

## Response to Comment Letter O5

**Adams Broadwell Joseph and Cardozo  
on behalf of Citizens for Responsible Industry  
June 1, 2015**

**O5-1** Comment noted.

### Comment Letter O5

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#### Via Email and U.S. Mail

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Re: Comments on the Draft Environmental Impact Report for the  
Jacumba Solar Project (PDS2014-MUP-14-041)  
(SCH No. 2014091034)

Dear Ms. Gungle:

On behalf of the Citizens for Responsible Industry, we submit these comments on the Draft Environmental Impact Report ("DEIR") for the Jacumba Solar Energy Project, a proposed 20 megawatt ("MW") solar photovoltaic ("PV") energy facility proposed to be located on 304 acres of private land in southeastern San Diego County ("County"), approximately 3/5 miles east of Jacumba, near Historic Rt. 80 and Carrizo George Rd RL 80/S92. The solar facility, proposed by Jacumba Solar, LLC, a division of NextEra Energy Capital Holdings ("Applicant") would use PV fixed-tilt rack electric generation system technology to produce solar energy at the utility scale, including approximately 81,108 PV modules fitted on 2,253 fixed-tilt rack panels (solar arrays), inverters, an on-site substation, and a battery storage facility capable of storing approximately 10 MW of energy (collectively, "Project" or "Jacumba Project").<sup>1</sup>

The Project site is located in the County's desert region, and is rich with rare and special-status vegetation.<sup>2</sup> The site contains key foraging and nesting habitat for special-status raptors and other birds, such as golden eagles, prairie falcons, and

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<sup>1</sup> DEIR, pp. S-1 to S-2.  
<sup>2</sup> See DEIR Biological Appendix 2.2-1, Appendix C.  
3144-009ev

<p>June 1, 2015 Page 2</p> <p>Cooper's hawk.<sup>3</sup> The site also contains several stream channels and drainages that are considered jurisdictional non-wetland waters, including a tributary to Carrizo Creek.<sup>4</sup> The nearest sensitive human receptor is a single-family residence located approximately 3,500 feet (1,067 meters) north of the Project site.<sup>5</sup></p> <p>Construction of the Project is expected to take 6 months, and will require up to 120 workers and 298 truck trips per day during construction.<sup>6</sup> Upon completion, the Project would be an unmanned facility that would be monitored off site through a supervisory control and data acquisition ("SCADA") system.<sup>7</sup> The overall lifespan of the solar facility is estimated to be 30 years. At the end of its useful life, the Project would either have to be retooled with new technology or decommissioned and dismantled.<sup>8</sup></p> <p>Based upon our review of the DEIR, we conclude that the DEIR fails to comply with the California Environmental Quality Act<sup>9</sup> ("CEQA") in numerous aspects. For example, the DEIR's objectives and alternatives analysis does not comply with CEQA. The Project's objectives are much too narrow, arbitrarily rejecting any alternative that generates less than 20 MW, including the environmentally superior Reduced 15 MW Project Alternative ("Alternative 1"). The DEIR's cumulative impact analyses are also flawed because the DEIR's list of cumulative projects is confined to an overly narrow list of projects within 20 miles of the Project site and arbitrarily excludes projects within that 20 mile radius. The analysis therefore excludes other relevant development projects in the direct vicinity of the Project, and within the San Diego Air Basin. As a result, the DEIR's analyses of cumulative air quality and biological impacts are incomplete.</p> <p>Additionally, the Project will generate a multitude of significant, unmitigated impacts on air quality and biological resources, including significant cumulative impacts. The DEIR either mischaracterizes, misanalyzes, underestimates or fails to identify many of these impacts. First, the DEIR seriously underestimated the cancer risk posed to nearby residents and children from toxic air contaminants ("TACs") released during Project construction. The DEIR's air quality analysis</p> <p><sup>3</sup> See e.g. DEIR, p. 2.2-51.  <sup>4</sup> DEIR, pp. 2.2-31 to 2.2-32.  <sup>5</sup> DEIR, Air Quality Appendix, p. 53.  <sup>6</sup> DEIR, p. S-3.  <sup>7</sup> DEIR, pp. S-1, 1-12.  <sup>8</sup> DEIR, p. S-1.  <sup>9</sup> Pub. Resources Code ("PRC") §§ 21000 et seq. 3144-009ev</p>	<p><b>O5-2</b> This comment is introductory and a summary of more detailed comments that occur later in the comment letter. As such, this comment is noted and detailed responses to the issues mentioned in this comment are provided below in Responses to Comments O5-26 through O5-30 as well as common themes comment ALT1 and responses to comments O5- 36 through O5-38.</p> <p><b>O5-3</b> This comment is introductory and a summary of more detailed comments that occur later in the comment letter. As such, this comment is noted and detailed responses to the issues mentioned in this comment are provided below in Responses to Comments O5-55.</p>
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relied on incorrect Project factors to calculate health risk. As a result, the DEIR inaccurately concludes that the Project will not have significant health impacts from toxic diesel particulate matter ("DPM") emissions, and fails to mitigate them. Our expert air quality consultants performed the same health risk assessment using the correct Project input value factors, and found that unmitigated DPM emissions released during Project construction will result in a cancer risk of 1.8 per million for adults, 10.4 per million for children, and 34.6 per one million for infants.<sup>10</sup> This risk is well above the San Diego Air Pollution Control District's ("SDAPCD") significance threshold for cancer of 1 in a million, and is therefore a significant impact requiring mitigation.<sup>11</sup>

The DEIR also omits an analysis of key issues, such as public health impacts from exposure to Valley Fever. Valley Fever, or Coccidioidomycosis, is an infectious disease caused by inhaling the spores of *Coccidioides immitis*, a fungus commonly found in soils in the Central Valley and Southern California desert regions. The disease can have serious health effects, including fever, chronic pneumonia, meningitis, or even death.<sup>12</sup> The spores are commonly released during soil-disturbing construction activities like those planned for the Project, yet the DEIR fails to even mention it.<sup>13</sup> Valley Fever has become increasingly prevalent in San Diego County in recent years.<sup>14</sup> This critical health impact requires analysis and mitigation in CEQA documents prepared for construction activities like the Project.

Finally, the DEIR makes erroneous assumptions about the impacts of the Project on wildlife and special-status plants, without substantial evidence. For example, the DEIR omits a meaningful discussion of the impacts of "lake effect" from solar panel on bird deaths because the DEIR concludes that there is little scientific information about this impact.<sup>15</sup> By contrast, expert biologist Renee

<sup>10</sup> See Exhibit A, Soil, Water, Air Protection Enterprise, Comments on the Jacumba Solar Energy Project, Jacumba, California (May 29, 2015) ("SWAPE Comments"), p. 15.

<sup>11</sup> See DEIR, p. 3.1.1-11 (requiring implementation of Toxics Best Available Control Technology ("T-BACT") for projects whose emissions of TACs result in an incremental cancer risk greater than 1 in 1 million); *Schenck v. County of Sonoma* (2011) 198 Cal.App.4th 949, 960 (EIR must disclose an impact as significant when it exceeds a duly adopted CEQA significance threshold).

<sup>12</sup> See Exhibit C, <http://www.cdc.gov/fungal/diseases/coccidioidomycosis/risk-prevention.html>.

<sup>13</sup> See Exhibit D, Cal. Dep't of Public Health, Preventing Work-Related Coccidioidomycosis (Valley Fever) (June 2013), pp. 1-2.

<sup>14</sup> See Exhibit E, <http://www.cdph.ca.gov/HealthInfo/diseases/EnglishValleyFeverBrochure.pdf>.

<sup>15</sup> See Dudek, Biological Resources Report for the Jacumba Solar Energy Project (April 2015) ("Bio Appendix"), p. 76.  
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O5-5

**O5-4**

This comment is introductory and a summary of more detailed comments that occur later in the comment letter. As such, this comment is noted and detailed responses to the issues mentioned in this comment are provided below in Responses to Comments O5-48.

**O5-5**

This comment is introductory and a summary of more detailed comments that occur later in the comment letter. As such, this comment is noted and detailed responses to the issues mentioned in this comment are provided in Responses to Comments O3-6, O3-7, O5-151 and Common Response BIO1.

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Owens has submitted evidence with these comments which demonstrates that impacts to bird populations from deaths caused by the "lake effect" can be substantial. Ms. Owens concludes that the Project is likely to result in significant impacts to special-status raptors and other birds that attempt to forage or nest in the Project site.<sup>16</sup> The County must address this impact in a revised EIR and must adopt mitigation measures to reduce the impact to less than significant levels.

CEQA requires recirculation of a DEIR for public review and comment when significant new information is added to the DEIR following public review, but before certification.<sup>17</sup> The CEQA Guidelines clarify that new information is significant if "the DEIR is changed in a way that deprives the public of a meaningful opportunity to comment upon a substantial adverse environmental effect of the Project or a feasible way to mitigate or avoid such an effect."<sup>18</sup>

The purpose of recirculation is to give the public and other agencies an opportunity to evaluate the new data and the validity of conclusions drawn from it.<sup>19</sup> As explained herein, there is significant new information, and significant information that was omitted from the DEIR, which require recirculation in this case. The County may not approve the Project until a legally adequate DEIR is prepared and recirculated for public review and comment.

We have reviewed the DEIR and its technical appendices with the assistance of expert consultants, whose comments and qualifications are attached as follows: Matt Hagemann and Jessie Jaeger (Attachment A), and Renee Owens (Attachment B). The attached expert comments require separate response under CEQA. A revised or supplemental EIR should be prepared and recirculated prior to Project approval to analyze all impacts and require implementation of all feasible mitigation measures.

#### I. STATEMENT OF INTEREST

Citizens for Responsible Industry is an unincorporated association of individuals and labor unions that would be adversely affected by the potentially adverse public and worker health and safety hazards, and environmental and public

<sup>16</sup> See Exhibit B, Renee Owens Comments on the Draft Environmental Impact Report Prepared for the Jacumba Solar Development Project (May 31, 2015) ("Owens Comments"), pp. 9-15.

<sup>17</sup> PRC § 21092.1.

<sup>18</sup> 14 Cal. Code Regs. ("CCR") § 15088.5.

<sup>19</sup> *Save Our Peninsula Comm. v. Monterey County Bd. of Supervisors* (1981) 122 Cal.App3d 813, 822, 3144-009ev

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O5-6

O5-7

#### O5-6

The County disagrees that recirculation of the DEIR is required because none of the new information added to the EIR is "significant." The fact that commenter proposed alternative methods of analyzing the significance of an impact does not make it significant new information that would trigger a recirculation. The County is entitled to rely on its experts and other sources of substantial evidence to draw conclusions about the significance of environmental impacts even if commenter and commenter's experts disagree with those conclusions.

CEQA requires an EIR to be recirculated when the addition of new information deprives the public of a meaningful opportunity to comment on substantial adverse project impacts or feasible mitigation measures or alternatives that are not adopted. (*Laurel Heights Improvement Ass'n v Regents of Univ. of Cal.* (1993) 6 C4th 1112; CEQA Guidelines, Section 15088.5(a). The critical issue in determining whether recirculation is required is whether any new information added to the EIR is "significant." If added information is significant, recirculation is required under Public Resources Code section 21092.1. The purpose of recirculation is to give the public and other agencies an opportunity to evaluate the new data and the validity of conclusions drawn from it. (*Silverado Modjeska Recreation & Park Dist. v County of Orange* (2011) 197 Cal.App.4th 282, 305; *Save Our Peninsula Comm. v Monterey County Bd. of*

	<p><i>Supervisors</i> (2001) 87 Cal.App.4th 99, 131; <i>Sutter Sensible Planning, Inc. v Board of Supervisors</i> (1981) 122 Cal.App.3d 813, 822.)</p> <p><i>In Laurel Heights Improvement Ass'n v Regents of Univ. of Cal.</i> (1993) 6 Cal.4th 1112, 1130 (Laurel Heights II), the court gave four examples of situations in which recirculation is required:</p> <ul style="list-style-type: none"> <li>• When the new information shows a new, substantial environmental impact resulting either from the project or from a mitigation measure;</li> <li>• When the new information shows a substantial increase in the severity of an environmental impact, except that recirculation would not be required if mitigation that reduces the impact to insignificance is adopted;</li> <li>• When the new information shows a feasible alternative or mitigation measure, considerably different from those considered in the EIR, that clearly would lessen the significant environmental impacts of a project and the project proponent declines to adopt it; and</li> <li>• When the draft EIR was “so fundamentally and basically inadequate and conclusory in nature” that public comment on the draft EIR was essentially meaningless.</li> </ul>
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<p>June 1, 2015 Page 5</p> <p>service impact, of the Project. The association includes San Diego County residents, such as Richard Daniels, and California Unions for Reliable Energy ("CURE") and its local union affiliates and their members and families that live and/or work in San Diego and Imperial counties (collectively, "Citizens"). The association was formed to advocate for responsible and sustainable industrial development in San Diego County and nearby surrounding areas in order to protect public health and safety and the environment where the association members and their families live, work and recreate.</p> <p>The individual members of Citizens and the members of the affiliated labor organizations live, work, recreate, and raise their families in San Diego County, including around the Project site. They would be directly affected by the Project's environmental and health and safety impacts. Individual members may also work constructing the Project itself. They will, therefore, be first in line to be exposed to any environmental hazards that exist onsite.</p> <p>The organizational members of Citizens also have an interest in enforcing environmental laws that encourage sustainable development and ensure a safe working environment for the union organization's members that they represent. Environmentally detrimental projects can jeopardize future jobs by making it more difficult and more expensive for business and industry to expand in the region, and by making it less desirable for businesses to locate and people to live there. This in turn jeopardizes future development by causing construction moratoriums and otherwise reducing future employment opportunities for construction workers. The labor organization members of Citizens therefore have a direct interest in enforcing environmental laws to minimize the adverse impacts of projects that would otherwise degrade the environment.</p> <p>II. LEGAL BACKGROUND</p> <p>CEQA requires that an agency analyze the potential environmental impacts of its proposed actions in an environmental impact report ("EIR") (except in certain limited circumstances).<sup>20</sup> The EIR is the very heart of CEQA.<sup>21</sup> The foremost principle in interpreting CEQA is that the Legislature intended the act to be read so</p> <p><sup>20</sup> See, e.g., PRC § 21100. <sup>21</sup> <i>Dunn-Edwards v. BAAQMD</i> (1992) 9 Cal.App.4th 644, 652. 3144-009ev</p>	<p>After <i>Laurel Heights II</i>, these examples were incorporated into the CEQA Guidelines. (CEQA Guidelines Section 15088.5(a).)</p> <p>Any new information that has been added to the EIR since circulation of the DEIR serves simply to clarify or amplify information already found in the DEIR, and does not raise important new issues about significant effects on the environment. The ultimate conclusion about the project's significant impacts do not change in light of any new information added to the EIR. Therefore, any new information in the EIR is insignificant for purposes of CEQA, particularly as set forth in Section 15088.5(b) of the CEQA Guidelines.</p> <p>Detailed responses to the letter provided by Matt Hagemann and Jessie Jaeger (Exhibit A of the comment letter) and the letter provided by Renee Owens (Exhibit B of the comment letter) are included separately as requested by the commenter (comment responses O5-93 through O5-128 address Exhibit A and comment responses O5-131 through O5-173 address Exhibit B).</p> <p><b>O5-7</b> Comment noted. This comment does not address the adequacy of the DEIR, therefore no further response is required.</p> <p><b>O5-8</b> Comment noted. The County has prepared the DEIR pursuant to the applicable requirements under</p>
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as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language.”<sup>22</sup>

CEQA has two primary purposes. First, CEQA is designed to inform decision makers and the public about the potential, significant environmental effects of a project.<sup>23</sup> “Its purpose is to inform the public and its responsible officials of the environmental consequences of their decisions before they are made. Thus, the EIR ‘protects not only the environment but also informed self-government.’”<sup>24</sup> The EIR has been described as “an environmental ‘alarm bell’ whose purpose it is to alert the public and its responsible officials to environmental changes before they have reached ecological points of no return.”<sup>25</sup>

Second, CEQA requires public agencies to avoid or reduce environmental damage when “feasible” by requiring “environmentally superior” alternatives and all feasible mitigation measures.<sup>26</sup> The EIR serves to provide agencies and the public with information about the environmental impacts of a proposed project and to “identify ways that environmental damage can be avoided or significantly reduced.”<sup>27</sup> If the project will have a significant effect on the environment, the agency may approve the project only if it finds that it has “eliminated or substantially lessened all significant effects on the environment where feasible” and that any unavoidable significant effects on the environment are “acceptable due to overriding concerns.”<sup>28</sup>

While the courts review an EIR using an “abuse of discretion” standard, “the reviewing court is not to ‘uncritically rely on every study or analysis presented by a project proponent in support of its position. *A clearly inadequate or unsupported study is entitled to no judicial deference.*”<sup>29</sup> As the courts have explained, “a prejudicial abuse of discretion occurs “if the failure to include relevant information

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<sup>22</sup> *Comtys. for a Better Env’ v. Cal. Res. Agency* (2002) 103 Cal. App.4th 98, 109 (“*CBE v. CRA*”).

<sup>23</sup> 14 CCR § 15002(a)(1).

<sup>24</sup> *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal. 3d 553, 564.

<sup>25</sup> *Berkeley Keep Jets Over the Bay v. Bd. of Port Comm’rs.* (2001) 91 Cal. App. 4th 1344, 1354 (“*Berkeley Jets*”); *County of Inyo v. Yorty* (1973) 32 Cal.App.3d 795, 810.

<sup>26</sup> 14 CCR § 15002(a)(2) and (3); see also *Berkeley Jets*, 91 Cal.App.4th at 1354; *Citizens of Goleta Valley*, 52 Cal.3d at 564.

<sup>27</sup> 14 CCR § 15002(a)(2).

<sup>28</sup> PRC § 21081; 14 CCR § 15062(b)(2)(A) & (B).

<sup>29</sup> *Berkeley Jets*, 91 Cal. App. 4th 1344, 1355 (emphasis added), quoting, *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 391 409, fn. 12.

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CEQA. This comment does not address the adequacy of the DEIR, therefore no further response is required. The County notes that CEQA has several policies. Among the policies the commenter fails to note are the following:

“Ensure the long-term protection of the environment, *consistent with the provision of a decent home and suitable living environment for every Californian*, shall be the guiding criterion in public decisions” Pub. Res. Code 21001(d); emphasis added. The Proposed Project creates a source of renewable energy to help power homes and create a suitable living environment for Californians.

“If economic, social, or other conditions make it infeasible to mitigate one or more significant effects on the environment of a project, the project may nonetheless be carried out or approved *at the discretion of a public agency* if the project is otherwise permissible under applicable laws and regulations.” Pub. Res. Code 21002(c); emphasis added. The administrative record supports and will support the County decision-makers final findings with regards to the feasibility of mitigation at the time they are made with the decision-makers having fully and independently considered all the evidence.

