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December 14, 2018

Via Hand-Delivery

Chair Chuck Washington and Board Members  
c/o Kecia Harper-Ihem, Clerk of the Board  
Riverside County Board of Supervisors  
4080 Lemon Street, 1<sup>st</sup> Floor  
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**Re: Appeal of November 28, 2018 Planning Commission Decision  
Initial Study/Mitigated Negative Declaration for Painted Hills  
Wind Repowering Project, WECS Permit No. 180001/Variance  
Case No. 180003/ Adoption of MND for EA No. 1800059**

Dear Chair Washington and Members of the Board of Supervisors:

We write on behalf of **California Unions for Reliable Energy ("CURE")**, Charles A. McDaniel, Kasey L. Woolridge-Caspersen, Elmer Diaz, William R. Pieper, and Juan O. Dominguez to appeal the County of Riverside Planning Commission's November 28, 2018 decision to approve the Initial Study/Mitigated Negative Declaration ("IS/MND")<sup>1</sup> prepared by Riverside County ("County") for the Painted Hills Wind Repowering Project ("Project"), proposed by Painted Hills, LLC, which is owned by Terra-Gen ("Applicant"). Specifically, we appeal each of the following Planning Commission approvals related to the Project:

1. Approval of Commercial WECS Permit No. 180001,
2. Approval of Variance Case No. 180003, and

<sup>1</sup> Environmental Assessment Form: Initial Study Number CEQ180059, County of Riverside, at 2 (Oct. 2018) (hereafter "IS/MND").

3. Adoption of the Mitigated Negative Declaration for Environmental Assessment No. 1800059.

The Project proposes to decommission and remove approximately 291 existing commercial wind turbines and install up to 14 new commercial wind turbines up to 499-feet in height with a per turbine generating capacity of between 2.0 megawatts ("MW") and 4.2 MW, which is up to 58.8 total MW, on land within the Wind Energy Resource Zone. The Project will also install ancillary equipment, including meteorological towers up to 309-feet in height, new access roads, collector circuits, and substation.

The grounds for the appeal are set forth in detail below. In sum, based on our review of the IS/MND and available documents, we conclude that the IS/MND fails to comply with the requirements of the California Environmental Quality Act ("CEQA"). The IS/MND fails to describe the whole Project, fails to describe the existing setting upon which to measure impacts, fails to disclose and analyze the Project's potentially significant environmental impacts and fails to identify enforceable measures that can reduce those impacts to a less than significant level.

As explained in these comments, there is more than a fair argument based on substantial evidence that the Project will result in potentially significant public health impacts from construction emissions and potentially significant biological resources impacts from construction and operation. The County may not approve the Project until it prepares an environmental impact report ("EIR") that adequately analyzes the Project's potentially significant direct, indirect and cumulative impacts, and incorporates all feasible mitigation measures to avoid or minimize these impacts.

These comments were prepared with the assistance of Phyllis Fox, Ph.D., PE<sup>2</sup> and Biologist and Independent Environmental Consultant Renée Owens.<sup>3</sup> Dr. Fox and Ms. Owens provide substantial evidence<sup>4</sup> of potentially significant impacts that have not been adequately disclosed, analyzed, or mitigated. Dr. Fox's and Ms. Owens' technical comments and responses to letters received from Project consultant DUDEK are attached hereto and are submitted to the County, in addition to the comments in this letter.

## I. STATEMENT OF INTEREST

CURE is a coalition of labor organizations whose members construct, operate, and maintain powerplants and other industrial facilities throughout California. CURE encourages sustainable development of California's energy and natural resources. Environmental degradation destroys cultural and wildlife areas, consumes limited water resources, causes air and water pollution, and imposes other stresses on the environmental carrying capacity of the State. Environmental degradation also jeopardizes future jobs by making it more difficult and expensive for industry to expand in Riverside County, and by making it less desirable for businesses to locate and for people to live and recreate in the area. Continued environmental degradation can, and has, caused construction moratoriums and

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<sup>2</sup> P. Fox, Comments on the Initial Study for the Painted Hills Wind Energy Repowering Project (November 26, 2018) (hereinafter, "Fox Comments"), Exhibit A; P. Fox, Letter from Dr. Phyllis Fox to Kyle Jones (Dec. 14, 2018) Comments on the Responses to Comments on the Painted Hills Wind Energy Repowering Project Initial Study/Mitigated Negative Declaration (hereinafter, "Fox Response"), Exhibit B (Dr. Fox's letter and CV are provided via email).

<sup>3</sup> R. Owens, Letter from Renée Owens to Kyle Jones (Nov. 27, 2018) Comments for the Painted Hills Wind Repowering Project Initial Study, Commercial WECS Permit No. 180001 / Variance Case No. 180003 – Intent to Adopt a Mitigated Negative Declaration – CEQ180059 (hereinafter, "Owens' Comments"), Exhibit D; R. Owens, Letter from Renée Owens to Kyle Jones (Dec. 14, 2018) Response to County/DUDEK Comments for the Painted Hills Wind Repowering Project Initial Study, Commercial WECS Permit No. 180001 / Variance Case No. 180003 – Intent to Adopt a Mitigated Negative Declaration – CEQ180059 (hereinafter, "Owens' Response"), Exhibit E (Ms. Owens' letter and CV are provided).

<sup>4</sup> 14 CCR § 15384 subd. (b) identifies "reasonable assumptions predicated upon facts, and expert opinion supported by facts" as substantial evidence. Attempts to rebut the expert opinions from two highly qualified technical experts with legal argument are inappropriate since the Applicant's attorney's is not qualified to provide expert opinion to meet the standard of substantial evidence. Refutations to DUDEK responses are provided in this appeal.

other restrictions on growth that, in turn, reduce future employment opportunities for CURE's participating organizations and their members. CURE therefore has a direct interest in enforcing environmental laws and minimizing project impacts that would degrade the environment.

CURE's participating organizations and their members also live, recreate, work, and raise families in Riverside County. Thus, CURE, its participating organizations and their members stand to be directly affected by the Project's adverse environmental and health impacts. Members may also work on the Project itself and would therefore be first in line to be exposed to any health and safety hazards that the Project may create.

Charles A. McDaniel lives in, and works and recreates in and around, Desert Hot Springs, California. Kasey L. Woolridge-Caspersen lives in, and works and recreates in and around, Morongo Valley, California. Elmer Diaz lives in, and works and recreates in and around, Cathedral City, California. William R. Pieper lives in, and works and recreates in and around, Desert Hot Springs, California. Juan O. Dominguez lives in, and works and recreates in and around, Cathedral City, California. Mr. McDaniel, Ms. Woolridge-Caspersen, Mr. Diaz, Mr. Pieper and Mr. Dominguez are each concerned about impacts on public health and the environment in the affected areas where they live, work and recreate.

## II. AN EIR IS REQUIRED

CEQA requires that lead agencies analyze any project with potentially significant environmental impacts in an EIR.<sup>5</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>6</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>7</sup>

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<sup>5</sup> See Pub. Resources Code § 21000; CEQA Guidelines § 15002.

<sup>6</sup> *Citizens of Goleta Valley v. Bd. of Supervisors* (1990) 52 Cal.3d 553, 564 (internal citations omitted).

<sup>7</sup> *County of Inyo v. Yorty* (1973) 32 Cal.App.3d 795, 810.



CEQA's purpose and goals must be met through the preparation of an EIR, except in certain limited circumstances.<sup>8</sup> CEQA contains a strong presumption in favor of requiring a lead agency to prepare an EIR. This presumption is reflected in the "fair argument" standard. Under that standard, a lead agency "shall" prepare an EIR whenever substantial evidence in the whole record before the agency supports a fair argument that a project may have a significant effect on the environment.<sup>9</sup>

In contrast, a mitigated negative declaration may be prepared only when, after preparing an initial study, a lead agency determines that a project may have a significant effect on the environment, but:

- (1) revisions in the project plans or proposals made by, or agreed to by, the applicant before the proposed negative declaration and initial study are released for public review *would avoid the effects or mitigate the effects to a point where clearly no significant effect on the environment would occur,* and
- (2) there is *no substantial evidence* in light of the whole record before the public agency that the project, as revised, *may have a significant effect on the environment.*<sup>10</sup>

Courts have held that if "no EIR has been prepared for a nonexempt project, but substantial evidence in the record supports a fair argument that the project may result in significant adverse impacts, the proper remedy is to order preparation of an EIR."<sup>11</sup> The fair argument standard creates a "low threshold" favoring environmental review through an EIR, rather than through issuance of a negative

<sup>8</sup> See Pub. Resources Code § 21100.

<sup>9</sup> Pub. Resources Code §§ 21080(d), 21082.2(d); CEQA Guidelines §§ 15002(k)(3), 15064(f)(1), (h)(1); *Laurel Heights Improvement Assn. v. Regents of the Univ. of Cal.* (1993) 6 Cal.4th 1112, 1123; *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 75, 82; *Stanislaus Audubon Society, Inc. v. County of Stanislaus* (1995) 38 Cal.App.4th 144, 150-151; *Quail Botanical Gardens Found., Inc. v. City of Encinitas* (1994) 29 Cal.App.4th 1597, 1601-1602.

<sup>10</sup> Pub. Resources Code § 21064.5 (emphasis added).

<sup>11</sup> See, e.g., *Communities for a Better Environment v. South Coast Air Quality Management Dist.* (2010) 48 Cal.4th 310, 319-320.

declaration.<sup>12</sup> An agency's decision not to require an EIR can be upheld only when there is no credible evidence to the contrary.<sup>13</sup>

"Substantial evidence" required to support a fair argument is defined as "enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached."<sup>14</sup> According to the CEQA Guidelines, when determining whether an EIR is required, the lead agency is required to apply the principles set forth in Section 15064, subdivision (f):

[I]n marginal cases where it is not clear whether there is substantial evidence that a project may have a significant effect on the environment, the lead agency shall be guided by the following principle: If there is disagreement among expert opinion supported by facts over the significance of an effect on the environment, the Lead Agency shall treat the effect as significant and shall prepare an EIR.

Furthermore, CEQA documents, including EIRs and MNDs, must mitigate significant impacts through measures that are "fully enforceable through permit conditions, agreements, or other legally binding instruments."<sup>15</sup> Deferring formulation of mitigation measures to post-approval studies is generally impermissible.<sup>16</sup> Mitigation measures adopted after Project approval deny the public the opportunity to comment on the Project as modified to mitigate impacts.<sup>17</sup> If identification of specific mitigation measures is impractical until a later stage in the Project, specific performance criteria must be articulated and further approvals

<sup>12</sup> *Citizens Action to Serve All Students v. Thornley* (1990) 222 Cal.App.3d 748, 754.

