehicle speed.<sup>144</sup>

In contrast, the EPA AP-42 describes the potential for wind erosion from disturbed soils and exposed storage piles as follows:

Open area wind erosion is associated with exposed soils that have been disturbed, removing the protection afforded by natural crusting.<sup>145</sup>

Emissions generated by wind erosion are also dependent on the frequency of disturbance of the erodible surface because each time that a surface is disturbed, its erosion potential is restored. A disturbance is defined as an action that results in the exposure of fresh surface material. On a storage pile, this would occur whenever aggregate material is either added to or removed from the old surface. A disturbance of an exposed area may also result from the turning of surface material to a depth exceeding the size of the largest pieces of material present.<sup>146</sup>

The fact that windblown dust PM10 emissions during grading are *not* calculated by CalEEMod is supported not only by the above statement from the *CalEEMod Technical Paper* but is also by the fact that there is no discussion of wind erosion of disturbed soil and storage piles in Appendix A (Calculation Details for CalEEMod) to the *CalEEMod User's Guide*. Further, the *CalEEMod User's Guide* reminds the reviewer in two more instances that wind erosion from disturbed soil and storage piles are not calculated by the model:

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<sup>144</sup> *Id.*

<sup>145</sup> Pless FCEIR Comments; EPA, AP-42, Background Document for Revisions to Fine Fraction Ratios Used for AP-42 Fugitive Dust Emission Factors, Prepared by Midwest Research Institute for Western Governors' Association, Western Regional Air Partnership (WRAP), MRI Project No. 110397, November 1, 2006, p. 6, *emphasis added*; <https://www3.epa.gov/ttn/chief/ap42/ch13/bgdocs/b13s02.pdf>.

<sup>146</sup> Pless FCEIR Comments; EPA, AP-42, 13.2.5 Industrial Wind Erosion, November 2006, p. 13.2.5-2; <https://www3.epa.gov/ttn/chief/ap42/ch13/final/c13s0205.pdf>.

**Fugitive dust from wind blown sources such as storage piles are not quantified in CalEEMod** which is consistent with approaches taken in other comprehensive models.<sup>147</sup>

Some fugitive dust mitigation required by some districts do not appear here since **the fugitive dust source they mitigate is not quantified by CalEEMod in particular this includes fugitive dust generated by wind over land and storage piles.** Since they are not quantified it is not appropriate to apply the reduction.<sup>148</sup>

Therefore, the County's claim that the FEIR's estimate of PM10 emissions includes fugitive emissions due to wind erosion is not supported by substantial evidence. The FCEIR relies on the CalEEMod model to estimate construction emissions. Because the EPA's methodology for windblown dust emissions from construction sites<sup>149</sup> is not incorporated into CalEEMod, there is indeed "a gap in the Lead Agency's methodology." The FCEIR must be revised to quantify PM10 emissions from disturbed, unstabilized soils.<sup>150</sup>

To address this gap, Pless provides a table summarizing the potential for windblown fugitive dust PM10 emissions using five scenarios assuming different acreages of disturbed (not stabilized) *versus* stable soil for the 1402-acre Project site.<sup>151</sup>

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<sup>147</sup> Pless FCEIR Comments; CalEEMod, User's Guide, *op. cit.*, p. 3.

<sup>148</sup> Pless FCEIR Comments; CalEEMod, User's Guide, *op. cit.*, p. 40.

<sup>149</sup> Pless FCEIR Comments; See AP-42, Section 13.2.3 Heavy Construction Operation, January 1995, p. 13.2.3-2; <https://www.epa.gov/ttn/chief/ap42/ch13/final/c13s0205.pdf>. ("High wind events also can lead to emissions from cleared land and material stockpiles. Section 13.2.5, "Industrial Wind Erosion, presents an estimation methodology that can be used for such sources at construction sites.")

<sup>150</sup> RTC 7-A2.

<sup>151</sup> Pless RDEIR Comments Revised, p. 6; Pless FCEIR Comments.



