

**Comment Letter No. 12: Adams, Broadwell, Joseph, and Cardozo**

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August 17, 2020

**VIA EMAIL AND U.S. MAIL**

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**Re: Comments on the Draft Environmental Impact Report – RB  
Inyokern Solar Project (SCH No. 2017071020)**

Dear Ms. Oviatt, Mr. Murphy and Ms. Candia:

We are writing on behalf of **Citizens for Responsible Solar** to provide comments on the Draft Environmental Impact Report (“DEIR”) prepared for the RB Inyokern Solar Project (SCH No. 2017071020) (“Project”) proposed by R&L Capital Inc. (“Applicant”). The project proposes to construct and operate a 26.6 megawatt (MW) solar photovoltaic electrical generating facility and battery energy storage on approximately 166.5 acres of privately-owned land in the unincorporated community of Inyokern in the eastern high desert region of Kern County, California (“County”). The proposed Project would interconnect to an existing Southern

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California Edison (SCE) 33-kilovolt (kV) electrical distribution line to an existing SCE Inyokern Substation approximately 0.5 miles to the east.

The Applicant is requesting a Conditional Use Permit (CUP) from Kern County for the construction and operation of the 20 MW Phase 1 solar PV electrical generating facility on approximately 124.5 acres and the construction and operation of the 6.6 MW Phase 2 solar PV electrical generating facility on approximately 41.93 acres.

Based on our review of the DEIR, appendices, and other relevant records, we have determined that the DEIR fails to meet the requirements of the California Environmental Quality Act ("CEQA"). Specifically, the DEIR suffers from the following deficiencies:

- Failure to provide a proper project description as required under CEQA;
- Failure to properly establish the environmental setting for and adequately disclose, analyze and mitigate the Project's impacts on biological resources;
- Failure to adequately disclose and analyze the Project's impacts on air quality and from greenhouse gas emissions;

For each of these reasons, the County must revise and recirculate the DEIR in order to properly disclose, analyze, and mitigate the Project's significant impacts. The County cannot certify the EIR or approve the project until a revised draft EIR addresses these issues.

These comments were prepared with the assistance of conservation biologist Renee Owens and air quality experts Matt Hagemann and Paul E. Rosenfeld of Soil/Water/Air Protection Enterprise ("SWAPE"). Ms. Owens' comments and curricula vitae are attached to this letter as **Exhibit A**.<sup>1</sup> SWAPE's technical

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<sup>1</sup> **Exhibit A** – Letter from Renee Owens re: Comments on the Draft Environmental Impact Report for RB Inyokern Solar dated August 16, 2020. ("Exhibit A").  
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(cont.)

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comments and curriculum vitae are attached to this letter as **Exhibit B**.<sup>2</sup> Exhibits 1 and 2 are fully incorporated herein and submitted to the County herewith. Therefore, the County must separately respond to the technical comments of SWAPE and Ms. Owens in addition to our comments.

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## I. STATEMENT OF INTEREST

Citizens for Responsible Solar (“Citizens”) is an unincorporated association of individuals and labor organizations that 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 **California Unions for Reliable Energy** and its member labor organizations, and their members and families, and other individuals that live and/or work in Kern County.

The individual members of Citizens and the members of the affiliated labor organizations live, work, recreate and raise their families in Kern 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. They each have a personal interest in protecting the Project area from unnecessary, adverse environmental and public health impacts.

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The organizational members of the Citizens 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 businesses to locate and people to live there. This, in turn, jeopardizes future development by causing construction moratoriums and otherwise reduces future employment opportunities for construction workers. The labor organization members of the Citizens therefore have a direct interest in enforcing environmental laws to minimize the adverse impacts of projects that would otherwise degrade the environment.

Finally, the organizational members of the Citizens are concerned about projects that risk serious environmental harm without providing countervailing economic benefits. CEQA provides a balancing process whereby economic benefits

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<sup>2</sup> **Exhibit B** – Letter from SWAPE to Nirit Lotan re: Comments on the RB Inyokern Solar Project (SCH No. 2017071020) dated July 28, 2020 (“Exhibit B”).  
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are weighed against significant impacts to the environment and it is in this spirit that we offer these comments.