“To provide more meaningful public disclosure, reduce the time and cost required to prepare an

	<p>environmental impact report, and focus on potentially significant effects on the environment of a Proposed Project, lead agencies shall, in accordance with Section 21000, focus the discussion in the environmental impact report on those potential effects on the environment of a proposed project <i>which the lead agency has determined are or may be significant. Lead agencies may limit discussion on other effects to a brief explanation as to why those effects are not potentially significant.</i>” Pub. Res. Code 21002.1(e); emphasis added.</p> <p>“The legislature further finds and declares that it is the policy of the state that:...(f) All persons and public agencies involved in the environmental review process be responsible for carrying out the process in the most efficient, expeditious manner in order to conserve the available financial, governmental, physical, and social resources with the objective that those resources may be better applied toward mitigation of actual significant effects on the environment.” Pub. Res. Code 21003(f).</p> <p>“In addition to the policies declared by the Legislature concerning environmental protection and administration of CEQA in Sections 21000, 21001, 21002, and 21002.1 of the Public Resources Code, the courts of this state have declared the following policies to be implicit in CEQA:</p>
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	<p>‘(g) The purpose of CEQA is <i>not to generate paper</i>, but to compel government at all levels to make decisions with environmental consequences in mind.’ (Bozung v. LAFCO (1975) 13 Cal. 3d 263.; emphasis added)</p> <p>(i) CEQA <i>does not required technical perfection</i> in an EIR, but rather adequacy, completeness, and a good-faith effort at full disclosure. A court does not pass upon the correctness of an EIR’s environmental conclusions, but only determines if the EIR is sufficient as an informational document. (Kings County Farm Bureau v. City of Hanford (1990) 221 Cal. App. 3d 692; emphasis added)</p> <p>“(j) CEQA requires that decisions be informed and balanced. <i>It must not be subverted into an instrument for the oppression and delay of social, economic, or recreational development or advancement.</i> (Laurel Heights Improvement Assoc. v. Regents of U.S. (1993) 6 Cal. 4<sup>th</sup> 1112 and Citizens of Goleta Valley v. Board of Supervisors (1990) 52 Cal. 3d 553)” See CEQA Guidelines section 15003 ((g), (i) and (j); emphasis added).</p> <p>Here, the County has provided a good faith effort to analyze the environmental impacts of the project using methodologies approved by the project and with the assistance of experts in environmental analysis. The County is not required to generate paper to perform</p>
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<p>June 1, 2015 Page 7</p> <p>precludes informed decisionmaking and informed public participation, thereby thwarting the statutory goals of the EIR process.”<sup>30</sup></p> <p><b>III. THE DEIR FAILS TO ADEQUATELY DESCRIBE THE PROJECT</b></p> <p>The DEIR does not meet CEQA’s requirements because it fails to include an accurate, complete and stable Project description, rendering the entire analysis inadequate. California courts have repeatedly held that “an accurate, stable and finite project description is the <i>sine qua non</i> of an informative and legally sufficient [CEQA document].”<sup>31</sup> CEQA requires that a project be described with enough particularity that its impacts can be assessed.<sup>32</sup> Accordingly, a lead agency may not hide behind its failure to obtain a complete and accurate project description.<sup>33</sup></p> <p>It is impossible for the public to make informed comments on a project of unknown or ever-changing description. “A curtailed or distorted project description may stultify the objectives of the reporting process. Only through an accurate view of the project may affected outsiders and public decision-makers balance the proposal’s benefit against its environmental costs....”<sup>34</sup> As articulated by the court in <i>County of Inyo v. City of Los Angeles</i>, “a curtailed, enigmatic or unstable project description draws a red herring across the path of public input.”<sup>35</sup> Without a complete project description, the environmental analysis under CEQA is impermissibly limited, thus minimizing the project’s impacts and undermining meaningful public review.<sup>36</sup></p> <p><b>A. The DEIR Fails to Adequately Describe the Open Space Preserve</b></p> <p>The DEIR contains conflicting and contradictory descriptions of the Open Space Preserve that fail to adequately inform the public of the size and purpose of</p> <p><small><sup>30</sup> <i>Berkeley Jets</i>, 91 Cal.App.4th at 1355; <i>San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus</i> (1994) 27 Cal.App.4th 713, 722; <i>Galante Vineyards v. Monterey Peninsula Water Management Dist.</i> (1997) 60 Cal.App.4th 1109, 1117; <i>County of Amador v. El Dorado County Water Agency</i> (1999) 76 Cal.App.4th 931, 946. <sup>31</sup> <i>County of Inyo v. City of Los Angeles</i> (3d Dist. 1977) 71 Cal.App.3d 185, 193. <sup>32</sup> <i>Id.</i> at 192. <sup>33</sup> <i>Sundstrom v. County of Mendocino</i> (1988) 202 Cal.App.3d 296, 311 (“<i>Sundstrom</i>”). <sup>34</sup> <i>Id.</i> at 192-193. <sup>35</sup> <i>Id.</i> at 197-198. <sup>36</sup> See, e.g., <i>Laurel Heights Improvement Assn. v. Regents of the Univ. of Cal.</i> (1988) 47 Cal.3d 376, 3144-009cv</small></p>	<p>additional analysis the commenter considers technically perfect, that uses different methodologies of analysis, and different thresholds of significance would subvert CEQA into an instrument of oppression and delay of social and economic advancement by further delaying this project’s contribution to construction jobs within the County and to helping the state meet and exceed its renewable portfolio standard targets through the creation of clean, solar energy. Here, the County has properly weighed comments from all sources and either made appropriate clarifications in the EIR or explained in good faith why it disagrees with the comment.</p> <p><b>O5-9</b></p> <p>This comment states that the DEIR does not include “an accurate, complete and stable Project description” yet does not provide specific details regarding the commenter’s issue with the project description in this specific comment. CEQA Guidelines section 15124 identifies the required elements of a project description. It provides that “the description of the project shall contain the following information but should not supply extensive detail beyond that needed for evaluation and review of the environmental impact:” (a) The precise location and boundaries of the Proposed Project shown on a detailed map, preferably topographic and also including a regional map; (b) a statement of objectives sought by the Proposed</p>
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	<p>Project; (c) a general description of the project's technical, economic, and environmental characteristics; (d) a statement briefly describing the intended uses of the EIR including, a list of agencies expected to use the EIR in decision-making, a list of permits and other approvals required to implement the project and a list of related environmental review and consultation requirements required by federal, state, or local laws, regulations, or policies'.</p> <p>The DEIR's project description includes each of these required elements. The Project location and boundaries are depicted on Figures 1-1 and 1-2; a statement of project objectives is included on pages 1-1 to 1-2; the project's technical, economic, and environmental characteristics are described on pages 1-2 through 1-20; and the intended use of the EIR and further permits and approvals required to implement the Project are set forth on pages 1-20 through 1-21.</p> <p><b>O5-10</b> Discussion of the Open Space preserve is found in Chapter 1, Project Description, and Section 2.2, Biological Resources, of the DEIR. The comment is correct in its description of how the Open Space preserve is described in various sections of the EIR. It should be noted that the size of the preserve is consistently stated throughout each identified section of the DEIR (Chapter 1, Project Description, Section 2.2, Biological Resources, and Appendix 2.2-1) as</p>
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the preserve. The Project Description chapter of the DEIR states that the Project will put aside 184 acres as a permanent open space preserve.<sup>37</sup> As explained in that chapter, the purpose of the preserve is to "enable wildlife access across the private lands to adjoining federal lands in an area where cross-border movement is possible."<sup>38</sup> However, proposed Mitigation Measure M-BI-4 then states that the open space preserve will include just 180.4 acres of native habitat, 3.1 acres of already disturbed habitat, and is intended to "mitigate for Project impacts to 99.9 acres of special status upland vegetation communities."<sup>39</sup> Finally, the DEIR Bio Appendix again describes the Open Space Preserve as 184 acres,<sup>40</sup> but admits that the 3.1 acres of disturbed land cannot be considered as replacement habitat with equivalent function or value acreage of that being lost to the Project.<sup>41</sup> The DEIR Bio Appendix also asserts that the Open Space Preserve has been configured "to be consistent with current wildlife movement constraints and movement areas."<sup>42</sup>

There is no analysis in the DEIR of use of the Open Space preserve to mitigate for special status vegetation. The only mention of this purpose is in the text of Mitigation Measure M-BI-4, and all other discussion of the preserve addresses migrating wildlife. It is therefore unclear whether the preserve is appropriately designed to mitigate either impacts to special-status plants or to migrating wildlife. The DEIR must be revised to clarify this inconsistency, and provide a legally adequate discussion of the Open Space Preserve.

**B. The DEIR Contains Conflicting Information About the Number of Workers on the Project Site During Operation**

The DEIR's Project Description chapter makes clear that there will be no on-site workers used during Project operation. It explains that "[t]he Project would be an unmanned facility that would be monitored remotely."<sup>43</sup> However, Mitigation Measure M-BI-1 purports to require on-site workers to monitor bird kills once the Project is operation. Mitigation Measure M-BI-1 states that "[d]uring operations, site personnel will collect the same data [data on incidentally detected dead avian

<sup>37</sup> DEIR, p. 1-2.

<sup>38</sup> *Id.*

<sup>39</sup> DEIR, p. 8-15.

<sup>40</sup> DEIR Bio Appendix p. 1.

<sup>41</sup> DEIR, p. 2.2-32.

<sup>42</sup> DEIR Bio Appendix, p. 75.

<sup>43</sup> DEIR, p. 1-12; *see also* DEIR, p. 1-3 ("Upon completion, Jacumba Solar would be monitored off site through a supervisory control and data acquisition (SCADA) system.").

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O5-10  
Cont.

O5-11

O5-12

approximately 184 acres. The specifically identified approximately 180.4 acres of native habitats required to mitigate for Project impacts to 99.9 acres of special-status upland vegetation and approximately 3.1 acres of disturbed land that is not required for mitigation of Project impacts to special-status species totals approximately 183.5 acres for the entire open space preserve (which can be rounded to approximately 184 acres). The provision of the approximately 184-acre preserve for wildlife movement is not mutually exclusive from utilizing the preserve to also mitigate for impacts to special-status species for the simple reason that wildlife can move across both native habitat and disturbed land, whereas the portion of the 184 acre preserve that qualifies as mitigation for special status vegetation is more limited. Classifying the subportions of the approximately 184 acre preserve into types of land does not mean the project description is unstable. A careful reading of the EIR shows the preserve has been described as an approximately 184 acre preserve and remains described as approximately 184 acre preserve throughout the document.

**O5-11**

Please see response to comment O3-15. The use of the Open Space preserve to mitigate for impacts to special-status plant species is discussed in Section 2.2, Biological Resources, of the DEIR. Specifically, on page 2.2-90, the DEIR states that

	<p>significant long-term direct impacts to Jacumba milk-vetch, pygmy lotus, Mountain Springs bush lupine, Parry's tetradleus, southern jewelflower, Tecate tarplant, sticky gerardia, slender-leaved ipomopsis, desert beauty, pink fairy-duster, Parish's desert-thorn, and Fremont barberry would be reduced to less than significant through implementation of the Open Space preserve as required by mitigation measure M-BI-4.</p> <p><b>O5-12</b> The commenter is incorrect in the citation of mitigation measure M-BI-1, as identified in Section 2.2 of the DEIR, as all requirements outlined in the mitigation measure apply to the construction phase only. No such statement exists within mitigation measure M-BI-1.</p> <p>The quoted statement appears to be sourced from mitigation measure M-BI-15. The commenter is correct in stating that the Project Description states that the Jacumba Solar Facility will be unmanned and monitored remotely (page 1-12 of the DEIR). Commenter fails to quote the very next sentences stating "Appropriate levels of security lighting would be installed at the Project entrance. The site would be secured 24 hours per day by remote security services with motion-detection cameras." The EIR project description is not inadequate as an informational document because a reasonable person can understand</p>
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	<p>that an unmanned facility that is remotely monitored is referring to the fact that there are not full-time security personnel at the site. Solar projects that are much larger than this 20 MW facility often have full-time security staff, instead of remote monitoring so it informs the public decision-making process to tell the public the method used to monitor this particular project. It is clear that the reference to the site as unmanned and remotely monitored is with regards to security. The EIR does not say it is unmanned and remotely monitored <i>for biological monitoring</i> and then impose a contradictory on-site biological monitoring mitigation requirement.</p> <p>The commenter claims that the fact that operational workers will be on site from time to time is not disclosed and impacts of such vehicle trips and worker use of the site is not analyzed in the EIR. However, the DEIR project description accurately describes that periodic operation and maintenance staff would visit the Electrical Substation and Energy Storage Facility and the Solar Field would be visited on an as-needed basis in addition to the biannual panel washing (page 1-13 of the DEIR). Operational staff conducting the periodic and as-needed visits to the project site during operations can also fulfill the required quarterly reports outlined in mitigation measure M-BI-15. Furthermore DEIR page 3.1.1-19 discusses the marginal impacts to air quality from emissions associated with inspection vehicles, personnel</p>
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<p>June 1, 2015 Page 9</p> <p>wildlife], take photographs, and notify the Project's environmental manager, who will then notify CDFW and PDS on a quarterly basis unless listed species are involved."<sup>44</sup></p> <p>These two statements are clearly inconsistent. If the Project site is "unmanned," there would be no on-site workers to monitor or intercept dead birds. If that is the case, then Mitigation Measure M-BI-1 is infeasible. Alternatively, if the Project site will host on-site personnel once operational, that fact must be disclosed in the DEIR and the impacts of vehicle trips and other worker use of the site analyzed. The DEIR must be revised to clarify this issue.</p> <p><b>C. The DEIR Fails to Adequately Describe Project Decommissioning</b></p> <p>CEQA mandates that lead agencies must include in a project description the "whole of an action" which is being approved, including <i>all</i> components and future activities that are reasonably anticipated to become part of the project.<sup>45</sup> This includes, but is not limited to, "later phases of the project, and any secondary, support, or off-site features necessary for its implementation."<sup>46</sup> The requirements of CEQA cannot be avoided by chopping a large project into many little ones or by excluding reasonably foreseeable future activities that may become part of the project.<sup>47</sup> The County, as the lead agency, must fully analyze the whole of the project in a single environmental review document and may not piecemeal or split the project into pieces for purposes of analysis. Nevertheless, the DEIR fails to adequately describe Project decommissioning activities and fails to analyze air quality and biological impacts of decommissioning activities. Instead, the DEIR defers analysis and creation of a Decommissioning Plan to post-Project approval. As a result, the DEIR fails to describe the full scope of the Project being approved in the DEIR, and fails to disclose the full range and severity of the Project's significant environmental impacts. This violates CEQA's fundamental requirement that an EIR must fully inform the public of a project's environmental consequences. For this reason, every phase of the Jacumba Project must be assessed with the same level of specific details.</p> <p><sup>44</sup> DEIR, p. S-22.  <sup>45</sup> 14 Cal. Code Regs ("CEQA Guidelines") §15378 (emphasis added).  <sup>46</sup> <i>Bozung v. Local Agency Formation Com.</i> (1975) 13 Cal.3d 263, 283-84.  <sup>47</sup> Pub. Resources Code § 21159.27 (prohibiting piecemealing); <i>see also, Rio Vista Farm Bureau Center v. County of Solano</i> (1992) 5 Cal.App.4th 351, 370.  3144-009ev</p>	<p>transport vehicles, panel washing equipment, and service trucks during operation and maintenance of the solar project. Finally, by way of example, the DEIR's traffic analysis states that a conservative 20 ADT were included during the operational phase to account for workers traveling to the site.</p> <p><b>O5-13</b> Please refer to Response to Comment O5-12.</p> <p><b>O5-14</b> The comment states that every phase of the Jacumba Project must be assessed with the same level of specific details and accuses the County of deferring the analysis to the creation of a Decommissioning Plan created post-Project Approval. The DEIR accurately identified decommissioning as a mitigation measure (M-AE-3) for aesthetic impacts. The law is contrary to commenter's statement because CEQA makes it clear that secondary impacts from implementing mitigation measures are not required to be analyzed in the same level of detail as the project. CEQA Guidelines 15126.4(a)(1)(D) states, "[i]f a mitigation measure would cause one or more significant effects in addition to those that would be caused by the project as proposed, the effects of the mitigation measure shall be discussed, <i>but in less detail than the significant effects of the project as proposed.</i>" (emphasis added). Indirect effects are changes to the physical environment that occur later in time or farther removed in distance than direct effects. 14 Cal Code Regs Section 15358(a)(2)</p>
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	<p>Accordingly, because project decommissioning is a mitigation measure that will not be implemented until decades from project approval, there is limited analysis regarding its indirect, secondary impacts that can be foreseen. Nevertheless, in response to this comment and in a good faith effort to provide an adequate analysis that further clarifies the impacts from the decommissioning mitigation measure, the FEIR includes additional information about impacts related to decommissioning (including air quality impacts related to soil disturbance activities) and mitigation measures have been amended to address any potentially significant indirect, secondary impacts.</p> <p>The revised Section 2.1 Aesthetics, which is further supported by technical memorandums for air quality and GHG, biological resources, cultural resources, hazards (fire), noise, and paleontological resources addresses the secondary environmental impacts associated with decommissioning. The DEIR does include a description of the anticipated water demand for decommissioning, Section 1 Project Description, and includes evaluation of the effects of drawing that water supply in sections 3.1.4 Hydrology and Water Quality and 3.1.8 Utilities and Service Systems. Because decommissioning would not increase the disturbance footprint and would generally involve reduced activity compared to construction, the secondary impacts would not include a new significant impact or a substantial increase in the severity of an</p>
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	<p>impact identified in the EIR for construction. The supplemental, clarifying analyses provided in attached memorandums [Appendices 9.1-1 through 9.1-7] do not identify any new significant impacts or mitigation measures. For clarity, the mitigation measures identified for construction activities throughout the DEIR have been revised to include decommissioning activities.</p> <p>With regards to commenter's claim that the decommissioning plan is improper deferred mitigation, the County disagrees. The details of decommissioning are necessarily deferred until closer to the time of project construction when the exact design or the project and types of materials that will be used are known. This information aids the County in approving a Decommissioning Plan that maximizes recycling of those materials. Nevertheless, the Mitigation Measure M-AE-3 contains proper performance standards that assure the future Decommissioning Plan will be effective in reducing significant visual impacts of the project to below a level of significance because it requires any such plan to remove all above-grade structures and non-shared transmission facilities from the site, recontour the site, hydroseed the site with vegetative cover, and meet the Regional Water Quality Control Board's requirements for stabilizing the site from a hydrology and water quality standpoint. This satisfies CEQA's requirements for proper deferred mitigation.</p>
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The Project would be operational for 30 years and has three distinct phases: construction, operation/maintenance and decommissioning.<sup>48</sup> The DEIR describes the general activities that would be involved with decommissioning the Project, but does not describe the length of time involved in decommissioning, nor does it include any analysis of air quality or biological impacts of this phase of the Project. Evidence in the DEIR suggests that decommissioning will have impacts similar to the construction phase of the Project, and will entail removal of both ground-level and underground components, thus involving soil disturbing activities.<sup>49</sup> There can be no reasonable question that, if construction activities will result in significant impacts to air quality and biological resources, then surely decommissioning activities will as well.<sup>50</sup> These impacts must be described and analyzed in a revised DEIR.

IV. THE DEIR FAILS TO ADEQUATELY ESTABLISH THE EXISTING ENVIRONMENTAL SETTING FOR BIOLOGICAL RESOURCES

The DEIR fails to adequately describe the environmental setting for biological resources against which the Project's environmental impacts are to be measured. This contravenes the fundamental purpose of the environmental review process, which is to determine whether there is a potentially substantial, adverse change compared to the existing setting. CEQA requires that a lead agency include a description of the physical environmental conditions, or "baseline," in the vicinity of the project as they exist at the time environmental review commences.<sup>51</sup> As the courts have repeatedly held, the impacts of a project must be measured against the "real conditions on the ground."<sup>52</sup> The description of the environmental setting constitutes the "baseline" physical conditions against which the lead agency assesses the significance of a project's impacts.<sup>53</sup>

<sup>48</sup> DEIR, pp. 1-3, 1-10 to 1-13.

<sup>49</sup> DEIR, pp. S-13 to S-14.

<sup>50</sup> Indeed, other lead agencies, such as the California Energy Commission ("CEC") have included extensive analyses of decommissioning in their EIRs for renewable energy projects. See Exhibit F.

<sup>51</sup> 14 CCR § 15125(a); *Comtys. for a Better Envt v. So. Coast Air Qual. Mgmt. Dist.* (2010) 48 Cal. 4th 310, 321 ("CBE v. SCAQMD").

<sup>52</sup> *CBE v. SCAQMD*, 48 Cal. 4th at 321; *Save Our Peninsula Com. v. Monterey County Bd. of Supervisors* (2001) 87 Cal.App.4th 99, 121-22; *City of Carmel-by-the-Sea v. Bd. of Supervisors of Monterey County* (1986) 183 Cal.App.3d 229, 246.

<sup>53</sup> 14 CCR § 15125(a); *CBE v. SCAQMD*, 48 Cal. 4th at 321.  
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O5-15

O5-16

**O5-15** Please refer to Response to Comment O5-14. Decommissioning would involve the removal of facilities on the approximately 108-acre project site that would at that time be a developed solar facility. The removal of the facility would not increase the acreage of the footprint or result in impacts that are additional or more severe than those already discussed in the DEIR for construction activities.

**O5-16** The existing setting for the purposes of the DEIR is established in Section 1.4 and specifically for biological resources is discussed in Section 2.2, Biological Resources. These sections include a thorough description of the existing conditions, including vegetation communities, water resources, plants, wildlife, wildlife movement, soils, and topographic setting information.

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The DEIR failed to conduct sufficient background analysis of several bird and special-status plant species to establish an accurate baseline from which to assess the Project's impacts to biological resources. First, the DEIR conducted inadequate surveys for golden eagles. As explained by biologist Ms. Owens, the DEIR relies on data provided for previous projects that is either out-of-date or does not include site-specific golden eagle surveys.<sup>54</sup> Old surveys from different project sites are not substantial evidence of existing conditions at *this* Project site.<sup>55</sup> As a result of the DEIR's lack of site-specific information on the existing setting, the DEIR fails to identify the current state of use of the site by golden eagles for foraging and nesting, and fails to include any mitigation for significant impacts to foraging raptors.

05-17

The DEIR also includes flawed assumptions about which species may be impacted the Project because the DEIR failed to document several special-status species that are reported by the California Natural Diversity Database ("CNDDB") as occurring on or near the Project site. The DEIR states that it obtained species data from the CNDDB.<sup>56</sup> However, the DEIR failed to document several species that are listed on the CNDDB. Omitted species include migrating tricolored blackbirds and Southern Grasshopper Mouse foraging habitat.<sup>57</sup> The DEIR's baseline information on these species is therefore inadequate.

05-18

Ms. Owens explains that the DEIR also includes inadequate surveys for the federally endangered Quino checkerspot butterfly. As with golden eagles, the data on Quino conditions that is included in the DEIR is both outdated and flawed in its reporting protocol.<sup>58</sup> The DEIR acknowledges that critical habitat for the Quino occurs less than 3 miles away from the Project site.<sup>59</sup> Thus, establishing an accurate baseline for conditions related to this endangered species is critical to an effective analysis of Project impacts. The DEIR must be revised to include current and accurate Quino surveys prior to construction commencement.

05-19

Finally, the DEIR failed to conduct any surveys for rare plants. Instead, the DEIR relies on modeling and assumptions for the anticipated presence of rare plants on the Project site, which do not constitute the "real conditions on the ground" for these species. As a result, the DEIR contains a flawed analysis of

05-20

<sup>54</sup> See Exhibit B, pp. 2-3.

<sup>55</sup> 14 CCR § 15125(a).

<sup>56</sup> DEIR, p. 2.2-2.

<sup>57</sup> Exhibit B, pp. 14-19.

<sup>58</sup> Exhibit B, pp. 23-24.

<sup>59</sup> See DEIR Bio report, Figure 5, USFWS Critical Habitat. 3144-009ev

**05-17** Please see response to comments F1-3. The County disagrees that the DEIR fails to provide sufficient background on use of the site by golden eagles. The DEIR states that there is no nesting habitat on site and acknowledges that the Project site is likely used for foraging for golden eagles. It also summarizes golden eagle observations in the vicinity of the Project site. M-BI-4 conserves 180.4 acres of native habitat suitable for raptor foraging.

