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March 5, 2020

**Via U.S. Mail and Electronic Mail**

Ms. Amy Dutschke, Regional Director  
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**Via Electronic Mail Only**

Harold Hall, Acting Chief  
Division of Environmental, Cultural Resource Management and Safety  
Bureau of Indian Affairs  
[Harold.hall@bia.gov](mailto:Harold.hall@bia.gov)

**Re: Comments on the Final Environmental Impact Statement for the  
Campo Wind Project with Boulder Brush Facilities**

Dear Ms. Dutschke and Mr. Hall:

We are writing on behalf of **Citizens for Responsible Wind Energy** to provide comments on the January 2020 Final Environmental Impact Statement (“FEIS”) prepared by DUDEK for the Bureau of Indian Affairs (“BIA”), pursuant to the National Environmental Policy Act (“NEPA”),<sup>1</sup> for the lease agreement between the Campo Band of Diegueño and Terra-Gen Development Company LLC (“Campo Lease”) for the Campo Wind Project with Boulder Brush Facilities (“Project”).<sup>2</sup> We

<sup>1</sup> 42 U.S.C. §§ 4321 et seq.

<sup>2</sup> Bureau of Indian Affairs, Final Environmental Impact Statement for the Campo Wind Project with Boulder Brush Facilities, (Jan. 2020), p. 1 (hereafter “FEIS”).  
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provided comments, dated July 8, 2019 on the Draft Environmental Impact Statement (“DEIS”) for the Project.<sup>3</sup>

The Project consists of approval of the Campo Lease, which proposes to develop, construct, operate and ultimately decommission a renewable energy generation facility on land within the boundary of the Campo Indian Reservation in Eastern San Diego County, California. The Campo Wind Project consists of both the Campo Wind Facilities on land within the Reservation and the Boulder Brush Facilities on adjacent private lands within the Boulder Brush Boundary. The Project includes up to 60 wind turbines, each approximately 4.2 megawatts in capacity and approximately 586 feet in total height, access roads, electrical collection and communication system, project collector substation, operations and maintenance facility, meteorological towers, water collection and septic system, temporary concrete batch plant, temporary staging areas, on-reservation portion of the generation tie line (“gen-tie line”), and boulder brush facilities, which include a portion of the gen-tie line, a high-voltage substation, a switchyard, and access roads.

As explained in these comments, the FEIS fails to comply with NEPA’s basic requirement to act as an “informational document.” It is devoid of meaningful details upon which the public and decisionmakers can adequately assess the Project’s significant impacts. The DEIS fails by (1) segmenting the Campo Wind Project from the Boulder Brush Facilities, (2) lacking a sufficient discussion of alternatives, (3) failing to describe all Project components, (4) failing to accurately describe the affected environment, and (5) not disclosing, analyzing, or discussing mitigation for Project impacts. Because of these shortcomings, the FEIS is deficient as a matter of law and its determinations that it properly identifies and mitigates the Project’s significant impacts are arbitrary and capricious, rendering the document inadequate for purposes of compliance with NEPA.

For each of these reasons, the BIA may not issue a Record of Decision (“ROD”) to approve the Project until a revised environmental review document is prepared and re-circulated for public review and comment.

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<sup>3</sup> Letter from Kyle C. Jones, Adams, Broadwell, Joseph & Cardozo to the Bureau of Indian Affairs, Comments on the Draft Environmental Impact Statement for the Campo Wind Project with Boulder Brush Facilities (Jul. 8, 2019), (hereafter “DEIS Comments”), **Exhibit A**.

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We reviewed the FEIS, its technical appendices, and the reference documents with the assistance of biologist Scott Cashen, and Phyllis Fox.<sup>4</sup> Mr. Cashen and Dr. Fox provide substantial evidence of potentially adverse effects that have not been adequately disclosed, analyzed, or mitigated. Mr. Cashen's and Dr. Fox's technical comments are attached hereto and are hereby submitted to the BIA, in addition to the comments in this letter.

## I. STATEMENT OF INTEREST

Citizens for Responsible Wind Energy is an unincorporated association of individuals and labor organizations with members who may be adversely affected by the potential public and worker health and safety hazards and environmental and public service impacts of the Project. The association includes San Diego County residents, such as Mr. Doyle Mills, and **California Unions for Reliable Energy ("CURE")** and its members and families and other individuals that live, recreate and/or work in San Diego County (collectively "Citizens").

Citizens supports the development of clean, renewable energy technology, including the use of wind power generation, where properly analyzed and carefully planned to minimize impacts on public health and the environment. Wind energy projects should avoid impacts to sensitive species and habitats, water resources, and public health, and should take all feasible steps to ensure unavoidable impacts are mitigated to the maximum extent feasible. Only by maintaining the highest standards can energy supply development truly be sustainable.

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

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<sup>4</sup> Scott Cashen, Letter from Scott Cashen to Kyle C. Jones, Comments on the Final Environmental Impact Statement for the Campo Wind Project (Mar. 3, 2019) (hereafter "Cashen Comments") **Exhibit B**; Phyllis Fox, Letter to Kyle C. Jones: Campo Wind FEIS: Response to Valley Fever Comment VF-1, (Feb. 28, 2020) (hereafter, "Fox Comments"), **Exhibit C**. Materials cited will be provided on a separate storage device in the mailing of these comments.

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The organizational members of Citizens and their members also have an interest in enforcing environmental laws that encourage sustainable development and ensure a safe working environment for the members that they represent. Environmentally detrimental projects can jeopardize future jobs by making it more difficult and more expensive for industry to expand in the County, and by making it less desirable for businesses to locate and people to live and recreate in the County, including the Project vicinity. Continued degradation can, and has, caused construction moratoriums and other restrictions on growth that, in turn, reduce future employment opportunities.

Finally, the organizational members of Citizens are concerned with projects that can result in serious environmental harm without providing countervailing economic benefits. NEPA provides a balancing process whereby economic benefits are weighed against significant impacts to the environment. It is in this spirit we offer these comments.

## II. THE FEIS FAILS TO SATISFY NEPA'S PURPOSE AND GOALS

NEPA requires that agencies take a “hard look” at the environmental consequences of a proposed action.<sup>5</sup> A hard look is defined as a “reasoned analysis containing quantitative or detailed qualitative information.”<sup>6</sup> The level of detail must be sufficient to support reasoned conclusions by comparing the amount and the degree of the impact caused by the proposed action and the alternatives.<sup>7</sup> An EIS must provide a “full and fair discussion of significant environmental impacts and shall inform the decision-makers and the public of the reasonable alternatives that would avoid or minimize adverse impacts or enhance the quality of the human environment.”<sup>8</sup> “General statements about ‘possible’ effects and ‘some risk’ do not

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<sup>5</sup> *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989); *Dubois v. U.S. Dep't of Agric.*, 102 F.3d 1273, 1284 (1st. Cir. 1996); see also *South Fork Band Council Of Western Shoshone Of Nevada v. U.S. Dept. of Interior*, 588 F.3d 718, 727 (9th Cir. 2009) [“NEPA requires that a hard look be taken, if possible, *before* the environmentally harmful actions are put into effect”].

<sup>6</sup> BIA, Indian Affairs National Environmental Policy Act (NEPA) Guidebook, (Aug. 2012), p. 19 (hereafter “NEPA Guidebook”).

<sup>7</sup> See 40 C.F.R. § 1502.1.

<sup>8</sup> 40 C.F.R. § 1502.1.

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constitute a ‘hard look’ absent a justification regarding why more definitive information could not be provided.”<sup>9</sup> “[L]ack of knowledge does not excuse the preparation of an EIS; rather it requires [the agency] to do the necessary work to obtain it.”<sup>10</sup>

NEPA review makes information on the environmental consequences of a proposed action available to the public, which may then offer its insight to assist the agency’s decision-making.<sup>11</sup> An EIS is more than just a disclosure device, however; it is an “action-forcing device” which ensures that NEPA’s requirements are infused into the ongoing programs and actions of the federal government.<sup>12</sup> An EIS must provide a full and fair discussion of every significant impact, as well as inform decision-makers and the public of reasonable alternatives which would avoid or minimize adverse impacts.<sup>13</sup> The impacts analysis must include a discussion of the relationship between short-term uses of the environment and the maintenance and enhancement of long-term productivity, and any irreversible or irretrievable commitments of resources which would be involved in the proposal should it be implemented.<sup>14</sup> The discussion of impacts must include both “direct and indirect effects (secondary impacts) of a proposed project.”<sup>15</sup> The agency need not speculate about all conceivable impacts, but it must evaluate the reasonably foreseeable significant effects of the proposed action.<sup>16</sup> In this context, reasonable foreseeability means that “the impact is sufficiently likely to occur that a person of ordinary prudence would take it into account in reaching a decision.”<sup>17</sup>

In addition to a scientifically defensible analysis of project impacts, an EIS must also include a discussion of “appropriate mitigation measures not already included in the proposed action or alternatives.”<sup>18</sup> An EIS is not complete unless it contains “a reasonably complete discussion of possible mitigation measures.”<sup>19</sup>

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<sup>9</sup> *Neighbors of Cuddy Mountain v. U.S. Forest Service*, 137 F.3d 1372, 1380 (9th Cir. 1998).

<sup>10</sup> *National Parks & Conservation Association v. Babbitt*, 241 F.3d 722, 733 (9th Cir. 2001), *abrogated on other grounds by Monsanto Co. v. Geertson Seed Farms*, 2010 WL 2471057, 12 (U.S.) (U.S., 2010) [An injunction should issue only if the traditional four-factor test is satisfied].