**Table 1: Fugitive dust PM10 emissions due to wind erosion from disturbed soil**

Wind speed bin (mph)	12-15	15-20	20-25	25-30	30-35	Total
Stable soil PM emission factor <sup>a</sup> (ton/acre/5-min)	1.10E-05	2.93E-05	7.68E-05	1.64E-04	3.10E-04	
Disturbed soil PM emission factor <sup>a</sup> (ton/acre/5-min)	5.44E-05	1.69E-04	5.14E-04	1.24E-03	2.57E-03	
Percent of time in wind speed bin <sup>b</sup> (%/year)	13.5%	19.3%	10.7%	3.3%	0.8%	
Count of 3- or 5-minute periods/year in wind speed bin (#/year) <sup>c</sup>	175,200	105,120	105,120	105,120	105,120	
PM10 Emissions (ton/year) <sup>d</sup>						
100 acres disturbed/1302 acres stable	1.28	3.54	6.15	4.67	2.38	18.01
200 acres disturbed/1202 acres stable	2.57	7.09	12.29	9.33	4.75	36.03
500 acres disturbed/902 acres stable	6.42	17.71	30.73	23.33	11.88	90.07
1000 acres disturbed/402 acres stable	12.83	35.43	61.47	46.66	23.76	180.14
1402 acres disturbed/0 acres stable	17.99	49.67	86.18	65.41	33.31	252.56

a Maricopa County Air Quality Department, 2008 PM10 Periodic Emissions Inventory for the Maricopa County, Arizona, Nonattainment Area, Revised June 2011, Appendix 4. Windblown Dust Emission Estimation Methodology;

[https://www.maricopa.gov/qa/divisions/planning\\_analysis/docs/Reports/2008/08\\_PM10\\_PEI\\_Entire.pdf](https://www.maricopa.gov/qa/divisions/planning_analysis/docs/Reports/2008/08_PM10_PEI_Entire.pdf)

b From: Western Regional Climate Center - Desert Research Institute for Poppy Park, CA, for October 31, 1995 through October 31, 2015; <http://www.raws.dri.edu/cgi-bin/rawMAIN.pl?caCPOP>

c Count of 3- or 5-minute periods/year in wind speed bin = (365 days/year) × (24 hours/day) × (60 minutes/hour) / (3 or 5)

d PM10 Emissions = {(stable soil acreage) × (count of 3- or 5-minute periods/year in wind speed bin) × (% of time in wind speed bin) × (wind speed bin stable soil PM emission factor) × (PM10/PM: 0.0125)} + {(disturbed soil acreage) × (count of 3- or 5-minute periods/year in wind speed bin) × (% of time in wind speed bin) × (wind speed bin disturbed soil PM emission factor) × (PM10/PM: 0.0125)} - {(1402 acres) × (count of 3- or 5-minute periods/year in wind speed bin) × (% of time in wind speed bin) × (wind speed bin stable soil PM emission factor) × (PM10/PM: 0.0125)}

In its Response to Comments, the FCEIR attempts to dismiss these calculations based on the claim that Dr. Pless fails to show her methodology. This is not correct. Dr. Pless has provided her calculations, modeling and a detailed explanation of her methodology and has also provided the Maricopa County Air Quality Department methodology which Dr. Pless relies upon.<sup>152</sup> Even if Dr. Pless had not established a foundation for her calculations (which she has), the FCEIR fails to provide any alternative calculation of the Project's wind blown dust emissions. Accordingly, the FCEIR lacks substantial evidence to support its finding that PM10 emissions during construction will be less than significant.

<sup>152</sup> Pless FCEIR Comments.

The FCEIR Response to Comments also claims that there is no need to measure the fugitive wind-blown dust from such soils because: (1) All clearing, grading, earth moving, and excavation activities must cease during periods of winds greater than 20 miles per hour; (2) the applicant is required to stabilize soils as grading and site preparation occur, meaning that, at most, only negligible areas of disturbed soils will exist on-site at any given time; (3) stockpiles of soil or other fine loose material must be stabilized; and (4) the Project must establish a Site Specific Dust Control Plan, requiring watering to prevent excessive dust, use of dust suppressants, and other measures to minimize dust impacts, including wind-blown fugitive dust.