**05-18** The existing setting for biological resources is discussed in Section 2.2, Biological Resources, of the DEIR. Appendix G to the Biological Resources Report concludes that neither species (tricolored blackbirds and Southern Grasshopper Mouse) is likely to be present.

**05-19** The County disagrees that the surveys completed for this project were inadequate. Winter and breeding season foraging surveys were conducted on site as discussed in RTC O3-16 and surveys completed by WRI have been acknowledged by the USFWS as being valuable (Heather Beeler, USFWS pers com 2015). That data is relevant with regard to the locations of nests in the vicinity. The DEIR analyzes potential effects to golden eagle in accordance with the County's EIR Format and General Content Requirements for Biological Resources, dated September 26, 2006, including describing the

	<p>guideline for determining significance pursuant to the Guidelines for Determining Significance, Guideline 4.1 (E) (County of San Diego 2010a), which states “any alteration of habitat within 4,000 feet of an active golden eagle nest could only be considered less than significant if a biologically-based determination can be made that the project would not have a substantially adverse effect on the long-term survival of the identified pair of golden eagles”. As stated in the DEIR, there are no active golden eagle nests within 4,000 feet of the Proposed Project; therefore, the Proposed Project does not meet significance threshold for this guideline. However, impacts to functional foraging habitat for raptors, including foraging habitat for golden eagle, were quantified, is considered a potentially significant impact from the Proposed Project, and is mitigated through habitat preservation. Suitable habitat for the golden eagle is outlined on page 2.2-20 of the DEIR. These habitat types and their existing acreages on the Proposed Project site (i.e., vegetation communities) are included on Table 2.2-7, Summary of Impacts, Mitigation, and Open Space for Vegetation Communities and Jurisdictional Areas of the DEIR. Both of the species mentioned in this comment – tricolored blackbird and southern grasshopper mouse – are reported in Appendix G of the Biological Resources Report (BRR). A complete review of the CNDDB, FWS data, and other data sources was</p>
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	<p>compiled as discussed in Section 2.2.3.2 of the DEIR and BRR. Further, all species directed by the County to be address, were addressed. It should be noted that the “sensitive” category for tricolored blackbird is “Colony” (Appendix G of the BRR) and that colonies are not expected to occur due to unsuitable breeding habitat, thus no additional analysis is required by the County. Similarly, grasshopper mouse was identified as having a low potential to occur based on geography and vegetation communities. They typically occur in rougher terrain, and all of the CNNDDB data points within 10 miles were collected over 20 years ago. This is a species that the County does not require focused trapping for. Please see response to comments O3-8. Detailed responses to Ms. Renee Owen’s comment letter are provided in Responses to Comments O5-131 through O5-174. See also responses to comments O3-8 through O3-12 concerning the adequacy of QCB surveys.</p> <p><b>O5-20</b> Please see response to comment O3-15. The Desert Beauty is discussed as potential species in section 2.2 (pp. 2.2-11 and 2.1-12) of the DEIR. The Mt Laguna aster is not identified as expected to occur due to unsuitable vegetation as provided in Appendix D (page D-15) of Appendix 2.2-1 Biological Resources Report of the EIR.</p>
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<p>June 1, 2015 Page 12</p> <p>Project impacts to rare plants, in particular to desert beauty and Mt. Laguna aster.<sup>60</sup> This omission must be corrected.</p> <p>The failure to describe the existing setting for numerous biological resources precludes informed decision making and public participation, contrary to the goals of CEQA. The County must gather relevant data and provide an adequate description of the existing setting in a revised DEIR.</p> <p><b>V. THE DEIR FAILS TO ADEQUATELY ESTABLISH THE EXISTING ENVIRONMENTAL SETTING FOR WATER RESOURCES</b></p> <p>The DEIR fails to disclose whether waters on the Project site are “navigable waters” of the United States subject to regulation as non-wetland jurisdictional waters by the U.S. Army Corps of Engineers (“USACE”), or whether the waters are State waters, subject to regulation by the California Department of Fish and Wildlife (“CDFW”). The DEIR also fails to disclose whether the Project will require waste discharge permits from the Regional Water Quality Control Board (“RWQCB”).</p> <p>The DEIR explains that surface waters at the Project are dominated by ephemeral drainages that convey runoff during and/or shortly after rain events.<sup>61</sup> The Project site contains approximately 10 separate basins which contain an active water flow during and immediately after significant rain events.<sup>62</sup> While the DEIR asserts that there are no U.S. Geological Survey (“USGS”) mapped creek channels within the Jacumba Valley that connect directly to Carrizo Gorge, it is presumed that the valley is hydrologically connected to the northerly-draining Carrizo Wash.<sup>63</sup> The Project site is also within the watershed of, and hydrologically connected to, the Salton Sea, which is an impaired water under the Federal Clean Water Act (“CWA”) Section 303(d).<sup>64</sup> The DEIR concludes that, in total, there are approximately 3.3 acres (24,361 linear feet) of potential jurisdictional waters of the United States/state identified within the solar site.<sup>65</sup> The DEIR clearly explains the connection between these Project waters and larger, Federally regulated “waters of the United States”:</p> <p><sup>60</sup> Exhibit B, pp. 20-21.  <sup>61</sup> DEIR, p. 3.1.4-2.  <sup>62</sup> DEIR, p. 3.1.4-3.  <sup>63</sup> DEIR, p. 3.1.4-3.  <sup>64</sup> DEIR, p. 3.1.4-20 to 21.  <sup>65</sup> DEIR, p. 2.2-32.  3144-009ev</p>	<p><b>O5-21</b> Please see response to comments O5-16 and O5-18.</p> <p><b>O5-22</b> Discussion of the existing water resources within and surrounding the Project site is found in Section 2.2, Biological Resources, and Section 3.1.4, Hydrology and Water Quality, of the DEIR. The Project site’s aquatic resources are characterized in the DEIR and are described as potentially jurisdictional. The DEIR analyzes impacts to these resources. The status of aquatic resources as waters of the U.S./state is a legal determination, not biological one. CEQA does not require that the legal status of waters be resolved prior to the circulation of the DEIR or certification of the FEIR. Specifically, the following language is included on page 2.2-32 describing the waters on site: “these non-wetland waters were determined to be under the potential combined jurisdiction of the U.S. Army Corps of Engineers (ACOE), Regional Water Quality Control Board (RWQCB), and CDFW.”</p> <p>Further, mitigation measure M-BI-14 requires the project to comply with state and federal regulations for impacts to waters of the U.S. and state, including obtaining agency permits per Sections 401 and 404 of the Clean Water Act and Section 1602 of California Fish and Game Code.</p> <p><b>O5-23</b> See response to comment O5-22. The legal status of the site’s aquatic resources affects whether permits from regulatory agencies are required, not whether</p>
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Flows within these drainages are directed northwest from the site and into a tributary to Carrizo Creek, which flows into Carrizo Creek, turns into Carrizo Wash, and connects San Felipe Wash and eventually the Salton Sea (USGS 2014) (see Figure 2.2-2 and Figure 2.2-4, Hydrologic Setting) and therefore form a significant nexus to a traditional navigable water of the United States.<sup>66</sup>

Despite this clear connection to Federal waters, the County failed to analyze whether the Project site drainages are themselves subject to regulation as “waters of the United States.” Instead, the DEIR simply states that “[t]he solar site was surveyed to determine the presence of potential waters of the United States and state.... these waters do not meet any one of the three criteria required to be considered a County RPO wetland. However, these non-wetland waters were determined to be under the *potential combined jurisdiction* of the U.S. Army Corps of Engineers (ACOE), Regional Water Quality Control Board (RWQCB), and CDFW.”<sup>67</sup> As a result, the DEIR’s description of the existing setting for water resources fails to inform the public whether the Project site contains sensitive Federally-regulated or State-regulated waters, and fails to accurately disclose whether the Project will require additional permits from USACE, the RWQCB, or CDFW in order to construct and operate the Project, in violation of CEQA.<sup>68</sup>

Full disclosure regarding whether the Project is permissible under applicable laws and is important because there is an intricate and substantive regulatory scheme that would be triggered by a determination that a Project site drainage is a “navigable waters” for purposes of Federal regulation. The Federal permitting and licensing regulations trigger the requirement to analyze the least environmentally damaging practical alternative and the need for specific mitigation measures to reduce impacts to navigable waters.<sup>69</sup>

<sup>66</sup> DEIR, p. 2.2-32.

<sup>67</sup> DEIR, p. 2.2-32.

<sup>68</sup> PRC § 21002.1 (EIR must disclose whether project is otherwise permissible under applicable laws and regulations).

<sup>69</sup> PRC § 21002 (agency may not approve a project unless it has implemented all feasible mitigation measures which would substantially lessen the significant environmental effects of the project); 14 CCR §15002(a)(2) (EIR must “identify ways that environmental damage can be avoided or significantly reduced”); *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal. App. 4th 713, 722 (agency abuses its discretion by failing to proceed in a manner required by law when it fails to address potentially significant impact in the EIR). 3144-009ev

O5-23  
Cont.

O5-24

the Project is permissible under applicable laws. Additionally, Section 3.1.4 of the DEIR discusses the potential for runoff resulting from the Project site to affect the Salton Sea. Specifically, page 3.1.4-21 states:

Conceptually, the Proposed Project site is hydrologically connected to the Salton Sea because it is within its watershed. However, due to the arid climate and the site’s distance away from the Salton Sea (over 40 miles away), stormwater runoff from the Project site is unlikely to reach these features before infiltrating into the ground or evaporating.

Additionally, as stated in Section 2.2 of the DEIR on page 2.2-60, the Project site does not contain any wetlands under the jurisdiction of ACOE, RWQCB, CDFW, or County.

**O5-24**

Comment noted. See response to comment O5-22. The County is aware of the applicable regulations of the Clean Water Act that may affect permitting of the Proposed Project. As specified in mitigation measure MM-BI-14, the project is required to comply with state and federal regulations for impacts to waters of the U.S. and state, including obtaining agency permits per Sections 401 and 404 of the Clean Water Act and Section 1602 of California Fish and Game Code.

<p>June 1, 2015 Page 14</p> <p>Section 404 of the CWA authorizes the USACE to issue permits regulating the discharge of dredged or fill materials into the "navigable waters at specified disposal sites."<sup>70</sup> Section 401 of the CWA requires that an applicant for a federal license or permit to discharge into navigable waters must provide the federal agency with a water quality certification, declaring that the discharge will comply with water quality standard requirements of the CWA. The USACE is prohibited from issuing a CWA permit until the applicant receives a CWA Section 401 water quality certification or waiver from the RWQCB.<sup>71</sup> The RWQCB, in turn, may not issue a Section 401 permit unless the RWQCB finds that the Project is consistent with water quality standards, effluent guidelines, New Source Performance Standards ("NSPS"), and the CWA's toxics provisions, among other considerations.<sup>72</sup> A project may be required to adopt mitigation measures or alternatives to a proposed design in order to meet these requirements.<sup>73</sup> Lastly, the Applicant may be required to enter into a streambed alteration agreement ("SAA") with CDFW if the Project is found to impede or impair a State water. In order to issue an SAA, CDFW may require a project to implement measures intended to protect fish and wildlife resources that may be impacted by the project's impacts on the water body.<sup>74</sup></p> <p>Here, the County must determine whether the Project will require dredge or fill permits and, in turn, whether the Project and its design comply with applicable water quality standards. If not, the Applicant may be required to implement mitigation measures, alternatives, or changes to Project design that would cause the Project to come into compliance with Federal regulations. Without this compliance, no Federal permits can issue, and the Project could not proceed.</p> <p><sup>70</sup> 33 U.S.C. § 1344. <sup>71</sup> 33 U.S.C. § 1341. <sup>72</sup> CWA §404(a)(1); 33 USC 1341(a)(1). <sup>73</sup> <i>Id.</i> <sup>74</sup> Cal. Fish &amp; Game Code § 1602(1)(F)(4)(a)(1). 3144-009ev</p>	<p><b>O5-25</b> See response to comments O5-22 through O5-24.</p> <p>O5-24 Cont.</p> <p>O5-25</p>
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<p>June 1, 2015 Page 15</p> <p>VI. THE DEIR CONTAINS OVERLY NARROW OBJECTIVES AND A DEFICIENT ALTERNATIVES ANALYSIS</p> <p>A. The DEIR's Objectives and Alternatives Analysis are Inadequate Because the Project's Objectives Automatically Disqualify the Environmentally Superior Alternative</p> <p>CEQA requires that an EIR's statement of objectives be sufficiently broad to permit consideration of a reasonable range of alternatives.<sup>75</sup> A lead agency "may not give a project's purpose an artificially narrow definition" so as to eliminate alternatives other than the proposed project.<sup>76</sup> Here, the DEIR improperly rejects the environmentally superior alternative to the Project as infeasible because the Project objectives are artificially narrow.</p> <p>Objective 1 for the Proposed Project is to "<i>Develop approximately 20 megawatts (MW) of renewable solar energy</i> that can operate during on-peak power periods to indirectly reduce the need to emit greenhouse gases (GHGs) caused by the generation of similar quantities of electricity from either existing or future non-renewable sources to meet existing and future electricity demands."<sup>77</sup> By limiting the primary Project objective to developing "20 megawatts (MW) of renewable solar energy" (Objective 1), the DEIR precludes meaningful consideration of the alternatives analyzed. This is most noticeable with regard to Alternative 1, an alternative which the DEIR admits would substantially reduce the Project's impacts to biological resources and was found to be the environmentally superior alternative.<sup>78</sup></p> <p>The principal reason given in the DEIR for rejecting Alternative 1 was that it did not meet Objective 1. In other words, Alternative 1 was rejected because it is not a 20-MW solar project. The reasoning violates CEQA. A set of objectives and alternatives that, by definition, renders all of the alternative projects inconsistent with the objectives is a meaningless exercise and inconsistent with CEQA's requirement to analyze a reasonable range of alternatives. The Project objectives,</p> <p><sup>75</sup> 14 CCR § 15124(b); <i>In re Bay-Delta Programmatic Evtl. Impact Report Coordinated Proceedings ("In re Bay-Delta")</i> (2008) 43 Cal. 4th 1143, 1166; <i>Cal. Oak Found. v. Regents of Univ. of Cal.</i>, (2010) 188 Cal. App. 4th 227, 272.  <sup>76</sup> <i>In re Bay-Delta</i>, 43 Cal. 4th 1143, 1166.  <sup>77</sup> DEIR, p. S-3 (emphasis added).  <sup>78</sup> DEIR, p. 4-18.  3144-009ev</p>	<p><b>05-26</b></p> <p>This comment states the project objectives are "artificially narrow" and as a result preclude consideration of a reasonable range of alternatives and eliminate alternatives other than the Proposed Project. However, the project's objectives are not "artificially narrow" such that they preclude informed decision making or consideration of a reasonable range of project alternatives as required by CEQA. (CEQA Guidelines, Section 15126.6(a).) To the contrary and consistent with the requirements of CEQA, detailed project objectives describe the underlying purpose of the project and aid the lead agency in developing a reasonable range of alternatives to evaluate in the EIR and thus provide more exact information to the decision-makers and public. (CEQA Guidelines, Section 15124(b); <i>Habitat &amp; Watershed Caretakers v City of Santa Cruz</i> (2013) 213 Cal.App. 4th 1277, 1300 [project objectives must "illuminate" the underlying purpose of a project rather than just describe the nature of a project.]; see also <i>In re Bay-Delta et al.</i> (2008) 43 Cal. 4th 1143, 1166 ["Although a lead agency may not give a project's purpose an artificially narrow definition, a lead agency may structure its EIR alternative analysis around a reasonable definition of underlying purpose and need not study alternatives that cannot achieve that basic goal."])</p> <p><b>05-26</b></p> <p><b>05-27</b></p> <p><b>05-28</b></p>
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	<p>The comment also states that the DEIR improperly rejects the environmentally superior alternative. This is not true. Section 4.7 of the EIR discusses the environmentally superior alternative and on Page 4-18, the EIR states that Alternative 1 (the Reduced 15 MW Project Alternative) would not meet Objective 1. The EIR does not, however, reject Alternative 1. The decision makers at the County will ultimately make a decision about whether or not to reject Alternative 1; the EIR merely identifies Alternative 1 as the environmentally superior alternative as required by Section 15126.6(e)(2) of the CEQA Guidelines. Please also see Common Response ALT1. As described in Common Response ALT1, Alternative 1 (the Reduced 15 MW Alternative) would also not meet Underlying Fundamental Project Objectives 1 and 2.</p> <p><b>O5-27</b> This comment states that Objective 1, to develop approximately 20 MW of renewable energy, precludes meaningful consideration of the alternatives analyzed. The County disagrees with this statement. Consistent with CEQA Guidelines section 15126.6(a), the alternatives studied in the DEIR, including Alternative 1, (i) meet <i>most</i> of the basic project objectives, (ii) are potentially feasible and (iii) avoid or substantially lessen the proposed project's significant environmental effects. (Pub Res C Section 21002; CEQA Guidelines, Section 15126.6(a)–(b). The purposes of evaluating such alternatives is to foster</p>
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informed decision making and public participation. The DEIR serves this purpose while satisfying the CEQA's substantive requirements for consideration of alternatives. For example, Alternative 1 illustrates to decision makers and the public the relative environmental impacts of a project with a reduced footprint that undergirds the gen-tie line. As the comment points out, Alternative 1 does not meet every project objective, but that is not required by CEQA. CEQA only requires that alternatives meet *most* of the project's basic objectives. (CEQA Guidelines, Section 15126.6(a); *Mira Mar Mobile Community v. City of Oceanside* (2004) 119 CA4th 477; *California Native Plant Soc'y v City of Santa Cruz* (2009) 177 CA4th 957, 991 [no requirement that the alternatives included in an EIR's analysis satisfy every key objective of the project].) Similarly, CEQA does not require that each alternative in an EIR must be feasible; it only requires that alternatives be "potentially feasible." (*City of Long Beach v. Los Angeles Unified Sch. Dist.* (2009) 176 CA4th 889, 920.) As noted in Response to Comment O5-26, the decision maker ultimately decides whether an alternative is feasible or not. Based on the foregoing, Alternative 1 is properly included as a project alternative even if there is substantial evidence in the record that it does not meet the project objective developing a 20 MW solar facility.

<p>June 1, 2015 Page 16</p> <p>coupled with an alternative that is almost identical to the Project but could never meet those objectives is patently unreasonable.<sup>79</sup></p> <p><b>B. Alternative 1 is the Environmentally Superior Alternative and Must be Selected as the Project</b></p> <p>The DEIR admits that Alternative 1 is the environmentally superior alternative because it substantially reduces the Project's impacts on biological resources, involves substantially less acreage than the Proposed Project, and proposes to develop more disturbed land than the proposed Project.<sup>80</sup> The DEIR does not make a specific finding that Alternative 1 is infeasible. Nor does the DEIR contain substantial evidence to support such a finding. Therefore, the County must select Alternative 1 as the Project.<sup>81</sup></p> <p>The sole reason provided by the DEIR for rejecting Alternative 1 is that it does not meet Objective 1 (20 MW project). Failure to meet a single Project objective is an invalid reason for rejecting a feasible alternative.<sup>82</sup> The County is poised to make the same mistake made by the lead agency in <i>Preservation Action Council</i>. In that case, the developer proposed to construct a Lowe's home improvement store in the City of San Jose on a site that contained a historic landmarked warehouse building. As originally proposed, the Project would demolish the two-story historic building in order to construct a single-story Lowe's store. The EIR for the project contained a reduced-size alternative that would preserve the historic building, but would alter the store design such that the store would be two stories, rather than one. The City (and Lowe's) rejected the reduced size alternative because it "would not meet the applicant's objectives for the project," which included the applicant's "desire [that] the layout of the store to be on a single level, simple and rectangular in shape for efficient circulation and layout of</p> <p><sup>79</sup> See 14 CCR 15126.6a; <i>Watsonville Pilots v. Watsonville</i> (2010) 183 CA4th 1059, 1087 (alternatives in EIR must meet most project objectives).  <sup>80</sup> DEIR, pp. 4-8 to 4-11, 4-18.  <sup>81</sup> <i>Preservation Action Council v. City of San Jose</i> (2006) 141 Cal. App. 4th 1336, 1356 ("Preservation Action Council").  <sup>82</sup> PRC §21002. Indeed, even if Alternative 1 were less profitable as a result of producing just 15 MW rather than the 20 MW of the proposed Project, that would not render Alternative 1 infeasible. "The mere fact that an alternative might be less profitable does not itself render the alternative infeasible unless there is also evidence that the reduced profitability is 'sufficiently severe as to render it impractical to proceed with the project.'" <i>Preservation Action Council</i>, 141 Cal. App. 4th at 1357; <i>Citizens of Goleta Valley v. Board of Supervisors</i>, 197 Cal.App.3d 1167, 1181.  3144-009ev</p>	<p>The County notes that commenter does not consistently refer to Objective 1 as being "approximately 20 MW." In some places the comment properly states that the objective is to develop "approximately 20 MW," but in other places the comment selectively quotes the objective as saying it is to "develop 20 MW." That is not an accurate description of the objective because the objective would allow alternatives with more or less than 20 MW so long as there is substantial evidence that the alternative MW is "approximately 20 MW." As stated, the County's final decision-maker, which may be the Planning Commission or the Board of Supervisors, will decide if the 15 MW alternative is approximately 20 MW and the commenter has the opportunity to participate in public hearings to provide its opinion on what "approximately 20 MW" means.</p> <p><b>O5-28</b> See Response to Comment O5-26 and O5-27.</p> <p><b>O5-29</b> This comment states that Alternative 1 is the environmental superior alternative and must be selected as the project. The County agrees that Alternative 1 is the environmentally superior project, but does not agree that it must be selected as the project. See Response to Comment O5-27. The decision maker will ultimately determine whether Alternative 1 is feasible, meaning "capable of being accomplished in a successful manner within a</p>
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	<p>reasonable period of time, taking into account economic, environmental, social, technological, and legal factors.” (Pub. Res. Code Section 21061.1; 14 CEQA Guidelines, Section 15364.) It may determine that a 15 MW project is infeasible because, for example, it does not further the RPS goal and goals associated with reducing greenhouse gas emissions as set forth in AB 32 to the same extent as the Proposed Project. It may decide that a 15 MW project is not close enough to 20 MW to meet a fundamental project objective that the project be “approximately 20 MW.” Please also see common response ALT-1. Accordingly, there is substantial evidence in the record to support an infeasibility finding should the County’s decision-maker make such a finding. The commenter has the opportunity to participate in public hearings to provide its opinion on what it believes makes the alternative feasible.</p> <p><b>O5-30</b> This comment says “rejecting” Alternative 1 is unlawful and similar to the facts presented in <i>Preservation Action Council v. City of San Jose</i>. The City in the <i>Preservation Action Council</i> case rejected a reduced floor format that would have reduced impacts to a historic building because the applicant said a reduced footprint would put it at a “competitive disadvantage.” The court found fault with that conclusion because it did not believe that the applicant’s market concerns was substantial evidence</p>
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display and storage units.”<sup>83</sup> The City ultimately made a finding that the alternative was infeasible because it was Lowe’s belief that a smaller store would place it at a “competitive disadvantage” in a “large market such as San Jose” due to its inability “to meet the demands and requirements of a large market store in terms of throughput and merchandise availability.”<sup>84</sup> The court rejected this reasoning as ambiguous and concluded that Lowe’s market concerns did not constitute substantial evidence of infeasibility. The Court remanded the project back to the City to reevaluate the feasibility of the reduced-size alternative.