<sup>11</sup> *See Robertson*, 490 U.S. at 350; *Dubois*, 102 F.3d at 1284.

<sup>12</sup> 40 C.F.R. § 1502.1.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at § 1502.16.

<sup>15</sup> *Id.* at § 1502.16 subd. (b); *see also Sierra Club v. Marsh*, 976 F.2d 763, 767 (1st Cir. 1992).

<sup>16</sup> *Sierra Club v. Marsh*, 976 F.2d at 767.

<sup>17</sup> *Id.*; *see also Dubois v. Dept. of Agriculture*, 102 F.3d 1273, 1286 (1st Cir. 1996).

<sup>18</sup> 40 C.F.R. § 1502.14 subd. (f).

<sup>19</sup> *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 352 (1989).

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Mitigation includes “avoiding the impact altogether by not taking a certain action or parts of an action.”<sup>20</sup> It also includes “minimizing impacts by limiting the degree or magnitude of the action and its implementation.”<sup>21</sup> The mandate to thoroughly evaluate all feasible mitigation measures is critical to NEPA’s purposes.<sup>22</sup> Hence, a “perfunctory description” or a “mere listing” of possible mitigation measures is not adequate to satisfy NEPA’s requirements.<sup>23</sup> The fact that individual harms are somewhat uncertain due to limited understanding of the Project characteristics and baseline conditions does not relieve BIA of the responsibility under NEPA to discuss mitigation of reasonably likely impacts at the outset.<sup>24</sup>

Finally, an EIS should be “concise, clear, to the point, and supported by evidence that the agency has made the necessary environmental analyses.”<sup>25</sup> A concise and clear EIS that is supported by evidence ensures that federal agencies are informed of environmental consequences *before* making decisions and that the information is available to the public.<sup>26</sup> As the Council on Environmental Quality (“CEQ”) explains in its regulations, “[e]nvironmental impact statements shall serve as the means of assessing the environmental impact of proposed agency actions, rather than justifying decisions already made.”<sup>27</sup>

The FEIS for the proposed Project fails to comply with these basic requirements. The FEIS inappropriately segments the Project and fails to include a robust discussion of alternatives. In addition, the BIA fails to take a hard look at all of the Project’s impacts. As a result, the FEIS precludes a meaningful analysis of the Project, and the BIA cannot issue an ROD without first correcting these fatal flaws.

### III. THE FEIS FAILS AS AN INFORMATIONAL DOCUMENT

The purpose of NEPA is to ensure that every federal agency prepares an EIS for major federal actions significantly affecting the quality of the human

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<sup>20</sup> 40 C.F.R. § 1508.20 subd. (a).

<sup>21</sup> *Id.* at subd. (b).

<sup>22</sup> *Id.* at § 1500.1 subd. (c.)

<sup>23</sup> *Neighbors of Cuddy Mountain*, 137 F.3d at 1380; *Idaho Sporting Cong. v. Thomas*, 137 F.3d 1146, 1151 (9th Cir. 1998).

<sup>24</sup> *See South Fork Band Council of Western Shoshone of Nevada*, 588 F.3d at 727, citing *National Parks*, 241 F.3d at 733.

<sup>25</sup> *Id.*

<sup>26</sup> *Inland Empire Pub. Lands Council v. U.S. Forest Serv.*, 88 F.3d 754, 758 (9th Cir. 1996).

<sup>27</sup> 40 C.F.R. § 1502.2 subd. (g).

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environment.<sup>28</sup> An EIS must provide a “full and fair discussion of significant environmental impacts and shall inform the decision-makers and the public of the reasonable alternatives that would avoid or minimize adverse impacts or enhance the quality of the human environment.”<sup>29</sup>

The FEIS fails to properly describe the Project, adequately describe the existing environmental setting, and address the magnitude of the impacts that will be posed by this Project. The Project’s construction and operation will cause numerous significant impacts to species. Many of these impacts were not identified, disclosed, analyzed, or mitigated in the FEIS.

The FEIS fails to provide all information to inform the public and decision-makers of the Project’s impacts by leaving out discussions of entire species that could be impacted by its construction and operation. The BIA cannot issue a ROD for the Project until these issues are addressed.

#### **IV. THE FEIS FAILS TO RESPOND TO COMMENTS**

NEPA requires a lead agency to respond to comments provided on the DEIS in the FEIS.<sup>30</sup> Responses must include modification of alternatives, consideration of new alternatives, improvements in the analysis, factual corrections, or an explanation as to why the comments do not require a response.<sup>31</sup> The FEIS fails to respond to some comments that we raised in comments on the DEIS. Other responses are factually incorrect, or inconsistent with the rest of the FEIS. We raise these issues throughout the document where they have occurred.

#### **V. THE FEIS MUST ACCURATELY DESCRIBE THE PROPOSED ACTION**

A complete and consistent description of the proposed action is necessary for the public and decision-makers to understand the effects of the proposed action.<sup>32</sup> A clear description results in more focused and meaningful public input and BIA

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<sup>28</sup> 42 U.S.C. § 4332; 40 C.F.R. § 1501.

<sup>29</sup> 40 C.F.R. § 1502.1.

<sup>30</sup> 40 C.F.R. § 1503.4.

<sup>31</sup> 40 C.F.R. § 1503.4

<sup>32</sup> See 40 C.F.R. § 1502.15; see also *State of Cal. v. Block*, 690 F.2d 753, 761 (9th Cir. 1982) [starting point for analysis of whether a “critical decision” with respect to site development is “to describe accurately the ‘federal action’ being taken”].

participation, a more complete identification of issues, development of reasonable alternatives, sound analysis and interpretation of effects, focused analysis, and a sound and supportable decision.<sup>33</sup>

It follows that information in the FEIS that is incomplete and/or inaccurate will skew the environmental consequences analysis and prevent informed public input. Courts have held that “[w]here the information in the initial EIS was so incomplete or misleading that the decisionmaker and the public could not make an informed comparison of the alternatives, revision of an EIS [was] necessary to provide a reasonable, good faith, and objective presentation of the subjects required by NEPA.”<sup>34</sup>

Finally, where mitigation measures would, themselves, cause significant environmental impacts, NEPA requires an evaluation of those secondary (indirect) impacts.<sup>35</sup>

**A. The FEIS Fails to Adequately Respond to Issues Raised on the DEIS Relating to Project Description**

We commented that the DEIS failed to include a map of all the access roads that would be constructed or modified for the Project, failed to depict the location of where meteorological towers are located, failed to disclose the route of the proposed water line for the Operations and Maintenance Facility, failed to include a grading plan, and only describes decommissioning of the Project in vague terms.<sup>36</sup> The FEIS responds to these comments generally by stating that the FEIS overstated total disturbance limits by considering 76 turbines, while the Project will only consist of 60 turbines.<sup>37</sup> This response fails to capture the nature of our comments, which were that these various activities could have different impacts depending on their location, and that those impacts must be disclosed as part of the NEPA process. For example, Mr. Cashen provides evidence that meteorological towers can increase impacts to bat and avian mortality when those towers are located near turbines, as they can attract species to them.<sup>38</sup> These impacts were not disclosed and cannot be

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<sup>33</sup> 40 C.F.R. § 1508.14.

<sup>34</sup> *Natural Res. Def. Council v. U.S. Forest Serv.*, 421 F.3d 797, 811 (9th Cir. 2005), citing *Animal Def. Council v. Hodel*, 840 F.2d 1432, 1439 (9th Cir. 1988).

<sup>35</sup> 40 C.F.R. § 1502.16(h).

<sup>36</sup> DEIS Comments, pp. 9-11.

<sup>37</sup> FEIS, pp. RTC-7-RTC-9, RTC-83-RTC-84.

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assessed without discussing possible locations for the meteorological towers within the FEIS.<sup>39</sup> Additionally, Mr. Cashen notes that access roads and a water line will require impacts along specific routes that could harm sensitive vegetation or habitat based on location.<sup>40</sup> These routes can and should have been disclosed and analyzed, yet the FEIS fails to do so and fails to fulfil its duty under NEPA to take a hard look at environmental impacts from the Project.

### **B. Campo Lease and Changes to Tribal Laws**

The Project itself includes the approval of the Campo Lease, which only applies some tribal law to the Project.<sup>41</sup> The FEIS fails to disclose which tribal laws are waived for the Project in the Campo Lease. The FEIS must explain these changes so that the public and decision-makers can determine whether they would have an impact on the environment.

The FEIS fails to describe several components of the Project, which is necessary for the public and decision-makers to understand the effects of the Project. Therefore, the FEIS fails to serve its purpose as an informational document.

## **VI. THE FEIS FAILS TO CONSIDER A REASONABLE RANGE OF ALTERNATIVES**

### **A. The Purpose and Need Statement is Arbitrarily Narrow and Precludes a Sufficient Alternatives Analysis**

An EIS must briefly describe the underlying purpose and need to which the agency is responding in proposing the alternatives, including the Proposed Action.<sup>42</sup> The BIA's NEPA Guidebook mandates that the EIS must address the purpose and need of the action.<sup>43</sup> The "need" for the action is the underlying issue the BIA is addressing with the action.<sup>44</sup> Clearly distinguishing the purpose and the need clarifies for the public and decision-makers why the agency is proposing to spend large amounts of taxpayers' money, while at the same time causing significant

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<sup>39</sup> Cashen Comments, pp.4-5.

<sup>40</sup> Cashen Comments, p. 5.

<sup>41</sup> FEIS, p. C-1.