The Responses to Comments claims that even assuming the applicant could disturb, without stabilizing, 100 acres of the site at once, with the 20 mile per hour wind restriction on construction activities, fugitive dust from disturbed soil would add at most 1.95 tons per year of PM10 based on commenter's Table 1. This Response appears to rely on the claim made in Responses to Comments 7-E2, 7-I12 and 7R6 that the Project would be limited to disturbing no more than 100 acres per day per Kern County and EKAPCD requirements. Contrary to this claim, neither Kern County or the EKAPCD limit earth disturbing construction activities to no more than 100 acres per day. The Project simply is not subject to this alleged limitation nor has such a limitation been included in the proposed mitigation.

Even if an enforceable 100 acre a day limit existed, the 20 mile per hour wind restriction would not address fugitive dust emissions – it would just address emissions from active construction activities. If the applicant is grading or disturbing 100 acres and the wind picks up to greater than 20 miles, they have to immediately cease work – but this would not ensure that the soil that they were just grading has been stabilized.

Further, it does not even take 100 acres of disturbed soils to exceed the EKAPCD's annual threshold of significance for PM10 of 15 tons/year due added fugitive dust from wind erosion. According to the FCEIR's calculations, the other construction activities already contribute 4.31 tons/year of mitigated PM10 emissions (or 29% of the threshold<sup>153</sup>) in Year Two of construction.<sup>154</sup> Thus, as little as 71.3 acres of disturbed land throughout the year would contribute enough PM10

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<sup>153</sup> Pless FCEIR Comments;  $(4.31 \text{ tons/year}) / (15 \text{ tons/year}) = 0.29$ .

<sup>154</sup> FCEIR, Table 4.3-6, p. 4.3-39.

emissions from wind erosion.<sup>155</sup> Further, wind erosion of disturbed surfaces is not the only dust source that has been omitted from the EIR's estimates of fugitive PM10 emissions; storage piles and stabilized graded surfaces are also subject to wind erosion. These emissions are also not included in the FCEIR's modeling of construction emissions.<sup>156</sup>

Even with application of dust control measures, Dr. Pless finds that Project PM10 emissions from wind erosion will be significant since such measures are not 100% effective.<sup>157</sup> Dust control measures are not 100% effective. Particularly in dry desert climates, such as is encountered here, watering only applies temporary control efficacy due to rapid evaporation rates.<sup>158</sup> Moreover, during construction activities, and during temporary work stoppages due to high wind, large portions of land will not be stabilized. The FCEIR fails to identify this significant and unavoidable impact.

**C. The FCEIR Violates CEQA by Failing to Consider Background Dust Emissions when Determining the Significance of the Project's Dust Emissions**

The FCEIR Response to Comments claims that it is not necessary to consider background concentrations when evaluating the impact of the Project's PM emissions because that is not the "methodology" of EKAPCD for determining significance and because background conditions would be significant even without the Project.<sup>159</sup> Regardless of the EKAPCD's "methodology," background conditions are directly relevant to the significance of the Project's PM emissions because the Project's emissions Project would increase the severity of the impacts and would likely cause Project plus background conditions to exceed significance thresholds even in years where background conditions alone may fall below significance thresholds. The Courts have long upheld the requirement to take into account background conditions when looking at air quality impacts under CEQA, holding that the analysis must assess the collective or combined effect.<sup>160</sup>

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<sup>155</sup> Pless FCEIR Comments;  $(100 \text{ acres}) \times (1-0.29) = 71.3 \text{ acres}$ .

<sup>156</sup> Pless FCEIR Comments.

<sup>157</sup> Pless FCEIR Comments; see also SCAQMD, CEQA, Air Quality Analysis Handbook, Mitigation Measures and Control Efficiencies, Fugitive Dust; <http://www.aqmd.gov/home/regulations/ceqa/air-quality-analysis-handbook/mitigation-measures-and-control-efficiencies/fugitive-dust>.