<sup>13</sup> *Sierra Club v. County of Sonoma* (1992) 6 Cal.App.4th, 1307, 1318; see also *Friends of B Street v. City of Hayward* (1980) 106 Cal.App.3d 988, 1002 ("If there was substantial evidence that the proposed project might have a significant environmental impact, evidence to the contrary is not sufficient to support a decision to dispense with preparation of an EIR and adopt a negative declaration, because it could be 'fairly argued' that the project might have a significant environmental impact").

<sup>14</sup> CEQA Guidelines § 15384(a).

<sup>15</sup> CEQA Guidelines § 15126.4(a)(2).

<sup>16</sup> *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 308-309; Pub. Resources Code § 21061.

<sup>17</sup> *Gentry v. City of Murrieta* (1995) 36 Cal.App.4th 1359, 1393; *Quail Botanical*, *supra*, 29 Cal.App.4th at p. 1604, fn. 5.

must be made contingent upon meeting these performance criteria.<sup>18</sup> Courts have held that simply requiring a project applicant to obtain a future report and then comply with the report's recommendations is insufficient to meet the standard for properly deferred mitigation.<sup>19</sup>

With respect to this Project, the IS/MND fails to satisfy the basic purposes of CEQA. The County failed to adequately investigate, analyze, and disclose the Project's potentially significant impacts. Therefore, the County's conclusions that the Project will have less than significant air quality and public health impacts are unsupported.<sup>20</sup> Whereas the County lacks substantial evidence to support its conclusions, Dr. Fox and Ms. Owens provide substantial evidence that the Project may result in potentially significant public health impacts from construction emissions and potentially significant impacts to biological resources.<sup>21</sup> Therefore, a fair argument can be made that the Project may cause significant impacts requiring the preparation of an EIR.

### III. THE IS/MND FAILS TO INCLUDE A COMPLETE PROJECT DESCRIPTION

The IS/MND does not meet CEQA's requirements because it fails to include a complete project description, rendering the entire analysis inadequate. Without a complete project description, the environmental analysis under CEQA will be impermissibly narrow, thus minimizing the Project's impacts and undercutting public review.<sup>22</sup>

CEQA places the burden of environmental investigation on the government rather than the public. Accordingly, a lead agency may not hide behind its failure to obtain a complete and accurate project description.<sup>23</sup> CEQA requires that the project description contained in a CEQA document that is circulated for public review contain sufficiently detailed information to permit a meaningful evaluation

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<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> Pub. Resources Code § 21064.5; MND, pp. 31-36.

<sup>21</sup> See Fox Comments; Owens' Comments

<sup>22</sup> See, e.g., *Laurel Heights Improvement Assn. v. Regents of the Univ. of Cal.* (1988) 47 Cal.3d 376.

<sup>23</sup> *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 311.

and review of the potential environmental impacts of a proposed project.<sup>24</sup> California courts have repeatedly held that “an accurate, stable and finite project description is the sine qua non of an informative and legally sufficient [CEQA document].”<sup>25</sup> In contrast, an inaccurate or incomplete project description renders the analysis of environmental impacts inherently unreliable. Without a complete project description, the environmental analysis under CEQA will be impermissibly narrow, thus minimizing the project’s impacts and undercutting public review.<sup>26</sup>

**A. The IS/MND Fails to Describe the Transportation of the New Turbine Blades to the Project Site**

The Project consists of numerous large components, including 213-foot wind turbine blades.<sup>27</sup> However, the IS/MND is silent as to how these components will be transported to the Project site. Wind turbine blades cannot be manufactured on-site, thus requiring transport.<sup>28</sup> Furthermore, the nearest blade manufacturer to the Project site is in Colorado.<sup>29</sup> This means that the blades may have to travel over land, either a far distance from other states, or from a nearby port, such as Long Beach. Transportation of such long pieces of equipment is difficult, requiring careful planning to ensure they are routed through turns properly.<sup>30</sup> These large blades will require several diesel-powered trucks to move and may have to operate very slowly.<sup>31</sup>

Transporting large components of the Project has the potential to lead to serious impacts. Traffic could be severely delayed moving such long blades, especially if they are routed through existing congested traffic corridors, such as Los

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<sup>24</sup> 14 Cal. Code Regs. § 15124 (hereafter “CEQA Guidelines”).

<sup>25</sup> *County of Inyo v. City of Los Angeles* (3d Dist. 1977) 71 Cal.App.3d 185, 193.

<sup>26</sup> *See, e.g., Laurel Heights Improvement Association v. Regents of the University of California* (1988) 47 Cal.3d 376.

<sup>27</sup> IS/MND, at 2.

<sup>28</sup> *See* Next-Generation Wind Energy Technologies and their Environmental Implications, California Energy Commission (Oct. 29, 2018) available at <https://efiling.energy.ca.gov/Lists/DocketLog.aspx?doctetnumber=19-ERDD-01>.

<sup>29</sup> Ryan Wiser and Mark Bolinger, 2017 Wind Technologies Market Report, United States Department of Energy, 12 (Aug. 2018) available at [https://emp.lbl.gov/sites/default/files/2017\\_wind\\_technologies\\_market\\_report.pdf](https://emp.lbl.gov/sites/default/files/2017_wind_technologies_market_report.pdf).

<sup>30</sup> Fox Comments, p. 11.

<sup>31</sup> Fox Comments, p. 11.



Angeles. The use of diesel engines could increase exposure of sensitive populations to Toxic Air Contaminants ("TACs"), which can lead to heightened cancer risks to those who live and work along the route.<sup>32</sup>

Depending on which route is selected, different homes and schools will be affected. Residents and school patrons may be required to modify their own schedules and practices to accommodate, or avoid the adverse effects of, the trucks in their neighborhood. The County must also analyze the impacts that each potential route will cause to the differently affected neighborhoods and must identify appropriate mitigation measures that will mitigate significant impacts to each neighborhood.

The Memorandum responding to our November 26, 2018 comments ("Response Memorandum") admits that the IS/MND contains no analysis of traffic or air impacts beyond the Project site.<sup>33</sup> The Response Memorandum then assumes that standard haul trucks would be used and concludes the Project would not result in significant impacts on air quality, public health, or traffic.<sup>34</sup> This response misses the point of our comments. Because these blades are so large, standard haul trucks cannot move them to the Project site.<sup>35</sup> Different equipment, with potentially greater emissions, would have to be used.<sup>36</sup> The maneuvering of such large materials may result in lane closures or other transportation-adjusting methods to accommodate them.<sup>37</sup> The IS/MND does not consider the unique circumstances of this Project at all.<sup>38</sup> Further, given the limited sources of large wind turbine blades, the location of traffic and air quality impacts will be far beyond Highways 10 and 62, which are the only highways addressed in the IS/MND.

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<sup>32</sup> Fox Comments, p. 11.

<sup>33</sup> Memorandum from Adam Poll and Michael Greene to Jay T. Olivas, (Nov. 27, 2018), p. 4 (*hereafter* Response Memo).

<sup>34</sup> Response Memo, p. 4.

<sup>35</sup> Fox Comments, p. 11.

<sup>36</sup> Fox Comments, p. 11.

<sup>37</sup> Fox Comments, p. 11.

<sup>38</sup> Fox Comments, p. 11.

**B. The IS/MND Fails to Accurately Describe the Decommissioning of the Existing 291 Wind Turbines**

The IS/MND discusses the decommissioning of existing wind turbines from the Project site, but does not disclose disposal of the existing wind turbines.<sup>39</sup> Cutting up of wind turbines can release hazardous fibers into the air, which can negatively impact public health.<sup>40</sup> The IS/MND fails to discuss where the blades will be cut up, what equipment will be used, and where material would be shipped for recycling.<sup>41</sup> Moreover, the IS/MND discusses recycling the blade material; however, the blade material is not suitable for recycling.<sup>42</sup> The IS/MND must accurately describe the decommissioning and disposal of the existing wind turbines.

The Response Memorandum attempts to address this issue by asserting that the materials that will be cut up on the Project site will be steel and glass only, and existing state and federal Occupational Safety and Health Administration ("OSHA") regulations would protect workers.<sup>43</sup> Dr. Fox notes that there is no Material Safety Data Sheet or chemical composition report in the record; therefore, there is no evidence to support the claims in the Response Memorandum that no release of methane or other volatile organic compounds would occur, or that the turbines will be recycled.<sup>44</sup> Instead, Dr. Fox provides substantial evidence through cited, published studies that show that turbine blades normally consist of materials that ~~can result in releases of methane and other volatile organic compounds when cut,~~ and are unrecyclable.<sup>45</sup> Additionally, the IS/MND does not identify specific details on applicable OSHA regulations and how they would protect workers and the environment from exposure.<sup>46</sup>

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<sup>39</sup> Fox Comments, p. 8.

<sup>40</sup> Fox Comments, pp. 8-9.

<sup>41</sup> Fox Comments, pp. 8-9.

<sup>42</sup> Fox Comments, p. 9.

<sup>43</sup> Response Memo, pp. 4-5.

<sup>44</sup> Fox Response, pp. 8-9; Response Memo, pp. 4-5.

<sup>45</sup> Fox Response, p. 9.

<sup>46</sup> Fox Response, p. 9.

**C. The IS/MND Fails to Adequately Describe the New Turbines to Be Installed on the Project Site**

The IS/MND provides a potential maximum height for new turbines that can be installed, rather than what turbines are *actually* proposed to be installed, which makes any determination of impacts to birds and bats speculative at best.<sup>47</sup> Higher, wider wind turbine blades can lead to increased avian and mortality from the Project.<sup>48</sup> Some birds, such as Golden Eagles, fly in ranges that are higher than the wind turbines that are being replaced.<sup>49</sup> Should raptors be present at elevations where the proposed turbines are operating, but not at lower elevations where existing turbines are operating, a greater risk of collision and take for those species will occur.

The Memorandum that responds to our November 27, 2018 comments (“Bio Memorandum”) suggests that higher turbines will not increase risks to eagles because “actual mortality at Shiloh IV indicates no eagle takes at all since the repowering with fewer taller turbines occurred.”<sup>50</sup> The fact that no take has been observed at the Shiloh IV project post-construction does not support the claim that repowering decreased overall take at the site, since the data does not include the past six years.<sup>51</sup> Furthermore, the fact that there has not been documented take of Golden Eagles at one project in a different part of the state does not disprove the fact that the *risk* associated with taller turbines increases impacts to raptors.<sup>52</sup>

The Bio Memorandum also states that Ms. Owens’ observations at the “Octotillo Wind Farm are simply inapposite since it was not a repowering project.”<sup>53</sup> This statement misses the point of Ms. Owens’ evidence, which was that raptors prefer flying ranges that put them in greater risk of collision with taller turbines.<sup>54</sup>

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<sup>47</sup> IS/MND, p. 2.; Owens’ Comments, p. 2.

<sup>48</sup> Owens’ Comments, pp. 2-3.

<sup>49</sup> Owens’ Comments, p. 3.

<sup>50</sup> Memorandum from Collin Ramsey to Jay T. Olivas, (Nov. 28, 2018), p. 1 (*hereafter* Bio Memo).