<sup>42</sup> 40 C.F.R. § 1502.13.

<sup>43</sup> 40 C.F.R. § 1502.13.

<sup>44</sup> NEPA Guidebook, p. 18.

environmental impacts.<sup>45</sup> The Ninth Circuit explains that “an agency cannot define its objectives in unreasonably narrow terms,” and other courts have found that an unreasonably narrow objective renders an EIS a foreordained formality due to a lack of robust alternatives.<sup>46</sup>

While the courts have given agencies deference to define the purpose and needs of a project, that deference is not unlimited.<sup>47</sup> A statement of purpose and need must meet a reasonableness standard.<sup>48</sup> The statutory objectives of an action serve as a guide to determine reasonableness of a statement of purpose and need.<sup>49</sup> We previously commented that the DEIS’ purpose and need statement was impermissibly narrow.<sup>50</sup> The BIA has subsequently revised the purpose and need statement for the FEIS, yet many flaws with the purpose and need statement remain.

a. The FEIS’ Purpose and Need Statement

The FEIS states that the purpose and need of the Project is to “utilize readily available wind resources on the reservation to develop economic income to support needed governmental programs” and that the purpose and need of the BIA’s proposed action is to authorize the Campo Lease.<sup>51</sup> These arbitrarily narrow purpose and need statements prevent any alternative that is neither a wind energy project nor a project consistent with the Campo Lease from being discussed and promotes the developer’s objectives over NEPA’s requirements to inform decision-makers about a reasonable range of alternatives. By limiting purpose and need statements in these ways, the BIA distorts the EIS from an analytical tool to allow the public to weigh impacts of a proposed action into a rubber-stamped document to satisfy a developer’s needs. It is unreasonable to narrow the statement to one that precludes any action other than what is in the proposed lease. In doing so, the BIA is wasting taxpayer resources with nothing to gain from the analysis.

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<sup>45</sup> Ronald E. Bass et al., *The NEPA Book* 89 (2d. ed. 2001).

<sup>46</sup> *National Parks & Conservation Ass’n v. Bureau of Land Management*, 606 F.3d 1058 (9th Cir. 2010), quoting *City of Carmel-By-The-Sea v. United States Dep’t. of Transp.*, 123 F.3d 1142, 1155 (9th Cir. 1997); *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 198 (D.C. Cir. 1991).

<sup>47</sup> *Westlands Water Dist. v. U.S. Dept. of Interior*, 376 F.3d 853, 866 (9th Cir. 2004).

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> DEIS Comments, pp. 11-13.

<sup>51</sup> FEIS, p. 1.

b. The FEIS' Characterization of the Purpose and Need Statement for the Campo Lease is Impermissibly Narrow

The FEIS's purpose and need statement that describes the Campo Lease states that it is for a wind project only. This narrow statement leads to only a configuration of wind turbines being analyzed within the FEIS. It ignores the broader need for renewable energy generation, which may be wind, but could also be solar, for example. The Project is proposed to be located in a region with other renewable energy resources, such as solar. By limiting the analysis to wind projects only, the FEIS rejects other alternatives as infeasible without determining their impacts. Instead of explaining whether a solar farm generating an equivalent amount of energy would have more or less adverse impacts, the BIA leaves the public wholly in the dark.

c. The FEIS' Purpose and Need Statement for the BIA is Impermissibly Narrow

The DEIS attempts to justify a narrow purpose and need statement by suggesting that "in reviewing a proposed lease, the BIA will defer to the landowners' determination that the lease is in their best interest to the maximum extent possible."<sup>52</sup> A lead agency's statement of purpose and need is governed by reasonableness.<sup>53</sup> Generally, NEPA requires a lead agency to consider reasonable alternatives that are not within the jurisdiction of the lead agency, and the CEQ interprets its regulations to require the scope of alternatives for permit decisions to be based on reasonableness, rather than applicant preference.<sup>54</sup> In one instance, the Ninth Circuit has held that the Army Corps of Engineers ("ACOE") purpose and need statement was proper where it only considered the applicant's preference where ACOE regulations required the EIS to be limited to alternatives that meet the applicants purpose and need.<sup>55</sup> The BIA's regulations for lease approval do not similarly constrain the NEPA requirements for the BIA to only consider an applicant's preferences where it would be reasonable to consider other Projects. Therefore, the BIA is required to consider reasonable alternatives that are not

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<sup>52</sup> DEIS, p. 1.

<sup>53</sup> *Friends of Southeast's Future v. Morrison* (9th Cir. 1998) 153 F.3d 1059, 1066-1067; *National Parks & Conservation Ass'n v. Bureau of Land Management* (9th Cir. 2010) 606 F.3d 1058, 1070-1072.

<sup>54</sup> 40 C.F.R. § 1502.14 subd. (c); CEQ, *Forty Most Asked Questions Concerning CEQ's NEPA Regulations* (1981), question No. 2(a), 46 Fed.Reg. 18026, 18027 (March 23, 1981).

<sup>55</sup> *National Parks & Conservation Ass'n v. Bureau of Land Management* (9th Cir. 2010) 606 F.3d 1058, 1070-1071 (quoting *City of Angoon v. Hodel* (9th Cir. 1986) 803 F.2d 1016, 1021. 4646-016j

within the jurisdiction of the lead agency and a scope of alternatives based on reasonableness, rather than applicant preference.

i. 25 U.S.C. § 415 (a) Does Not Provide Statutory Objectives to Limit the Purpose and Need Statement to the Applicant's Preference

The FEIS states that the BIA must determine that adequate consideration has been given to the factors of 25 U.S.C. § 415 (a), the federal statute for leasing restricted Indian lands. This section requires that consideration be given to “the relationship between the use of the leased lands and the use of neighboring lands; the height, quality, and safety of any structures or other facilities to be constructed on such lands; the availability of police and fire protection and other services; the availability of judicial forums for all criminal and civil causes arising on the leased lands; and the effect on the environment of the uses to which the leased lands will be subject.”<sup>56</sup> The statutory objectives include a requirement that the Secretary perform a robust analysis of a range of topics that are typically covered in an EIS. Likewise, the purpose and need statement of an EIS should be as broad as reasonably possible to ensure that adequate consideration of the factors of 25 U.S.C. § 415(a) are met, instead of the narrow statement relied on in the FEIS. By failing to do so, the BIA has failed to comply with the leasing statute and NEPA.

ii. 25 CFR § 162.566 Does Not Preclude Considering Other Alternatives

The FEIS states that BIA regulations require the agency to defer to interests of a tribe when deciding whether to approve a lease for a wind project.<sup>57</sup> The FEIS does not provide any authority as to why this regulation allows the BIA to reject reasonable alternatives to the Project in the FEIS. This is easily distinguishable from the ACOE regulations, mentioned above, which required the ACOE's EIS' to be limited to alternatives that meet an applicant's purpose and need. Here, the BIA only defers to tribal judgement, to the maximum extent possible. The BIA cannot interpret its regulations to nullify other mandates from Congress. The maximum extent possible must be limited by the BIA's statutory obligations under NEPA to consider a full range of alternatives.

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<sup>56</sup> 25 U.S.C. § 415 subd. (a).

<sup>57</sup> FEIS, p. RTC-72; 25 CFR § 162.566.  
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The FEIS' purpose and need statement is unreasonably narrow, precluding discussion of a reasonable range of alternatives, which were summarily rejected in the FEIS. The FEIS should have instead considered the impacts of the rejected alternatives to provide the public with information about their environmental impacts. The BIA would still be able to reject these alternatives in the FEIS, without robbing the public and decision-makers of the information about their impacts. This omission renders the FEIS' alternatives analysis arbitrary and capricious. A revised purpose and need statement, focused on the purpose and need of a renewable energy project, is required for the FEIS to comply with NEPA.

### **B. Reasonable Alternatives Omitted from Analysis**

Under NEPA, federal agencies must consider alternatives to their proposed actions, as well as their environmental impacts.<sup>58</sup> The alternatives analysis has been called the “linchpin” of the Environmental Impact Statement.<sup>59</sup>

An EIS must “[r]igorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated.”<sup>60</sup> It is “absolutely essential to the NEPA process that the decisionmaker be provided with a detailed and careful analysis of the relative environmental merits and demerits of the proposed action and possible alternatives, a requirement that courts have characterized as ‘the linchpin of the entire impact statement.’”<sup>61</sup> This is particularly true in cases where there may be “unresolved conflicts concerning alternative uses of available resources.”<sup>62</sup>

The alternative discussion must include not only primary alternatives, *i.e.*, substitutes for the agency's proposed action that accomplish the action in another manner, but also secondary alternatives, which are means of carrying out the action in a different manner.<sup>63</sup> The range of alternatives to be discussed is governed by a

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<sup>58</sup> 40 CFR § 1502.14.

<sup>59</sup> *Monroe County Conservation Council, Inc. v. Volpe* (2d Cir. 1972) 472 F.2d 693.

<sup>60</sup> 40 C.F.R. § 1502.14 sub.d (a).

<sup>61</sup> *NRDC v. Callaway*, 524 F.2d 79, 92 (2d Cir. 1975) (citation omitted); *see Silva v. Lynn*, 482 F.2d at 1285; *All Indian Pueblo Council v. United States*, 975 F.2d 1437, 1444 (10th Cir. 1992) [a thorough discussion of the alternatives is “imperative”].

<sup>62</sup> *See* 42 U.S.C. § 4332 subd. (2)(E); *California v. Block*, 690 F.2d 753, 766-767 (9th Cir. 1982).