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## II. LEGAL BACKGROUND

CEQA requires that an agency analyze the potential environmental impacts of its proposed actions in an EIR, except in limited circumstances.<sup>3</sup> The EIR is the very heart of CEQA.<sup>4</sup> “The foremost principle in interpreting CEQA is that the Legislature intended the act to be read so as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language.”<sup>5</sup>

CEQA has two primary purposes. First, CEQA is designed to inform decisionmakers and the public about the potential, significant environmental effects of a project.<sup>6, 7</sup> CEQA’s purpose is to inform the public and its responsible officials of the environmental consequences of their decisions before they are made. In this respect, an EIR “protects not only the environment but also informed self-government.”<sup>8</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.”

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To fulfill this function, the discussion of impacts in an EIR must be detailed, complete, and “reflect a good faith effort at full disclosure.”<sup>9</sup> CEQA requires an EIR to disclose all potential direct and indirect, significant environmental impacts of a project.<sup>10</sup> In addition, an adequate EIR must contain the facts and analysis necessary to support its conclusions.<sup>11</sup>

<sup>3</sup> See, e.g., Pub. Res. Code § 21100.

<sup>4</sup> *Dunn-Edwards v. BAAQMD* (1992) 9 Cal.App.4th 644, 652.

<sup>5</sup> *Communities for a Better Env’t v. Cal. Res. Agency* (2002) 103 Cal. App.4th 98, 109.

<sup>6</sup> 14 Cal. Code Regs. (“CEQA Guidelines”), § 15002, subd. (a)(1).

<sup>7</sup> See, e.g., Pub. Resources Code § 21100.

<sup>8</sup> *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564.

<sup>9</sup> CEQA Guidelines § 15151; *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 721-722.

<sup>10</sup> Pub. Resources Code § 21100, subd. (b)(1); CEQA Guidelines § 15126.2, subd. (a).

<sup>11</sup> See *Citizens of Goleta Valley* 52 Cal.3d at 568.



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The second purpose of CEQA is to require public agencies to avoid or reduce environmental damage when possible by requiring appropriate mitigation measures and through the consideration of environmentally superior alternatives.<sup>12</sup> The EIR serves to provide agencies and the public with information about the environmental impacts of a proposed project and to “identify ways that environmental damage can be avoided or significantly reduced.” To that end, if an EIR identifies significant impacts, it must then propose and evaluate mitigation measures to minimize these impacts.<sup>13</sup> CEQA imposes an affirmative obligation on agencies to avoid or reduce environmental harm by adopting feasible project alternatives or mitigation measures.<sup>14</sup> Without an adequate analysis and description of feasible mitigation measures, it would be impossible for agencies relying upon the EIR to meet this obligation.

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While the courts review an EIR using an “abuse of discretion” standard, “the reviewing court is not to ‘uncritically rely on every study or analysis presented by a project proponent in support of its position. A clearly inadequate or unsupported study is entitled to no judicial deference.’”<sup>15</sup> As the courts have explained, “a prejudicial abuse of discretion” occurs “if the failure to include relevant information precludes informed decision-making and informed public participation, thereby thwarting the statutory goals of the EIR process.”<sup>16</sup>

### III. THE DEIR FAILS TO ADEQUATELY DESCRIBE THE PROJECT

The DEIR fails to meet CEQA’s requirements because it lacks an accurate, complete, and stable project description, rendering the entire environmental

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<sup>12</sup> CEQA Guidelines § 15002, subds. (a)(2)-(3); see also, *Berkeley Keep Jets Over the Bay Committee v. Board of Port Commissioners* (2001) 91 Cal.App.4th 1344, 1354; *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564; *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 391, 400.

<sup>13</sup> Pub. Res. Code §§ 21002.1, subd. (a), 21100, subd. (b)(3).

<sup>14</sup> Pub. Res. Code §§ 21002-21002.1.

<sup>15</sup> *Berkeley Jets*, 91 Cal. App. 4th 1344, 1355 (emphasis added), quoting, *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 391 409, fn. 12.

<sup>16</sup> *Berkeley Jets*, 91 Cal.App.4th at 1355; *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 722; *Galante Vineyards v. Monterey Peninsula Water Management Dist.* (1997) 60 Cal.App.4th 1109, 1117; *County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, 946.