<sup>51</sup> Owens’ Response, pp. 3-4.

<sup>52</sup> Owens’ Response, pp. 4-5.

<sup>53</sup> Bio Memo, p. 1.

<sup>54</sup> Owens’ Comments, p. 3.

Whether or not the project was a new project or a repowering project does not refute Ms. Owens' substantial evidence of collision risk posed by taller wind turbines.<sup>55</sup>

The Bio Memo asserts that comments regarding turbine specifications are irrelevant because the largest possible turbine size was assumed, and that there is no data that smaller turbines with a smaller rotor diameter would have a greater impact on birds.<sup>56</sup> This misstates the issue with the IS/MND, which is that no specifics on turbine size were provided, preventing accurate analysis by the public and decisionmakers as to the significance of Project impacts.<sup>57</sup> Because the IS/MND never attempted to calculate the amount of avian mortality from the proposed Project, nor compared that data with the baseline, then the assumption of the largest possible blades without any numbers of data does not further the analysis or provide information the public can use to assess the Project's potentially significant impacts.<sup>58</sup>

Without an adequate description of the width and height, in addition to the length, of the turbines, impacts to biological resources cannot be determined. Since the Project description is incomplete, the IS/MND fails as an informational document as required by CEQA.

**D. The Project Description is Not Complete Because the Project  
~~has Not Completed Joint Project Review as Required by the~~  
Coachella Valley Multiple Species Habitat Conservation Plan**

The Coachella Valley Multiple Species Habitat Conservation Plan ("CVMSHCP") requires projects within its boundaries to undergo a Joint Project Review ("JPR") between the Coachella Valley Conservation Commission ("CVCC"), the United States Fish and Wildlife Service ("USFWS"), and California Department of Fish and Wildlife ("CDFW") in order to determine if the project can be approved consistent with the existing take permits provided to the plan.<sup>59</sup>

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<sup>55</sup> Owens' Response, pp. 4-5.

<sup>56</sup> Bio Memo, p. 1.

<sup>57</sup> Owens' Response, pp. 1-2.

<sup>58</sup> Owens' Response, p. 2.

<sup>59</sup> Final Recirculated Coachella Valley Multiple Species Habitat Conservation Plan and Natural Community Conservation Plan (Sept. 2007), pp. 1-2-1-3 (*hereafter* "HCP").

At this time, the JPR process has not been completed. The IS/MND conditions a determination of no adverse effects on “successful completion of the JPR process.”<sup>60</sup> An e-mail from a GIS Technician with the Coachella Valley Association of Governments (“CVAG”) to USFWS and CDFW staff provided a November 30, 2018 deadline for comments from those agencies, which would be needed to finalize the JPR and which would occur at some unknown later time, potentially after further Project review by the County.<sup>61</sup> Because the JPR has not been finalized, additional changes to the Project may be mandated by USFWS or CDFW in order to be certain there will be consistency with the CVMSHCP and its take authorization. If the JPR process cannot be completed successfully, premature consideration and approval of the Project will have significant unmitigated impacts to habitats and species.

Without a finalized JPR, the Project fails to provide an accurate or stable project description, rendering the consistency analysis with the CVMSHCP unreliable. The IS/MND must be withdrawn and recirculated with correct information from after the JRP process.

All phases of the Project — the “whole of an action” — must be evaluated in a single EIR. Accordingly, the County must revise and recirculate the environmental document to include a description of the Project transporting components to and from the Project site.

#### IV. THE IS/MND VIOLATES CEQA’S PROHIBITION ON PIECEMEAL ENVIRONMENTAL REVIEW

A public agency may not segment a large project into two or more smaller projects in order to mask serious environmental consequences. CEQA prohibits such a “piecemeal” approach and requires review of a project’s impacts as a whole.<sup>62</sup> CEQA mandates “that environmental considerations do not become submerged by chopping a large project into many little ones – each with a minimal potential impact on the environment – which cumulatively may have disastrous

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<sup>60</sup> IS/MND, p. 37.

<sup>61</sup> E-mail from Oscar Vizcarra to Heather Pert, [KBAEZ@rivco.org](mailto:KBAEZ@rivco.org), Jenness McBride, and Applicant (Oct. 31, 2018), Exhibit G.

<sup>62</sup> 14 CCR § 15378(a); *Burbank- Glendale-Pasadena Airport Authority v. Hensler* (1991) 233 Cal.App.3d 577, 592.



consequences.”<sup>63</sup> Before approving a project, a lead agency must assess the environmental impacts of all reasonably foreseeable phases of a project.<sup>64</sup>

The IS/MND notes that there may not be sufficient habitat needed to mitigate impacts to the Coachella Valley Jerusalem Cricket within the Upper Mission Creek/Big Morongo Conservation Area.<sup>65</sup> The CVMSHCP allows for a Transfer of Conservation Goals; however, it is subject to subsequent approval by USFWS and CDFW.<sup>66</sup>

This future part of the Project will occur if the JPR does not find adequate habitat within the existing Conservation Area and will require further discretionary approval by the CVCC. Without a completed JPR process, it is impossible to determine whether this action will occur, what areas it will impact, or whether it will even be approved. There may be potential significant impacts from future actions to provide sufficient habitat for this Project to conform to the CVMSHCP take permits, or no sufficient habitat available to reduce the impact from the Project to a less-than-significant level.

The IS/MND also notes that there must be a Restoration Plan to revegetate the Project site and restore habitat.<sup>67</sup> This plan will be submitted to the CVCC and County prior to any site disturbance for approval. This plan is part of this Project and needed to be disclosed and analyzed prior to Project approval to prevent fragmenting the analysis, limiting the amount of revegetation that will occur, and to ensure that revegetation will happen.

The proposed Restoration Plan must be developed and disclosed to the public prior to consideration by the County. The IS/MND must be withdrawn and a revised analysis must be recirculated for public review once the analysis is complete, disclosed to the public and adequate mitigation has been identified.

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<sup>63</sup> *Bozung v. Local Agency Formation Commission* (1975) 13 Cal.3d 263, 283-84; *City of SanTEE v. County of San Diego* (1989) 214 Cal.App.3d 1438, 1452.

<sup>64</sup> *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 396-397 (EIR held inadequate for failure to assess impacts of second phase of pharmacy school's occupancy of a new medical research facility).

<sup>65</sup> IS/MND, p. 34.

<sup>66</sup> HCP, p. 6-52.

<sup>67</sup> IS/MND, p. 34.

**V. THE IS/MND FAILS TO ADEQUATELY ESTABLISH THE EXISTING ENVIRONMENTAL SETTING AGAINST WHICH THE COUNTY IS REQUIRED TO ANALYZE THE PROJECT'S POTENTIALLY SIGNIFICANT IMPACTS**

The IS/MND describes the existing environmental setting inaccurately and incompletely, thereby skewing the County's impact analysis. The existing environmental setting is the starting point from which the lead agency must measure whether a proposed Project may cause a significant environmental impact.<sup>68</sup> CEQA defines the environmental setting as the physical environmental conditions in the vicinity of the project, as they exist at the time the notice of preparation is published, from both a local and regional perspective.<sup>69</sup>

Describing the environmental setting accurately and completely for each environmental condition in the vicinity of the Project is critical to an accurate and meaningful evaluation of environmental impacts. The importance of having a stable, finite and fixed environmental setting for purposes of an environmental analysis was recognized decades ago.<sup>70</sup> Today, the courts are clear that "[b]efore the impacts of a Project can be assessed and mitigation measures considered, an [EIR] must describe the existing environment. It is only against this baseline that any significant environmental effects can be determined."<sup>71</sup>

An EIR must also describe the existing environmental setting in sufficient detail to enable a proper analysis of project impacts.<sup>72</sup> The CEQA Guidelines provide that "[k]nowledge of the regional setting is critical to the assessment of environmental impacts."<sup>73</sup> This level of detail is necessary to "permit the significant effects of the project to be considered in the full environmental context."<sup>74</sup>

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<sup>68</sup> See, e.g., *Communities for a Better Env't v. S. Coast Air Quality Mgmt. Dist.* (March 15, 2010) 48 Cal.4th 310, 316; *Fat v. City of Sacramento* (2002) 97 Cal.App.4th 1270, 1278, citing *Remy, et al.*; *Guide to the Calif. Environmental Quality Act* (1999) p. 165.

<sup>69</sup> CEQA Guidelines § 15125, subd. (a); *Riverwatch v. City of San Diego* (1999) 76 Cal.App.4th 1428, 1453.

<sup>70</sup> *City of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185.

<sup>71</sup> *City of Amador v. El Dorado City Water Agency* (1999) 76 Cal.App.4th 931, 952.

<sup>72</sup> *Galante Vineyards v. Monterey Peninsula Water Mgmt. Dist.* (1997) 60 Cal.App.4th 1109, 1121-22.

<sup>73</sup> CEQA Guidelines § 15125, subd. (d).

<sup>74</sup> *Id.*

The IS/MND fails to accurately and adequately describe the environmental setting to enable the County to properly assess transportation, air and public health impacts from the Project. Decision makers cannot determine the Project's impacts, and in turn, apply appropriate mitigation for those impacts, without an accurate description of the environmental setting. The County must gather the relevant data and revise the IS/MND to include an accurate and complete description of the existing environmental setting.

**A. The IS/MND Fails to Establish the Environmental Setting for Traffic, the Air Basin, and Sensitive Receptors Along the Blade Transit Route**

As stated above, the IS/MND is silent on how the Project will transport 213-foot-long wind turbine blades to the Project site.<sup>76</sup> What is also lacking is an adequate description of existing traffic patterns, the air basin, and sensitive receptors along the route so that there can be a comparison between the existing setting and effects on traffic and air quality from the Project on sensitive receptors.<sup>76</sup> Since the IS/MND fails to describe existing traffic patterns, the air basin and sensitive receptors, the County failed to establish the existing setting and cannot make an effective determination of the Project's impacts and mitigation required to address those impacts.<sup>77</sup>

The Response Memorandum suggests that the analysis is complete because the County estimated impacts from standard haul truck trips on Highways 10 and 62.<sup>78</sup> As explained above, this does not cover the full scope of the Project, since turbine blades cannot be sourced locally. The IS/MND analysis wrongly assumes standard haul trucks will be used, instead of the uniquely large equipment that may have a difficult time navigating existing routes that are needed to deliver the turbine blades to the site.

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<sup>76</sup> Fox Comments, p. 11.

<sup>76</sup> Fox Comments, p. 11.

<sup>77</sup> Fox Comments, p. 11.

<sup>78</sup> Response Memo, p. 4.