<sup>63</sup> *See Methow Valley Citizens Council v. Regional Forester*, 833 F.2d 810 (9th Cir. 1987), *rev'd on other grounds*, 490 U.S. 332 (1989); *see also Mandelker, NEPA Law and Litigation* (2d ed., rel. 8, 2000).

“rule of reason.” Agencies have a duty “to study all alternatives that appear reasonable and appropriate for study . . . , as well as significant alternatives suggested by other agencies or the public during the comment period.”<sup>64</sup>

Reasonable alternatives are those that may be feasibly carried out based on technical, economic, environmental, and other factors. It is well established that an alternative is not infeasible merely because the project proponent does not like it or is not capable of implementing it.<sup>65</sup> “The ‘existence of a viable but unexamined alternative renders an environmental impact statement inadequate.’”<sup>66</sup>

Alternatives outside of an agency jurisdiction must still be analyzed if they are reasonable, as the EIS may serve as a basis for modifying implementing policies.<sup>67</sup>

If an EIS is prepared in connection with an application for a permit or other federal approval, the EIS must rigorously analyze and discuss alternatives that are “reasonable.” “Reasonable alternatives include those that are practical or feasible from the technical and economic standpoint and using common sense, rather than simply desirable from the standpoint of the applicant.”<sup>68</sup> Courts have shown little reluctance in striking down EISs that fail to include a thorough discussion of reasonable, less environmentally damaging alternatives.<sup>69</sup> Finally, an EIS must include a discussion of “natural or depletable resource requirements *and conservation potential of various alternatives and mitigation measures.*”<sup>70</sup>

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<sup>64</sup> *Roosevelt Campobello Int'l Park Comm'n v. United States EPA*, 684 F.2d 1041, 1047 (1st Cir. 1982) (quotations omitted); *City of Carmel-By-The-Sea v. U.S. Dept. of Transp.*, 95 F.3d 892, 903 (9th Cir. 1996).

<sup>65</sup> See CEQ, *Forty Most Asked Questions Concerning CEQ's NEPA Regulations* (1981), question No. 2(a), 46 Fed.Reg. 18026, 18027 (March 23, 1981).

<sup>66</sup> *Resources Ltd. v. Robertson*, 35 F.3d 1300, 1307 (9th Cir. 1993), quoting *Idaho Conservation League v. Mumma*, 956 F.2d 1508, 1519 (9th Cir. 1992); see *Grazing Fields Farm v. Goldschmidt*, 626 F.2d 1068, 1072 (1st Cir. 1980) [Even the existence of supportive studies and memoranda contained in the administrative record but not incorporated in the EIS cannot “bring into compliance with NEPA an EIS that by itself is inadequate”].

<sup>67</sup> See *Forty Most Asked Questions Concerning CEQ's [NEPA] Regulations at Question 2a*.

<sup>68</sup> *Forty Most Asked Questions Concerning CEQ's [NEPA] Regulations at Question 2a*.

<sup>69</sup> See, e.g., *Marble Mountain Audubon Society v. Rice*, 914 F.2d 179 (9th Cir. 1990); *Dubois v. U.S. Dept. of Agriculture*, 102 F.3d 1273 (1st Cir. 1996).

<sup>70</sup> 40 C.F.R. § 1502.16 subd. (f), emphasis added.  
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1. The FEIS Improperly Eliminated Primary Alternatives Due to the Impermissibly Narrow Purpose and Need Statement

The FEIS' reliance on an impermissibly narrow purpose and need statement improperly caused the BIA to dismiss numerous alternatives without completing the evaluation required by NEPA. All primary alternatives were rejected by the BIA due to claimed infeasibility.

The FEIS eliminates a mixed solar and wind alternative, suggesting that the developer would not be willing to develop solar.<sup>71</sup> This violates NEPA's requirement that alternatives cannot be deemed infeasible simply because the project proponent does not like it or cannot implement it.<sup>72</sup> The FEIS could and should have evaluated a solar project or a mixed solar and wind project in order to present the public with an understanding as to what levels of impacts would occur. For example, generation of an equivalent level of solar energy would likely cause more ground disturbance and impacts to some species, while impacting birds in a different way than wind. The FEIS' rejection of this alternative and failure to provide further evaluation of this alternative violates NEPA.

The FEIS includes an impermissibly narrow purpose and need statement and improperly rejects viable alternatives as infeasible in violation of NEPA. Courts have routinely rejected an EIS when it contains too few alternatives, like the one alternative in this FEIS.<sup>73</sup> The FEIS here improperly narrows the purpose and need statement to fit within the BIA's jurisdiction and improperly tailors secondary alternatives to the developer's interests. The FEIS must be withdrawn and recirculated with feasible alternatives that are designed to actually reduce environmental effects so that decision-makers and the public can truly evaluate the Project, as required by NEPA.

**VII. THE FEIS IMPERMISSIBLY SEGMENTS THE CAMPO WIND PROJECT FROM THE BOULDER BRUSH FACILITIES**

The FEIS impermissibly segments the Campo Wind Project from the off-reservation Boulder Brush Facilities by failing to fully analyze those facilities in the

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<sup>71</sup> DEIS, p. 24.

<sup>72</sup> See CEQ, *Forty Most Asked Questions Concerning CEQ's NEPA Regulations* (1981), question No. 2(a), 46 Fed.Reg. 18026, 18027 (March 23, 1981).

<sup>73</sup> *Natural Resources Defense Council v. Evans* (N.D. Cal 2002) 232 F.Supp. 1003, 1039-1040. 4646-016j

FEIS. Under NEPA, federal agencies must analyze and disclose the impacts of major Federal actions. Major Federal actions include not only those actions undertaken by federal agencies, but also “actions with effects that may be major and which are potentially subject to Federal control and responsibility.”<sup>74</sup> This includes “projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies . . . .”<sup>75</sup> Thus, when evaluating a project’s environmental impacts under NEPA, a federal agency must consider the entire project. “Proposals or parts of proposals which are related to each other closely enough to be, in effect, a single course of action shall be evaluated in a single impact statement.”<sup>76</sup> This principle was established early in the development of NEPA law and applies even when the federal involvement is limited to approving a relatively small aspect of the project.<sup>77</sup>

The FEIS must address closely related “connected actions,” as well as similar actions and cumulative actions.<sup>78</sup> Under NEPA, actions are connected if they:

- (i) Automatically trigger other actions which may require environmental impact statements.
- (ii) Cannot or will not proceed unless other actions are taken previously or simultaneously.
- (iii) Are interdependent parts of a larger action and depend on the larger action for their justification.<sup>79</sup>

In requiring agencies to analyze these types of actions in the same environmental review document, the agency is prevented from segmenting the project into multiple individual actions, each of which would have an insignificant impact, but collectively would have a significant one.<sup>80</sup>

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<sup>74</sup> 40 C.F.R. § 1508.18.

<sup>75</sup> *Id.* at § 1508.18, subd. (a).

<sup>76</sup> *Id.* at § 1502.4, subd. (a).

<sup>77</sup> *E.g., Maryland Conservation Council, Inc. v. Gilchrist*, 808 F.2d 1039, 1042 (4th Cir. 1986); *Sierra Club v. Hodel*, 544 F.2d 1036, 1040-41 (9th Cir. 1976); *Cady v. Morton*, 527 F.2d 786, 795 (9th Cir. 1975).

<sup>78</sup> 40 CFR §1508.25(a).

<sup>79</sup> *Id.* at §1508.25(a)(1).

<sup>80</sup> *Kentucky Coal Ass’n, Inc. v. Tennessee Valley Authority* (W.D. Ky. 2014) 68 F.Supp.3d 685, 697 (citing *Delaware Riverkeeper Network*, 753 F.3d at 1314 (citing *NRDC v. Hodel*, 865 F.2d 288, 297 (D.C.Cir.1988))



Multiple tests have evolved in the courts for determining whether projects were impermissibly segmented pursuant to NEPA and CEQ regulations. One test looks at whether the segments have independent utility from each other, such that it would be irrational or unwise to undertake one project without the other.<sup>81</sup> Another test looks at whether one segment coerces another segment.<sup>82</sup> A highway segment to nowhere necessarily coerces another segment, as the point of a highway is to connect to some other logical place.<sup>83</sup>

Wind turbines serve no independent utility absent supporting facilities that connect the turbines to the electrical grid. Similarly, a gen-tie line to nowhere has no purpose. It would be completely irrational to undertake either project without the other. Similarly, the presence of a wind farm necessarily coerces the development of facilities to connect that power plant to a logical place, which is the electrical grid to allow the public to use the power. Thus, under either test, the wind turbines and gen-tie line and all related facilities are connected actions pursuant to NEPA and the CEQ regulations and must be considered in a single EIS.

The FEIS notes that the Project and Boulder Brush Facilities are connected actions, but the FEIS fails to adequately discuss impacts within the Boulder Brush Corridor. We commented that the DEIS erroneously states that there are no federally listed plants or wildlife off-reservation, improperly limiting the analysis where the Boulder Brush Facilities are located.<sup>84</sup> Responses to comments noted that Quino checkerspot butterfly (Quino) were detected within the Boulder Brush Corridor during 2019 studies, yet the FEIS continues to state that there are no impacts to Quino within the Boulder Brush Corridor and that no endangered species are present.<sup>85</sup>

The FEIS fails to properly consider the Boulder Brush Facilities, which are connected actions. The BIA cannot issue a ROD for the Project until these flaws are addressed.