O5-30  
Cont.

Similarly here, the DEIR states that Alternative 1 must be rejected, despite its significant environmental benefits, because it would not meet Objective 1.<sup>85</sup> Objective 1 is to “[d]evelop approximately 20 MW of renewable solar energy that can operate during on-peak power periods to indirectly reduce the need to emit greenhouse gases (GHGs) caused by the generation of similar quantities of electricity from either existing or future non-renewable sources to meet existing and future electricity demands.”<sup>86</sup> Alternative 1 is identical in components and energy production to the Project, save for a 5 MW reduction in output. There is therefore nothing about Objective 1 that Alternative 1 fails to satisfy except the number of MW of production. The DEIR’s claim that a 5 MW reduction in energy production is sufficiently problematic to render Alternative 1 infeasible is almost identical to Lowe’s claim that it could not function in a two-story store because it wanted a single-story store, and should be rejected for the same reasons. Just as in *Preservation Action Council*, there is no evidence, let alone substantial evidence, that the 5MW reduction would render Alternative 1 infeasible as defined by CEQA.<sup>87</sup>

O5-31

Where a project is found to have significant adverse impacts, *CEQA requires the adoption of a feasible alternative that meets most of the project objectives but results in fewer significant impacts*.<sup>88</sup> Alternative 1 was found

O5-32

<sup>83</sup> 141 Cal. App. 4th at 1346.

<sup>84</sup> *Id.* At 1355.

<sup>85</sup> DEIR, p. 4-18.

<sup>86</sup> DEIR, p. 4-2.

<sup>87</sup> A “feasible” alternative is one that is capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, legal, social and technological factors. PRC §21061.1; 14 CCR §15364.

<sup>88</sup> *CCEC v. Woodland*, 225 Cal. App. 4th at 203; *County of El Dorado v. Dept. of Transp.* (2005) 133 Cal. App. 4th 1376 (agency must consider small alternative to casino project). 3144-009ev

of infeasibility. The County acknowledges that any findings it makes with regard to Alternative 1 must be supported by substantial evidence, but rejects the comparison to the facts in *Preservation Action Council* because the County’s concern with producing 5 MW less than the 20 MW project is not based on the applicant’s market concerns. Objective 1 references important public goals, such as production of renewable energy during peak period times to indirectly reduce the need to emit greenhouse gases caused by the generation of similar quantities of electricity from either existing or non-renewable sources to meeting existing and future electricity demands. Whether or not a project closer to 20 MW meets the applicant’s market concerns is not a factor in the County’s determination of Alternative 1’s feasibility. To the extent the decision-makers in the City of San Jose improperly supported its infeasibility finding with the applicant’s private market concerns, those are not the facts in this CEQA analysis. Please also refer to common response ALT-1 and Response to Comment O5-27 thru O5-29.

**O5-31** See Responses to Comments O5-30

**O5-32** The fact that Alternative 1 achieves some project objectives, and impedes to some degree the attainment of other project objectives is grounds under CEQA Guidelines 15126.6(c) for the County

	<p>to analyze Alternative 1 as one of its project alternatives in the EIR, but the ultimate determination regarding whether Alternative 1 is feasible rests with the County decision-makers. Failure to meet a fundamental project objective is still grounds for the County to find that Alternative 1 is infeasible because it falls in the category of “social and other considerations” for infeasibility. The California Supreme Court held in <i>In re Bay-Delta Programmatic Environmental Impact Report Coordinated Proceedings</i>, 43 Cal.4th 1143, 1165 that “an EIR need not study in detail an alternative that is infeasible or that the lead agency has reasonably determined cannot achieve <i>the project’s underlying fundamental purpose</i>.” As explained by one court, “CEQA does not restrict an agency’s discretion to identify and pursue a particular project designed to meet a particular set of objectives. CEQA simply requires the agency to thereafter prepare and certify a legally adequate EIR that provides the agency and the public alike with detailed information regarding the proposed project’s significant environmental impacts, as well as reasonable alternatives that would ‘feasibly attain most of the basic project objectives but would avoid or substantially lessen [those impacts]’ (Guidelines 15126.6(a).) As this language demonstrates, CEQA clearly recognizes that the agency will look to the proposed project’s particular objectives when</p>
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	<p>developing its range of project alternatives (Guidelines 15124(b), 15126.6).” (<i>California Oak Foundation v. the Regents of the University of California</i> (2010) 188 Cal. App. 4th 227, 276-277.) The Court held in favor of the County finding:</p> <p>‘CEQA does not restrict an agency’s discretion to identify and pursue a particular project designed to meet a particular set of objectives.’ [citation omitted] ‘Although a lead agency may not give a project’s purpose an artificially narrow definition, a lead agency may structure its EIR alternative analysis around a reasonable definition of underlying purpose and need not study alternatives that cannot achieve that basic goal.’ [citation omitted] ‘For example, if the purpose of the project is to build an oceanfront resort hotel [citation] or a waterfront aquarium [citation], a lead agency need not consider inland locations.” (ibid.) Likewise, a lead agency need not consider lower density housing that would defeat the underlying purpose of providing affordable housing. [citation omitted.] <i>Here, the underlying purpose of the Project was to streamline the winery approval process to promote the growth of local grapes and the related wine industry.</i> In compliance with CEQA, the FEIR thus properly identified and discussed mitigation measures that allowed a by-right use without further discretionary approvals as well as Project alternatives...</p>
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<p>June 1, 2015 Page 18</p> <p>to be feasible for all but one reason, and reduces several significant impacts of the project. Therefore, the County must select Alternative 1 as the Project.</p> <p><b>VII. THE DEIR'S CUMULATIVE IMPACTS ANALYSIS IS INADEQUATE</b></p> <p>An EIR is required to discuss the cumulative impacts of a project "when the project's incremental effect is cumulatively considerable."<sup>89</sup> An EIR is required to discuss significant impacts that the proposed project will cause in the area that is affected by the project.<sup>90</sup> "This area cannot be so narrowly defined that it necessarily eliminates a portion of the affected environmental setting."<sup>91</sup></p> <p>The Guidelines specifically direct the County to "define the geographic scope of the area affected by the cumulative effect and provide a reasonable explanation for the geographic limitation used."<sup>92</sup> The courts have held that it is vitally important that an EIR avoid minimizing the cumulative impacts. Rather, it must reflect a conscientious effort to provide public agencies and the general public with adequate and relevant detailed information about them.<sup>93</sup> An EIR's cumulative impacts discussion "should be guided by the standards of practicality and reasonableness," but several elements are deemed "necessary to an adequate discussion of significant cumulative impacts" including "[a] list of past, present, and probable future projects producing related or cumulative impacts, including, if necessary, those projects outside the control of the agency."<sup>94</sup></p> <p>The DEIR incorrectly concluded that the Project would have no significant cumulative impacts, and as a result, contains no mitigation measures for cumulative impacts.<sup>95</sup> The error in the DEIR's analysis is threefold. First, the DEIR relies on an overly narrow list of cumulative projects with which to compare Project impacts, thereby omitting from its analysis impacts from other relevant cumulative projects in the region. Second, the DEIR's cumulative air quality</p> <p><sup>89</sup> 14 CCR § 15130(a).  <sup>90</sup> <i>Bakersfield Citizens</i>, 124 Cal.App.4th at 1216 (emphasis added); see 14 CCR § 15126.2(a).  <sup>91</sup> <i>Bakersfield Citizens</i>, 124 Cal.App.4th at 1216.  <sup>92</sup> 14 CCR § 15130(b)(3); <i>Bakersfield Citizens</i>, 124 Cal.App.4th at 1216.  <sup>93</sup> PRC § 21061; <i>San Franciscans for Reasonable Growth v. City and County of San Francisco</i> (1984) 151 Cal.App.3d 61, 79. See also <i>Kings County Farm Bureau v. City of Hanford</i> (1990) 221 Cal.App.3d 692, 723.  <sup>94</sup> 14 CCR § 15130(b); <i>Rialto Citizens for Responsible Growth v. City of Rialto</i> (2012) 208 Cal.App.4th 899, 928-29.  <sup>95</sup> See DEIR, p. S-36.  3144-009ev</p>	<p><b>05-33</b> This comment is introductory to more detailed comments that occur later in the comment letter. As such, this comment is noted and detailed responses to the issues mentioned in this comment are provided below in Responses to Comments 05-36 through 05-45.</p> <p><b>05-34</b> This comment is introductory to more detailed comments that occur later in the comment letter. As such, this comment is noted and detailed responses to the issues mentioned in this comment are provided below in Responses to Comments 05-36 through 05-45.</p> <p><b>05-35</b> This comment is introductory and a summary of more detailed comments that occur later in the comment letter. As such, this comment is noted and detailed responses to the issues mentioned in this comment are provided below in Responses to Comments 05-36 through 05-45.</p>
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impacts analysis is impermissibly narrow because it fails to analyze project's within the entire San Diego Air Basin ("SDAB"). Third, the DEIR relies on the erroneous assumption that, because the Project's individual air quality impacts may be incrementally small, they are not cumulatively considerable. This "drop in the bucket" approach is the opposite of what CEQA requires in a cumulative impacts analysis. As a result, the DEIR fails to perform any quantitative analysis of cumulative emissions, instead stating that it would be to "speculative" to analyze impacts from other projects.<sup>96</sup> This dismissive approach to a cumulative impacts analysis fails to meet CEQA's requirements for analysis of the Project's incremental contribution to cumulative impacts.

**A. The DEIR Relies on a Deficient Cumulative Projects List**

The DEIR arbitrarily limits its cumulative impacts analysis to thirteen (13) projects in southeastern San Diego County.<sup>97</sup> Although the DEIR allegedly analyzes cumulative projects within 20 miles of the Project site, it arbitrarily omits any reference to several other projects, including other solar projects, within that range. The DEIR also excludes other reasonably foreseeable projects from its analysis that are over 20 miles away, but which are nevertheless relevant to analyze cumulative impacts which require a range of more than 20 miles to analyze (e.g. air quality impacts).<sup>98</sup> An example of a key omission in the DEIR's cumulative air quality analysis is the fact that the limited 20-mile scope of cumulative projects list limits the DEIR's analysis of air quality impacts to the southeastern corner of the San Diego Air Basin, rather than air basin as a whole.<sup>99</sup>

An example of the limited nature of the cumulative projects list is the omission of three nearby solar farms. The DEIR purports to include the Soitec Solar Projects, another set of San Diego County solar projects, in its cumulative projects list.<sup>100</sup> The Soitec Project EIR analyzed four individual solar farm projects. However, the DEIR arbitrarily excludes 3 of the 4 Soitec solar projects from its list, despite the fact that the projects are less than 10 miles away. The DEIR includes Rugged Solar Farm in its list, which is one of the Soitec Projects. However, the DEIR excludes Soitec's LanWest and LanEast Solar Farms, which are even closer to

<sup>96</sup> DEIR AQ Appendix, p. 49.

<sup>97</sup> DEIR, pp. 1-27 to 1-28, Figure 1-9.

<sup>98</sup> DEIR, p. 2.2-71 (biological resources); DEIR AQ Appendix, p. 47 (limiting air quality analysis to southeastern corner of San Diego Air Basin rather than air basin as a whole).

<sup>99</sup> DEIR AQ Appendix, p. 47.

<sup>100</sup> DEIR, pp. 1-26 to 1-28.

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O5-35  
Cont.

O5-36

O5-37

**O5-36**

The list of cumulative projects is found in Table 1-7 in Chapter 1, Project Description, of the DEIR. The County, in compliance with CEQA Guidelines 15130, utilized both a list method and a General Plan projection method as applicable to each resource area. The EIR's cumulative impact analysis for air quality considers the air quality in the context of the entire San Diego Air Basin ("SDAB")<sup>1</sup> and San Diego Air Pollution Control District ("SDAPCD") air quality plans, not the list of projects within a 20-mile radius. (DEIR, p. 1-23, 3.1.1-25.) The cumulative hydrology and water quality analysis also covers areas within the same watershed and groundwater aquifer as the Project. (DEIR, p. 3.1.4-30.) Additionally, the extent of the cumulative impact area was adequately defined for each environmental issue area as the nature of cumulative impacts varies between issue areas.

**O5-37**

The cumulative list in Table 1-7 of the FEIR is updated to reflect the latest status of cumulative projects. The cited project in the comment (Tierra Del Sol) was withdrawn at the time of the Draft EIR preparation and has since been reinitiated and included in the FEIR. The LanWest and LanEast program components of the Soitec EIR have been withdrawn from the County and are not considered likely or reasonably foreseeable projects.

<sup>1</sup> The commenter correctly points out that the cumulative impact area includes the southeastern corner of the San Diego Air Basin, where the project is located. However, the cumulative impact study area is not limited to just the southeastern corner of the San Diego Air Basin.

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the Project than Rugged.<sup>101</sup> The DEIR also excludes the Tierra del Sol Solar Farm from its list, which is a similar distance from the Jacumba Project as Rugged (which was included on the list). Tierra del Sol was also analyzed at a project-level in the Soitec EIR, so there is no question that is reasonably foreseeable. Therefore, the DEIR should have included all of the Soitec projects in its analysis of cumulative impacts.

Indeed, other projects in the vicinity of Jacumba, in both San Diego County and Imperial County, have analyzed a far greater range of cumulative projects in their CEQA documents.<sup>102</sup> An example is the ECO Substation. The ECO Substation is located approximately 0.25 miles from the Project, and is the substation which would transmit energy generated by the Project.<sup>103</sup> The ECO Substation FEIR/FEIS, prepared in 2011 by the California Public Utilities Commission ("CPUC") and the Bureau of Land Management ("BLM"), analyzed projects within 36 miles of the substation, almost double the distance covered by the Jacumba Project's cumulative projects list.<sup>104</sup> The ECO Substation FEIS/FEIR's cumulative projects list also included 50 projects, ranging in type from renewable energy projects (solar, wind), to cell towers, and even construction of a Catholic church.<sup>105</sup> If the ECO Substation is located a quarter of a mile from the Project and analyzed such a comprehensive list of cumulative projects in its CEQA document, there is no basis for the Jacumba DEIR to include a less comprehensive list.

The DEIR also omits several projects from its cumulative impacts analysis that are identified on the San Diego County Planning Departments "Current Projects" webpage.<sup>106</sup> Examples of the omitted County-listed projects are Soitec (discussed above) and the North County Environmental Resources Recycling Facility, a recycling and construction / demolition debris ("CDI") recycling facility. CDI facilities are known for having significant air quality impacts.<sup>107</sup> The North Coast facility must therefore be included in the Project's cumulative air quality analysis.

<sup>101</sup> DEIR, pp. 1-27 to 1-28; see Exhibit G (Soitec Project description at Figure 1-1 (Regional Location Map) and Figure 1-2 (Specific Location Map)).

<sup>102</sup> See Exhibit H.

<sup>103</sup> DEIR, pp. 1-7, S-4.

<sup>104</sup> See Exhibit H (ECO Substation FEIR/FEIR Cumulatives section, p. F-6 [Existing Projects Covered in the Cumulative Impact Analysis = 23,493 acres (approximately 36 miles)]).

<sup>105</sup> *Id.*, pp. F-7 to F-21.

<sup>106</sup> See [http://www.sandiegocounty.gov/content/sdc/pds/Current\\_Projects.html#par\\_title](http://www.sandiegocounty.gov/content/sdc/pds/Current_Projects.html#par_title).

<sup>107</sup> See Exhibit I (CDI info from CalRecycle, 3144-009ev).

O5-37  
Cont.

O5-38

O5-39

**O5-38**

When the CPUC serves as the lead agency it uses its judgment in defining the cumulative impact area, but nothing in CEQA requires the County's judgment to match the CPUC's when the County serves as the lead agency. The County disagrees with the comparison to the ECO Substation FEIS/FEIR cumulative project list due, in part, to the different state of development projects in progress at time of the preparation of the two different environmental documents.

The County believes that the cumulative project list in the FEIR represents all relevant past, present and reasonably foreseeable projects necessary to evaluate the projects incremental impacts that are "individually limited but cumulatively considerable." (Pub. Resources Code, Section 21083(b)(2).) The cumulative projects list is updated compared to the ECO substation list and projects have been constructed or withdrawn since that document was released. The projects listed in the ECO substation list also included projects that are located well into Imperial County, outside the geographic area determined to be applicable for the Jacumba Solar project based on the types of potential effects, scale of the Proposed Project and locations of other projects as well as resources. The ECO Substation project also had to consider transmission lines and supporting infrastructure that fed into the project expanding the geographic scope of the project's cumulative consideration, compared to the Proposed

	<p>Project. See Response to Comment 05-38.</p> <p><b>05-39</b> The North County Environmental Resources Recycling Facility project is located in the North County Metropolitan Planning Area within San Diego County, approximately 68 miles from the Jacumba Project site. Due to the substantial distance, it was not included in the cumulative projects list found in Chapter 1 of the EIR. Commenter expressed particular concerns that the North County Environmental Resource Recycling Facility would have air quality impacts relevant to Jacumba's air quality analysis. As stated above, the EIR clearly states that the County did not rely on this list methodology for its air quality analysis. The list methodology for purposes of the air quality cumulative analysis is not appropriate because by its very nature, air pollution is largely a cumulative impact. The nonattainment status of regional pollutants is a result of all cumulative past and present development. Future attainment of State and Federal ambient air quality standards is a function of successful implementation of the District's attainment plans. Consequently, the San Diego Air Pollution Control District's (SDAPCD) application of thresholds of significance for criteria pollutants is relevant to the determination of whether a project's individual emissions would have a cumulatively significant impact on air quality. As such, isolated projects, including the North County Environmental Resource Recycling Facility project,</p>
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**B. The DEIR's Cumulative Air Quality Impacts Analysis is Impermissibly Narrow**

In order to analyze cumulative air emissions, an EIR must assess whether the Project, in conjunction with other reasonably foreseeable projects, results in air emissions that are above relevant Air District thresholds.<sup>108</sup> In particular, the County had a duty to analyze the cumulative increase in pollutants for which the SDAB is listed as nonattainment for the state and federal ambient air quality standards.<sup>109</sup>

The SDAB is currently classified as a federal nonattainment area for ozone ("O3") and a state nonattainment area for particulate matter less than 10 microns ("PM10"), particulate matter less than 2.5 microns ("PM2.5"), and O3.<sup>110</sup> The DEIR admits that this nonattainment status is the result of "cumulative emissions from all sources of these air pollutants and their precursors *within the SDAB*."<sup>111</sup> However, rather than analyze the Project's cumulative air quality impacts in relation to the SDAB as a whole, the DEIR restricted its cumulative analysis of air quality impacts to just San Diego County, which is in the southeastern corner of the SDAB.<sup>112</sup> This geographical area is impermissibly narrow because it omits a large portion of the SDAB from its analysis, making it impossible to determine whether, and to what extent, the Project causes an incremental increase or exceedance in nonattainment pollutants or other significance thresholds established by the Air District.

<sup>108</sup> 14 CCR 15130(a)(1); 14 CCR 15065(a)(1), (3); *Schenck v. County of Sonoma* (2011) 198 Cal.App.4th 949, 960 (EIR must disclose an impact as significant when it exceeds a duly adopted CEQA significance threshold); *CBE v. CRA*, 103 Cal.App.4th at 110-111; DEIR AQ Appendix, p. 47 (acknowledging that Project may have cumulatively considerable impact on air quality if Project emissions, in combination with the emissions from other proposed or reasonably foreseeable future projects, are in excess of established thresholds.).

<sup>109</sup> DEIR AQ Appendix, p. 47.

<sup>110</sup> DEIR, p. 3.1.1-3.

<sup>111</sup> DEIR AQ Appendix, p. 49 (emphasis added).

<sup>112</sup> DEIR AQ Appendix, p. 47.

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O5-41

were not analyzed on an individual basis as part of the cumulative air quality analysis. Moreover, the North County Environmental Resource Recycling Facility project would be required to analyze its contribution to cumulative impacts as part of its project-level environmental review under CEQA, including consistency with local air quality plans.