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impacts analysis inadequate. 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>17</sup> CEQA requires that a project be described with enough particularity that its impacts can be assessed.<sup>18</sup> Accordingly, a lead agency may not hide behind its failure to obtain a complete and accurate Project description.<sup>19</sup>

It is impossible for the public to make informed comments on a project of unknown or ever-changing description. California courts have held that “a curtailed or distorted project description may stultify the objectives of the reporting process.”<sup>20</sup> Furthermore, “only through an accurate view of the project may affected outsiders and public decision-makers balance the proposal’s benefit against its environmental cost...”<sup>21</sup> Without a complete project description, the environmental analysis under CEQA is impermissibly limited, thus minimizing the project’s impacts and undermining meaningful public review.<sup>22</sup>

Despite this clear mandate, all the DEIR provides in the Project Description section regarding the proposed energy storage systems (“ESS”) is the following short statement:

The proposed project may have up to two onsite ESS (one for each facility developed). Each ESS would be able to provide at least four hours of energy storage capacity for the electric grid. Each ESS would occupy approximately a 65-by-150-foot area within the project site and would consist of battery storage modules placed in either multiple prefabricated enclosures or steel buildings near the onsite switchyard.

The ESS would either be installed contemporaneously or after the installation of the PV facilities. *The final location is dependent on final design and may require construction of a vault or other form of supporting*

<sup>17</sup> *County of Inyo v. City of Los Angeles* (3d Dist. 1977) 71 Cal.App.3d 185, 193.

<sup>18</sup> *Id.* at p. 192.

<sup>19</sup> *See Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 311.

<sup>20</sup> *County of Inyo v. City of Los Angeles* (3d Dist. 1977) 71 Cal.App.3d 185, 192.

<sup>21</sup> *Id.* at p. 192-193, p. 198.

<sup>22</sup> *See, e.g., Laurel Heights Improvement Assn. v. Regents of the Univ. of Cal.* (1988) 47 Cal.3d 376. 3902-007acp

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*foundation similar to other structures onsite. The ESS would consist of battery banks housed in electrical enclosures and buried electrical conduit. The battery enclosures would have fire suppression equipment installed that automatically suppress thermal emergencies. Although the energy storage technology has not been determined at this time, it could include any commercially available battery technology, including but not limited to lithium ion, lead acid, sodium sulfur, and sodium or nickel hydride or any type of flow batteries (...)*<sup>23</sup>

As is clear from this quote, the County fails to provide the most basic information regarding the ESS, including its location, the type of energy storage technology that will be used and its design. The DEIR therefore fails as an informational document. Moreover, characteristics of the Project have direct impacts on Project's potentially significant impacts from fire and hazardous chemicals, and they must be disclosed. In addition, SWAPE lists the following information as missing information that must be disclosed:

- a) A volume estimate of the number and type of chemical suppressants and water sources and water volumes that may be necessary to fight a reasonable worst case fire scenario;
- b) A list of all chemical components in the batteries under consideration including chemicals in the electrolyte;
- c) Plans to show that secondary containment would be adequate to handle the volume of chemicals and any water required to fight a worst-case scenario fire;
- d) A list of all chemicals that are anticipated to be necessary to fight a battery fire;
- e) A Spill Prevention and Response Plan to address specific hazardous materials necessary for operation; and
- f) An Emergency Action Plan to include ability of local resources to fight a lithium ion battery fires and an evaluation of response times.<sup>24</sup>

<sup>23</sup> DEIR, p. 3-21, 3-22, emphasis added.

<sup>24</sup> Exhibit B: SWAPE comments, p. 3.

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The DEIR must be revised to properly describe all Project's component, including relevant details regarding the ESS characteristics and components.

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#### IV. THE DEIR FAILS TO ESTABLISH THE EXSITING SETTING FOR THE PROJECT

CEQA requires that an EIR will include a description of the physical environmental conditions in the vicinity of the project, also known as "baseline" conditions.<sup>25</sup> The existing environmental setting is the starting point from which the lead agency mnst measure whether a proposed project may cause a significant environmental impact.<sup>26</sup>

Describing the environmental setting accurately and completely for each environmental condition in the vicinity of the Project is critical to an accurate, meaningful evaluation of environmental impacts. The courts have clearly stated that "[b]efore the impacts of a project can be assessed and mitigation measures considered, an [environmental review document] must describe the existing environment. It is only against this baseline that any significant environmental effects can be determined."<sup>27</sup>

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The DEIR, however, fails to properly describe the environmental setting both for a long list of biological resources and for hazards and hazardous materials on the Project site, as described below.