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<sup>81</sup> *Jackson County, NC v. Federal Energy Regulatory Comm'n* (D.C. Cir. 2009) 589 F.3d 1284, 1290; *Sierra Club v. Babbitt* 69 F.Supp.2d 1202, 1230 (E. D. Cal. 1999); *Trout Unlimited v. Morton* (9th Cir. 1974) 509 F.2d 1276, 1285.

<sup>82</sup> *Citizens against the Destruction of Napa v. Lynn* 391 F.Supp. 1188, 1193-1194 (N.D. Cal. 1975).

<sup>83</sup> *Id.* at 1194.

<sup>84</sup> FEIS, p. RTC-74.

<sup>85</sup> Cashen Comments, p. 2.

## **VIII. THE FEIS FAILS TO ADEQUATELY DESCRIBE THE AFFECTED ENVIRONMENT**

The BIA must analyze the Project's impacts on the affected environment.<sup>86</sup> The FEIS must contain a description of the environment that will be affected by the Project and alternatives in order to understand their impacts.<sup>87</sup>

Once a project begins, the "pre-project environment" becomes a thing of the past, thereby making evaluation of the project's effect on pre-project resources impossible.<sup>88</sup> Without establishing the baseline conditions which exist in the vicinity of the proposed Project before it is built, there is simply no way to determine what effect the proposed Project will have on the environment and, consequently, no way to comply with NEPA.<sup>89</sup>

An accurate description of the affected environment is an essential prerequisite for an adequate analysis of Project impacts. For example, information on the type(s) and level(s) of habitat disturbance in the Project area is necessary to make inferences about the presence, abundance, and distribution of the special-status species that may be impacted by the Project. Here, however, some critical baseline information is incomplete, outdated, or was never provided.

### **A. The FEIS Fails to Adequately Describe the Affected Environment for Biological Resources**

The FEIS fails to accurately and adequately describe the area affected for numerous biological resources. Without an accurate description of the affected environment, there is no way to determine the Project's impacts to biological resources and, therefore, no way to apply appropriate mitigation for those impacts. To comply with NEPA, the FEIS must be revised to include accurate and complete descriptions of baseline conditions.

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<sup>86</sup> NEPA Guidebook, p. 33.

<sup>87</sup> NEPA Guidebook, p. 33.

<sup>88</sup> *Half Moon Bay Fishermans' Marketing Ass'n v. Carlucci* 857 F.2d 505, 510 (9th Cir. 1988), citing *LaFlamme v. FERC*, 842 F.2d 1063, 1071 (9th Cir. 1988).

<sup>89</sup> *Id.*

## 1. Quino Checkerspot Butterfly

Habitat discussion in the FEIS for the Quino was based on a habitat model developed by DUDEK. This model included hilltops, ridgelines, and 200-meter buffers around Quino sightings and certain numbers of host plants as habitat.<sup>90</sup> We provided comments calling into question this model, which was also raised by the United States Fish and Wildlife Service (“USFWS”).<sup>91</sup> Responses to comments suggest that the model was modified based on comments by USFWS, yet the figures cited as depicting the revised model correspond to bird surveys, not the Quino.<sup>92</sup> In fact, no revised habitat model data is presented in the FEIS.<sup>93</sup> The FEIS fails to meet its duty under NEPA to adequately respond to comments raised by suggesting that is the BIA amended the FEIS in response, even though the BIA did not actually do so.

Mr. Cashen’s review of any updated figures find that habitat models used in the FEIS contradict the description of how they were calculated, and some figures contradict each other.<sup>94</sup> The habitat model does not depict any habitat outside of the Project footprint, making it impossible for the BIA and the public to determine how the Quino could be indirectly impacted by the Project.<sup>95</sup> Figures depicting impacts of the Project also conflict with each other and fail to reflect the revised one-kilometer buffer for determining habitat thus underestimating total habitat affected by the Project.<sup>96</sup>

The habitat model for Quino relies on survey data to accurately map habitat, yet numerous areas of the Project site were never surveyed. Mr. Cashen notes that studies in 2018 did not cover the entirety of the Project site.<sup>97</sup> The FEIS continues to rely primarily on surveys from 2011 and 2012 which the authors of those studies admit did not follow USFWS guidelines and erroneously omitted habitat.<sup>98</sup> In response, the BIA provided further surveys in 2019 for the FEIS which found five instances of Quino, including in the Boulder Brush Corridor, but did not change any

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<sup>90</sup> Cashen Comments, p. 7.

<sup>91</sup> Cashen Comments, p. 7.

<sup>92</sup> Cashen Comments, pp. 7-8.

<sup>93</sup> Cashen Comments, pp. 7-8.

<sup>94</sup> Cashen Comments, pp. 8-9.

<sup>95</sup> Cashen Comments, p. 9.

<sup>96</sup> Cashen Comments, p. 9.

<sup>97</sup> Cashen Comments, pp. 9-10.

<sup>98</sup> Cashen Comments, pp 9-10.

of the analysis or conclusions in the FEIS.<sup>99</sup> This is inconsistent with the FEIS, which continues to state that there are no adverse impacts to the Quino and that no Quino are present in the Boulder Brush Corridor.<sup>100</sup> The FEIS failed to respond to comments that studies were inadequate by stating that further studies confirmed the results, while a) not actually incorporating those studies into the model properly (since a one-kilometer buffer was not applied), and b) failing to change any conclusions in the FEIS despite relying on studies that contradict it.

The habitat model also reduces the amount of habitat identified in the earlier 2011 and 2012 studies based on results from the 2018 study.<sup>101</sup> Mr. Cashen notes that the 2018 study did not cover the entire Project site.<sup>102</sup> Mr. Cashen found that the FEIS' reduction of suitable habitat for Quino from 3,803.1 acres to 1,216 acres remains unsupported by any evidence.<sup>103</sup>

The FEIS contains a process for excluding areas that are potential habitat, based on modeling, but continues to exclude large areas that the BIA already found to be suitable habitat that should not have been subject to the BIA's exclusion process.<sup>104</sup> The FEIS also states that areas excluded by only the 2012 or 2018 and 2019 models were still considered to be suitable habitat, yet those models did not cover the entire Project area, including areas outside the Project site.<sup>105</sup> Later in the FEIS, the BIA stated that areas identified as potential habitat in the 2012 models, but excluded in the 2018 and 2019 models, would not be counted.<sup>106</sup> Additionally, the authors of the 2012 models eventually noted that they improperly excluded habitat.<sup>107</sup> The FEIS states that there are few differences between the exclusion areas, which conflicts with data provided showing large portions of suitable habitat from the 2012 models excluded in the 2018 and 2019 models.<sup>108</sup> In responding to these issues, the FEIS states that no exclusion areas consisted of known Quino locations but maps from the 2012 model show areas where Quino were identified that were excluded by the 2018 and 2019 modeling efforts.<sup>109</sup> The

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<sup>99</sup> FEIS, pp. 38, RTC-92-RTC-93.

<sup>100</sup> Cashen Comments, p. 2.

<sup>101</sup> Cashen Comments, p. 11.

<sup>102</sup> Cashen Comments, pp. 11-12.

<sup>103</sup> Cashen Comments, pp. 11-12.

<sup>104</sup> Cashen Comments, pp. 11-12.

<sup>105</sup> Cashen Comments, pp. 11-12.

<sup>106</sup> Cashen Comments, pp. 11-12.

<sup>107</sup> Cashen Comments, pp. 11-12.

<sup>108</sup> Cashen Comments, pp. 11-12.

<sup>109</sup> Cashen Comments, pp. 11-12.

FEIS thus excludes more habitat than the affected environment for the Quino and fails to respond to comments by providing entirely false information.

Finally, in determining the host plants used for the model, the FEIS relies entirely on the 2012 model data.<sup>110</sup> This model did not cover the entire Project site.<sup>111</sup> The FEIS only provides a buffer around areas where at least 20 host plants were identified, yet the 2012 model does not disclose the number of plants on site.<sup>112</sup> The BIA and public have no way of knowing how these buffers were applied or if they are accurate.<sup>113</sup>

The FEIS fails to accurately account for Quino habitat. It relies on a model that was found to be flawed, yet never corrected, despite assertions it would be corrected. The FEIS relies on surveys that do not cover the entire Project site and failed to include updated information included in recent surveys, leading to conclusions that contradict the data they rely on. The FEIS fails to include all habitat and excludes habitat that was suitable for the Quino. The FEIS also lacks supporting evidence to show how host plants were used for determining habitat. In sum, the FEIS utterly fails to describe the affected environment for Quino while arbitrarily concluding that habitat should not be counted. The FEIS fails as an informational document and leaves the BIA and public with no way to understand how the Project will impact the species or how effective mitigation measures could be.

## 2. Golden Eagles

Mr. Cashen found that the FEIS fails to accurately state golden eagle use of the area, resulting in the BIA and public unable to determine actual Project impacts. The FEIS' response to comments continues to state that golden eagles were studied consistent with USFWS guidance.<sup>114</sup> Mr. Cashen provides evidence to show that this is false.

First, the USFWS guidance requires longer bird point counts, whereas the FEIS relied on short, 30-minute counts.<sup>115</sup> The FEIS did include all-day counts,

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<sup>110</sup> Cashen Comments, pp. 12-13.

<sup>111</sup> Cashen Comments, pp. 12-13.

<sup>112</sup> Cashen Comments, pp. 12-13.

<sup>113</sup> Cashen Comments, pp. 12-13.

<sup>114</sup> Cashen Comments, p. 18.