Furthermore, a Lead Agency may determine that a project's incremental contribution to a cumulative effect is not cumulatively considerable if the project will comply with the requirements in a previously approved plan or mitigation program, including, but not limited to an air quality attainment or maintenance plan that provides specific requirements that will avoid or substantially lessen the cumulative problem within the geographic area in which the project is located [CCR Section 15064(h)(3)]. As stated in Chapter 3.1.1, the project would not conflict with the Regional Air Quality Strategy which serves as the local air quality plan for the region, nor would it exceed daily thresholds for any criteria air pollutants. Therefore, impacts would not be considered cumulative considerable. Cumulative air quality impacts are analyzed in Section 3.1.1.4 of the DEIR. See response O5-41 and O5-42 for information regarding cumulative impacts and analysis methodology.

**O5-40**

Cumulative air quality impacts are analyzed in Section 3.1.1.4 of the DEIR. See response O5-41

	<p>and O5-42 for information regarding cumulative impacts and analysis methodology.</p> <p><b>O5-41</b> This comment recites that the SDAB is a nonattainment area for ozone (federal and state), PM<sub>10</sub> (state) and PM<sub>2.5</sub> (state). The comment also misconstrues the cumulative air quality study area as being limited to the southeastern corner of the SDAB. The cumulative impact study area for air quality includes the entire SDAB (DEIR p. 3.1.1-25), as the commenter advocates. The SDAPCD regulates air quality within the SDAB, and the thresholds established by the SDAPCD are intended to be applied to individual projects occurring within the SDAB as an enforcement mechanism to gauge, on an individual or project-level basis, that the project would not contribute to a cumulative air quality condition that may prevent the SDAPCD from achieving National Ambient Air Quality Standards (NAAQS) and California Ambient Air Quality Standards (CAAQS) attainment status for criteria pollutants. The Proposed Project's contribution to emissions within the entire SDAB is considered insignificant when compared to all activity taking place throughout the air basin. The SDAB and San Diego County boundaries are the same (i.e., they cover the same geographic area). It would not be practical to compare the project to every individual project taking place within the SDAB/County of San Diego. Therefore, on a regional level, the SDAB's attainment</p>
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C. The DEIR Incorrectly Concludes that the Project's Air Quality Impacts Do Not Have a Significant Cumulative Impact Because They are Incrementally Minor

The DEIR concludes that cumulative impacts resulting from the Proposed Project's air emissions in combination with other projects within the site vicinity would not be considered cumulatively considerable.<sup>113</sup> This conclusion was based on the erroneous premise that the Project "would be considered to have a cumulative impact only if the Proposed Project's contribution accounts for a significant proportion of the cumulative total emissions,"<sup>114</sup> and that it would be too "speculative" to perform a quantitative analysis of cumulative emissions from other projects.<sup>115</sup> The result is a dismissal of the Project's cumulative air quality impacts as insignificant by claiming that they are a "drop in a bucket" compared with other existing regional impacts. This approach has been rejected by the Courts, and fails to comply with CEQA's requirement that a project mitigate impacts that are "cumulatively considerable."<sup>116</sup>

In *Friends of Oroville*, the City of Oroville prepared an EIR for a retail center project. The EIR failed to analyze the project's cumulative contribution to significant GHG impacts by concluding, without analysis, that the project's "miniscule" GHG emissions were insignificant in light of the state's cumulative, state-wide GHG emissions problem. The EIR had concluded that a further analysis of the project's GHG impacts would result in "applying a meaningless, relative number to determine an insignificant impact."<sup>117</sup> The court of appeal rejected what amounted to an outright dismissal of the City's obligation to analyze the retail center's cumulative GHG impacts.<sup>118</sup>

Similarly, in *Kings County Farm Bureau v. City of Hanford*,<sup>119</sup> the city prepared an EIR for a 26.4-megawatt coal-fired cogeneration plant. Notwithstanding the fact that the EIR found that the project region was out of attainment for PM10 and ozone, the City failed to incorporate mitigations for the

<sup>113</sup> DEIR AQ Appendix, p. vii.

<sup>114</sup> DEIR AQ Appendix, p. 47.

<sup>115</sup> DEIR AQ Appendix, p. 49.

<sup>116</sup> PRC § 21083(b)(2); 14 CCR § 15130; *Friends of Oroville v. City of Oroville* (2013) 219 Cal. App. 4th 832, 841-42; *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal. App. 3d 692, 721.

<sup>117</sup> 219 Cal. App. 4th at 841-42.

<sup>118</sup> *Id.*

<sup>119</sup> (1990) 221 Cal. App. 3d 692, 721.  
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O5-43

O5-44

**O5-42**

status is dictated by all cumulative activity taking place within the SDAB/County of San Diego.

This comment challenges the Air Quality and Greenhouse Gas Technical Report for the Jacumba Solar Energy Project dated April 2015 prepared by Dudek to the extent it indicates that the project only has a cumulatively significant air quality impact if "the Proposed Project's contribution accounts for significant proportion of the cumulative total emissions." This is not the threshold described in the EIR and this language has been struck from the Air Quality Report. As stated in the EIR, a cumulatively significant impact may exist where direct impacts are less than significant but "the proposed project, in combination with the emissions of concern from other proposed projects or reasonably foreseeable future projects within a proximity relevant to the pollutants of concern, are in excess of the guidelines identified in Table 3.1.1-5, SDAPCD Air Quality Significance Thresholds." (DEIR, p. 3.1.1-27.)

The project's cumulative air quality analysis focuses on whether the project would result in a cumulatively considerable increase in emissions. The nonattainment status of regional pollutants is a combined result of past and present development within the SDAB, and this regional impact is cumulative rather than being attributable to any one source. Because of the

	<p>inherently cumulative nature of air quality conditions, the SDAPCD and County of San Diego generally provide that the same thresholds of significance apply to both a direct and cumulative impact analysis for air quality impacts. However, the EIR acknowledges that a project that does not have a significant direct impact on air quality could still have a cumulatively significant air quality impact if multiple construction projects proceed concurrently in the same vicinity. (DEIR p. 3.1.1-27 to 28.)</p> <p>Even if multiple construction projects occur at the same time, this project's cumulative contribution to air quality impacts would be less than significant. Each of these construction projects would be required to comply with SDAPCD regulations concerning construction equipment emissions controls, fugitive dust controls, etc. (fugitive dust abatement measures including watering the site three or more times per day to comply with SDAPCD Rule 55, adherence to County Code Section 87.428 – Dust Control Measures, CARB air toxic control measures, and construction phasing to reduce emissions). Moreover, as discussed in the DEIR, the Jacumba area is rural and has very low background levels of air pollution. Emissions reported in the DEIR include the combination of on-site and off-site emissions. On-site emissions would be primarily localized within the site boundaries and controlled through application of on-</p>
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	<p>site control measures, and construction equipment would be continually mobile throughout the entire site and would not be concentrated in any one area. Off-site emissions from haul trucks and worker trips would occur over the entire County resulting in low emission concentrations over a large geographic area. Only a fraction of the distance associated with construction worker and haul trucks, and thus emissions from those trips, would occur within the immediate project area. Moreover, emissions from the Proposed Project would dissipate at furthering distances from the site, and cumulative projects occurring within the Proposed Project vicinity would be located at distances such that emissions generated from the project would not result in a cumulatively considerable impact. Also, the project would be constructed over a short timeframe, after which time all construction emissions would cease. As such, the project would not contribute to a cumulative significant impact for which the SDAB is in nonattainment and would not prevent the SDAB from achieving attainment as a result of temporary emissions from project construction. Once operational, the project would result in minimal emissions as a result of operation and maintenance activities and would not contribute to a cumulatively considerable impact during operation.</p> <p><b>O5-43</b> Comment noted. This comment does not address the adequacy of the DEIR; therefore, no further response is</p>
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	<p>required. It bears noting that the EIR did not omit consideration of GHG emissions upon concluding the Project's GHG emissions are "miniscule." The EIR analyzed the Project's GHG emissions based upon the County's threshold of significance in accordance with the CEQA Guidelines for analyzing greenhouse gases. GHG emissions are inherently global, not regional. Chapter 3.1 of the DEIR describes the methodology adopted by the County for evaluation of GHG. The commenter has failed to explain why the County's methodology is flawed or why an evaluation of GHG impacts relative to regional projects is required. It should be noted that the 900 MT screening threshold adopted by the County is consistent with the guidance provided by the California Air Pollution Control Officers Association (CAPCOA) in "CEQA and Climate Change White Paper", dated 2008.. Likewise the EIR analyzed the Project's non-GHG air emissions in accordance with the County's threshold of significance for cumulative air quality impacts.</p> <p><b>O5-44</b> Comment noted. This comment describes another project and does not address the adequacy of the DEIR; therefore, no further response is required. It bears noting that the DEIR did not omit consideration of air quality impacts upon finding the project's contribution was "incremental" or minimal. The EIR analyzed the Project's GHG emissions based upon the County's threshold of significance. Likewise the EIR analyzed</p>
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project's cumulative air quality impacts from project emissions because it concluded that the Project would contribute "less than one percent of area emissions for all criteria pollutants."<sup>120</sup> The city reasoned that, because the project's air emissions were small in ratio to existing air quality problems, that this necessarily rendered the project's "incremental contribution" minimal under CEQA. The court rejected this approach, finding it "contrary to the intent of CEQA." The court stated:

We find the analysis used in the EIR and urged by GWF avoids analyzing the severity of the problem and allows the approval of projects which, when taken in isolation, appear insignificant, but when viewed together, appear startling. Under GWF's "ratio" theory, the greater the over-all problem, the less significance a project has in a cumulative impacts analysis. We conclude the standard for a cumulative impacts analysis is defined by the use of the term "collectively significant" in Guidelines section 15355 and the analysis must assess the collective or combined effect of energy development. The EIR improperly focused upon the individual project's relative effects and omitted facts relevant to an analysis of the collective effect this and other sources will have upon air quality.<sup>121</sup>

The County made the same mistake in the DEIR. Just as the *Oroville* EIR failed to compare Project GHG emissions to other regional projects, and the Kings County EIR failed to perform a cumulative analysis of the project's air emissions, the DEIR's air quality appendix fails to even compare the Jacumba Project's VOCs, CO, Sox, PM10, PM2.5, and NOx construction emissions with any other regional projects. Rather, the DEIR simply states that its own emissions will not result in cumulative impacts. "Due to the limited period of construction activities and the localized nature of pollutants, the Proposed Project would not result in a cumulatively considerable impact during construction."<sup>122</sup> This lack of analysis is precisely what the courts have rejected. The County must prepare a revised DEIR, which properly analyzes and mitigates the Project's cumulative air quality impacts.

<sup>120</sup> *Id.* at 719.

<sup>121</sup> *Id.* at 721.

<sup>122</sup> DEIR AQ Appendix, p. 49.  
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O5-44

O5-45

## O5-45

the Project's non-GHG air emissions in accordance with the County's threshold of significance.

The DEIR performs a legally adequate analysis of the project's GHG and air quality emissions. Please see response O5-41 and O5-42 for further discussion on cumulative air quality impacts. The commenter states the DEIR's analysis of air quality emissions is flawed because it "fails to even compare the Jacumba Project's VOCs, CO, SO<sub>x</sub>, PM<sub>10</sub>, PM<sub>2.5</sub> and NO<sub>x</sub> construction emission with any other regional projects. Rather the DEIR simply states that its own emissions will not result in a cumulatively considerable impact during construction. This lack of analysis is exactly what the courts have rejected." The County disagrees. The Court explained cumulative air quality analysis in *City of Long Beach v. Los Angeles Unified School Dist.* (2009) 176 Cal App. 4th 889 as follows:

Turning to the law of cumulative impact analysis, " '[t]he cumulative impact from several projects is the change in the environment which results from the incremental impact of the project when added to other closely related past, present, and reasonable foreseeable probable future projects. Cumulative impacts can result from individually minor but collectively significant projects taking place over a period of time.'

	<p>(CEQA Guidelines, Section 15355, subd. (b).) 'Cumulative impact analysis "assesses cumulative damage as a whole greater than the sum of its parts." ' [Citation.]" (Irritated Residents, supra, 107 Cal.App.4th at p. 1403; see Los Angeles Unified School Dist., supra, 58 Cal.App.4th at pp. 1024-1025; see also Guidelines, Section 15130, subd. (a)(1).) The cumulative impact analysis is an important element of the EIR.</p> <p><i>"[T]he relevant issue to be addressed in an EIR is not the relative amount of impact resulting from a proposed project when compared to existing {Page 176 Cal.App.4th 906} environmental problems caused by past projects, but rather whether the additional impact associated with the project should be considered significant in light of the serious nature of the existing problems."</i> (Guide to CEQA, supra, p. 473 (italics omitted, italics added), citing Los Angeles Unified School Dist., supra, 58 Cal.App.4th at pp. 1025-1026.)</p> <p>" 'Guidelines section 15130, subdivision (b) provides that "[t]he discussion of cumulative impacts shall reflect the severity of the impacts and their likelihood of occurrence, but the discussion need not provide as great detail as is</p>
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	<p>provided of the effects attributable to the project alone. The discussion should be guided by the standards of practicality and reasonableness.” ...[A] good faith and reasonable disclosure of such impacts is sufficient.’ [Citation.]” (Irritated Residents, supra, 107 Cal.App.4th at p. 1403.)</p> <p>“We review an agency's decision regarding the inclusion of information in the cumulative impacts analysis under an abuse of discretion standard. 'The primary determination is whether it was reasonable and practical to include the projects and whether, without their inclusion, the severity and significance of the cumulative impacts were reflected adequately.' [Citation.]” (Environmental Protection &amp; Information Center v. California Dept. of Forestry &amp; Fire Protection (2008) 44 Cal.4th 459, 525 (EPIC).)</p> <p>Long Beach first challenges the geographic scope of the FEIR's analysis of the cumulative impacts on air quality and traffic. Long Beach argues that LAUSD violated Guidelines section 15130, subdivision (b)(2) fn. 6 by “apparently only includ[ing] projects that LAUSD unilaterally, without explanation or justification, determined had 'the potential to impact study area intersections' “</p>
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	<p>(emphasis omitted), fn. 7 and omitted to consider the long list of projects {Page 176 Cal.App.4th 907} named in various comments to the DEIR, which projects Long Beach feels should have been included in the analysis. fn. 8</p> <p>“An EIR should define the relevant area affected in its analysis of cumulative impacts. [Citation.]” (Kostka, supra, Section 13:45, p. 654.) “Lead agencies should define the geographic scope of the area affected by the cumulative effect and provide a reasonable explanation for the geographic limitation used.” (Guidelines, Section 15130, subd. (b)(3).)</p> <p>“The factors to consider in determining which projects to include in the list include the nature of the resource in question, the location of the project, and the type of project. [Citation.] The CEQA Guidelines specify that location may be important when the location of other projects determines whether they contribute to an impact. For example, projects located outside a watershed would ordinarily not contribute to cumulative water quality impacts within the watershed.” (Kostka, supra, Section 13:42, p. 651; Guidelines, Section 15130, subd. (b)(2).)</p> <p>An EIR's cumulative impact analysis should</p>
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	<p>include all sources of related impacts, not simply similar sources or projects. (Kostka, supra, Section 13.44, p. 653.) Thus, “when the cumulative impact being considered is water runoff from logging operations, the EIR should evaluate all projects that contribute to runoff and erosion problems, not only other logging projects...” (Ibid.) Additionally, “[p]roject type[s] may be important... when the impact is specialized, such as a particular air pollutant...” (Guidelines, Section 15130, subd. (b)(2).) The area affected will depend on the nature of the impact being analyzed.</p> <p>While the geographic context or scope to be analyzed “cannot be so narrowly defined that it necessarily eliminates a portion of the affected environmental setting” (Bakersfield, supra, 124 Cal.App.4th at p. 1216, citing Guidelines, Section 15126.2, subd. (a)), <i>selection of the geographic area affected by the cumulative impacts falls within the lead agency's discretion. (Guidelines, Section 15130, subd. (b)(3); fn. 9 Ebbetts Pass Forest Watch v. Department of Forestry &amp; Fire Protection (2004) 123 Cal.App.4th 1331, 1351 (Ebbetts Pass))</i> {Page 176 Cal.App.4th 908} The selection of the assessment area is left to the agencies' expertise, and “[a]bsent a showing of arbitrary action, we</p>
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	<p>must assume that the agencies have exercised this discretion appropriately. [Citation.]” (Ebbetts Pass, supra, at p. 1351.)</p> <p><i>LAUSD's general analysis of cumulative impacts contained in its “Cumulative Scenario” section explains that it addressed the cumulative impact for each subject area, e.g., traffic, air quality, in the chapter associated with that subject.... An EIR may set out a cumulative impacts section within each chapter that analyzes a particular type of impact. If this approach is used, it may also be advisable to include a summary of the analysis in a separate section on cumulative impacts. (See Kostka, supra, Section 13.51, p. 661.) The FEIR's approach complies with this recommendation for presenting the cumulative impact analysis.</i></p> <p><i>Turning to Chapter 3A of the FEIR, devoted specifically to air quality, the cumulative impact portion covers a different, broader area than Long Beach suggests. The FEIR relies on the SCAQMD's CEQA Handbook for methods for determining the cumulative significance of land use projects, and relies on the strategy in the 2003 Air Quality Management Plan (AQMP) fn. 10 for reducing the high levels of</i></p>
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	<p><i>pollutants within the South Coast Air Basin. LAUSD's response to comments indicates that it considered the entire South Coast Air Basin with respect to ozone and particulate matter, and listed a container facility, a trucking company, terminals, and Long Beach Unified School District, among other projects. Accordingly, the FEIR contains a reasonable explanation for the geographic limitation used and its determination that the project will not cause an incremental effect. (Guidelines, Section 15130.) LAUSD did not abuse its discretion in defining the geographic scope of the cumulative impact area for air quality. (emphasis added.)</i></p> <p>Like the EIR in the Long Beach case, the County cumulative project list has been questioned in light of the region's status of not being in attainment of certain criteria pollutants, but the County provided a reasonable explanation that in fact the geographical limitation for air quality cumulative impact assessment is not a list of regional projects, but the entire regional air basin. The Long Beach case also makes it clear that the County is not supposed to evaluate the project's air quality impacts based upon its relative impact compared to existing environmental problems, but rather whether the impact associated with the project should be considered significant in light of the serious nature of the region's</p>
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	<p>existing air quality problems. The County did exactly this because it evaluated weather or not the project's VOCs, CO, SO<sub>x</sub>, PM<sub>10</sub>, PM<sub>2.5</sub> and NO<sub>x</sub> construction emissions exceeded the thresholds of significance the County and the San Diego Air Pollution Control District have determined would create a cumulatively considerable impact because they would interfere with this region's air quality management plan designed to restore the region to attainment status for all criteria air pollutants. As stated in the EIR, a cumulatively significant impact may exist where direct impacts are less than significant but "the proposed project, in combination with the emissions of concern from other proposed projects or reasonably foreseeable future projects within a proximity relevant to the pollutants of concern, are in excess of the guidelines identified in Table 3.1.1-5, SDAPCD Air Quality Significance Thresholds." (DEIR, p. 3.1.1-27.) The facts show the project's construction emissions are below these thresholds. This does not mean the project is doing nothing to assist in improving air quality. Separate from CEQA, the project must comply with SDAPCD regulations concerning construction equipment emissions controls, fugitive dust controls, etc. (fugitive dust abatement measures including watering the site three or more times per day to comply with SDAPCD Rule 55, adherence to County Code Section 87.428 – Dust Control Measures, CARB air toxic control</p>
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VIII. THE DEIR FAILS TO ADEQUATELY ANALYZE, QUANTIFY, AND MITIGATE SIGNIFICANT AIR QUALITY IMPACTS

The failure to provide information required by CEQA is a failure to proceed in the manner required by CEQA.<sup>123</sup> Challenges to an agency's failure to proceed in the manner required by CEQA, such as the failure to address a subject required to be covered in an EIR or to disclose information about a project's environmental effects or alternatives, are subject to a less deferential standard than challenges to an agency's factual conclusions.<sup>124</sup> In reviewing challenges to an agency's approval of an EIR based on a lack of substantial evidence, the court will "determine de novo whether the agency has employed the correct procedures, scrupulously enforcing all legislatively mandated CEQA requirements."<sup>125</sup>

O5-46

Even when the substantial evidence standard is applicable to agency decisions to certify an EIR and approve a project, reviewing courts will not 'uncritically rely on every study or analysis presented by a project proponent in support of its position. A clearly inadequate or unsupported study is entitled to no judicial deference."<sup>126</sup>

O5-47

A. The DEIR Failed to Adequately Disclose and Mitigate the Project's Significant Air Quality Impacts from Construction

1. The DEIR Fails to Analyze Public Health Impacts from Valley Fever.

The DEIR does not even mention Valley Fever, which has become endemic in San Diego County. Valley Fever incidents have been reported from the coast to the deserts in San Diego County in recent years.<sup>127</sup> It is well established that Valley Fever spores are stirred up during earthmoving and other construction activities like the Project, and may cause incidents of Valley Fever in construction workers, local residents, and other persons who come into contact with the airborne

O5-48

<sup>123</sup> *Sierra Club v. State Bd. Of Forestry* (1994) 7 Cal.4th 1215, 1236.

<sup>124</sup> *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 435.

<sup>125</sup> *Id.*, *Madera Oversight Coal., Inc. v. County of Madera* (2011) 199 Cal. App. 4th 48, 102.

<sup>126</sup> *Berkeley Jets*, 91 Cal.App.4th at 1355.