**B. The IS/MND Underestimates the Amount of Habitat the Project Will Disturb**

The Bio Memorandum suggests that our previous comment letter is not supported by substantial evidence.<sup>79</sup> This is incorrect, as our comment letter was supported by Ms. Owens' expert opinion, which determined after reviewing the IS/MND and cited materials that total lands disturbed were underestimated.<sup>80</sup>

The IS/MND states that the Project will only permanently disturb 2.59 acres of land but does not support this claim.<sup>81</sup> Construction of new access roads and widening of existing access roads to accommodate the larger turbines and cranes, a new laydown yard, and new turbine pads will all disturb the Project site. Ms. Owens' estimate based on the information provided by the County and the Applicant suggests that the actual area of permanently disturbed land may be closer to 20 acres.<sup>82</sup>

First, several miles of access roads will be expanded from 8 or 16 feet wide to 36 feet wide, disturbing 4.36 acres per mile.<sup>83</sup> Second, new access roads will be constructed to towers 2, 3, 13, and 14.<sup>84</sup> Third, the laydown yard itself will disturb over 5 acres.<sup>85</sup> Fourth, the IS/MND uses an unreasonably conservative estimate for turbine construction zones.<sup>86</sup> Finally, the IS/MND does not discuss the disturbance related to decommissioning of the existing 291 wind turbines.<sup>87</sup>

The areas that will be disturbed are, or are surrounded by, native habitat that may be occupied by sensitive species.<sup>88</sup> While the IS/MND suggests that disturbed areas will be revegetated, the County never discloses the potentially significant impacts, the extent of the potentially significant impacts and the

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<sup>79</sup> Bio Memo, p. 1.

<sup>80</sup> Owens' Response, p. 7.

<sup>81</sup> Owens' Comments, p. 4.

<sup>82</sup> Owens' Comments, p. 6.

<sup>83</sup> Owens' Comments, p. 6.

<sup>84</sup> Owens' Comments, p. 6.

<sup>85</sup> Owens' Comments, p. 6.

<sup>86</sup> Owens' Comments, p. 6.

<sup>87</sup> Owens' Comments, p. 7.

<sup>88</sup> Owens' Comments, pp. 6-7.

proposed mitigation for those impacts, including, but not limited to, potential revegetation, making potentially significant impacts undisclosed, unanalyzed and permanent.<sup>89</sup>

Additionally, the IS/MND fails to address the Project's potentially significant indirect impacts to biological resources, such as indirect impacts to wildlife from noise, dust, or vehicles.<sup>90</sup>

Overall, the County's failure to accurately describe the acreage that will be disturbed by the Project renders it impossible to analyze the Project's potentially significant impacts to biological resources, as required by CEQA. State law requires the County to prepare a revised environmental review document that accurately describes where and how the Project will disturb lands and any impacts resulting therefrom and to recirculate the document for public review and comment.

The Bio Memorandum alleges that the JPR process fully addresses the impacts to disturbed lands; however, it ignores that the JPR process is not complete and would occur outside of the public review process, pursuant to CEQA.<sup>91</sup> Determinations of impacts, including the number of permanently disturbed lands, could change through the JPR process.<sup>92</sup> Additionally, the JPR process only looks at habitat loss, not direct impacts to species, such as those identified by Ms. Owens that may occur during construction or operation of the Project.<sup>93</sup>

### **C. The IS/MND Fails to Describe the Existing Levels of Impacts to Avian Species on the Project Site**

The IS/MND cursorily and summarily concludes that the replacement of 291 existing wind turbines with 14 new, larger wind turbines will lead to less impacts to birds.<sup>94</sup> As Ms. Owens notes, this claim is unsupported by the evidence, since larger

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<sup>89</sup> Owens' Comments, pp. 5-6; see below, Section VII.

<sup>90</sup> Owens' Comments, p. 7.

<sup>91</sup> Bio Memo, p. 1.

<sup>92</sup> Owens' Response, p. 7.

<sup>93</sup> Owens' Response, p. 7.

<sup>94</sup> IS/MND, p. 35.



wind turbine blades can lead to increased impacts.<sup>95</sup> Any actual determination as to whether there will be increased or decreased impacts to birds is impossible, however, since the County provided no data on avian mortality from the existing project. The County must revise its environmental review document to include actual data on existing avian mortality, studies that model existing avian mortality or some other valid substantial evidence for public review before the County can even consider concluding that the Project would result in no significant impacts to birds.

The Bio Memorandum suggests that previous studies and the CVMSHCP address a baseline for this Project. However, the CH2M Hill Survey, cited in Appendix C, was provided for a different project and only concluded that the other project was designed to avoid impacts to avian species and that risk from collision would decrease, making no such claims for this Project.<sup>96</sup> Also, the CH2M Hill Survey never made any conclusions regarding mortality rates, nor did it provide the mortality rates. Further, the CH2M Hill Survey was unscientific and based off another survey that is too old and insufficient, as described below.

The CVMSHCP provides an assessment of impacts from habitat loss to species but does not evaluate the direct impacts to species from construction and operation of the Project.<sup>97</sup> It also is limited in the number of species it covers, leaving out other special-status birds found in the site, migratory birds, and bats.<sup>98</sup> No substantial evidence is provided, such as a decrease in avian mortality per turbine or kilowatt-hour, for this Project by which to determine that there is a decrease in impacts, as the IS/MND claims.

#### **D. The IS/MND Fails to Adequately Survey and Describe Onsite Biological Resources**

The IS/MND does not include any relevant, recent focused or protocol surveys for any special-status species that have a moderate to high potential to occur on the

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<sup>95</sup> Owens' Comments, pp. 2-3.

<sup>96</sup> IS/MND, Appendix D of Appendix C, p. 7.

<sup>97</sup> Owens' Response, p. 9.

<sup>98</sup> Owens' Response, p. 9.

Project site.<sup>99</sup> The Bio Memorandum contends that our comment ignores the surveys cited as substantial evidence that the County has determined the extent of species at the Project site.<sup>100</sup> The IS/MND relies on the CH2M Hill Survey for a completely different project, which was based on a National Renewable Energy Laboratory ("NREL") survey. In fact, the only survey conducted was a general, one-day field study in March of 2018.<sup>101</sup>

Ms. Owens found that at least 30 different plant and animal species, protected at both the state and federal level, could occur at the Project site and must be assessed and disclosed in a revised environmental review document.<sup>102</sup> For example, the IS/MND completely omits any data on bats in the area and any discussion of the Project's potentially significant impacts to bats.<sup>103</sup>

By failing to require the necessary surveys, the County lacks substantial evidence to support its conclusions in the IS/MND. The County cannot possibly determine whether the Project would result any impacts to biological resources, much less determine whether those impacts are significant and what mitigation is required. The County must require the Applicant to conduct proper surveys and provide actual data on biological resources and must revise and recirculate the environmental review document to the public.

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#### **i. The Cited CH2M Hill Survey Does Not Provide an Environmental Setting for the Project**

The CH2M Hill Survey, which the IS/MND cites as evidence that avian use at the Project site is low, is too old and unscientific to constitute substantial evidence.<sup>104</sup> Ms. Owens found that the age of the survey leaves it irrelevant for establishing a baseline for this project.<sup>105</sup> After review, Ms. Owens concludes that

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<sup>99</sup> Owens' Comments, p. 7.

<sup>100</sup> Bio Memo, p. 2.

<sup>101</sup> Owens' Comments, p. 7.

<sup>102</sup> Owens' Comments, pp. 7-8.

<sup>103</sup> Owens' Comments, pp. 13-15.

<sup>104</sup> Owens' Response, p. 16.

<sup>105</sup> Owens' Response, p. 16.

the CH2M Hill Survey is merely a summary of other surveys and not a CH2M Hill Survey of the Project site, as claimed by the IS/MND.<sup>106</sup>

The CH2M Hill Survey takes incompatible data from numerous other surveys and improperly treats their data as equitable in order to support its analysis.<sup>107</sup> The CH2M Survey also relies on unscientifically vague determinations, such as describing levels of avian use of the San Geronio Pass as “low,” despite other surveys providing quantitative data showing otherwise.<sup>108</sup>

Ms. Owens determined that the CH2M Hill Survey contains numerous errors, comes to an erroneous conclusion, and would not be accepted in a peer-reviewed journal.<sup>109</sup> The CH2M Hill Survey lacks scientific rigor, and the County cannot rely on it for substantial evidence to support any determinations of environmental setting or impacts in the IS/MND.

**ii. The NREL Survey is Insufficient to Determine the  
Existing Environmental Setting for This Project**

The NREL Survey cited by the Bio Memorandum and relied on by the CH2M Hill Survey does not support the IS/MND claims that risk of avian mortality is low. The NREL Survey concludes that it was not designed to provide data for standardized estimates of avian mortality and subject to high levels of — uncertainty.<sup>110</sup> The NREL Survey also relies on flawed analysis, as Ms. Owens notes in her response.<sup>111</sup> Ms. Owens concludes that the NREL Survey would not be accepted in a peer-reviewed journal due to flawed statistics.<sup>112</sup> Any reliance on the NREL Survey is invalid, and the survey does not provide substantial evidence about the existing environmental setting or avian mortality at the Project site.

<sup>106</sup> Owens' Response, p. 16.

<sup>107</sup> Owens' Response, pp. 16-17.

<sup>108</sup> Owens' Response, pp. 17-18.

<sup>109</sup> Owens' Response, pp. 16-19.

<sup>110</sup> Owens' Response, p. 14.

<sup>111</sup> Owens' Response, pp. 14-15.

<sup>112</sup> Owens' Response, p. 15.

**E. The IS/MND Ignores and Fails to Survey Migratory Birds Protected Under California Law**

The IS/MND does not provide any analysis for migratory birds, except those included in the insufficient special-status survey or CVMSHCP, citing recent USFWS determinations that the Migratory Bird Treaty Act (“MBTA”) does not apply to incidental take.<sup>113</sup> This ignores that migratory birds identified in the MBTA are still subject to incidental take prohibitions under California law.<sup>114</sup> This position has recently been affirmed by Attorney General Xavier Becerra, noting in his memo on the MBTA that “[California Department of Fish and Wildlife] and the Attorney General will continue to enforce California law to protect these birds.”<sup>115</sup>

California law regarding the MBTA did not change with the USFWS opinion cited in the IS/MND. The IS/MND thus fails to properly consider whether the Project may contribute to the take of migratory birds in the area.<sup>116</sup> The IS/MND must be withdrawn and recirculated with studies determining the extent to which birds covered under the MBTA may be present in the area and with existing levels of mortality for migratory birds.

**F. The IS/MND Relies on an Outdated and Improperly Conducted Survey for Golden Eagles**

The abundance of research supports the fact that wind turbines can kill Golden Eagles, which are fully protected under California law.<sup>117</sup> As a result, proper studies are needed to determine if the Project will lead to eagle mortality.

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<sup>113</sup> IS/MND, p. 34.

<sup>114</sup> Fish and Game Code § 3513.

<sup>115</sup> California Department of Fish and Wildlife and Attorney General Xavier Becerra, Advisory Affirming California’s Protections for Migratory Birds (Nov. 29, 2018), p. 3.