<sup>115</sup> Cashen Comments, pp. 18-19.

which did produce better data, but these were limited to brief windows of time that do not reflect the amount of time needed to form a conclusion about eagle use.<sup>116</sup>

Second, USFWS guidance requires nest surveys for two-years but the Project did not conduct any nest surveys.<sup>117</sup> We provided evidence of a suitable nest tree on the Project site, but the response to comment simply states that the tree was poorly developed and dominated by introduced species, with no evidence that these factors make the tree unsuitable for golden eagles.<sup>118</sup> The FEIS states that instead of nest surveys, it relied on telemetry data and nest maps from 2010 and 2012. Mr. Cashen explains that telemetry data is incomplete because it only tracks tagged eagles, and no eagles have been tagged within 10 miles of the Project site, so it cannot include all eagles that reside in the area.<sup>119</sup> Further, the 2010 and 2012 data is outdated due to the length of time since they occurred and the amount of wind development in the area, which has been proven to cause golden eagle migration away from projects.<sup>120</sup>

The FEIS state that golden eagle use of the site and project mortality are based on the results of point counts, but includes only the 30-minute point counts, of which only 20-minutes were devoted to raptors.<sup>121</sup> The FEIS also omits the all-day counts which identified eagle use.<sup>122</sup> Mr. Cashen also points out numerous inconsistencies within the FEIS, calling into further question the accuracy of the reporting.<sup>123</sup> The responses to comments about eagle surveys state that conclusions in the FEIS did not change, but the updated information now shows that both analyzed Project alternatives will result in golden eagle deaths.<sup>124</sup>

The FEIS failed to properly assess golden eagle use of the site, underestimating the potential impacts to the species. The FEIS also presents conflicting data throughout, leading to the BIA and the public being unable to draw any conclusions as to how the Project could impact golden eagles. Without establishing the baseline conditions which exist in the vicinity of the proposed

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<sup>116</sup> Cashen Comments, p. 19.

<sup>117</sup> Cashen Comments, pp. 18-21.

<sup>118</sup> Cashen Comments, pp. 19-21.

<sup>119</sup> Cashen Comments, p. 20.

<sup>120</sup> Cashen Comments, p. 20.

<sup>121</sup> Cashen Comments, p. 19.

<sup>122</sup> Cashen Comments, pp. 22-23.

<sup>123</sup> Cashen Comments, pp. 22-24.

<sup>124</sup> Cashen Comments, p. 24.

Project before it is built, as the BIA did here, there is simply no way to determine what effect the proposed Project will have on the environment and, consequently, no way to comply with NEPA.

### 3. Bats

The FEIS relies on acoustical monitoring from the Jewell Valley Wind Project to develop bat baseline data for the Project.<sup>125</sup> The Jewell Valley data consisted of three monitors installed on meteorological towers, of which one was later determined to be erroneous.<sup>126</sup> The FEIS continues to rely on the erroneous data which should invalidate any conclusions about bats on the Project site.<sup>127</sup>

Even if the data relied upon in the FEIS was not corrupted, it does not provide a scientific basis for establishing a baseline for the BIA's analysis. The data came from distances as far as three miles away.<sup>128</sup> Mr. Cashen reviewed the data and determined that it would be impossible for that data to be representative of the 26 vegetation communities within the Project site and their use by bats.<sup>129</sup> Mr. Cashen's analysis is supported in the FEIS, which compares bat activity data from Jewell Valley Wind Project, which is one to three miles away from this Project, to the Shu'luuk Wind Project, which was proposed on the same site as this Project.<sup>130</sup> Overall bat activity for the Shu'luuk site was over 35 times higher than Jewell Valley.<sup>131</sup>

Finally, the data does not comport with USFWS guidance, which requires acoustic monitoring every two kilometers where turbines are expected to be sited.<sup>132</sup> The FEIS concludes that bat activity is low by comparing data from Jewell Valley (despite this not being translatable to the Project) to activity values from Clark County, Nevada, which is not even in the region.<sup>133</sup> Mr. Cashen notes that the BIA could have compared data from the nearby Tule Wind Project, which is much closer

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<sup>125</sup> Cashen Comments, pp. 33-34.

<sup>126</sup> Cashen Comments, pp. 33-34.

<sup>127</sup> Cashen Comments, p. 34.

<sup>128</sup> Cashen Comments, p. 34.

<sup>129</sup> Cashen Comments, p. 34.

<sup>130</sup> Cashen Comments, p. 34.

<sup>131</sup> Cashen Comments, p. 34.

<sup>132</sup> Cashen Comments, p. 34.

<sup>133</sup> Cashen Comments, p. 36.

to the Project and includes post-construction bat fatality monitoring.<sup>134</sup> Without any relevant baseline data such as this, the BIA's conclusions about bat use of the Project site are unsupported, arbitrary, and capricious.

#### 4. Tecate Tarplant

The FEIS states that it conducted rare plant surveys designed to detect Tecate tarplant.<sup>135</sup> Mr. Cashen explains that the surveys and references checks cannot be relied upon to prove that the Tecate tarplant is not present because the studies were conducted at times when it is not normally detectable.<sup>136</sup>

The FEIS failed to accurately describe the environmental setting in numerous ways. As a result, impacts were underestimated throughout the document, skewing the analysis and rendering the FEIS fatally flawed at fulfilling its role as an informational document.

### **IX. THE FEIS MUST DISCLOSE, ANALYZE, AND MITIGATE ALL PROJECT IMPACTS**

The environmental consequences of a proposed action must be described in the FEIS. NEPA regulations require that this section of an EIS describe any direct, indirect and cumulative adverse environmental effects which cannot be avoided should the proposal be implemented; the relationship between short-term uses of man's environment and the maintenance and enhancement of long-term productivity; and any irreversible or irretrievable commitments of resources which would be involved in the proposal should it be implemented.<sup>137</sup> The FEIS must also describe possible conflicts between the proposed action and the objectives of Federal, regional, State, and local land use plans, policies and controls for the area concerned.<sup>138</sup> An agency fails to meet its hard look obligation when it relies on incorrect assumptions or data when drafting an EIS or when it presents information so incomplete as to be misleading.<sup>139</sup>

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<sup>134</sup> Cashen Comments, pp. 36-37.

<sup>135</sup> Cashen Comments, p. 46.

<sup>136</sup> Cashen Comments, p. 46.

<sup>137</sup> 40 C.F.R. § 1502.16.

<sup>138</sup> *Id.*

<sup>139</sup> *Native Ecosystems Council v. Marten* 883 F.3d 783, 795 (9th Cir. 2018).  
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The FEIS does not consider all of the Project's significant and foreseeable environmental impacts to biological resources and public health, among others. The BIA's failure to take a hard look at the Project's impacts violates the basic requirements of NEPA. The BIA must revise its impacts analysis prior to issuance of a ROD.

**A. The FEIS Fails to Adequately Disclose, Analyze, and Mitigate Impacts to Biological Resources**

The FEIS fails to adequately analyze and mitigate the Project's impacts to numerous species. The FEIS must be revised accordingly.

1. Quino Checkerspot Butterfly

As noted above, the FEIS fails to adequately describe Quino habitat on site; therefore, it cannot provide information regarding the scope of impacts to the species, nor make accurate conclusions regarding the severity of impacts. The FEIS continues to claim that no impacts to the species will occur in the Boulder Brush Corridor because no Quino are present, despite including studies where the species were found on that site.<sup>140</sup> The FEIS continues to state that because the Project will be decommissioned, there will not be adverse impacts to Quino but Mr. Cashen notes that there are no requirements in the FEIS that would specifically require restoration of Quino habitat.<sup>141</sup> These conclusions lack evidentiary support and conflict with available evidence, rendering them arbitrary and capricious.

The FEIS also understates impacts. The FEIS and DEIR for the Project conclude that different amounts of Quino habitat will be impacted by the Project, despite citing the exact same data, meaning one of these documents must be incorrect.<sup>142</sup> The FEIS also downplays impacts by noting, but not providing evidence, that more Quino habitat is available near the Project site.<sup>143</sup> Mr. Cashen again notes that the Project is located in the Campo Core Occurrence Complex with most of the habitat coinciding with the Project boundaries, which will be severely disturbed.<sup>144</sup> The FEIS still fails to disclose the importance of this site or the

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<sup>140</sup> Cashen Comments, pp. 13-15.

<sup>141</sup> Cashen Comments, pp. 13-15.

<sup>142</sup> Cashen Comments, pp. 13-15.

<sup>143</sup> Cashen Comments, pp. 13-15.

<sup>144</sup> Cashen Comments, pp. 13-15.

severity to which the Project can harm the species.<sup>145</sup> Finally the FEIS fails to respond to comments about impacts from off-highway vehicle usage, which were found to be severe enough to impact species use of the site in the DEIR.<sup>146</sup> Thus the FEIS does not fully describe the scope and severity of impacts for the Project by improperly underestimating habitat and failing to describe the importance of habitat lost. The FEIS's conclusions are unsupported, arbitrary, and capricious.

MM-BIO-1 includes habitat restoration and weed management plans but fails to include sufficient information to show that environmental consequences of the impacts have been fully evaluated. Habitat restoration proposes native plant restoration but does not tailor this towards recovering host plants the Quino would need to be restored in order to actually mitigate the impacts.<sup>147</sup> The proposed weed management plan lacks details, and includes performance standards that if met would still result in adverse impacts.<sup>148</sup> Further, MM-BIO-1 conflicts with other sections in the FEIS that state that passive restoration would occur, which likely would result in invasive species taking over and preventing restoration of Quino host plants.<sup>149</sup>

The FEIS also proposes mitigation measures that include MM-BIO-3, which relies on the Project seeking Consultation with the USFWS pursuant to Section 7 of the Endangered Species Act.<sup>150</sup> The details of this are entirely unclear. While the FEIS states that habitat-based conservation would focus on long-term health of the species, the BIA and public cannot be certain that any habitat-based conservation would be able to be found.<sup>151</sup> MM-BIO-3 does not discuss how much habitat may be needed or whether that habitat exists, which is concerning since other projects in the area have concluded that it may not.<sup>152</sup> This was raised in our DEIS comments, but was never responded to.