<sup>127</sup> See Exhibit J.

<http://www.cdph.ca.gov/data/statistics/Documents/YearlySummaryReports/SelectedGeneralCommDiseasesinCA2011-2013.pdf#page=29>  
3144-000ev

measures, and construction phasing to reduce emissions).

In accordance with CEQA Guidelines, Section 15130 and the holding in the Long Beach case, the County has provided a reasonable explanation for the geographic limitation used and its determination that the project will not cause an incremental effect. The County did not dismiss the project's air quality impacts on the grounds that they are "miniscule" or small in ratio to either the existing air quality problem or in relationship to other larger projects in the region. Accordingly, Friends of Oroville and Kings County Farm Bureau cases cited in the comment are inapplicable to the facts of this project.

O5-46

Comment noted. This comment does not address the adequacy of the DEIR nor does it speak to a specific issue; therefore, no further response is required.

O5-47

Comment noted. This comment does not address the adequacy of the DEIR nor does it speak to a specific issue; therefore, no further response is required.

O5-48

The Proposed Project is located in southeastern San Diego County, which, based on information compiled by the County of San Diego, has a very low background risk of coccidioidomycosis ("Valley Fever") (County of San Diego 2008). According to the County of San Diego Health and Human Services Agency (HHSA), 144, 138, 159, 160, and

	<p>121 confirmed cases of coccidioidomycosis were reported in San Diego County during a five-year period from 2009 to 2013 (County of San Diego 2014a). Furthermore, according to County of San Diego HHSA, there were no cases of coccidioidomycosis from 2008 to 2014 reported in zip codes 91905 (Boulevard), 91934 (Jacumba Hot Springs), 91906 (Campo), and 91962 (Pine Valley) (County of San Diego 2014b, 2014c). In addition, according to the California Department of Public Health, the number of cases in San Diego County has declined each year since 2011 through 2014 [<a href="http://www.cdph.ca.gov/data/statistics/Documents/YearlySummaryReportsofSelectedGeneralCommDiseasesinCA2011-2014.pdf#page=29">http://www.cdph.ca.gov/data/statistics/Documents/YearlySummaryReportsofSelectedGeneralCommDiseasesinCA2011-2014.pdf#page=29</a>]. Accordingly, there is no evidence that Valley Fever is a significant impact in the vicinity of the project. CEQA Guidelines 15143 states “[t]he EIR shall focus on the significant effects on the environment. The significant effects should be discussed with emphasis in proportion to their severity and probability of occurrence.” The evidence above demonstrates that there is no evidence that Valley Fever is a significant impact or is a significant health threat in the vicinity of the project. Therefore, in accordance with the CEQA Guidelines, it is appropriate for the County not to focus the EIR’s analysis on this issue. CEQA also does not require mitigation where there is no significant impact. CEQA Guidelines 15126.4(a)(3). The County finds there is no significant effect. Therefore, the County is not obligated to impose mitigation measures that either</p>
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	<p>the California Department of Public Health or the commenter's consultant at SWAPE recommends.</p> <p>Nevertheless, the County has already required the applicant to perform air quality related mitigation measures that incidentally are consistent with some of the mitigation measures that have been recommended. A 2013 Hazard Evaluation System and Information Service (HESIS) Fact Sheet entitled, "Preventing Work-Related Coccidioidomycosis (Valley Fever)", prepared by the California Department of Public Health recommends implementation of dust control measures including regular application of water during soil disturbance activities to reduce worker exposure to Valley Fever (California Department of Public Health 2013). The Proposed Project is already required to comply with SDAPCD Rule 55 (fugitive dust abatement measures including watering the site three or more times per day) and County Code Section 87.428 (and would implement measures recommended under Clearing and Grading in Section 1.2.1), which regulate construction activity capable of generating fugitive dust emissions, including active operations, open storage piles, and inactive disturbed areas, as well as track-out and carry-out onto paved roads beyond a project site, thereby controlling dust that the commenter claims has the potential to spread Valley Fever.</p>
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	<p>In addition, applicable regulations regarding hazards (including Valley Fever) protection and exposure are already included in Title 8 of the California Code of Regulations. For example, Section 342 requires employers to immediately report to the nearest District Office of the Division of Occupational Safety and Health any serious injury or illness, or death, of an employee occurring in a place of employment or in connection with any employment (8 CCR 342). Furthermore, Section 3203 requires that every employer establish, implement and maintain an effective Injury and Illness Prevention Program (Program) (8 CCR 3203(a)). The Program must include procedures for identifying and evaluating workplace hazards including scheduled periodic inspections to identify unsafe conditions and work practices (8 CCR 3203(a)(4)). Section 5144 requires that respirators shall be used and provided by the employer when such equipment is necessary to protect the health of the employee (8 CCR 5144(a)(2)). The primary purpose of Section 5144 is to prevent atmospheric contamination and control occupational diseases caused by breathing air contaminated with harmful dusts, fogs, fumes, mists, gases, smokes, sprays, or vapors. When such measures are necessary to protect the health of an employee, the employer shall be responsible for the establishment and maintenance of a respiratory protection program (8 CCR 5144(a)(2)). The requirements of the respiratory protection program are outlined on California Code of</p>
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	<p>Regulation Title 8, Section 5144 (c). Accordingly, even if there was a potentially significant impact from Valley Fever, the project must comply with the law and the state's regulatory system would adequately address any impact from Valley Fever that could occur.</p> <p>It should also be noted that Valley Fever does not present a serious health risk to most people. Most people who contract Valley Fever experience mild flu-like symptoms or no symptoms at all. In most cases, the body's immune response is effective and no specific course of treatment is necessary. About 5 percent of cases of Valley Fever result in pneumonia (infection of the lungs), while another 5 percent of patients develop lung cavities after their initial infection with Valley Fever. These cavities occur most often in older adults and about 50 percent of them disappear within two years. Only 1 percent–2 percent of those exposed to Valley Fever who seek medical attention would develop a disease that disseminates (spreads) to other parts of the body other than the lungs. Valley Fever is not contagious. (Valley Fever Center for Excellence, 2010c).</p> <p>Accordingly, the County finds there is no credible evidence that Valley Fever is a significant impact in the vicinity of the project, the EIR properly focuses on analyzing and mitigating impacts that are significant, and even if there were a potentially</p>
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spores.<sup>128</sup> The DEIR's omission of any discussion of this significant air quality and health impact is inexcusable.<sup>129</sup>

The California Department of Health reports that San Diego County has had up to 150 reported cases of Valley Fever per year from 2011 to 2013.<sup>130</sup> Local San Diego newspapers are also reporting increases in reported incidents of Valley Fever.<sup>131</sup> These statistics cannot be ignored, particularly when Valley Fever can be prevented.

In 2013, the California Department of Public Health recognized Valley Fever as a "serious concern in California" and recommended that specific on-site mitigation measures be adopted at construction sites to reduce the likelihood of exposure to Valley Fever.<sup>132</sup> SWAPE similarly concludes that, without adequate mitigation, Valley Fever is likely to be a significant impact of Project construction.<sup>133</sup> SWAPE explains that standard dust control measures designed to reduce particulate matter ("PM") pollution are insufficient to protect against Valley Fever.<sup>134</sup> Rather, specific mitigations focused on preventing exposure to Valley Fever spores, as recommended by the Department of Public Health, must be adopted in order to reduce impacts to less than significant. These mitigation measures include, at a minimum:

1. Determine if the worksite is in an area where Valley Fever is consistently present. Check with your local health department to determine whether cases have been known to occur in the proximity of your work area.
2. Encourage workers to report respiratory symptoms that last more than a week to a crew leader, foreman, or supervisor.

<sup>128</sup> See Exhibit A, pp. 14-16.

<sup>129</sup> *Berkeley Jets*, 91 Cal.App.4th at 1355.

<sup>130</sup> See Exhibit J.

<sup>131</sup> See Exhibit K, <http://www.eastcountymagazine.org/cost-valley-fever-human-and-economic>; <http://www.cdph.ca.gov/healthinfo/discond/Pages/Coccidioidomycosis.aspx>; <http://www.cdph.ca.gov/programs/ssss/Documents/CoccEpiSummary09-12.pdf>; <http://www.eastcountymagazine.org/experts-share-latest-research-valley-fever>.

<sup>132</sup> See Exhibit D (June 2013 CDH report).

<sup>133</sup> Exhibit A, SWAPE Comments, pp. 17-19.

<sup>134</sup> *Id.* at p. 17.  
3144-009cv

↑ O5-48  
Cont.

O5-49

O5-50

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significant impact, mitigation measures related to dust control and regulatory structures to protect worker safety are already required. There is substantial evidence demonstrating the Project does not present a significant air quality impact as it relates to Valley Fever.

**O5-49** Comment noted. Please see response O5-48 above.

**O5-50** Comment noted. Please see response O5-48 above. Because there is no significant impact, no mitigation is required such that the County does not need to analyze the feasibility of the commenter's proposed mitigation. Nevertheless, (1) when the County checked with the proposed local health department, it discovered there were no confirmed cases of Valley Fever in the vicinity of the project; and (2) reporting systems for worker health impacts are already required by law and no further mitigation measures would be needed.

**O5-51** Comment noted. Please see response O5-48 and O5-50 above. Because there is no significant impact, no mitigation is required and the County does not need to analyze the feasibility of the commenter's proposed mitigation. Nevertheless, (1) when the County checked with the proposed local health department, it discovered there were no confirmed cases of Valley Fever in the vicinity of the project; and (2) reporting systems for worker health impacts are already required by law and



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3. Suspend work during heavy wind or dust storms and minimize amount of soil disturbed.
4. Make sure workers keep the windows closed in heavy construction equipment and equip with high efficiency particulate air (HEPA) filters. Two-way radios can be used for communication so that the windows can remain closed but allow communication with other workers.
5. When digging a trench or fire line or performing other soil-disturbing tasks, position workers upwind when possible.
6. Place sleeping quarters and dining halls, away from sources of dust such as roadways.
7. Provide NIOSH-approved respiratory protection with particulate filters rated as N95, N99, N100, P100, or HEPA. Household materials such as washcloths, bandanas, and handkerchiefs do not protect workers from breathing in dust and spores. Respirators for employees must be used within a Cal/OSHA compliant respiratory protection program that covers all respirator wearers and includes medical clearance to wear a respirator, fit testing, training, and procedures for cleaning and maintaining respirators. Different classes of respirators provide different levels of protection according to their Assigned Protection Factor (see table below). Powered air-purifying respirators have a battery-powered blower that pulls air in through filters to clean it before delivering it to the wearer's breathing zone. PAPRs will provide a high level of worker protection, with an APF of 25 or 1000 depending on the model. When PAPRs are not available, provide a well-fitted NIOSH-approved full-face or half-mask respirator with particulate filters.

Fit-tested half-mask or filtering face-piece respirators are expected to reduce exposure by 90% while still allowing about 10% face-seal leakage which can result in an unacceptable risk of infection when digging where Valley Fever spores are present.<sup>135</sup>

<sup>135</sup> Exhibit A, SWAPE Comments, pp. 19-20; Exhibit D.  
3144-009ev

O5-50  
Cont.

no further mitigation measures would be needed.

**O5-52**

Comment noted. The comment refers to the DEIR NO<sub>x</sub> emissions estimates and cites the CalEEMod User Guide. This comment is an introduction to more detailed comments that occur later in the comment letter. As such, this comment is noted and detailed responses to the issues mentioned in this comment are provided below in Responses to Comments O5-53 through O5-54.

**O5-53**

Regarding CalEEMod value categories, the differences in land use setting of urban vs. rural do not affect modeling performed for construction of the Proposed Project because any default values utilized for construction of the Proposed Project are the same for both urban and rural land uses settings. Accordingly, the County properly exercised its judgement to use the urban setting. However, in response to this comment model settings were updated to reflect the rural land use.

Operational emissions generated as part of the Proposed Project would be miniscule; therefore, the County properly exercised its judgement to use a more conservative operation year. However, in response to this comment, operational emissions have been updated to reflect a 2016 calendar year.

Regarding imported material, the Proposed Project is intended to be a balanced site; therefore, the

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SWAPE concludes that these Valley Fever mitigation measures would be both feasible and effective to reduce human exposure and the likelihood of individuals contracting Valley Fever on or off the Project site during construction.<sup>136</sup> The DEIR must be revised to analyze Valley Fever and incorporate these, or other equally effective, mitigation measures.

O5-51

2. *The DEIR's Air Quality Analysis is Flawed Because Construction Emissions are Underestimated*

The DEIR significantly underestimated the Project's NO<sub>x</sub> emissions from construction and, as a result, inaccurately concluded that emissions from Project construction and operational activities do not exceed the SDAPCD Air Quality Significance Thresholds. As explained by SWAPE, the Air Quality Report relies on the California Emissions Estimator Model Version CalEEMod.2013.2.2 ("CalEEMod") to calculate the Project's emissions.<sup>137</sup> CalEEMod provides recommended default values based on site specific information, such as land use type, meteorological data, total lot acreage, Project type, and typical equipment associated with phases of construction. If more specific project information is known, CalEEMod allows the user to change the default values and input project-specific values, but cautions users that "site specific data" must be "supported by substantial evidence" if it is to be used.<sup>138</sup>

O5-52

The DEIR's Air Quality analysis changed several of these default values in the CalEEMod model to new values that were purported to relate to the Project, but which are either inaccurate when compared to the DEIR's description of Project components, or are simply unsupported. These value categories included:

- Land Use Setting: The DEIR's Air Quality analysis used an "Urban" setting rather than the "Rural" setting that applies to the Project site;
- Operational Year: The Air Quality analysis used 2014 instead of 2016, which is the year the Project is expected to become operational;
- Imported Material: The Air Quality analysis failed to factor into its analysis 6,300 cubic yards of imported material that will be brought to the Project site during the "Grading" construction phase; and

O5-53

<sup>136</sup> Exhibit A, SWAPE Comments, pp. 19-22.

<sup>137</sup> *Id.* at p. 4.

<sup>138</sup> *Id.*; Exhibit L, CalEEMod User Guide, pp. 2, 8, available at: <http://www.caleemod.com/>. 3144-008ev

County properly exercised its judgement that the import or export of material would not be required. However, for the purposes of responding to this comment and providing even more conservative emissions estimates, emissions estimates have been updated to reflect 6,300 cubic yards of imported material during grading activities.

The County properly exercised its judgement with regard to its traffic assumptions. However, for purposes of responding to this comment, construction traffic assumptions have been updated in the final Air Quality and GHG Technical Report (Appendix 3.1.1 to the EIR) per the comment to reflect even more conservative worker, vendor and haul truck assumptions. See Table 1 for updated emissions estimates during Proposed Project construction.

**Table 1**  
**Estimated Daily Maximum Construction Emissions**  
**(pounds per day)**

	VOC	NO <sub>x</sub>	CO	SO <sub>x</sub>	PM <sub>10</sub>	PM <sub>2.5</sub>
2016	18.10	246.4	150.52	0.42	28.48	15.55
Pollutant Threshold	75	250	550	250	100	55
Threshold Exceeded?	No	No	No	No	No	No

**Sources:** CalEEMod Version 2013.2.2. See Attachment 9.1-7 for complete results.

**Notes:** VOC = volatile organic compounds; NO<sub>x</sub> = oxides of nitrogen; CO = carbon monoxide; SO<sub>2</sub> = sulfur dioxide; PM<sub>10</sub> = suspended particulate matter; PM<sub>2.5</sub> = fine particulate matter

<p>June 1, 2015 Page 28</p> <ul style="list-style-type: none"> <li>Incorrect Worker, Vendor, and Hauler trip lengths and number of trips: The DEIR's Air Quality analysis undercalculated the number and length of vehicle trips expected during Project construction.</li> </ul> <p>These errors resulted in a significantly lower emissions factor and an artificially low calculation of Project NOx emissions during construction.<sup>139</sup></p> <p>SWAPE recalculated the Project's construction NOx emissions using the same CalEEMod software that the DEIR used, but with correct values, or values that match the Project description in the DEIR, for each of the above Project factors. When the correct maximum daily values were utilized to calculate the Project's air quality impacts, the Project's NOx emissions during construction are 529 lbs/day, which greatly exceeds the SDAPCD threshold of 250 lbs/day, and is therefore a significant impact.<sup>140</sup> The County must disclose this significant impact in a revised DEIR and identify mitigation measures to reduce these emissions to less than significant levels.</p> <p>3. <i>Cancer Risk from Construction Emissions is Underestimated, Resulting in an Erroneous Conclusion that the Project Will Not Result in Significant Health Impacts and Escaping Mitigation</i></p> <p>The County failed to adequately quantify and disclose the significant adverse health effects from exposure to TACs during Project construction in the DEIR. One of the primary emissions of concern regarding health effects for land development projects is DPM during construction.<sup>141</sup></p> <p>The Project will emit DPM from diesel equipment and trucks during construction. The SDAPCD significance threshold for cancer risk caused by exposure to TACs like DPM is one in one million.<sup>142</sup> The DEIR performed a health risk assessment to evaluate the cancer risk from the Project's DPM emissions, and concluded that the health risk was under the SDAPCD significance threshold, and therefore less than significant.<sup>143</sup> However, the DEIR's health risk assessment relied on the same incorrect Project factor inputs as it did for its criteria air pollutant analysis, as discussed above. As a result, the DEIR seriously</p> <p><sup>139</sup> See Exhibit A, SWAPE Comments, pp. 2-11. <sup>140</sup> <i>Id.</i> at p. 10. <sup>141</sup> DEIR AQ Appendix, p. 52. <sup>142</sup> DEIR, p. 3.1.1-11. <sup>143</sup> DEIR, pp. 3.1.1-17, 3.1.1-22, 3144-000ev</p>	<p>Values shown reflect the highest of summer or winter emissions.</p> <p>As shown in Table 1, maximum daily emissions during construction as updated per comment O5-53 would not exceed SDAPCD thresholds. Even with commenter's more conservative assumptions, impacts would remain less than significant during construction as originally stated in the DEIR and no mitigation is required.</p> <p><b>O5-54</b> Calculations as provided by SWAPE are incorrect and substantially overestimated. Specifically, the number of haul trips were not calculated correctly and were likely double-counted. As shown in Table 1 of response O5-53, updated emissions estimates per comment O5-53 would not exceed SDAPCD daily thresholds during construction. Emissions presented in Table 1 include the most conservative assumptions available regarding equipment fleet, construction worker trips, vendor trips, and haul truck trips. See Attachment 9.1-7 for complete results. Commenter has failed to disclose its CalEEMod and AERSCREEN input and output files in commenter's Exhibit A that would enable a more detailed response. Nevertheless, the County is entitled to rely on its experts' opinions backed by the substantial evidence in the air quality study and response O5-53.</p> <p><b>O5-55</b> Construction for the Proposed Project would only occur for a short-term, temporary duration of several months, after which time all construction-related emissions</p>
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	<p>would cease. Additionally, no high-emitting stationary sources would be associated with project construction – all pollutant sources related to Proposed Project construction would result from off-road equipment and mobile vehicles. The nearest sensitive receptor to the project site is located approximately 3,500 feet from the project site boundaries. CARB guidance provides examples of when a health risk related to mobile sources is greatest, including when sensitive receptors would be located 500 feet or less from a high-volume roadway (CARB 2012). Because the nearest sensitive receptor is located approximately 3,500 feet from the project site and the construction site is not considered a high-emission source or a stationary source of emissions, a health risk assessment is not warranted. Health risk assessments are typically conducted for long-term exposure of 9 years, 30 years or 70 years; however, a construction-specific screening health risk assessment was conducted for the purposes of a conservative analysis (See Appendix B to the Air Quality and GHG Technical Report provided as Appendix 3.1.1-1 of the FEIR).</p> <p>Although the County exercised reasonable judgement in its assumptions, for purposes of responding to this comment, the screening health risk assessment has been updated per construction assumptions suggested in comment O5-53. The dispersion modeling conducted for this updated assessment was performed using the U.S.</p>
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	<p>Environmental Protection Agency (EPA)-approved dispersion model, American Meteorological Society/Environmental Protection Agency Regulatory Model (AERMOD) and the calculations incorporate all the requirements provided by the Office of Environmental Health Hazard Assessment (OEHHA) as outlined in the <i>Air Toxics Hot Spot Program Risk Assessment Guidelines – Guidance Manual for Preparation of Health Risk Assessments</i> (OEHHA 2015). The commenter used the AERSCREEN model to perform a screening health risk calculation for construction activities; however, unlike AERSCREEN, AERMOD estimates the air quality impacts of single or multiple sources using actual meteorological conditions and therefore, provides more precise results than AERSCREEN. Additionally, it appears that the commenter applied total PM<sub>10</sub> emissions to the calculation of diesel particulate matter when calculating the annualized 1-hour emission rate of grams per second of diesel particulate matter. For the purposes of accurately calculating diesel particulate matter, only <i>on-site exhaust</i> PM<sub>10</sub> as part of the CalEEMod output files should be used, because all other sources of PM<sub>10</sub> would be related to fugitive dust, which are not considered exhaust-related diesel particulate matter. The original analysis provided in the DEIR estimated a cancer risk of 0.036 in one million; however, a revised health risk analysis was conducted to account for the most recent guidance provided by OEHHA (OEHHA 2015) and</p>
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underestimated the cancer risk posed to nearby residents and children from TACs. The DEIR's conclusion that the Project will not have significant health impacts from DPM emissions is therefore not supported by substantial evidence.

O5-55  
Cont.