##### A. The DEIR Fails to Establish the Existing Setting for Desert Tortoise

According to the DEIR and the biological reports, the only focused survey for the Endangered Species Act (ESA) listed Desert Tortoise (DT) were conducted in

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<sup>25</sup> 14 CCR § 15125.

<sup>26</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. County of Sacramento* (2002) 97 Cal.App.4th 1270, 1278 ("*Fat*"), citing Remy, et al., Guide to the Calif. Environmental Quality Act (1999) p. 165.

<sup>27</sup> *County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, 952.  
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2015.<sup>28</sup> The DEIR reliance on this five years old survey violates CEQA in two separate ways – first, because it violates the CEQA mandate that DEIRs will make impacts determinations based on existing conditions at the time the NOP is published and second, because it violates CEQA mandate that existing conditions will represent the most accurate and understandable picture practically possible of the Project’s impacts, because it completely fails to account for the substantial differences between rainy and dry years.

CEQA requires that the lead agency generally describes physical environmental conditions

*“...as they exist at the time the notice of preparation is published, or if no notice of preparation is published, at the time environmental analysis is commenced, from both a local and regional perspective.”<sup>29</sup>*

The notice of preparation (“NOP”) for this project was published and circulated in July 2017.<sup>30</sup> Therefore, as a starting point, the DEIR must at the very least include a survey from 2017 to properly represent existing conditions. By failing to conduct a survey at the time the NOP was published, the County violated CEQA.

Second, the CEQA Guidelines are clear regarding the purpose of establishing the existing conditions for a project site. As stated in the “Environmental Setting” Guidelines:

*“The purpose of this requirement is to give the public and decision makers the most accurate and understandable picture practically possible of the project's likely near-term and long-term impacts.”<sup>31</sup>*

As explained by Ms. Owens in her comments, the scientific reality is that ecosystems are not static. To gain a comprehensive and scientifically accurate

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<sup>28</sup> Exhibit A, p. 2.

<sup>29</sup> 14 CCR § 15125(a)(1), emphasis added.

<sup>30</sup> DEIR, p. 2-4.

<sup>31</sup> 14 CCR § 15125(a), emphasis added.

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(cont.)

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baseline, it is impossible to rely on one point in time, especially when trying to make determinations for projects that are expected to operate for several decades. Therefore, a more comprehensive review is needed.<sup>32</sup>

One major factor in changes in ecosystems is rain. Wetter rainy seasons can have a substantial impact on habitats. Thus, it is important that the existing conditions discussion take into account the difference between rainy and dry years and seasons. Ms. Owens also points out that both California Native Plants Society and the California Department of Fish and Wildlife's survey protocols emphasize the need to conduct surveys in a way that accounts for plants variability in different seasons and different years.<sup>33</sup>

This is especially true for desert habitats and for desert species like the desert tortoise. Ms. Owens notes that in her surveys of southern California habitats during and after 2019 (which is an example of a demonstrably wetter rainy season), she observed exponentially higher numbers of annual and perennial plants emergent and flowering. She also explains that research of the species in the Mojave desert "show that much of the variation in energetic variables, including movement and dispersal, was associated with one single climatic variable, rainfall."<sup>34</sup> Both 2017 and 2019 had, comparably to 2015, much wetter rainy season.<sup>35</sup>

The DEIR must therefore be revised to include further surveys that will properly reflect existing conditions for the desert tortoise. First, by reflecting the conditions at the time the NOP was published and, second, by accounting for the variability in the conditions that is the result of changes in rainfall. Accounting for the impact of rainfall is important to abide by CEQA's mandate to present "the most accurate and understandable picture." Since there were well documented wetter rainy seasons in recent years, accounting for it is definitely "practically possible" under CEQA.

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<sup>32</sup> Exhibit A, p. 2-4.

<sup>33</sup> Exhibit A, p. 2-3.

<sup>34</sup> Exhibit A, p. 3-4.