The FEIS concludes that cumulative impacts to Quino would not be adverse but does not attempt to calculate total cumulative impacts. Mr. Cashen notes that the FEIS/FEIR for the Tule Wind Project and East County Substation, located near

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<sup>145</sup> Cashen Comments, pp. 13-15.

<sup>146</sup> Cashen Comments, pp. 13-15.

<sup>147</sup> Cashen Comments, pp. 16-18.

<sup>148</sup> Cashen Comments, pp. 16-18.

<sup>149</sup> Cashen Comments, pp. 16-18.

<sup>150</sup> Cashen Comments, pp. 15-16.

<sup>151</sup> Cashen Comments, pp. 15-16.

<sup>152</sup> Cashen Comments, pp. 15-16.

this Project, found that cumulative impacts to Quino were significant and unavoidable.<sup>153</sup> This FEIS contains no analysis but yields the opposite conclusion, calling into doubt its accuracy.<sup>154</sup>

The FEIS's conclusions regarding impacts to Quino are unsupported or contradict the evidence in the document. Impacts to the species are downplayed and underestimated. Mitigation measures proposed are ineffective and ill-defined. The BIA's assertions that impacts will no longer be adverse after mitigation are arbitrary and capricious and cannot support issuance of a ROD for the Project.

## 2. Golden Eagle

The Project will adversely impact golden eagle habitat and cause direct mortality of birds. Despite this, the FEIS wrongly concludes that the Project will not affect eagle habitat and that risks of mortality are low.<sup>155</sup> Mr. Cashen first notes that the FEIS fails to accurately describe the Project site as habitat. Golden eagles fly through the area and can forage in the Project site.<sup>156</sup> Additionally, the FEIS' statement that the Project site does not include nesting areas lacks support because the BIA never bothered to look for nests and relied only on incomplete data.<sup>157</sup> The Project will directly remove 855 acres of foraging habitat and cause indirect impacts through displacement of golden eagles.<sup>158</sup> These impacts were not addressed in the FEIS, which responded that the areas around the Project are rural and undeveloped, providing similar foraging habitat.<sup>159</sup> This response fails to note that displacement itself is an impact, and fails to recognize the cumulative loss of foraging habitat to golden eagles from the multitude of energy projects in the area.<sup>160</sup>

Direct mortality of eagles was underestimated due to the BIA failing to establish the existing environmental setting of the Project site but were still projected to occur in the FEIS. Despite this, the FEIS still concludes that impacts

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<sup>153</sup> Cashen Comments, pp. 15-16.

<sup>154</sup> Cashen Comments, pp. 15-16.

<sup>155</sup> FEIS, p. RTC-108.

<sup>156</sup> Cashen Comments, pp. 24-26.

<sup>157</sup> Cashen Comments, pp. 24-26.

<sup>158</sup> Cashen Comments, pp. 24-26.

<sup>159</sup> FEIS, p. RTC-109.

<sup>160</sup> Cashen Comments, pp. 24-26.

to golden eagles are not adverse and that best available science shows that the impacts would not be significant.<sup>161</sup> Mr. Cashen provides evidence that golden eagle are declining and cannot withstand additional take.<sup>162</sup> Projected take of an eagle is a violation of the Eagle Act, which normally requires a permit and conservation plan.<sup>163</sup> Given the species status and extent of Federal protection for the species, the BIA's finding that impacts are not adverse is arbitrary and capricious.

The FEIS fails to consider cumulative impacts to golden eagles. Responses to comments point only to generic responses and do not respond to the substantive comment raised.<sup>164</sup> Mr. Cashen also notes that nearby wind projects have identified impacts from golden eagle mortality as significant and unavoidable.<sup>165</sup> The determination that cumulative impacts are not adverse or significant has no support with any evidence, because the BIA did not conduct any analysis to support its claims.<sup>166</sup>

The FEIS concludes that the loss of 855 acres of foraging habitat for golden eagle was not adverse and that it could be cumulatively considerable but did not analyze this impact cumulatively.<sup>167</sup> Mr. Cashen notes a series of cumulative projects that come to similar conclusions, exactly the type of scenario that a legally adequate cumulative impacts analysis was designed for.<sup>168</sup> The FEIS must include a cumulative analysis of the loss of golden eagle foraging habitat.

Lastly, the FEIS states that per MM-BIO-4, the Applicant is preparing a bird and bat conservation strategy for the Project.<sup>169</sup> This strategy does not explain how it would mitigate impacts to golden eagles. Mr. Cashen notes that a successful mitigation strategy would include micro-siting of turbines to reduce impact and requirements to curtail turbines when mortality thresholds are met for a species, none of which are included here.<sup>170</sup> Monitoring alone will not prevent mortality.

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<sup>161</sup> FEIS, pp. RTC-56-RTC-57.

<sup>162</sup> Cashen Comments, pp. 24-26.

<sup>163</sup> Cashen Comments, pp. 24-26.

<sup>164</sup> Cashen Comments, pp. 24-26.

<sup>165</sup> Cashen Comments, pp. 24-26.

<sup>166</sup> Cashen Comments, pp. 24-26.

<sup>167</sup> Cashen Comments, pp. 24-26.

<sup>168</sup> Cashen Comments, pp. 24-26.

<sup>169</sup> FEIS, pp. RTC-81-RTC-82.

<sup>170</sup> Cashen Comments, pp. 26-27.

Further, the monitoring is only proposed for two years, which statistically is not long enough to detect golden eagle mortality based off of the mortality projections in the FEIS.<sup>171</sup>

The FEIS fails to discuss loss of habitat and displacement impacts to golden eagles. The FEIS also claims eagle mortality is low and insignificant despite evidence documenting significant decline of the species and protections in Federal laws. Mitigation measures cited to lessen any impacts do not change mortality outcomes and fail to discuss proper measures that actually reduce deaths. The BIA lacks sufficient support for the FEIS' claims regarding golden eagle impacts and fails to meet NEPA's requirement to take a hard look at the issues.

### 3. Bats

The FEIS concludes, without analysis, that impacts to bats would be negligible.<sup>172</sup> Mr. Cashen provides evidence that mortality from wind turbines to bats are causing population-level threats.<sup>173</sup> Further, Mr. Cashen found that the BIA previously undertook a bat analysis for the Shu'luuk Wind Project and found then that impacts to bats from project-caused mortality would be significant and unavoidable.<sup>174</sup> Thus, the BIA underestimated bat use at the Campo site and summarily dismissed the idea that impacts would be anything more than negligible, despite previous BIA findings showing the exact opposite.<sup>175</sup> Further, the nearby Tule Wind Project determined that impacts to bats would be adverse.<sup>176</sup> The BIA completely failed to conduct a cumulative impact analysis in the FEIS; it is difficult to see how the BIA could conclude that there were not adverse impacts on bats from 769-MW of cumulative wind energy when the 201-MW facility nearby found adverse impacts to bats.<sup>177</sup> Finally the proposed mitigation measure for bat impacts, MM-BIO-4, fails to adequately mitigate impacts to bats because it fails to provide specific threshold mortalities for bat species and specific actions to reduce mortality if those thresholds are met.<sup>178</sup> The BIA failed to take a hard look at impacts to bats as required by NEPA.

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<sup>171</sup> Cashen Comments, pp. 26-27.

<sup>172</sup> Cashen Comments, 37-40.

<sup>173</sup> Cashen Comments, 37-40.

<sup>174</sup> Cashen Comments, 37-40.

<sup>175</sup> Cashen Comments, 37-40.

<sup>176</sup> Cashen Comments, 37-40.

<sup>177</sup> Cashen Comments, 37-40.

<sup>178</sup> Cashen Comments, p. 40.

#### 4. Willow Flycatcher

We provided comments that the federally protected willow flycatcher is known to occur on the Project site and were detected previously.<sup>179</sup> The response to this comment states that the species is known to visit the area during migration.<sup>180</sup> Despite this acknowledgement, the FEIS does not conduct further analysis of impacts to the willow flycatcher species or the potential for take to occur.

#### 5. Other Birds

The Project has the potential to harm birds protected under the Migratory Bird Treaty Act but dismisses the risk as low by comparing the Project sites' characteristics to other sites.<sup>181</sup> Mr. Cashen notes that this analysis fails to support a conclusion that the Project will not have an adverse impact. First, relative low risk compared to other sites does not mean that the Project will have a low absolute risk to birds.<sup>182</sup> Further, relative risk masks the numerous ways siting decisions, such as placing turbines near ridges, can change impact determinations, thus robbing the public of a full discussion of the potential for the Project to adversely impact birds through collision risk.<sup>183</sup> By dismissing the potential for adverse impacts, the BIA fails to take a hard look at the Project.

MM-BIO-4 is proposed to mitigate impacts to birds. As noted elsewhere, this proposes a vague and undefined strategy that does not include affirmative measures to ensure mortality to birds will be reduced.<sup>184</sup> We previously provided numerous examples of feasible mitigation measures, such as micro-siting, curtailment, and adaptive management, but the FEIS did not provide a response to these comments by mislabeling them as non-substantive, without further explanation as to why they do not require a response.<sup>185</sup>

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<sup>179</sup> Cashen Comments, p. 29.