SWAPE performed the same health risk assessment using the correct Project input value factors, namely those that match the DEIR's description of the Project, and found that unmitigated DPM emissions released during Project construction would result in a cancer risk of 1.8 per million for adults, 10.4 per million for children, and 34.6 per million for infants.<sup>144</sup> This risk is well above the SDAPCD significance threshold for cancer of (one in one million), and is therefore a significant impact requiring mitigation.<sup>145</sup>

O5-56

This significance determination also makes the Project subject to SDAPCD's New Source Review rule, which requires any new, relocated, or modified emission unit which may increase emissions of one or more TACs over the significance threshold to obtain an Authority to Construct or Permit to Operate, and to implement best available control technology for toxics ("T-BACT").<sup>146</sup> Rule 1200 establishes acceptable risk levels and emission control requirements for new and modified facilities that may emit additional TACs. Under Rule 1200, permits to operate may not be issued when emissions of TACs result in an incremental cancer risk greater than 1 in 1 million without application of T-BACT, or an incremental cancer risk greater than 10 in 1 million with application of T-BACT, or a health hazard index (chronic and acute) greater than one (SDAPCD 1996).<sup>147</sup> Since the Project will result in DPM emissions that create a health risk over the Rule 1200 threshold, T-BACT is required, and must be installed to reduce the Project's construction emissions.

O5-57

<sup>144</sup> See Exhibit A, Soil, Water, Air Protection Enterprise, Comments on the Jacumba Solar Energy Project, Jacumba, California (May 29, 2015) ("SWAPE Comments"), p. 15.

<sup>146</sup> See DEIR, p. 3.1.1-11 (requiring implementation of Toxics Best Available Control Technology ("T-BACT") for projects whose emissions of TACs result in an incremental cancer risk greater than 1 in 1 million); *Schenck v. County of Sonoma* (2011) 198 Cal.App.4th 949, 960 (EIR must disclose an impact as significant when it exceeds a duly adopted CEQA significance threshold).

<sup>147</sup> SDAPCD Rule 1200: Toxic Air Contaminants; DEIR, p. 3.1.1-11.

<sup>147</sup> DEIR, p. 3.1.1-11.  
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## O5-56

updated modeling assumptions as suggested in comment O5-53. The updated results of the construction-related health risk assessment estimated a cancer risk of 0.321 in one million (an increase of 0.285 from the original DEIR analysis). The cancer risk calculations were performed using the HARP2 model, Risk Assessment Standalone Tool version 15076 for 0.5 years of exposure and a 3rd trimester start date as recommended under the Air Toxics Hot Spot Program Risk Assessment Guidelines – Guidance Manual for Preparation of Health Risk Assessments (OEHHA 2015). Therefore, impacts would remain less than significant as originally stated in the DEIR. See Attachment 9.1-7 for complete results.

The County disagrees that the cancer risk based on updated construction assumptions exceeds SDAPCD's significance threshold. Updated results per suggestions provided in comment O5-53 and O5-55 are provided. See response O5-55. As explained in Response to Comment O5-55, SWAPE's analysis is flawed and inaccurate. Impacts related to short-term construction diesel particulate matter would remain less than significant as originally stated in the DEIR. See Attachment 9.1-7 for complete results. To the extent commenter and its consultant have come to a different conclusion, they represent an expert disagreement on the methodology for modelling. The County is entitled to rely on its experts' opinion, which is backed by substantial evidence in the modeling tool used, even if commenter prefers the County

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IX. THE DEIR FAILS TO ADEQUATELY ANALYZE, QUANTIFY, AND MITIGATE SIGNIFICANT IMPACTS TO BIOLOGICAL RESOURCES

A. The DEIR Fails to Adequately Analyze and Mitigate for Bird Collisions Caused by Lake Effect and Power Line Electrocutions

The DEIR states that there is little scientific information available regarding the "lake effect," and a detailed discussion of the potential impacts "would be speculative."<sup>148</sup> This conclusion is incorrect and reflects a lack of analysis and investigation by the County. As explained by Ms. Owens, there is currently sufficient evidence in the biological community to identify "lake effect" as a significant risk to birds. The "lake effect" occurs when birds and their insect prey mistake a reflective solar facility for a water body, or spot water ponds at the site, then hone in on them, colliding directly with the solar panels.<sup>149</sup>

Ms. Owens concludes that the DEIR makes erroneous assumptions regarding the insignificance of the Project's significant impacts on avian species from lake effect which run counter to recent guidance from regulatory agencies, like USFWS.<sup>150</sup> As explained by Ms. Owens, USFWS recently commented on the Program EIR for the Soitec Project, located approximately 8 miles from the Project, concluding that there is significant potential for birds to be attracted to southeastern San Diego County solar project sites. USFWS concluded that the risk of collision and other project-related mortality and injury to birds is a potentially significant impact that must be carefully assessed as part of mitigation protocols for such solar projects.<sup>151</sup>

Additionally, the Project site is located within the Pacific Flyway, a known migratory bird flyway and an area that is also rich in resident bird diversity. Ms. Owens explains that migrating birds with the potential to incur injury or death from collision with the Project components, throughout the life of the Project, include all birds known to occur moving through the area, including rare, threatened, or endangered species.<sup>152</sup> For these reasons, Ms. Owens similarly

<sup>148</sup> DEIR Bio Appendix, p. 76.

<sup>149</sup> Exhibit B, Owens Comments, pp. 9-12.

<sup>150</sup> Exhibit B, p. 14.

<sup>151</sup> Exhibit B, p. 14.

<sup>152</sup> Exhibit B, p. 14.

3144-009ev

O5-58

O5-59

O5-60

**O5-57**

to use a different model that commenter claims shows a different result.

For the reasons provided in Response to Comment O5-53, 55 and 56, the County disagrees with SWAPE's assessment, which is flawed and unreliable. The Project does not exceed SDAPCD significance thresholds and therefore is not required to obtain an Authority to Construct or Permit to Operate or to implement T-BACT.

The commenter's claim that the project would be subject to SDAPCD Rule 1200 is invalid. SDAPCD Rule 1200 only applies to permitted stationary sources over which the SDAPCD has permitting authority and would not apply to short-term construction activities. The project would not include a stationary source of emissions subject to permitting, and construction activity, which is comprised entirely of mobile sources, would not be subject to Rule 1200 because as stated in Rule 11, mobile source emissions are exempt from permitting requirements (SDAPCD 2012). Additionally, the Proposed Project's construction activities would not exceed a cancer risk of one in one million; therefore, best available control technologies for toxics (T-BACT) would not be required.

**O5-58–61** These comments summarize the comments provided by Ms. Owens as an exhibit to this letter and responded to herein. Responses are provided to Ms.

<p>June 1, 2015 Page 31</p> <p>concludes that an analysis of the impacts of “lake effect” is critical to a meaningful evaluation of the Project’s impacts on avian species.<sup>153</sup></p> <p>Rather than conduct an impact assessment, the DEIR simply concludes that insufficient evidence exists to analyze the impacts of “lake effect” caused by the Project.<sup>154</sup> This conclusion is wholly contrary to current evidence on “lake effect” and contrary to USFWS recommendations in this same locale. The County cannot turn a blind eye to a known significant impact, then conclude that the impact is less than significant. The County must revise and recirculate the DEIR to include an analysis of this impact, and feasible mitigations to reduce the impact to less than significant levels.</p> <p><b>B. The DEIR Fails to Adequately Analyze the Project’s Impacts on Special Status Species, Resulting in Inadequate or No Mitigation for Significant Impacts</b></p> <p>The DEIR performed inadequate surveys and investigation for numerous species. As discussed above, the DEIR relies upon out-of-date surveys performed for other projects to establish baseline data for golden eagles, which are likely to forage or nest on the Project site.<sup>155</sup> As a result, the DEIR did not find a significant impact to golden eagles from Project construction and operation, and did not provide mitigation for impacts to eagles or other raptors.<sup>156</sup></p> <p>The DEIR also includes flawed assumptions for what species must be mitigated because the DEIR failed to document all special-status species that are reported by the California Natural Diversity Database (“CNDDB”) as occurring on or near the Project site. In particular, the DEIR failed to adequately document migrating tricolored blackbirds and Southern Grasshopper Mouse foraging habitat – all of which are documented on the CNDDB, which the DEIR claims to have consulted.<sup>157</sup></p> <p>Ms. Owens explains that the DEIR includes inadequate surveys for the federally endangered Quino checkerspot butterfly. As with golden eagles, the data on Quino conditions that is included in the DEIR is both outdated and flawed in its</p> <p><sup>153</sup> Exhibit B, p. 13.  <sup>154</sup> DEIR Bio Appendix, p. 76.  <sup>155</sup> DEIR, p. 2.2-54.  <sup>156</sup> Exhibit B, pp. 5-9.  <sup>157</sup> Exhibit B, pp. 14-15, 16-17.  3144-009ev</p>	<p>Owens comments O5-144 through O5-175, and specifically regarding pseudo lake effect in Common Response BIO1 and Response to Comment O5-151. Please also refer to Responses to Comments O3-6 and O3-7.</p> <p><b>O5-62</b> Please also refer to Response to Comment O5-17. Loss of foraging habitat for golden eagles and other raptor species was found potentially significant absent mitigation, but with implementation of mitigation measure M-BI-4, the impacts will be less than significant.</p> <p>The County disagrees with the commenter’s assertion that the DEIR fails to adequately establish baseline conditions for golden eagle. See Response to Comment O3-16 and O5-17.</p> <p><b>O5-63</b> Please refer to response to comment O5-18.</p> <p><b>O5-64</b> Please also refer to Response to Comment O3-8. Response to Ms. Owens’ comments can be found in O5-144 through O5-175. The DEIR discusses impacts to QCB in Section 2.2. Due to the lack of adult nectar plants and negative survey results, the DEIR concluded that QCB was not likely to be present at the site. Due to drought conditions, the DEIR evaluated impacts to special status plants using a habitat suitability model. See response to comment O5-15.</p>
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<p>June 1, 2015 Page 32</p> <p>reporting protocol.<sup>158</sup> The DEIR acknowledges that critical habitat for the Quino occurs less than 3 miles away from the Project site.<sup>159</sup> Without adequate analysis, the impact to the Quino from the Project cannot be adequately evaluated. Finally, the DEIR failed to conduct any surveys for rare plants.</p> <p>These are egregious violations of CEQA's requirement to analyze the extent of impacts posed by a Project. The DEIR must be revised and recirculated to remedy these informational deficiencies.</p> <p><b>X. THE DEIR FAILS TO ADEQUATELY ANALYZE, QUANTIFY, AND MITIGATE POTENTIALLY SIGNIFICANT IMPACTS TO WATER RESOURCES</b></p> <p>The County failed to adequately analyze the Project's significant impacts on existing water resources, both on the site and on the larger "navigable waters" to which they connect.</p> <p>As explained above, the Project site is in an area that is hydrologically connected to the Salton Sea and contains approximately 10 separate basins which contain an active water flow during and immediately after significant rain events.<sup>160</sup> The DEIR concludes that, in total, there are at least 3.3 acres (24,361 linear feet) of potential jurisdictional waters of the United States/state identified within the solar site.<sup>161</sup> The DEIR clearly explains the connection between these Project waters and larger, Federally regulated "waters of the United States":</p> <p>Flows within these drainages are directed northwest from the site and into a tributary to Carrizo Creek, which flows into Carrizo Creek, turns into Carrizo Wash, and connects San Felipe Wash and eventually the Salton Sea (USGS 2014) (see Figure 2.2-2 and Figure 2.2-4, Hydrologic Setting) and therefore form a significant nexus to a traditional navigable water of the United States.<sup>162</sup></p> <p><sup>158</sup> Exhibit B, pp. 23-24.  <sup>159</sup> See DEIR Bio report, Figure 5, USFWS Critical Habitat.  <sup>160</sup> DEIR, p. 3.1.4-3.  <sup>161</sup> DEIR, p. 2.2-32.  <sup>162</sup> DEIR, p. 2.2-32.  3144-009ev</p>	<p><b>O5-65</b> Comment noted. The County disagrees that recirculation is required because the DEIR adequately analyzes impacts to sensitive species as set forth in Responses to Comments O5-58 through O5-64.</p> <p>This comment does not address the adequacy of the DEIR; therefore no further response is required. The County has made revisions to the DEIR in response to public review comments to clarify, amplify, or make insignificant modifications to the EIR. However, the County disagrees with the commenter's assertion that the Jacumba Solar Project DEIR must be recirculated as none of the criteria identified in CEQA Guidelines Section 15088.5, requiring recirculation are met.</p> <p><b>O5-66</b> See response to comments O5-22 through O5-24.</p> <p><b>O5-67</b> Impacts and significance determinations to waters on site are provided in Section 2.2.3.3, Riparian Habitat or Sensitive Natural Community, on page 2.2-60. Mitigation measure MM-BI-14 requires obtaining agency permits per Sections 401 and 404 of the Clean Water Act and Section 1602 of California Fish and Game Code for impacts to jurisdictional resources. Also, see response to comments O5-22 through O5-24.</p> <p><b>O5-68</b> Comment noted. This comment does not address the adequacy of the DEIR, therefore no further response is required.</p>
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<p>June 1, 2015 Page 33</p> <p>These facts trigger CEQA's requirement to assess the Project's potentially significant impacts on numerous waterways and the Salton Sea. Yet, the DEIR contains no analysis of these potential impacts.</p> <p>The Salton Sea is California's largest lake. It supports a multitude of recreational uses and a National Wildlife Refuge and is a critical stop on the Pacific Flyway for migrating birds, including several state- and federal-listed endangered and threatened species. Approximately 75 percent of the freshwater inflow to the Sea is agricultural drain water from Imperial Valley. Since the Sea has no outlets, salts concentrate in it and thus the sea is dependent on the continued inflow of freshwater to support it. Currently, the Sea is 25 percent saltier than the ocean, with salinity increasing at approximately 1 percent per year.</p> <p>The Project would affect waters flowing to the Salton Sea. Since the Salton Sea watershed is impaired and the Salton Sea ecosystem is imperiled, any reduction in water as a result of the Project may result in a potentially significant impact to the sea and its biological resources. According to the Salton Sea Authority, reduction in freshwater to the sea may result in significant impacts from rising salinity.</p> <p>The issue of salinity has become a major focus because it is reaching a level where it is likely to interfere with fish reproduction and, ultimately, survival. Loss of fish would greatly impact the Sea's productive sport fishery, and the food source of fish-eating birds that flock to the Sea.</p> <p>Current inflows to the Sea are equal to the amount of water lost in evaporation and Sea levels are stable. But each year roughly 5 million tons of new salt are added to the Sea in those inflows. To stabilize salinity levels in the Sea, at least an amount equal to the new salt must be removed so that salinity levels don't go higher. If relatively freshwater now flowing to the Sea is conserved and transferred elsewhere, significantly more salt will have to be removed to lower the concentration of salt in the remaining water in the Sea.</p> <p>Similarly, if the Project impedes freshwater from reaching the Salton Sea, significant impacts from increased salinity may occur. Thus, the Project's impacts on ephemeral streams which discharge into the Salton Sea is a potentially significant impact.</p> <p>3144-009ev</p>	<p><b>05-69</b> Comment noted. This comment does not address the adequacy of the DEIR; therefore no further response is required. Precipitation falling on the site would still have the potential to discharge into the Salton Sea. No reduction in volume is anticipated. Please also see response to comment O5-72. The commenters other observations are noted.</p> <p><b>05-70</b> Comment noted. This comment does not address the adequacy of the DEIR; therefore no further response is required.</p> <p><b>05-71</b> Comment noted. This comment does not address the adequacy of the DEIR; therefore no further response is required.</p> <p><b>05-72</b> Comment noted. Commenter appears to infer that the project would impede flows of freshwater to the Salton Sea. The project was designed to maintain flow connectivity to downstream areas. Specifically, drainage channels are proposed along the eastern edge of project site to capture sheet flow which is conveyed into east-west drainage channels that the Project's impacts to ephemeral streams may result in increased salinity in discharge flow into existing downstream channels which flow into Carrizo Creek and into the Salton Sea. The Project will not impede flows into the Salton Sea, as all precipitation that falls on the site will still be conveyed to the Salton Sea watershed (see Figure 1-5).</p>
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<p>June 1, 2015 Page 34</p> <p>Reduction in flows to the Sea may also result in potentially significant impacts on air quality. According to the Salton Sea Authority, as inflows are reduced, the Sea's elevation drops and sediments become exposed. Because the Sea is shallow (comparable to a forty foot puddle 1/8 of an inch deep), it doesn't take much drop in elevation to expose a large amount of sediments. Since the Project would impede water flow to the Salton Sea without replacing inflows, the Sea will drop in elevation and expose more sediments to the air.</p> <p>Thus, the Project's proposal to develop in ephemeral streams which discharge into the Salton Sea may result in potentially significant air quality impacts that must be analyzed in a revised DEIR. The Salton Sea National Wildlife Refuge was established in 1930 to preserve wintering habitat for waterfowl and other migratory birds. The Project's resulting reduction in the flow of water to the Salton Sea may potentially increase the salinity in the sea, resulting in significant impacts to beneficial uses of the sea, potentially significant impacts to wildlife and/or take of state- and federally-protected species. These potentially significant impacts must also be analyzed in revised DEIR.</p> <p>In sum, substantial evidence shows that the Project may result in significant unmitigated and unanalyzed impacts to water resources, air quality and biological resources from its development within ephemeral streams. The Project will develop in ephemeral streams which will reduce the freshwater flow into the Salton Sea. This may result in potentially significant impacts to the streams, the Salton Sea and its surrounding wetlands, biological resources, and air quality.</p> <p><b>XI. THE DEIR FAILS TO REQUIRE SUFFICIENT AND FEASIBLE MITIGATION MEASURES TO REDUCE SIGNIFICANT IMPACTS</b></p> <p><b>A. The DEIR Contains Inadequate Mitigation for the Project's Impacts on Migrating Wildlife and Rare Plants</b></p> <p>The DEIR proposes to set aside 180.4 acres of native open space on the Project site.<sup>163</sup> It is unclear from the DEIR whether the purpose of the preserve is to enable wildlife access across the private lands to adjoining federal lands" (DEIR, p. 1-2), or to mitigate for the loss of special-status plant communities.<sup>164</sup> However,</p> <p><sup>163</sup> DEIR, pp. 1-2, S-15. <sup>164</sup> DEIR, p. S-15. 3144-009ev</p>	<p>Refer to Section 3.1.4.3.1, Hydrology and Drainage Patterns, of the DEIR for more information.</p> <p><b>05-73</b> Comment noted. See Response to Comment 05-72. Because the Project will not impede flows into the Salton Sea, the Project will not cause air quality impacts resulting from increased exposure of sediment due to falling levels of the Salton Sea.</p> <p><b>05-74</b> See response to comments 05-72 and 05-73.</p> <p><b>05-75</b> See response to comments 05-72 and 05-73. Summary comment noted. Specific comments are addressed in Responses to Comments 05-66 through 05-74.</p> <p><b>05-76</b> The County disagrees with the commenter's statement that there are impacts to 194.3 acres listed on Table 4. There will be direct impacts to a total of 108.1 acres of vegetation communities on the solar site, which includes permanent direct impacts to 99.9 acres of special-status upland vegetation communities. The mitigation is consistent with the County's required mitigation ratios described in the <i>County of San Diego Guidelines for Determining Significance and Report Format and Content Requirements: Biological Resources</i>. The Open Space Preserve provides mitigation for impacts to special status species and connectivity for migrating wildlife species. These two functions are not mutually exclusive. Contrary to the commenter's assertion,</p>
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<p>June 1, 2015 Page 35</p> <p>even if 100% of the preserve is intended to mitigate for loss of special-status vegetation, 180.4 acres is inadequate mitigation for the loss.</p> <p>Based on the DEIR's Bio Appendix, the Project development footprint will impact a total of 194.3 acres of special status plant species.<sup>166</sup> Even if all 180.4 acres of native land is dedicated to mitigating this impact, that would still result in less than 2:1 mitigation. The courts have held that a mitigation ratio of at least 2:1 is required to be considered adequate mitigation under CEQA for loss of special status species or wildlife habitat.<sup>166</sup></p> <p>The proposed Open Space Preserve of 180.4 acres would provide less than a 1:1 replacement for lost vegetation (92%), and is therefore inadequate mitigation under CEQA. The Applicant must procure additional acreage to set aside so that the mitigation ratios are at least 2:1.</p> <p><b>B. The DEIR Contains Vague, Infeasible, or Unenforceable Mitigation Measures</b></p> <p>CEQA requires the lead agency to adopt feasible mitigation measures that will substantially lessen or avoid a project's potentially significant environmental impacts.<sup>167</sup> A public agency may not rely on mitigation measures of uncertain efficacy or feasibility.<sup>168</sup> "Feasible" means capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, legal, social and technological factors.<sup>169</sup> Mitigation measures must be fully enforceable through permit conditions, agreements or other legally binding instruments.<sup>170</sup></p> <p>Failure to include enforceable mitigation measures is considered a failure to proceed in the manner required by CEQA that is evaluated de novo by the courts.<sup>171</sup></p> <p><sup>166</sup> DEIR Bio Appendix, pp. 82-83, Table 4.  <sup>168</sup> <i>Banning Ranch Conservancy v. City of Newport Beach</i> (2012) 211 Cal. App. 4th 1209 (upholding two-to-one mitigation for loss of critical habitat for coastal California gnatcatcher as compliant with PRC 21081 mitigation requirements).  <sup>167</sup> CEQA §§ 21002, 21081(a)) and describe those mitigation measures in the EIR. (CEQA § 21100(b)(3); CEQA Guidelines section 15126.4  <sup>169</sup> <i>Kings County Farm Bureau v. City of Hanford</i> (1990) 221 Cal.App.3d 692, 727 (finding groundwater purchase agreement inadequate mitigation measure because no record evidence existed that replacement water was available).  <sup>169</sup> 14 CCR § 15364.  <sup>170</sup> Id. at §15126.4(a)(2).  <sup>171</sup> <i>San Joaquin Raptor Rescue Ctr. v. County of Merced</i> (2007) 149 Cal.App.4th 645, 672.  3144-009ev</p>	<p>neither CEQA nor relevant case law requires a specific mitigation ratio, much less mitigation at a 2:1 ratio. The case cited by the commenter concerns designated critical habitat for a federally listed bird. None of the sensitive plant species potentially impacted by the Project are listed under the federal Endangered Species Act (ESA) or California Endangered Species Act (CESA). The County believes the conservation and management of the Open Space Preserve mitigates for the potential loss of sensitive plants.</p> <p><b>05-77</b> Comment noted. This comment does not address the adequacy of the DEIR; therefore no further response is required.</p> <p><b>05-78</b> Comment noted. This comment does not address the adequacy of the DEIR; therefore no further response is required.</p> <p><b>05-79</b> The County disagrees that M-BI-1 lacks sufficient specificity to ensure adequate protection of plant species during construction. A "County-approved biologist" must have an educational background in biology and knowledge of flora and fauna in San Diego County. Mitigation measure M-BI-1 has been revised to clearly spell out the required qualifications for the Project Biologist, as follows:</p> <p style="text-align: center;"><u>"The Project Biologist shall have the following</u></p>
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The court of appeal recently clarified that, to meet this requirement, mitigation measures must be incorporated directly into the MMRP to be enforceable.<sup>172</sup>

**I. Mitigation Measure M-BI-1**

Mitigation Measure M-BI-1 is the DEIR's principal mitigation measure to protect special status plant and animal species during construction. However, M-BI-1 lacks sufficient specificity in several of its terms to ensure adequate protection for these species during construction. The measure requires "a County-approved biologist" to perform on-site monitoring during construction pursuant to "the most current version of the County's "Biological Report Format and Requirement Guidelines" and the Project permit.<sup>173</sup>

There are several problems with this mitigation measure. First, it does not ensure that an appropriately qualified biologist will be retained to perform on-site monitoring, as required by CEQA.<sup>174</sup> Second, the Biological Report Format document on which the measure relied is not available for public review. Therefore, there is no evidence available to the public to support the County's determination that this measure will be effective. Finally, monitoring must follow applicable regulatory agency guidelines, including those of CDFW and USFWS, not just County guidelines.