<sup>35</sup> Exhibit A, p. 2



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In addition, Ms. Owens explains that the DEIR drew the wrong conclusion from the fact that a desert tortoise carcass was found on the site. Contrary to the DEIR's conclusion that this is "evidence that this site is currently unoccupied by tortoises,"<sup>36</sup> Ms. Owens shows that relevant Fish and Wildlife Service protocol for the species clearly states that "occurrence of either live tortoises or tortoise sign (burrows, scats, and carcasses) in the action area indicates desert tortoise presence."<sup>37</sup>

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(cont.)

**B. The DEIR Fails to Establish the Existing Setting for Special Status Species**

Despite the fact the DEIR discusses a number of special status species, it fails to conduct focused surveys for any them except for the desert tortoise and Mohave ground squirrel.<sup>38</sup> Instead, the DEIR relies heavily on reconnaissance surveys and database review for establishing the existing conditions.

As explained by Ms. Owens, by doing so, the DEIR fails to properly establish the existing setting for these species, for the following reasons:

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While databases and reports are a standard part of the process for gathering information on a site, they cannot replace focused or protocol surveys when it comes to determining the presence, status, or scope of a particular species at a project. Ms. Owens explains that in focused surveys the biologist focuses on the species that is the subject of the survey, without splitting their attention with other plant and animal species, that live on different areas on the site and are active in different ways and on different times of the day and night. At the same time,

Reconnaissance surveys, like those conducted by the Applicant's consultant, serve the purpose of generating an overall picture of what habitats exist on site. They do not and cannot replace data representative of species specific or taxa-specific surveys.<sup>39</sup>

<sup>36</sup> DEIR Volume 2 Appendix D p. 6

<sup>37</sup> Exhibit A, p. 4-5.

<sup>38</sup> Exhibit A, p. 5.

<sup>39</sup> Exhibit A, p. 6.

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This is especially important when attempting to detect elusive, cryptic, rare or endangered species that requires a particular degree of intensive focus and species-specific search methodology by the surveying biologist.<sup>40</sup> Ms. Owens explains that “The demonstrated need for species-intensive focus is why agencies require protocol surveys to be conducted for one focal species at a time.”<sup>41</sup>

In particular, Ms. Owens explains that studies of Mojave Desert species show that their presence and abundance are highly variable from year to year and depend on many factors such as rainfall, soil disturbance and more. This underscores the importance of project-wide focused surveys that can provide accurate data both on presence and on potential mitigation.

Reliance on databases also fails to provide substantial evidence for baseline determinations. Ms. Owens shows that the DEIR relies heavily on the California Natural Diversity Database (CNDDDB) to make determinations about the potential for species to occur. However, she explains that the CNDDDB is a very limited resource and cannot be relied upon such determinations, for a number of reasons.

First, many species sightings are not actually reported on the public CNDDDB. For example, for most birds the CNDDDB maps only those occurrences that can be associated with “evidence of nesting.” Second, CNDDDB records are voluntarily reported and only exist for locations that have been surveyed to a greater extent than others. As a result, explains Ms. Owens, “the lack of CNDDDB records, or records from any other database or report (i.e. the DRECP) does not mean a species is absent”<sup>42</sup>

This means that the CNDDDB presents, at best, a conservative description of what may or may not be present onsite and is limited in its ability to predict species currently present at any given locale. This is also evident in the disclaimer posted by CDFW on the CNDDDB website:

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<sup>40</sup> Exhibit A, p. 6.

<sup>41</sup> Exhibit A, p. 6.

<sup>42</sup> Exhibit A, p. 9.



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“(…) we cannot and do not portray the CNDDB as an exhaustive and comprehensive inventory of all rare species and natural communities statewide. Field verification for the presence or absence of sensitive species will always be an important obligation of our customers.”<sup>43</sup>

The DEIR must be revised to include focused surveys for the relevant special status species and/or their representative taxa: bats, reptiles, raptors, nesting and migratory birds.<sup>44</sup>

### **C. The DEIR Fails to Establish the Existing Conditions for Hazards and Hazardous Materials**

The “Hazards and Hazardous Materials” section of the DEIR describes the affected environment and regulatory setting for hazards and hazardous materials in the Project site, as well as the project's potential impacts on residences and other sensitive receptors that could be exposed to these hazards.<sup>45</sup> The DEIR states that the information for the hazards analysis is “based primarily” on two Phase I Environmental Site Assessments (“ESAs”). These assessments include the Terracon ESA from 2015 and the SEI ESA from 2014.