<sup>116</sup> Owens’ Response, p. 13.

<sup>117</sup> Fish and Game Code § 3511(b)(7).

**i. The January 11, 2012 Wildlife Research Institute, Inc. Survey is Too Old, Does Not Cover the Project Site, and Was Improperly Conducted and Cannot Provide an Adequate Description of the Existing Environmental Setting**

The County references a Wildlife Research Institute, Inc. survey for Golden Eagles in the IS/MND, but the survey does not accurately inventory habitat and potential impacts to eagles for numerous reasons. The survey data is too old to represent current conditions for the Golden Eagle.<sup>118</sup> More recent data is needed since breeding status for a nest territory is based on whether it is being used in the current year.<sup>119</sup> All breeding sites in an area with eagles demonstrating pair bonding activities are deemed occupied.<sup>120</sup> A seven year old study cannot possibly determine whether breeding Golden Eagles are present at the proposed Project site; a focused study must be completed.<sup>121</sup>

The IS/MND lacks any detail on Golden Eagle prey on or near the Project site.<sup>122</sup> Golden Eagle presence is highly correlated with prey abundance, further limiting the description of Golden Eagle habitat at the site.<sup>123</sup>

The study referenced is too limited in scope to be adequate to assess the Project's potentially significant impacts. Admittedly, it does not provide complete coverage of the Project site.<sup>124</sup> Admittedly, it failed to follow the United States Fish and Wildlife Service Protocol Guidelines.<sup>125</sup>

<sup>118</sup> Owens' Comments, p. 8.

<sup>119</sup> Owens' Comments, p. 8.

<sup>120</sup> Owens' Comments, p. 9.

<sup>121</sup> Owens' Comments, pp. 8-9.

<sup>122</sup> Owens' Comments, p. 9.

<sup>123</sup> Owens' Comments, p. 9.

<sup>124</sup> Owens' Comments, p. 10.

<sup>125</sup> Owens' Comments, p. 10.



The survey provided is technically invalid, since the author of the study, Dave Bittner, was working without a California state permit since 2000.<sup>126</sup> The memo notes that Mr. Bittner lied to probation officials, failed to provide required data to wildlife agencies, and accepted \$600,000 in payment from wind facilities developers.<sup>127</sup> Mr. Bittner conducted an unpermitted helicopter study of eagle nests in 2011, which may be the study cited in the IS/MND.<sup>128</sup>

Because the study cited in the IS/MND is too old to assess impacts to this species, is invalid and lacks relevance, among other problems, the County's IS/MND lacks any evidence to support its description of existing Golden Eagle activity at or near the Project site. The County must revise and recirculate the document with accurate studies to determine whether Golden Eagle habitat is present at the Project site.

The Bio Memorandum argues that our previous comment does not provide evidence that impacts to Golden Eagles *will be* significant.<sup>129</sup> This misstates the law. As stated above, an EIR is required when there is substantial evidence that a project *may* have a potentially significant impact. The Golden Eagle is a California Fully Protected Species and no take may be authorized<sup>130</sup>; the take of one Golden Eagle would be significant. We provided evidence, based on expert observation, that Golden Eagles are present near the Project site, that raptors prefer flying heights that would place them within the rotor-swept area of the Project, and that the IS/MND does not provide substantial evidence to support a claim that there will be no Golden Eagle take.<sup>131</sup>

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<sup>126</sup> East County Magazine, Eagle Expert Bittner Sentenced to Probation, Ordered to Turn Over Missing Data (Aug. 2013) available at <https://www.eastcountymagazine.org/eagle-expert-bittner-sentenced-probation-ordered-turn-over-missing-data>.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> Bio Memo, p. 2.

<sup>130</sup> Fish and Game Code § 3511.

<sup>131</sup> See Owens' Comment.

## **VI. SUBSTANTIAL EVIDENCE SUPPORTS A FAIR ARGUMENT THAT THE PROJECT MAY RESULT IN SIGNIFICANT IMPACTS THAT REQUIRE THE COUNTY TO PREPARE AN EIR**

Under CEQA, a lead agency must prepare an EIR whenever substantial evidence in the whole record before the agency supports a fair argument that a project may have a significant effect on the environment.<sup>132</sup> The fair argument standard creates a “low threshold” favoring environmental review through an EIR, rather than through issuance of a negative declaration.<sup>133</sup> An agency’s decision not to require an EIR can be upheld only when there is no credible evidence to the contrary.<sup>134</sup> Substantial evidence can be provided by technical experts or members of the public.<sup>135</sup> “If a lead agency is presented with a fair argument that a project may have a significant effect on the environment, the lead agency shall prepare an EIR even though it may also be presented with other substantial evidence that the project will not have a significant effect.”<sup>136</sup>

### **A. The IS/MND Fails to Adequately Disclose, Analyze and Mitigate the Project’s Potentially Significant Public Health Risks.**

The IS/MND fails as an information disclosure document under CEQA by failing to adequately disclose, analyze, and mitigate the Project’s public health

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<sup>132</sup> Pub. Resources Code § 21082.2; CEQA Guidelines § 15064(f), (h); *Laurel Heights II*, *supra*, 6 Cal. 4th at p. 1123; *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal. 3d 68, 75, 82; *Stanislaus Audubon Society, Inc. v. County of Stanislaus* (1995) 33 Cal.App.4th 144, 150-151; *Quail Botanical*, *supra*, 29 Cal.App.4th at pp. 1601-1602.

<sup>133</sup> *Citizens Action to Serve All Students v. Thornley* (1990) 222 Cal.App.3d 748, 754.

<sup>134</sup> *Sierra Club v. County of Sonoma* (1992) 6 Cal.App.4th, 1307, 1318; *see also Friends of B Street*, *supra*, 106 Cal.App.3d at p. 1002 (“If there was substantial evidence that the proposed project might have a significant environmental impact, evidence to the contrary is not sufficient to support a decision to dispense with preparation of an [environmental impact report] and adopt a negative declaration, because it could be ‘fairly argued’ that the project might have a significant environmental impact”).

<sup>135</sup> *See, e.g., Citizens for Responsible and Open Government v. City of Grand Terrace* (2008) 160 Cal.App.4th 1323, 1340 (substantial evidence regarding noise impacts included public comments at hearings that selected air conditioners are very noisy); *see also Architectural Heritage Assn. v. County of Monterey*, 122 Cal.App.4th 1095, 1117-1118 (substantial evidence regarding impacts to historic resource included fact-based testimony of qualified speakers at the public hearing); *Gabric v. City of Rancho Palos Verdes* (1977) 73 Cal.App.3d 183, 199.

<sup>136</sup> CEQA Guidelines § 15062(f).

impacts. The County concludes that “the toxics impact related to construction would be less than significant.”<sup>137</sup> The County lacks substantial evidence to support this conclusion. Instead, Dr. Fox provides substantial evidence that the public health risk may be significant.<sup>138</sup>

CEQA requires lead agencies to prepare risk assessments to evaluate the nature and extent of the health hazards posed by exposure to toxic materials released by a project. CEQA Guidelines section 15126.2(a) expressly requires a CEQA document to discuss the “health and safety problems caused by the physical changes that a project will precipitate.”<sup>139</sup> Numerous cases have held that CEQA must analyze human health impacts. For example, in *Communities for a Better Environment v. South Coast Air Quality Management District*,<sup>140</sup> the Supreme Court held that a Mitigated Negative Declaration for a refinery was inadequate for failure to analyze nitrogen oxide emissions, pollutants known to have significant effects on human health.<sup>141</sup>

The Courts of Appeal have repeatedly held that a CEQA document must analyze impacts of projects on human health. In *Communities for a Better Environment v. City of Richmond*, the court held that a CEQA document is inadequate where it “does not address the public health or other environmental consequences of processing heavier crude [thereby emitting Toxic Air Contaminants (“TAC”)], let alone analyze, quantify, or propose measures to mitigate those impacts.”<sup>142</sup> In *Bakersfield Citizens for Local Control v. City of Bakersfield*,<sup>143</sup> the court held that an EIR for a commercial shopping center was inadequate because it failed to correlate adverse air quality impacts to resulting adverse health impacts on surrounding communities. The court explained:

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<sup>137</sup> DEIR, § 4.2, p. 31.

<sup>138</sup> Fox Comments, p. 2.

<sup>139</sup> CEQA Guidelines, § 15126.2(a).

<sup>140</sup> *Communities for a Better Environment v. South Coast Air Quality Management District*, (2010) 48 Cal. 4th 310, 317.

<sup>141</sup> 48 Cal.4th at 317.

<sup>142</sup> *Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70, 82. See also *Californians for Alternatives to Toxics v. Cal. Dep’t of Food & Agric.* (2006) 136 Cal.App.4th 1, 16, (EIR on statewide application of pesticide was inadequate when it failed to independently evaluate risks of toxic exposure.)

<sup>143</sup> (2004) 124 Cal.App.4th 1184, 1219-20 (“on remand, the health impacts resulting from the adverse air quality impacts must be identified and analyzed in the new EIR’s.”).

[The] City's failure to...correlate the adverse air quality impacts to resulting adverse health consequences, cannot be dismissed as harmless or insignificant defects. As a result of these omissions, meaningful assessment of the true scope of numerous potentially serious adverse environmental effects was thwarted. No discrete or severable aspects of the projects are unaffected by the omitted analyses; the defects relate to the shopping centers in their entirety, not just to one specific retailer. These deficiencies precluded informed public participation and decision making.<sup>144</sup>

In *Berkeley Keep Jets Over the Bay Com. v. Bd. of Port Comrs.*,<sup>145</sup> the court held that an EIR must include a "human health risk assessment."<sup>146</sup> In *Berkeley Jets*, the Port of Oakland approved a development plan for the Oakland International Airport. The EIR admitted that the Project would result in an increase in the release of TACs, which were known to cause both carcinogenic and adverse noncarcinogenic health effects.<sup>147</sup> The EIR adopted mitigation measures to reduce TAC emissions but failed to perform a health risk assessment to quantify the Project's impacts on human health. The court held that the mitigation measures alone were insufficient, and that the Port had a duty to analyze the health risks associated with exposure to TACs:

The Port has not cited us to any reasonably conscientious effort it took either to collect additional data or to make further inquiries of environmental or regulatory agencies having expertise in the matter. These failures flout the requirement that the lead agency consult "with all responsible agencies and with any other public agency which has jurisdiction by law over natural resources affected by the project . . ." (§ 21080.3, subd. (a).) At the very least, the documents submitted by the public raised substantial questions about the project's effects on the environment and the unknown health risks to the area's residents...the Port has not offered any justification why more definitive information could not have been provided....The EIR's approach of simply labeling the effect "significant" without accompanying analysis of the project's impact on the health of the Airport's employees and nearby

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<sup>144</sup> *Id.*, at 1220-21.