**2. Mitigation Measure M-BI-2**

Mitigation Measure M-BI-2, which requires dust control measures to be implemented to reduce biological impacts during Project construction, provides simply that the location and details for dust-control fencing "will be provided."<sup>175</sup> Without specific information about the nature of dust control measures to be taken, this mitigation measure is vague and unenforceable.

<sup>172</sup> *Lotus v. Dept of Forestry* (2014) 223 Cal. App. 4th 645, 651-52.

<sup>173</sup> DEIR, p. S-11.

<sup>174</sup> See *Citizen Action To Serve All Students v. Thornley* (1990) 222 Cal.App.3d 748; *Citizens' Committee to Save Our Village v. City of Claremont* (1995) 37 Cal.App.4th 1157; compare to DEIR, p. S-34 (mitigation measure for paleontological resources requires a paleontologist with a PhD or paleontology degree to monitor Project construction).

<sup>175</sup> DEIR, p. S-13.

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05-78  
Cont.

05-79

05-80

minimum qualifications:

- a. Have a bachelor's degree in biological sciences, zoology, botany, ecology or a closely related field and at least 2 years of experience in biological compliance for construction projects; and
- b. Have at least 1 year of field experience with biological resources found in the geographic region of the Project."

The County disagrees that the County-approved biological monitor would not be qualified for on-site monitoring. Mitigation measure M-BI-1 specifically includes language per the County's Conditions of Approval Manual which includes requirement of a memorandum of understanding (MOU) between the County and the consulting firm. The purpose of the MOU allows the County to ensure the qualifications of the biological monitor.

The County's Biological Report Format and Content Requirements, along with all County EIR guidelines, are publically available on the County's website: <http://www.sandiegocounty.gov/pds/procguid.html>. These guidelines are informed by CDFW and USFWS, but the County disagrees that monitoring must follow regulatory agency guidelines where, as here, none of the species impacted are federally or state listed.

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3. Mitigation Measure M-BI-6

Mitigation Measure M-BI-6 provides specific measures to halt Project construction in the event the nest of a special-status avian species is disrupted during project construction.<sup>176</sup> However, the measure does not describe any mitigation for impacts to nests "that are started on construction equipment or panels or supporting structures."<sup>177</sup> Some of these nests could belong to special-status species. Mitigation must be incorporated to address impacts to nests on Project components and construction equipment.

05-81

4. Mitigation Measure M-BI-15

Mitigation Measure M-BI-15 is impermissibly vague as to the means of recording bird deaths. The measure provides that on-site construction workers will monitor and record bird deaths, and make a determination as to the cause of death and whether the dead bird was a special-status species.<sup>178</sup> However, there is nothing in the measure that requires the reporting construction worker to have any specialized expertise in identifying avian species. It appears that a bird handbook is to be provided on-site. But that alone is insufficient to ensure accurate recording of bird deaths. The County must revise the measure to require a biologist to identify dead birds. Additionally, in the event a construction worker is the only individual on hand to identify a bird at the time it is found, the measure should require that photos be taken of all bird deaths, and that the worker retain the carcass(es) on-site until a qualified biologist is able to both view and confirm the species and cause of death.

05-82

C. The DEIR Improperly Defers Mitigation of Significant Impacts

It is generally improper to defer the formulation of mitigation measures.<sup>179</sup> An exception to this general rule applies when the agency has committed itself to specific performance criteria for evaluating the efficacy of the measures to be implemented in the future, and the future mitigation measures are formulated and operational before the project activity that they regulate begins.<sup>180</sup> As the courts have explained, deferral of mitigation may be permitted only where the lead agency:

05-83

<sup>176</sup> DEIR, p. S-17.

<sup>177</sup> DEIR, p. S-17.

<sup>178</sup> DEIR, pp. S-21 to S-22.

<sup>179</sup> 14 CCR § 15126.4(a)(1)(B); *POET v. CARB*, 218 Cal.App.4th at 735.

<sup>180</sup> *POET*, 218 Cal.App.4th at 738.  
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05-80

The SWPPP and related BMPs are implemented to control construction-related erosion and sedimentation, not dust control as the commenter asserts. Fencing or flagging will be located to avoid impacts to special status species and vegetation communities and jurisdictional waters. Specific locations will be determined by the Project biologist when detailed construction plans are prepared. The reference to the dust-control fencing is only one part of longer list of measures and restrictions of M-BI-2. As indicated in the measure, the dust-control fencing would only be required if it is determined to be needed as part of the SWPPP. Dust control and SWPPP approvals are required as part of the grading and building permit approval process by the County. The other measures and restrictions are specifically described would adequately reduce the potential direct and indirect impacts.

05-81

Construction equipment and PV panels are not suitable locations for nesting. With construction-related activity occurring in the vicinity, it is unlikely that nesting will occur in these areas and these impacts will be less than significant. Any birds attempting to build nests in construction equipment or PV panels and support structures would likely relocate to other adjacent open space areas. The mitigation measure M-BI-6 has been revised and covers impacts to all species covered under the Migratory Bird Treaty Act (MBTA), which includes all special-status birds.

	<p><b>O5-82</b> Please also refer to Response to Comment F1-2 and S2-2. The comment expresses a concern as to whether or not a biologist is involved in identifying bird deaths and that untrained workers can accurately record such deaths. The County notes that mitigation measure M-BI-15 requires that a Project Biologist will be on retainer to assist. Accordingly a complete reading of the mitigation measure demonstrates that it is not impermissibly vague. Nevertheless, measure M-BI-15 has been revised to make it more clear the Project Biologists' role in data collection, identification and assessing the causation of injury or death, and implementing the Worker Response Reporting System (WRRS). The measure M-BI-15 is a public benefit providing resource agencies with data and is not required by CEQA as no significant impacts are identified for bird collisions on panel arrays (CEQA Guidelines section 15126.4(a)(3)). Furthermore mitigation measure M-BI-13 already reduces potential impacts to bird collisions from the gen-tie line to below a level of significance and is not impermissibly vague. The County disagrees with the recommendation that workers retain carcasses on-site as that would require appropriate permits from agencies.</p> <p><b>O5-83</b> Comment noted. This comment is introductory and to more specific comments and responses are provided below to the more specific comments. Therefore no further response is required.</p>
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<p>June 1, 2015 Page 38</p> <p>(1) undertakes a complete analysis of the significance of the environmental impact; (2) proposes potential mitigation measures early in the planning process; and (3) articulates specific performance criteria that would ensure that adequate mitigation measures were eventually implemented.<sup>181</sup></p> <p>The mitigation measures discussed below are examples of impermissibly deferred mitigation. The County must revise these measures to correct their deficiencies and include specific and measureable performance standards, and the County must recirculate the DEIR for public review.</p> <p>1. <i>Mitigation Measure M-AE-3: Decommissioning Plan</i></p> <p>As discussed above, the DEIR fails to describe the decommissioning phase of the Project. Instead, the DEIR includes the creation of a Decommissioning Plan in a mitigation measure and defers creation of the Plan to post-Project approval.<sup>182</sup> The only performance standard provided for the Plan is that it comply with Section 6952.b.3 (d) of the County of San Diego Zoning Ordinance (County of San Diego 2012) by providing a financial surety for removal.<sup>183</sup> Mitigation Measure M-AE-3, visual character, adds some detail as to what would be required in the Decommissioning Plan, such as identifying removal of above-grade structures from the site and any non-shared transmission facilities, associated decompaction activities, recontouring, application of hydroseeding, and, "if necessary," installation of permanent best management practices.<sup>184</sup> The measure also states that the Decommissioning Plan will be required to comply with regional Water Board requirements for Notice of Termination filings.<sup>185</sup> However, the DEIR contains no analysis of the environmental impacts of all of those decommissioning activities, and no requirement that the Decommissioning Plan require compliance with applicable air quality or biological resource requirements from applicable resource agencies. Thus, despite substantial evidence that the decommissioning phase of the Project would cause significant impacts similar to those during construction, the DEIR contains no measurable performance standards to ensure that</p> <p><sup>181</sup> <i>Comtys. for a Better Env't v. City of Richmond</i> (2010) 184 Cal.App.4th 70, 95; <i>Cal. Native Plant Socy' v. City of Rancho Cordova</i> (2009) 172 Cal.App.4th 603, 621.  <sup>182</sup> DEIR, p. 1-14 (final decommissioning plan would be provided within one year of issuance of the building permits for the Project).  <sup>183</sup> DEIR, p. 1-14.  <sup>184</sup> DEIR, p. S-10.  <sup>185</sup> <i>Id.</i>  3144-009ev</p>	<p><b>05-84</b></p> <p>Please see Responses to Comments O5-14 and O5-15 above. The secondary impacts of implementing the mitigation measure M-AE-3 would not result in impacts that are different or more severe than those identified for construction activities throughout the DEIR; supplemental, clarifying technical memorandums are provided as Appendices 9.1-1 through 9.1-7 to the FEIR. Commenter acknowledges that the impacts are similar to construction. Accordingly, the County has clarified that construction related mitigation measures also apply to the decommissioning work performed pursuant to M-AE-3. Just as the construction related mitigation measures reduced construction impacts to below a level of significance, they will also reduce any potentially significant secondary impacts from decommissioning to below a level of significance. It should also be noted that M-AE-3 includes timing for the development of a Decommissioning Plan and submittal to the County.</p>
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<p>June 1, 2015 Page 39</p> <p>decommissioning activities will not have significant, unmitigated impacts on air quality and biological resources.</p> <p>Evidence in the DEIR suggests that decommissioning will have significant impacts similar to the construction phase of the Project. Decommissioning will require extensive physical activity at the Project site, just like the construction phase of the Project. Decommissioning activities will include disassembly of the solar facilities and substantive restoration of the site.<sup>186</sup> This will entail removal of both ground-level and underground components, thus involving soil disturbing activities.<sup>187</sup> Recycling and disposal of Project components will necessarily require numerous truck trips to and from recycling facilities and construction and demolition debris disposal facilities.<sup>188</sup> Site restoration will involve removal of all ground-level components, preparing the site with a soil stabilization agent, and reseeded native plants.<sup>189</sup></p> <p>All of these activities involve intense physical disturbance at the Project site. There can be no reasonable question that, if construction activities will result in significant impacts to air quality and biological resources, then surely decommissioning activities will as well. These impacts should have been analyzed in the EIR. Once analyzed, creation of the decommissioning phase of the Project is, at most, 30 years away.<sup>190</sup> The Decommissioning Plan may only be permissibly deferred if the Mitigation Monitoring and Reporting Plan ("MMRP") contains specific performance standards to ensure that every potentially significant environmental impact is adequately mitigated. The County failed to set forth this analysis and mitigation in the DEIR for the decommissioning phase of the Project.</p> <p><b>2. Mitigation Measure M-BI-2: Water Quality</b></p> <p>Mitigation Measure M-BI-2 provides that construction activity "will not be permitted in jurisdictional waters of the United States/state except as authorized by applicable law and permits.<sup>191</sup> However, the measure defers a determination of whether the Project site contains waters that are subject to regulation by the U.S. Army Corps of Engineers ("USACE"), CDFW, or the Regional Water Quality Control</p> <p><sup>186</sup> DEIR, p. S-13.  <sup>187</sup> DEIR, p. S-14.  <sup>188</sup> See DEIR, p. S-14.  <sup>189</sup> DEIR, p. S-14.  <sup>190</sup> DEIR, p. S-1.  <sup>191</sup> DEIR, p. S-13.  3144-009ev</p>	<p><b>O5-85</b> Comment noted. Please see Responses to Comments O5-14, O5-15, and O5-84 above.</p> <p><b>O5-86</b> Please also refer to Responses to Comments O5-14, O5-15, and O5-84 above. The County notes that the Decommissioning Plan's timing is appropriate because more details about the project materials will be known at that time. In addition, CEQA only requires the County to mitigate for significant impacts that are foreseeable. The Decommissioning Plan will address any foreseeable aesthetic impacts and secondary impacts using the performance standards noted in Response to Comments O5-14 and O5-15.</p> <p><b>O5-87</b> Please refer to response to comments O5-22 through O5-24. Additionally, the County understands that the final determinations of jurisdictional waters are legal determinations by the state and federal agencies with jurisdiction. They are responsible agencies, not the Lead Agency. Therefore, their final determinations on jurisdictional waters logically come after the County certifies an EIR that evaluates the Proposed Project or a Project alternative. Their determinations are completed during their individual responsible agency permitting process. Nevertheless, the public and County decision-makers can adequately assess the impact because the DEIR assumes these waters are jurisdictional under the ACOE, CDFW, and RWQCB</p>
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<p>June 1, 2015 Page 40</p> <p>Board (“RWQCB”) until after Project approval. This determination must be made now, and incorporated into the DEIR in order to effectively evaluate whether, and to what extent, the siting of Project components may significantly impact these waters.</p> <p>3. <i>Mitigation Measure M-CR-1: Research Design and Data Recovery Program</i></p> <p>Mitigation Measure M-CR-1 is intended to mitigate significant impacts to cultural resources that are disturbed during Project construction. However, the measure improperly defers creation of a Research Design and Data Recovery Program, which is “required to mitigate impacts to identified significant cultural resources” to post-Project approval. Measure M-CR-1 states that the Program “shall be carried out using professional archeological methods,” but fails to provide any specific detail, discussion, or regulatory standards about which “archeological methods” the Program is expected to comply. As such, Measure M-CR-1 is vague and fails to include comprehensible performance standards. The measure must be revised.</p> <p>XII. MISSING DOCUMENTS REFERENCED IN THE DEIR</p> <p>The DEIR references numerous outside studies and reports, which the County failed to make available to the public, as required by CEQA. Several of these documents are listed in the “References” chapter of the DEIR without accessible weblinks, and have not otherwise been made available to the public during the DEIR comment period. The County’s failure to make these documents available violates CEQA’s requirement that “all documents referenced in the environmental impact report” be available for review and “readily accessible” during the entire public comment period on an EIR.<sup>192</sup> The courts have held that the failure to provide even a few pages of a CEQA documents for a portion of the CEQA review period invalidates the entire CEQA process.<sup>193</sup></p> <p>Missing documents include, but are not limited to:</p> <p><sup>192</sup> PRC 21062(b)(1); 14 CCR 15087(c)(5).  <sup>193</sup> <i>Ultramar v. South Coast Air Quality Man. Dist.</i> (1993) 17 Cal.App.4th 689, 3144-009ev</p>	<p>05-87 Cont.</p> <p>05-88</p> <p>05-89</p> <p>and states that impacts to these features are significant and provides measures to reduce the impacts to less than significant. The County accepts the mitigation measures and project restrictions set forth by these agencies during the permitting process.</p> <p><b>05-88</b> This refers to the mitigation measure for CULT#GR-2(b) at DEIR, pp. 2.3.24-25 which says “The Research Design and Data Recovery Program (Program) shall be prepared by the Project Archaeologist in consultation with the Native American monitor. The County Archaeologist shall review and approve the Program, which shall be carried out using professional archaeological methods.” There is no improper deferral of mitigation because the performance standards are all the professional archeological methods identified in the mitigation measure in the sentence that follows the one commenter quotes, each of which would adequately reduce the impact to below a level of significance. The public and decision-makers are not left without adequate information to evaluate the effectiveness of the mitigation measure because that sentence states, “The Program shall include (1) avoidance of Traditional Cultural Properties, (2) reasonable efforts to preserve (avoidance) “unique” cultural resources pursuant to CEQA Section 21083.2(g) or Sacred Sites, (3) the capping of identified Sacred Sites or unique cultural resources and placement of development over the cap,</p>
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- The County's "Biological Report Format and Requirement Guidelines," referenced in Mit Measure M-BI-2.<sup>194</sup> The Biological Guidelines are listed in the References chapter, but no weblink or other information about the location of the document is provided.<sup>195</sup> These guidelines form the basis for mitigation proposed under Measure M-BI-2 to mitigate impacts to special status species. Without having access to the guidelines, commenters and other members of the public are unable to evaluate the efficacy of this mitigation measure.
- San Diego County Recommended Approach for Addressing Climate Change ("County GHG Guidelines").<sup>196</sup> The County GHG Guidelines form the basis for the DEIR's analysis of the applicable GHG significance threshold, and for the DEIR's conclusion that the Project's construction GHG emissions are insignificant because the Guidelines permit them to be amortized over the life of the Project.<sup>197</sup> The References chapter of the DEIR lists the County GHG Guidelines among the Greenhouse Gas references, but no weblink or other information about the location of the document is provided. Without having access to the County GHG Guidelines, commenters and other members of the public are unable to evaluate the accuracy of the DEIR's GHG analysis.

We submitted a request for immediate access to all referenced documents in the DEIR on May 19, 2015. As of the date of this writing, we have not yet been provided with access to the requested documents. The County's failure to provide the referenced documents violates CEQA's basic requirement that all documents referenced in an EIR must be available for public review during the entire comment period. PRC s 21092(b)(1) 14 CCR s 15087(c)(5). Once the referenced documents are made available to the public, the County must either extend the comment period on the DEIR by an additional 45 days, or the DEIR must be recirculated for a new 45-day public review period.

<sup>194</sup> DEIR, p. S-11.

<sup>196</sup> DEIR, p. 5.

<sup>196</sup> DEIR AQ Appendix, p. 75; DEIR, p. 5-18.

<sup>197</sup> DEIR AQ Appendix, pp. 75, 78, 79.

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O5-89  
Cont.

if avoidance is infeasible, and (4) data recovery for non-unique cultural resources. The preferred option is preservation (avoidance)."

**O5-89**

See Response to Comment O1 and O2. As noted in prior responses to comments, there is no obligation under CEQA to provide weblinks for the documents "referenced" in the EIR, though most are easy to locate through the search function on the County's website or a broader internet search. In any event, the documents requested have been made available to the commenter pursuant to the California Public Records Act made by the commenter's law firm. The Notice of Availability included the physical address and a web link to where the DEIR and Appendices were available.

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**XIII. CONCLUSION**

The County failed to comply with CEQA. The DEIR is inadequate as an environmental document because it fails to include a complete and accurate Project description, fails to set forth the existing environmental setting, fails to include an adequate alternatives and cumulative impacts analysis, and fails to identify and mitigate the Project's potentially significant impacts on air quality and sensitive species. In particular, the DEIR lacks substantial evidence for its significance conclusions regarding the Project's air quality impacts and cancer risk from construction. Due to these significant deficiencies in the DEIR, the County cannot conclude that the Project's potentially significant impacts have been mitigated to a less-than-significant level.

We urge the County to fulfill its responsibilities under CEQA by revising and recirculating a legally adequate Draft EIR that addresses the issues raised in this comment letter. In this way, the County and the public can ensure that the Project's significant environmental impacts are adequately disclosed, and adequately mitigated to a less-than-significant level.

Thank you for your attention to these comments. Please include the in the record of proceedings for the Jacumba Project.

Sincerely,



Christina Caro

CMC:clv

Attachments

3144-009ev

O5-90

O5-91

**O5-90** Comment noted. This comment concludes the letter and no further response is required. Please refer to Response to Comment 05-6 regarding recirculation.

**O5-91** Detailed responses to the letter provided by Matt Hagemann and Jessie Jaeger (Exhibit A of the comment letter) and the letter provided by Renee Owens (Exhibit B of the comment letter) are provided as requested by the commenter.

All other attachments (including attachments to Exhibits A and B) were determined to be references in support of the comment letter. All attachments are noted and do not address the adequacy of the DEIR, therefore no further response is required.