However, as stated in the DEIR, the SEI ESA from 2014 “is actually for a site that is south of the project site when a different location was being evaluated.” The DEIR goes on to argue that “[h]owever, considering that Phase I reports examine a 1-mile radius of a location, it was still used as relevant to the proposed project locations.”<sup>46</sup>

SWAPE’s review of both ESA’s found that indeed, the SEI ESA was prepared for a different parcel south of the Project. *This means that a large part of the Project was never covered by an ESA.* SWAPE found that the area of the Project site not covered by a Phase I ESA is roughly coincident with the “Phase 2” Project site. That means that out of roughly 165 acres; about 40 acres were never reviewed in a phase I ESA.

<sup>43</sup> <https://wildlife.ca.gov/Data/CNDDB/About>

<sup>44</sup> Exhibit A, p. 9.

<sup>45</sup> DEIR, p. 4.9-1.

<sup>46</sup> DEIR, p. 4.9-21.

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This lack of information regarding the Project site is a failure to establish the existing setting for the Project. As SWAPE explains, [a]n inspection is an integral part of standards for performing a Phase I ESA established by the US EPA and the American Society for Testing and Materials Standards (ASTM).<sup>47</sup> A Proper Phase I ESA that covers the whole of the Project's site is required to properly set the existing conditions for the project, as required under CEQA. The County must revise the DEIR to properly reflect the findings and conclusions of such an updated Phase I ESA.

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(cont.)

## **V. THE DEIR FAILS TO DISCLOSE AND ANALYZE SIGNIFICANT IMPACTS ON BIOLOGICAL RESOURCES, AIR QUALITY AND GHG**

An EIR must fully disclose all potentially significant impacts of a Project and implement all feasible mitigation to reduce those impacts to less than significant levels. The lead agency's significance determination with regard to each impact must be supported by accurate scientific and factual data.<sup>48</sup> An agency cannot conclude that an impact is less than significant unless it produces rigorous analysis and concrete substantial evidence justifying the finding.<sup>49</sup>

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As described below, the DEIR violates CEQA by failing to support its impact analysis with substantial evidence with regard to biological resources, air quality and GHG.

### **A. The DEIR Fails to Adequately Disclose and Analyze Impacts on Biological Resources**

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According to the DEIR, a total of 92 plant species were identified on the project site during the biological surveys<sup>50</sup> and 14 special-status plant species have been recorded within the vicinity of the project site.<sup>51</sup> Wildlife species observed or otherwise detected on the project site included four reptiles, twenty six birds

<sup>47</sup> Exhibit B: SWAPE comments, p. 2.

<sup>48</sup> 14 CCR § 15064(b).

<sup>49</sup> *Kings Cty. Farm Bur. v. Hanford* (1990) 221 Cal.App.3d 692, 732.

<sup>50</sup> DEIR, 4.4-4.

<sup>51</sup> DEIR, 4.4-8.



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species, and nine mammal species<sup>52</sup>, and fifteen special-status wildlife species (three reptiles, eight birds, and four mammals) have been recorded within the vicinity of the project site.<sup>53</sup>

Despite that, the DEIR fails to properly disclose and analyze the Project's impacts on many of the biological resources within the Project Site and vicinity.

As described below, the DEIR makes an unsupported claim that the "lake-effect" impact of solar projects on birds is "uncertain," when in fact there is substantial evidence that shows the impacts of the phenomenon. The DEIR also fails to properly disclose, analyze and, as a result, mitigate, the Project's impacts on a number of Special Status avian Species, including Swainson's Hawk, and on reptiles.

### **1. The DEIR's Impact Analysis Relies on Unsupported and Illogical Assumptions**

In its impact discussion, the DEIR includes the following statement:

Direct impacts to special-status species are unlikely to result from project operation and maintenance activities because implementation of the project onsite would remove habitat for special-status species on the project site and restrict sensitive wildlife species movement into the project site..."<sup>54</sup>

As Ms. Owens explains, this statement is so "scientifically erroneous" that "it brings into question the logic of other arguments in the document regarding lack of impacts".<sup>55</sup> First, because removal of habitat is a primary cause of significant ecological impacts. Second, because this statement is not based on any evidence due to the DEIR's failure to conduct proper surveys and establish the existing conditions and finally, because most bird species have high natal site fidelity and will return to

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<sup>52</sup> DEIR, 4.4-8.