<sup>145</sup> *Berkeley Keep Jets Over the Bay Com. v. Bd. of Port Comrs.* ("Berkeley Jets") (2001) 91 Cal.App.4th 1344.

<sup>146</sup> *Id.*, at 1369.

<sup>147</sup> *Id.*, at 1364.

residents is inadequate to meet the environmental assessment requirements of CEQA.<sup>148</sup>

Here, the County is required to conduct an assessment of the Project's potentially significant public health impacts. As in *Berkeley Jets*, there is no dispute that the Project will use off-road diesel construction equipment and on-road heavy-duty diesel trucks that generate Diesel Particulate Matter ("DPM") emissions.<sup>149</sup> The IS/MND identifies DPM as the main TAC of concern.<sup>150</sup> Construction would occur near sensitive receptors<sup>151</sup> over a period of approximately 18 months.<sup>152</sup> There is also no dispute that the County did not prepare an assessment of the health risks associated with that exposure. This violates CEQA's requirement that the lead agency correlate the adverse air quality impacts generated by a project to their resulting adverse health consequences.<sup>153</sup>

The courts may not look for "perfection" in a CEQA document, but do expect "adequacy, completeness, and a good faith effort at full disclosure [in an EIR]."<sup>154</sup> The County has failed to meet these requirements. Dr. Fox explains that health risk assessments are routinely performed for construction projects and due to the proximity to sensitive receptors and duration of construction.<sup>155</sup> The failure to prepare a health risk assessment is a glaring omission. The County must prepare a health risk assessment to adequately disclose, analyze, and mitigate the Project's public health risks and disclose those significant risks in a revised and recirculated document.

The Response Memorandum suggests that Dr. Fox did not provide evidence to show a need for a health risk assessment by arguing that the South Coast Air Quality Management District ("SCAQMD") does not have a recommendation or

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<sup>148</sup> *Id.* at 1370-71.

<sup>149</sup> Fox Comments, p. 2.

<sup>150</sup> Fox Comments, p. 2.

<sup>151</sup> Fox Comments, p. 2 (some sensitive receptors are less than 25 meters from excavation work).

<sup>152</sup> DEIR, § 4.2, p. 31.

<sup>153</sup> *Berkeley Jets*, 91 Cal App 4th at 1370-71; DEIR, § 4.2, pp. 23-24 (identifying significant unmitigated construction emissions)

<sup>154</sup> CEQA Guidelines, § 15151.

<sup>155</sup> Fox Comments, p. 5.



threshold at which a health risk assessment should be performed.<sup>156</sup> This suggestion, however, ignores Dr. Fox's previous comments citing the Office of Environmental Health Hazard Assessment's ("OEHHA") guidance for determining when a health risk assessment must be completed.<sup>157</sup> Further, since 2002 SCAQMD guidance has also recommended that mobile source health risk assessments should be prepared for all projects involving vehicular trips. SCAQMD's *Health Risk Assessment Guidance for Analyzing Cancer Risks from Mobile Source Diesel Emissions* explain that "in the event that the proposed project generates or attracts vehicular trips, especially heavy-duty diesel-fueled vehicles, it is recommended that the lead agency perform a mobile source health risk assessment." The SCAQMD mobile source guidance does not create any exception for projects that comply with CARB regulations.<sup>158</sup>

The Response Memorandum cites a "screening health risk assessment," which provides an estimate of impacts below SCAQMD's thresholds for cancer impacts.<sup>159</sup> Dr. Fox notes that OEHHA requires a formal health risk assessment, not a "screening health risk assessment."<sup>160</sup> Dr. Fox also finds that the assessment in the Response Memorandum was not publicly evaluated, uses improper model inputs, only evaluated DPM and no other TACs, used inappropriate risk factors, did not include acute exposure, and did not address cumulative impacts.<sup>161</sup>

Dr. Fox did prepare an assessment using OEHHA procedures which determined that there is a medium to high cancer risk from construction activities on the Project site, thus meeting the OEHHA threshold to require a formal health risk assessment, which the County was required to provide prior to Project approval.<sup>162</sup>

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<sup>156</sup> Response Memo, p. 1.

<sup>157</sup> Fox Response, p. 1.

<sup>158</sup> See "Mobile Source Toxics Analysis," SCAQMD, (Aug. 2002) available at: <http://www.sqmd.gov/home/regulations/ceqa/air-quality-analysis-handbook/mobile-source-toxics-analysis>.

<sup>159</sup> Response Memo, p. 1.

<sup>160</sup> Fox Response, p. 2.

<sup>161</sup> Fox Response, pp. 2-4.

<sup>162</sup> Fox Response, p. 4.

**B. The IS/MND Fails to Adequately Disclose, Analyze and Mitigate the Project's Potentially Significant Odor Impacts.**

Rather than conduct an adequate analysis of odor impacts from construction, the IS/MND merely concludes that odor impacts would be less than significant. The County's conclusion is flawed for several reasons.

First, CEQA requires a lead agency to identify all potentially significant environmental effects. Significant effects may be "both short-term and long-term."<sup>163</sup> Thus, even temporary Project impacts may have significant effects on the environment that require mitigation.<sup>164</sup> CEQA does not permit the County to dismiss odor impacts on the basis that they are "temporary."

Second, the County lacks substantial evidence to support its less-than-significant impact conclusion. Project construction will result in diesel exhaust.<sup>165</sup> As Dr. Fox explains, the odors associated with diesel exhaust "are characterized by offensive odors."<sup>166</sup> Yet, the IS/MND does not contain any analysis at all to support its conclusion that odor impacts would not be significant.<sup>167</sup> The only way to conclude that odor impacts are insignificant is to use air dispersion modeling to estimate ambient concentrations of DPM at nearby sensitive receptors and compare the resulting concentrations to DPM odor thresholds.<sup>168</sup> In any case, the County conducted no analysis whatsoever. Thus, the IS/MND fails as an informational document under CEQA and the County lacks substantial evidence to support its conclusion.

Whereas the IS/MND lacks substantial evidence to support its conclusion, Dr. Fox provides substantial evidence based on her expert opinion that odor impacts will be significant.<sup>169</sup> The County admits that the primary source of odor anticipated from the construction of the proposed Project would be exhaust emissions from the diesel equipment. Dr. Fox comments, "[b]ased on my personal

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<sup>163</sup> CEQA Guidelines, § 15126.2(a).

<sup>164</sup> CEQA Guidelines, § 15126.2(a).

<sup>165</sup> Fox Comments, p. 5.

<sup>166</sup> Fox Comments, p. 6.

<sup>167</sup> Fox Comments, p. 6.

<sup>168</sup> Fox Comments, p. 7.

<sup>169</sup> CEQA Guidelines, § 15384.

experience at construction sites, residential areas are close enough to Project construction sites for residents to smell noxious diesel and other exhaust fumes.”<sup>170</sup> Furthermore, mitigation is available and should be required to reduce the significant odor impact from all construction within at least 1,000 feet of sensitive receptors.<sup>171</sup> For example, the construction equipment can be equipped with diesel oxidation catalysts, which eliminate odors.<sup>172</sup>

The IS/MND fails as an information disclosure document by failing to adequately analyze and disclose the Project’s potentially significant odor impacts. Consequently, the County must revise and recirculate the analysis in a draft EIR to adequately disclose, analyze and mitigate the Project’s significant odor impact.

The Response Memorandum suggests that odors were analyzed in accordance with the CEQA Guidelines and SCAQMD’s thresholds of significance.<sup>173</sup> However, the IS/MND does not contain any odor analysis at all.<sup>174</sup> The Response Memorandum identifies various uncited studies to argue that sulfur oxides are the primary source of odors from diesel engines, and that sulfur oxide emissions have been greatly reduced.<sup>175</sup> Dr. Fox counters this unfounded assertion with a published study that shows that aldehydes are the primary source of odor from diesel engines.<sup>176</sup> Rules cited by SCAQMD and the California Air Resources Board are also inapposite since they do not apply until after emissions occur, or do not account for running emissions, respectively.<sup>177</sup>

### **C. The IS/MND Underestimates Potentially Significant Construction Emissions**

The IS/MND contains numerous flaws in its air quality analysis, rendering the analysis unreliable and the impacts underestimated. The County must revise

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<sup>170</sup> Fox Comments, p. 6.

<sup>171</sup> Fox Comments, p. 8.

<sup>172</sup> Fox Comments, p. 8.

<sup>173</sup> Response Memo, p. 2.

<sup>174</sup> Fox Response, p. 4.

<sup>175</sup> Response Memo, p. 2.

<sup>176</sup> Fox Response, p. 5.

<sup>177</sup> Fox Response, p. 5.

the air quality analysis to account for all sources of construction emissions and operational emissions in a recirculated environmental document.

The IS/MND omits highly relevant information from its air quality analysis. As a result, the IS/MND underestimates construction emissions. Dr. Fox explains that the CalEEMod fails to account for all sources of PM10 and PM2.5 construction emissions.

First, CalEEMod omits windblown dust from graded areas and storage piles and fugitive dust from off-road travel.<sup>178</sup> As Dr. Fox explains, these emissions must be separately calculated using a different tool, the U.S. EPA Compilation of Air Pollution Emissions Factors AP-42.<sup>179</sup> Once separately calculated, those emissions must be added to the CalEEMod total.<sup>180</sup> Dr. Fox provides substantial evidence that windblown dust from graded areas and storage piles and fugitive dust from off-road travel can be the major sources of PM10 and PM2.5 emissions from construction projects.<sup>181</sup>

Dr. Fox adds that dust emissions during construction are unique to individual sites. Here, the Project is sited on desert land in Coachella Flats, which will create greater particulate matter emissions than default conditions.<sup>182</sup> As such, the default conditions should have been calibrated to reflect the actual site.<sup>183</sup>

The IS/MND omits sources of emissions from cutting up and dismantling 291 existing wind turbines. The only source of emissions from decommissioning listed in the IS/MND addresses off-road construction impacts. A major source of emissions has been left out of decommissioning from fibers that can be released during cutting up of turbine blades, and any industrial equipment used during decommissioning.<sup>184</sup>

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<sup>178</sup> Fox Comments, p. 12.

<sup>179</sup> Fox Comments, p. 12.

<sup>180</sup> Fox Comments, p. 12.

<sup>181</sup> Fox Comments, p. 12.

<sup>182</sup> Fox Comments, p. 13.

<sup>183</sup> Fox Comments, p. 13.

<sup>184</sup> Fox Comments, p. 13.

The IS/MND states that the existing turbine blades will be recycled. No analysis is provided including the emissions from disposal of the cut-up blades.<sup>185</sup> If they can be recycled, then the IS/MND must determine emissions of moving the material to the recycling center.<sup>186</sup>

Finally, the IS/MND severely underestimates emissions from moving the large new turbines to the site. These turbines would require non-standard heavy-duty transportation, including ships, barges, rail, trucks, or a combination thereof.<sup>187</sup> No analysis is attempted to determine the impacts from this activity.<sup>188</sup>

This underestimation of construction emissions fails to provide the public with accurate information regarding the scope and severity of potentially significant impacts to air quality. The County must correct its analysis and recirculate the revised analysis to reflect these potentially significant impacts.