<sup>180</sup> FEIS, p. RTC-90.

<sup>181</sup> Cashen Comments, pp. 28-29.

<sup>182</sup> Cashen Comments, pp. 28-29.

<sup>183</sup> Cashen Comments, pp. 28-29.

<sup>184</sup> Cashen Comments, pp. 29-33.

<sup>185</sup> Cashen Comments, pp. 29-33.

The FEIS fails to conduct a cumulative impacts analysis for impacts to bird species.<sup>186</sup> The FEIS first concludes that the Kumeyaay Wind Project is not a cumulative project, despite it being a past action with present effects that is specifically called out as a requirement for a cumulative impacts analyses by the CEQ.<sup>187</sup> The FEIS also never considered the cumulative avian mortality from the numerous other wind and solar projects in the area.<sup>188</sup> Mr. Cashen provided fatality estimates for birds from the cumulative wind farms in the area, but the FEIS failed to adequately respond to that comment when it simply noted our comment, made no changes and provided no reasoned analysis of why including the Kumeyaay Wind Project in the cumulative analysis was not warranted.

## 6. Vegetation

We commented that the DEIS' reasoning that the Project would not have adverse impacts to vegetation because it would be allowed to revegetate was flawed and would allow for invasive species to colonize the area. In response, the FEIS provides further details on the revegetation requirements, which would still allow for 60 percent of revegetation to occur with non-native species.<sup>189</sup>

We also provided comments that the DEIS did not support its findings that cumulative impacts to vegetation communities consisted of 2,893 acres.<sup>190</sup> The response to this comment cited in the FEIS does not address this comment at all.<sup>191</sup> Mr. Cashen's review of cumulative projects finds that the BIA's estimate that cumulative impacts to vegetation communities consists of 2,893 acres underestimates total impacts and is unsupported.<sup>192</sup>

### **B. The FEIS Fails to Adequately Disclose, Analyze, and Mitigate Adverse Groundwater Impacts**

The FEIS responds to comments raised about the Project's groundwater usage by noting that alternative groundwater supplies would be available for Project construction should insufficient water be present on the Campo

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<sup>186</sup> Cashen Comments, pp. 43-44.

<sup>187</sup> Cashen Comments, pp. 43-44.

<sup>188</sup> Cashen Comments, pp. 43-44.

<sup>189</sup> Cashen Comments, pp. 49-50.

<sup>190</sup> Cashen Comments, pp. 42-43.

<sup>191</sup> Cashen Comments, pp. 49-50.

<sup>192</sup> Cashen Comments, pp. 49-50.

Reservation.<sup>193</sup> The County of San Diego's Draft Environmental Impact Report for the Project notes that groundwater pumping from some alternative wells would be a potentially significant impact and would require a groundwater mitigation and monitoring plan for any pumping.<sup>194</sup> The FEIS fails to disclose that the reasonably foreseeable reliance on a groundwater well would be a significant adverse impact requiring mitigation and fails to disclose any mitigation measures, such as the one identified by the County for the groundwater impacts from the construction of the on-reservation portion of the Project, thereby failing in its role as an informational document.

### **C. The FEIS Fails to Adequately Disclose, Analyze, and Mitigate Impacts to Public Health**

We provided expert comments that the DEIS failed to properly disclose the Project's public risks from exposure to Valley Fever spores from earthmoving activities during Project construction and failed to discuss feasible mitigation measures to reduce the risk. In response, the FEIS first notes that less than 6 people per 100,000 in San Diego County are diagnosed with Valley Fever.<sup>195</sup> The BIA goes on to suggest that earthmoving activities may not cause exposure to Valley Fever, exposure does not guarantee illness and climactic conditions are not ripe for exposure.<sup>196</sup> Finally, the FEIS states, without evidence, that no other projects in the area have resulted in Valley Fever exposure and that Mitigation Measure MM-BIO-1's fugitive dust control plan and a worker environmental awareness program that includes Valley Fever education are sufficient mitigation for the impact.<sup>197</sup>

Dr. Fox reviewed the FEIS and provides expert opinion that the Project's risks to public health, including construction workers, is higher than disclosed in the FEIS and that the BIA is required to discuss further mitigation. Dr. Fox explains that the FEIS underestimates rates of Valley Fever exposure. First, Dr. Fox provides evidence that Valley Fever rates are 8.2 cases per 100,000 people in San Diego County, which is much higher than disclosed in the FEIS.<sup>198</sup> Dr. Fox also

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<sup>193</sup> FEIS, p. RTC-43.

<sup>194</sup> See County of San Diego, Draft Environmental Impact Report: Campo Wind Project with Boulder Brush Facilities, (Dec. 2019), Appendix J, p. 33.

<sup>195</sup> FEIS, p. RTC-35.

<sup>196</sup> FEIS, p. RTC-35.

<sup>197</sup> FEIS, pp. RTC-35-RTC-36.

<sup>198</sup> Fox Comments, p. 2.



discusses several problems with relying on official exposure rates, which the FEIS fails to include, such as exposure that does not lead to a person seeking medical care and misdiagnosis, particularly in rural areas such as Eastern San Diego County.<sup>199</sup> Dr. Fox also provides evidence from the Centers for Disease Control stating that Valley Fever is widely underdiagnosed due to a lack of reporting and that exposure rates near the Project do not even get reported because the low population in the area makes reporting on a scale of cases per 100,000 people unworkable.<sup>200</sup> Dr. Fox continues by providing evidence that Valley Fever rates coincide with construction timetables, contrary to the FEIS statements that it is climactic conditions that determine exposure rates.<sup>201</sup> Thus, the FEIS's assertion that exposure rates for Valley Fever are low is without basis in fact.

Overall, the BIA entirely misrepresents the risks of exposure to the public, including construction workers, in the FEIS. Dr. Fox points out that the FEIS lacks evidence to support its claim that nearby projects caused exposure to Valley Fever.<sup>202</sup> Without evidence from the FEIS, Dr. Fox reviewed nearby projects presented in the FEIS and found only projects with limited earthmoving activities or projects that did not contain data because they did not undergo environmental review.<sup>203</sup> Regardless, the lack of exposure in the area is likely due to the sparse population and lack of earthmoving activities because the County is endemic to Valley Fever.<sup>204</sup> The FEIS's unsupported claims about other projects are irrelevant to providing an accurate discussion about risk. Risk of exposure is correlated with outdoor activities that generate dust, like construction.<sup>205</sup> Dr. Fox provides further evidence that a high-risk worksite in Monterey had incident rates as high as 1,095/100,000 people.<sup>206</sup> The FEIS statements that the risk is low is inconsistent with all available evidence.

Dr. Fox also reviewed proposed Valley Fever mitigation and found them inadequate and has instead provided proper mitigation measures that should have been discussed in the FEIS. Dr. Fox provides evidence that MM-BIO-1's dust control provisions will not mitigate Valley Fever exposure because they are geared

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<sup>199</sup> Fox Comments, pp. 2-3.

<sup>200</sup> Fox Comments, p. 3.

<sup>201</sup> Fox Comments, pp. 4-5.

<sup>202</sup> Fox Comments, pp. 5-6.

<sup>203</sup> Fox Comments, pp. 5-6.

<sup>204</sup> Fox Comments, pp. 5-6.

<sup>205</sup> Fox Comments, p. 6-10

<sup>206</sup> Fox Comments, p. 10.

towards controlling soil particles larger than Valley Fever spores.<sup>207</sup> Valley Fever spores and risk of exposure will remain in the air following these dust control measures.<sup>208</sup> Dr. Fox goes on to provide a summary of numerous mitigation measures the BIA could have easily included in the FEIS:

- An injury and illness prevention program,
- Valley Fever training for workers,
- Dust control targeted towards Valley Fever,
- Measures to prevent spore transport out of worksites,
- Improved medical surveillance,
- Mandatory respiratory protection,
- Tracking and reporting of all suspected cases,
- Soil testing prior to disturbance, and
- Designing project destruction to avoid exposure.<sup>209</sup>

The FEIS fails to adequately respond to comments by responding with unsupported and incorrect statements. Dr. Fox provides evidence that the risk to exposure is real and adverse. Where the FEIS provides ineffective mitigation measures, failing to meet NEPA's requirement of an adequate discussion of mitigation, Dr. Fox has provided numerous examples that the BIA could use in the EIS in order to comply with NEPA.

In sum, the FEIS fails to conclude a robust and scientifically supported analysis of the Project's impacts needed for the BIA to have shown that it took a hard look at the issues. The BIA cannot issue a ROD for the Project until these serious errors are addressed.

## **X. CONCLUSION**

The FEIS fails as an informational document and violates NEPA. The BIA fails to accurately describe the affected environment, does not fully and fairly describe the proposed action, provides incomplete analyses of some Project impacts and wholly omits discussion of other potentially significant adverse effects, and fails

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<sup>207</sup> Fox Comments, pp. 12-13.

<sup>208</sup> Fox Comments, p. 13.

<sup>209</sup> Fox Comments, pp. 13-19.

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to adequately discuss and mitigate the Project's adverse impacts. The BIA's issuance of a ROD for the Project based on the FEIS would be arbitrary and capricious. We respectfully urge the BIA to correct the FEIS prior to any further consideration of the Project.

Sincerely,



Kyle C. Jones

KCJ:lj1

Exhibits