<sup>53</sup> DEIR, 4.4-13.

<sup>54</sup> DEIR, 4.4-34.

<sup>55</sup> Exhibit A, p. 10

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their specific location of birth regardless of the addition of anthropogenic activities and constructs.<sup>56</sup>

Ms. Owens points out that since birds fly, they are not especially restricted by fencing or an “awareness” program and moreover, birds are known to take advantage of man-made constructs for perching, shade, nesting, or attraction as a stopover and thus exposing themselves to injury, harm, and reduced fertility over time, as is shown in the evidence presented by Ms. Owens.

12-N  
(cont.)

## **2. Failure to Analyze Impacts on Birds From the “Lake Effect”**

Under its discussion of impacts and mitigation measure for biological resources, the DEIR discusses impacts from operational and maintenance of the project. Here, the DEIR devotes a few short paragraphs to the phenomenon known as “the lake effect”. As Ms. Owens explains, this is a well-documented phenomenon in which birds are attracted to solar panels that may appear as bodies of water, which result in injury, death, or stranding from strikes to panels and associated structures.<sup>57</sup>

The DEIR, however, states that:

though it is apparent that solar energy facilities present a risk of fatality for birds, additional standardized and systematic fatality data would be needed to better understand and quantify the risks.<sup>58</sup>

The DEIR then argues that despite the fact that “[t]he causes of avian injuries and fatalities at commercial-scale solar projects continue to be evaluated by the USFWS, CDFW, and others,” still “there remains a great deal of uncertainty regarding the extent to which birds might be impacted by the project” for various reasons. The DEIR then lists the reasons for this purported uncertainty as follows:

12-O

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<sup>56</sup> Exhibit A, p. 10.

<sup>57</sup> Exhibit A, p. 11.

<sup>58</sup> DEIR, 4.4-34.



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- (1) the mortality data from the other projects has been collected over a relatively short period of time and still is being evaluated
- (2) in most cases, the cause of death is not clear; and
- (3) mortality information from one project location is not necessarily indicative of the mortality that might be found at another project location.<sup>59</sup>

The DEIR concludes that “[t]herefore, “fake lake effect” does not have a significant direct or indirect impact on migratory birds including foraging raptors.” It also states that “there was no consistent pattern to support or refute the hypothesis that water-dependent species were more susceptible to mortality at solar facilities.” Finally, the DEIR adds that “[i]n order to determine if the operational phase of the project is resulting in a significant amount of avian mortality, a monitoring program would be implemented as described in Mitigation Measure MM 4.4-12.”<sup>60</sup>

As explained by Ms. Owens in her comments, none of these claimed reasons for the purported “uncertainty” of the lake effect is supported by the evidence. On the contrary, and as Ms. Owens shows, there is substantial evidence that supports the conclusion this phenomenon presents significant impacts for birds and must be analyzed and mitigated in an environmental document.

Regarding the claim that mortality data from other projects has been collected over a relatively short period of time and still is being evaluated, Ms. Owens explains that “mortality monitoring has been conducted as long as the commercial industry of solar panel-powered energy has existed”<sup>61</sup> and quotes relevant peer-reviewed articles. She also shows that the data are abundant, and methodologies standardized, which enables proper impact evaluation, as discussed in more details below.

12-O  
(cont.)

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<sup>59</sup> DEIR, 4.4-34.

<sup>60</sup> DEIR, 4.4-34, 4.4-35.

<sup>61</sup> Exhibit A, p. 11.

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Regarding the claim that in most cases the cause of death is not clear, Ms. Owens presents evidence this is incorrect. She presents a detailed review of the data presented to the agencies from monitoring reports, which clearly indicates cause of death. Ms. Owens has also conducted herself mortality monitoring at several industrial solar sites and presents evidence, backed by photos, that “the majority of strikes that cause injury and death are readily interpreted due not only to the condition of the bird but the evidence on the solar panels themselves”<sup>62</sup>

12-O  
(cont.)