The Response Memorandum argues that the CalEEMod analysis used includes Santa Ana wind gusts up to 50 mph and that SCAQMD's Fugitive Dust rules apply.<sup>189</sup> It continues to assert that the IS/MND includes fugitive dust emissions from work on unpaved roads.<sup>190</sup>

Dr. Fox notes that the CalEEMod analysis used for the project assumed a 7.5 mph wind speed, which is well below gusts up to 50 mph.<sup>191</sup> The SCAQMD rules do not apply until wind speeds reach 25 mph, therefore impacts from gusts between 7.5 and 25 mph were not included.<sup>192</sup> The IS/MND ignores the fact that the CalEEMod explicitly states that fugitive dust from construction is not included.<sup>193</sup> Dr. Fox has provided substantial evidence that the model also does not include decommissioning

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<sup>185</sup> Fox Comments, pp. 13-14.

<sup>186</sup> Fox Comments, p. 14.

<sup>187</sup> Fox Comments, p. 14.

<sup>188</sup> Fox Comments, p. 14.

<sup>189</sup> Response Memo, p. 2.

<sup>190</sup> Response Memo, p. 3.

<sup>191</sup> Fox Response, p. 6.

<sup>192</sup> Fox Response, pp. 5-6.

<sup>193</sup> Fox Response, p. 6.

of the existing facilities.<sup>194</sup> The IS/MND does not include all sources of emission, and thus underestimates impacts.

**D. The IS/MND Underestimates the Project's Potentially Significant Valley Fever Impacts and Lacks Appropriate Mitigation**

The IS/MND summarily dismisses the Project's threat of Valley Fever to workers and sensitive receptors in the project area, while failing to implement feasible mitigation measures to lessen its impact. Valley Fever is a disease that can spread when people are exposed to spores during ground disturbance, such as this Project's construction.<sup>195</sup> Impacts to human health are severe, including possible death, and there is no known cure.<sup>196</sup> Sensitive receptors near the Project site, including workers and those who live nearby are at risk from exposure from disturbed dust, both during construction and during high-wind events.<sup>197</sup>

Despite this risk, the IS/MND does not include any mitigation to protect the public.<sup>198</sup> Dr. Fox has identified several mitigation measures that can feasibly be implemented to reduce the Project's potentially significant public health impacts from Valley Fever, including:

- 1) ~~Reevaluating and updating the Injury and Illness Prevention Program to ensure Valley Fever safeguards are included,~~
- 2) Training all employees on Valley Fever related issues,
- 3) Controlling dust exposure,
- 4) Preventing transporting deadly spores out of endemic areas, and

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<sup>194</sup> Fox Response, p. 6.

<sup>195</sup> Fox Comments, p. 20.

<sup>196</sup> Fox Comments, p. 22.

<sup>197</sup> Fox Comments, p. 21.

<sup>198</sup> Fox Comments, pp. 24-25.



5) Improving medical surveillance for all employees.<sup>199</sup>

The County's lack of adequate analysis of potentially significant impacts from the Project exposing people to Valley Fever and feasible mitigation for Valley Fever renders the IS/MND insufficient under CEQA. The County must revise and recirculate an EIR to disclose and mitigate these serious impacts.

The Response Memorandum contends that Riverside County is not "highly endemic" for Valley Fever, compliance with SCAQMD rules would reduce exposure, and that general regulations on exposure from the California Department of Industrial Relations ("CDIR") would sufficiently protect workers.<sup>200</sup>

Dr. Fox provides substantial evidence that it does not matter how endemic Riverside County is to risk exposing workers to Valley Fever, but that simply being endemic is sufficient.<sup>201</sup> The County has no evidence to support the claim that there will not be exposure of Valley Fever to workers. Regardless, in this case, an EIR is required because substantial evidence shows a significant impact may occur. SCAQMD fugitive dust rules cited only address PM 2.5 and 10, which are larger than Valley Fever spores, and thus insufficient.<sup>202</sup> Dr. Fox also found that CDIR regulations have been in existence on numerous other sites where Valley Fever exposure occurred, thus demonstrating that they are insufficient to fully protect workers.<sup>203</sup> Dr. Fox ~~has provided feasible mitigation measures to protect workers,~~ which must be applied to this project.

**E. The IS/MND Incorrectly Assumes No Potentially Significant Impacts to Birds and Bats from Taller Wind Turbines**

As stated above, the County in the IS/MND fails to describe the existing environmental setting for avian and bat mortality. Instead, the County concludes, without any evidence, that a smaller number of turbines means less impacts. Ms.

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<sup>199</sup> Fox Comments, pp. 25-27.

<sup>200</sup> Response Memo, pp. 3-4.

<sup>201</sup> Fox Response, p. 7.

<sup>202</sup> Fox Response, p. 7.

<sup>203</sup> Fox Response, pp. 7-8.

Owens explains that the County's statement is unsupported and incorrect since other repowering projects have resulted in increased impacts to species.<sup>204</sup>

Although the IS/MND does not provide substantial evidence to support its claim. Ms. Owens provides substantial evidence based on data and her expert opinion that the Project's impacts from avian and bat mortality may be significant. There is an increase in mortality with an increase in wind turbine hub heights.<sup>205</sup> Many raptors, including Golden Eagles, prefer higher flight paths between 300-600 feet, which would be above the height of the existing wind turbines, but directly in the range of the proposed Project's wind turbines.<sup>206</sup> Because Golden Eagles are fully protected under the Fish and Game code, take of just one would be significant, thus the increased collision risk from the new turbines is potentially significant.

Bat mortality can also vary greatly depending on which species are present because of differences in foraging and migrating.<sup>207</sup> The County cannot support its claim in the IS/MND that there will not be any impacts to bats, since the County never analyzed any bat species which could occur near the Project.

The Bio Memorandum suggests that our previous comments do not provide evidence that the project may have a potentially significant impact to bats. Ms. Owens has provided expert evidence that the Project will cause bat mortality. Bats can be present at the Project site because they fly, forage, and migrate through the area.<sup>208</sup> Bats are attracted to lights, which must be installed on the Project.<sup>209</sup>

Ms. Owens provides additional expertise that turbine siting is critical for limiting impacts to species.<sup>210</sup> Specifically, birds tend to return to places of birth for future breeding.<sup>211</sup> If turbines are sited closer to nests, instinct of birds to avoid human activities can adversely impact their success at breeding in their traditional

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<sup>204</sup> Owens' Comments, p. 2.

<sup>205</sup> Owens' Comments, p. 2.

<sup>206</sup> Owens' Comments, p. 3.

<sup>207</sup> Owens' Comments, p. 3.

<sup>208</sup> Owens' Response, p. 24.

<sup>209</sup> Owens' Response, p. 24.

<sup>210</sup> Owens' Response, p. 9.

<sup>211</sup> Owens' Response, p. 9.

homes.<sup>212</sup> The Project proposes new turbines further north than before, into the foothills.<sup>213</sup> No analysis has been done to determine any impacts from turbines being located in these areas.<sup>214</sup>

The County in the IS/MND fails to provide the public with accurate information regarding the scope and severity of the Project's potentially significant impacts from avian and bat mortality. The County must provide analysis supported by substantial evidence and must recirculate the revised analysis to disclose, analyze and mitigate these potentially significant impacts.

**F. The IS/MND Fails to Adequately Disclose, Analyze and Mitigate the Project's Potentially Significant Impacts to Special-Status Species**

The County lacks any data to support its claims in the IS/MND that the Project will not impact sensitive species that may occur at or near the Project site, since the County never actually analyzed whether those species may exist on the Project site or impacted area. Instead, the County only suggests that the Project would be consistent with the CVMSHCP, which does not address every special status species that may be found on the site.<sup>215</sup>

Ms. Owens notes that a Biological Technical Report is normally provided with an environmental review document, prepared pursuant to CEQA, since the environmental review document is required to contain detailed analyses of species that may occur and a baseline from which to determine a Project's potentially significant impacts.<sup>216</sup> Without a biological technical report that covers all special-status species that may occur on the Project site, there is no substantial evidence to support the County's conclusion that the Project will not have potentially significant impacts to the many sensitive plant and animal species that are found near the site.

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<sup>212</sup> Owens' Response, p. 10.

<sup>213</sup> Owens' Response, p. 9.

<sup>214</sup> Owens' Response, p. 10.

<sup>215</sup> Owens' Comments, p. 12.

<sup>216</sup> Owens' Comments, p. 12.

The Bio Memorandum responds by suggesting that Appendix C is a Biological Technical Report that complies with CEQA.<sup>217</sup> This report did not actually conduct any focused surveys on species or habitat present on the project site, nor did it provide any specific data to support its claims.<sup>218</sup> Ms. Owens points out that the California Natural Diversity Database ("CNDD") identifies 145 sensitive species that can occur in the region, however Appendix B only lists 43 species.<sup>219</sup>

The Bio Memorandum also states that the adherence to the CVMSHCP will ensure that impacts to sensitive species are reduced to a less-than-significant level.<sup>220</sup> As stated above, the JPR process has not concluded, so this determination could not have been made at the time of Project approval. Additionally, the CVMSHCP only addresses impacts to habitat for certain species, while Ms. Owen's research and the CNDD provide evidence that more species may be present, and those species may be harmed by project construction and operation.

Under CEQA, the burden is on the County to investigate a Project's impacts to species when the County is made aware that there are endangered species and suitable habitat at the Project site.<sup>221</sup> The County must conduct focused surveys to determine the extent to which the project may impact special-status species, independent of the single day survey that was conducted.<sup>222</sup>

In addition to avian and bat mortality, Ms. Owens' expert opinion supported by data provides substantial evidence that there may be potentially significant impacts to special-status species, such as Coachella Fringe-Toed Lizards, Swainson's Hawk, and Burrowing Owls, particularly during Project construction.<sup>223</sup> Noise, dust, and vehicles can kill or harass sensitive species that are found at or

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<sup>217</sup> Bio Memo, pp. 2-3.

<sup>218</sup> Owens' Comments, pp. 11-12

<sup>219</sup> Owens' Comments, p. 11; IS/MND at Appendix B of Appendix C.

<sup>220</sup> Bio Memo, pp. 2-3.

<sup>221</sup> *Napa Citizens for Honest Govt. v. Napa Co. Bd. Of Supervisors* (Aug. 3, 2001) 91 Cal.App.4th 342, 384-385.

<sup>222</sup> Owens' Response, pp. 8-9.

<sup>223</sup> Owens' Comments, p. 7.

near the Project site.<sup>224</sup> Because the CVMSHCP only address loss of habitat, not direct impacts, further analysis must be done.