<sup>158</sup> Pless FCEIR Comments.

<sup>159</sup> FCEIR at p. 7.5-380.

<sup>160</sup> *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 721.

#### IV. A NEW EIR MUST BE RECIRCULATED FOR PUBLIC REVIEW

An EIR must be recirculated if: (1) it reveals new substantial environmental impacts not disclosed in the FCEIR; (2) it reveals a substantial increase in the severity of impacts (unless mitigated); (3) comments have been received that identify new feasible mitigation measures, but the feasible mitigation measures are not adopted; or (4) it is so fundamentally and basically inadequate and conclusory in nature that public comment on the FCEIR was essentially meaningless.<sup>161</sup>

The courts have held that the failure to recirculate an EIR turns the process of environmental evaluation into a "useless ritual" which could jeopardize "responsible decision-making."<sup>162</sup> Both the opportunity to comment and the preparation of written responses to those comments are crucial parts of the EIR process.

These comments have identified substantial environmental impacts that were not discussed at all in the FCEIR or were not meaningfully considered. These include direct and cumulative impacts on special status species and air quality impacts. The FCEIR must be withdrawn, revised and recirculated to properly evaluate these impacts.<sup>163</sup>

These comments have also identified feasible mitigation measures for significant, unmitigated impacts that have not been evaluated or proposed for adoption by the FCEIR. Under CEQA Guidelines, the FCEIR must be revised and recirculated to allow for public comment on these unadopted, feasible mitigation measures.<sup>164</sup>

Finally, the FCEIR must be withdrawn and revised because its numerous deficiencies preclude meaningful public comment.<sup>165</sup> These deficiencies include failing to disclose the presence or potential presence of special status species, mischaracterizing the baseline environmental setting and failing to disclose significant environmental impacts. These combined deficiencies reflect an EIR "so fundamentally inadequate and conclusory in nature that public comment on the

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<sup>161</sup> CEQA Guidelines § 15088.5, subd. (a).

<sup>162</sup> *Sutter Sensible Planning v. Sutter County Board*, (1981) 122 Cal.App.3d 813, 822.

<sup>163</sup> CEQA Guidelines § 15088.5, subd. (a).

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

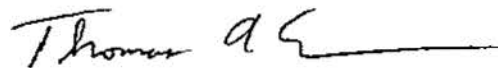
draft was in effect meaningless.”<sup>166</sup> The omission of key information regarding the Project’s environmental setting and potential impacts denied the public an “opportunity to test, assess, and evaluate the data and make an informed judgment as to the validity of the conclusions to be drawn therefrom.”<sup>167</sup> Under these circumstances, recirculation is required.

## VII. CONCLUSION

The Project is one of approximately 48 approved or proposed solar power plants that will cumulatively covert over 35,000 acres of agricultural land and special status species habitat to an industrial use.<sup>168</sup> While these projects will employ solar technology, each one will unavoidably tax the State’s limited water, land, air, and biological resources to a potentially significant cumulative extent. In addition, many of the projects are on agricultural land that has provided substantial employment to Kern County residents - employment opportunities that will not be replaced by the meager operational staff required to operate these land intensive solar projects.

Due to the unprecedented scope of large scale development projects taking place in this region, it is essential that the County’s EIR 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 requires nothing less. The EIR must be revised to resolve its inadequacies and must be recirculated for public review and comment.

Sincerely,



Thomas A. Enslow

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<sup>166</sup> *Laurel Heights Improvement Association v. Regents of the University of California* (1993) 6 Cal.4<sup>th</sup> 1112, 1130.

<sup>167</sup> *Save Our Peninsula Committee v. Monterey County Bd. of Supervisors* (2001) 87 Cal.App.4<sup>th</sup> 99, 131; CEQA Guidelines § 15088.5.

<sup>168</sup> [http://www.co.kern.ca.us/planning/pdfs/renewable/solar\\_projects.pdf](http://www.co.kern.ca.us/planning/pdfs/renewable/solar_projects.pdf)



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Attachments