As explained above, the Bio Memorandums claim that the public does not provide evidence that taller turbines can have greater impact is false. As stated, without substantial evidence to determine existing mortality, and reliable studies to determine Project mortality, no comparison can be made to support the IS/MND claim that harm can occur. Therefore, the IS/MND fails to comply with CEQA as a matter of law.

**G. The IS/MND Fails to Adequately Disclose, Analyze and Mitigate the Project's Potentially Significant Impacts to Migratory Birds**

Because the County misstates the law regarding the MBTA, it never provided studies or determinations whether the Project will take migratory birds. Ms. Owens has provided substantial evidence that numerous migratory birds are present at the Project site and may be significantly impacted by the Project.<sup>225</sup> Any take of migratory birds is prohibited, unless a permit has been granted by the Secretary of the Interior.<sup>226</sup>

Because the County has not provided a baseline, nor conducted any surveys on migratory birds, and asserts, contrary to the law, that they do not have to, the County fails to provide substantial evidence that the Project will not have a potentially significant impact. Ms. Owens' expert opinion provides substantial evidence that migratory birds are present at the site and may be significantly impacted, citing a study that identifies that 217 of the 535 bird species in California have been found in the San Geronio Pass, with a greater percentage of those species being migratory birds.<sup>227</sup> The County must conduct further analysis to disclose, analyze, and mitigate potentially significant impacts to migratory birds.

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<sup>224</sup> Owens' Comments, p. 7.

<sup>225</sup> Owens' Response, p. 13.

<sup>226</sup> Fish and Game Code § 3513.

<sup>227</sup> Owens' Response, p. 13.

Since the County in the IS/MND does not adequately disclose, analyze, or mitigate the Project's potentially significant impacts to species present at the Project site, the IS/MND fails as an informational document. The County must revise and recirculate the analysis to adequately disclose, analyze, and mitigate the Project's potentially significant impacts on biological resources, including special-status species and migratory birds.

#### **VII. THE MITIGATION MEASURES IN THE IS/MND FAIL TO ADEQUATELY MITIGATE IMPACTS TO BIOLOGICAL RESOURCES**

An MND must include all mitigation measures included in the project to avoid potentially significant effects.<sup>228</sup> The IS/MND concludes that compliance with the CVMSHCP is adequate mitigation. The CVMSHCP does not address every species, and the IS/MND does not detail what specific guidelines from the CVMSHCP are being adopted as conditions of Project approval.<sup>229</sup> Thus, the County fails to require in the IS/MND specific, enforceable, and in some cases any, mitigation for the Project's potentially significant impacts on many species. The County must revise and recirculate the analysis to identify adequate mitigation for the Project's significant biological resources impacts.

#### **VIII. THE IS/MND IMPROPERLY RELIES ON "DESIGN FEATURES" AND NONBINDING MITIGATION MEASURES**

The County in the IS/MND suggests that following construction, revegetation of the area will occur.<sup>230</sup> However, the County fails completely to disclose the actual potentially significant impact in order for the public and decisionmakers to be able to determine whether the mitigation will actually reduce impacts. Therefore, the County improperly applies mitigation before actually disclosing the extent of the significant impact.<sup>231</sup> Furthermore, revegetation is non-binding and, as Ms. Owens suggests, unlikely to occur.<sup>232</sup>

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<sup>228</sup> Pub. Res. Code § 21080(c); 14 CCR § 15071(e).

<sup>229</sup> Owens' Comments, pp. 12-13.

<sup>230</sup> IS/MND, p. 6.

<sup>231</sup> IS/MND, p. 6.

<sup>232</sup> Owens' Comments, p. 5.



**A. Failure to Disclose Potentially Significant Impacts Prior to Mitigation.**

The County's application of mitigation to the Project's unmitigated impacts violates CEQA's requirement that the lead agency must first determine the extent of a project's impacts before it may apply mitigation measures to reduce those impacts.<sup>233</sup> Moreover, the CEQA Guidelines define "measures which are proposed by project proponents to be included in the project" as "mitigation measures" within the meaning of CEQA.<sup>234</sup>

As described under CEQA Guidelines Section 15370, "Mitigation" includes:

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

*Lotus v. Department of Transportation*<sup>235</sup> clarified the requirements of CEQA Guideline 15370. In *Lotus*, the court held that "avoidance, minimization and/or mitigation measures," are not "part of the project."<sup>236</sup> Rather, they are mitigation measures designed to reduce or eliminate environmental impacts of the Project and must be treated as such. Mitigation measures cannot be incorporated in an EIR's

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<sup>233</sup> 14 CCR § 15370; *Lotus v. Dep't of Transp.* (2014) 223 Cal.App.4th 645, 651-52.

<sup>234</sup> 14 CCR 15126.4(a)(1)(A).

<sup>235</sup> *Lotus v. Dept. of Transportation* (2013) 223 Cal.App.4th 650.

<sup>236</sup> *Id.* at 656.

initial calculation of the Project's unmitigated impacts because the analysis of unmitigated impacts, by definition, must accurately assess such impacts before any mitigation measures to reduce those impacts are applied.<sup>237</sup>

Because CEQA and *Lotus* prohibit the compressing of a mitigation measure with the Project, the IS/MND's lack of analysis of impacts caused by the Project's impacts from land disturbance, violates CEQA. The analysis should be revised to disclose the severity of all potentially significant impacts prior to mitigation.

**B. Failure to Require Enforceable Mitigation.**

**i. Proposed Revegetation Plan**

Mitigation measures must be enforceable through conditions of approval, contracts or other means that are legally binding.<sup>238</sup> This requirement is intended to ensure that mitigation measures will actually be implemented, not merely adopted and then ignored.<sup>239</sup> The IS/MND reliance on revegetation fails to meet this threshold requirement because the measures are not incorporated as binding mitigation measures for the Project. This plan will be created after the JPR process, well after project approval. As a result, the IS/MND fails to include any details or binding mechanism to ensure that the Applicant will be required to implement these measures for the Project.

**ii. Bird Diverters**

The Applicant mentioned during the November 28, 2018 Planning Commission hearing that they will install bird diverters on guy wires for meteorological towers in order to limit impact to birds. This mitigation measure was never included as a condition of the project and is not enforceable and may lead to unmitigated significant impacts.

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<sup>237</sup> *Id.*, at 651 - 52.

<sup>238</sup> PRC § 21081.6(b); 14 CCR § 15126.4(a)(2); *Lotus v. Dep't of Transp.* (2014) 223 Cal. App. 4th 645, 651-52.

<sup>239</sup> *Fed'n of Hillside & Canyon Ass'n v. City of Los Angeles* (2000) 83 Cal. App. 4th 1252, 1261; *Anderson First Coal. v. City of Anderson* (2005) 130 Cal.4th 1173, 1186.

Without an enforceable mechanism, the Restoration Plan for revegetation and installation of bird diverters may not happen, and the IS/MND's conclusions that the Project's impacts will be less than significant with these measures incorporated are unsupported. The County must include the Restoration Plan with revegetation of disturbed lands from the Project as a binding mitigation requirement.

The Bio Memorandum asserts that the public does not have evidence that mitigation measures will not be implemented.<sup>240</sup> This is an unfounded legal opinion which does not show that the Project has complied with CEQA's mandate to include binding mitigation measures.

#### **IX. THE IS/MND IMPROPERLY DEFERS MITIGATION OF SIGNIFICANT IMPACTS**

It is generally improper to defer the formulation of mitigation measures.<sup>241</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>242</sup> As the courts have explained, deferral of mitigation may be permitted only where the lead agency: (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>243</sup>

##### **A. The IS/MND Defers Mitigation of Significant Impacts for Coachella Valley Jerusalem Cricket Habitat Loss**

As noted above, the IS/MND has determined that impacts to the Coachella Valley Jerusalem Cricket are significant and that mitigation will require acquiring habitat, however there is not suitable habitat in place within the Conservation

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<sup>240</sup> Bio Memo, p. 3.

<sup>241</sup> 14 CCR § 15126.4(a)(1)(B); *POET v. CARB*, 218 Cal.App.4th at 735.

<sup>242</sup> *POET*, 218 Cal.App.4th at 738.

<sup>243</sup> *Comtys. for a Better Env't v. City of Richmond* (2010) 184 Cal.App.4th 70, 95; *Cal. Native Plant Socy' v. City of Rancho Cordova* (2009) 172 Cal.App.4th 603, 621.

Area. Properly mitigating this habitat may require future actions by USFWS and CDFW, who may not approve plans to provide mitigation. Deferral of this mitigation makes it uncertain whether habitat is available, or if the USFWS and CDFW will approve it, potentially leaving the impact unmitigated.

Mitigation will require revegetation of disturbed lands, the details which is not to be revealed until a future Restoration Plan is approved by the CVCC and County. The IS/MND says but provides no assurances that this will be completed prior to any ground disturbance.<sup>244</sup> Approval of the Restoration Plan should occur with or before project approval, not after. This future action may not occur or may be insufficient to fully mitigate the significant impacts, as required. If impacts cannot be fully mitigated, it will be too late to change the Project to reduce impacts to a less-than-significant level.

This deferral of mitigation will have impacts to the region and its workers because the Project without mitigation will exceed Rough Step for the Coachella Valley. This will prevent the County from approving any other projects that may impact the Coachella Valley Jerusalem Cricket until this mitigation is completed.<sup>245</sup>

The Bio Memorandum argues that our previous comments had no basis to allege that the County will not adhere to mitigation requirements.<sup>246</sup> First, as stated above, this is an unfounded legal opinion. Second, mitigation measures are improperly deferred when they are not formulated and not held to certain performance criteria. Without a completed JPR and Restoration Plan, it cannot be determined by the County or the public that the Project's mitigation was adequate, because the County and public would have no assurances what the mitigation measures were or what their impact would be, or whether they will actually reduce significant impacts to a less-than-significant level.

The IS/MND must be withdrawn and recirculated with appropriate mitigation measures identified and required with the project approval, not at a later time as was done here.

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<sup>244</sup> Is/MND, p. 34.

<sup>245</sup> See Coachella Valley Conservation Commission, Draft Joint Project Review (JPR) (Oct. 30, 2018), p. 3., **Exhibit G**.

<sup>246</sup> Bio Memo, p. 3.

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## X CONCLUSION

Substantial evidence supports more than a fair argument that the Project may result in potentially significant adverse public health, transportation, odor and biological resource impacts that were not identified in the IS/MND, and thus have not been adequately analyzed or mitigated. The IS/MND also fails to comply with CEQA as a matter of law. We urge the County to fulfill its responsibilities under CEQA by granting this appeal, withdrawing the IS/MND and preparing a legally adequate EIR to rectify the legal errors and address the potentially significant impacts described in this comment letter and the attached letters from Dr. Fox and Ms. Owens. This is the only way the County and the public will be able to ensure that the Project's potentially significant environmental impacts are mitigated to less than significant levels.

Sincerely,



Kyle Jones

KCJ:lj

Attachments