Ms. Owens also presents data refuting the DEIR’s argument that data do not exist to confirm water birds are more susceptible to lake effect mortality. Ms. Owens explains that when considering the many hundreds of migrant species of all types that fly over solar project it is clear that there is preponderance of water loving species among those that strike the panels. This is especially obvious given the fact that the most abundant species that reside in proximity to the solar sites are not water birds.<sup>63</sup>

In addition, Ms. Owens explains that the DEIR also omits required analysis of impacts to entire bird populations, not just to individuals: the evidence presented below clearly shows that bird strikes to solar panels can cause injury and death to birds of many species, including protected ones (e.g. Swainson’s hawk, burrowing owl, tricolored blackbird). For these and other rare and endangered species, “loss of even a few breeding adults can significantly reduce the population’s regional population stability.”<sup>64</sup>

12-P

The DEIR also contradicts itself regarding the impact of the lake effect. Under the cumulative impact discussion, the DEIR includes the following statement:

Little is known about the potential for impacts to migratory birds associated with the “fake lake effect.” *However, evidence suggests that significant impacts to migratory birds could occur even after mitigation.* Further, as take

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<sup>62</sup> Exhibit A, p. 12.

<sup>63</sup> Exhibit A, p. 12.

<sup>64</sup> Exhibit A, p. 15-16.  
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authorization for migratory bird species is not available, any mortality of migratory birds would be considered significant under CEQA. Therefore, the proposed project, in combination with all identified cumulative projects, could result in a cumulatively considerable contribution to a significant cumulative impact.<sup>65</sup>

As Ms. Owens notes, the emphasized statement contradicts the DEIR's entire discussion claiming insignificant operational impacts to birds from the lake effect.<sup>66</sup>

Ms. Owens presents in her comments an expansive body of literature, reports and data that constitutes substantial evidence and supports the conclusion that solar projects present a significant risk to birds due to the impacts of the "lake effect". At the same time, these data refutes the argument that the lake-effect is "uncertain" and show it is not supported by the evidence.

Below is a summary of *some* of the evidence presented by Ms. Owens in her comments<sup>67</sup>

- **Compilation of data from avian mortality reports for solar desert facilities submitted to the state and federal Fish and Wildlife agencies between 2011 and 2016.** This compilation lists species that are protected under the Federal ESA, California ESA, California Species of Special Concern, and Migratory Bird Treaty Act, and have been killed by collision deaths at Southern California desert solar facilities. The data shows that protected, endemic, and unusual desert migrants of all sizes are affected by the lake effect.
- **Peer-review studies** that documented the lake effect and evaluated its potential impact on birds' populations. Using the data in these and other studies, Ms. Owens calculated that bird deaths in the region would number between 548,000 and over 4,347,000, causing a significant cumulative

<sup>65</sup> DEIR, p. 4.4-54., emphasis added.

<sup>66</sup> Exhibit A, p. 16.

<sup>67</sup> Exhibit A, p. 18- 23.

12-P  
(cont.)

12-Q

12-R



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impact.<sup>68</sup>

- **Data and reports from government agencies acknowledging the lake effect impacts.** This includes the Solar Energy Development Programmatic EIS PEIS , published by the U.S. Department of Energy’s Office of Energy Efficiency and Renewable Energy and the U.S. Bureau of Land Management, which concluded that “Since birds are prone to collisions with reflective surfaces, it would be expected that a utility-scale solar energy project could cause significant bird mortality.”

The USFWS, in their comments on the Palo Verde Solar DEIR, confirms that there is growing evidence of the impacts from what is known as the “lake effect,” especially for water-associated birds and other species seeking migratory stopover habitat.

The 2015 National Renewable Energy Laboratory’s review of avian monitoring and mitigation information at existing utility-scale solar facilities also acknowledged the potential impacts, stating that “PV facilities may attract some species of birds through what has been called the “lake effect””.

- **Mortality reports** from the California Valley Solar Ranch Project (CVSRP), located in the California desert region. The reports from the site, which is arguably of lower overall quality habitat than the Project site, show 703 bird mortalities were reported at CVSRP over the course of just two years, including three burrowing owls, despite burrowing owl mitigation measures described in the EIR. Ms. Owens calculated, based on this data and after accounting for the relevant differences, that throughout the life of the Project strikes could thus total an average of 1,194 birds, including an unknown number of rare, SSC, and ESA listed species. This, concludes Ms. Owens, means the Project “would thus pose a high risk of significantly impacting an entire population or a resident or migratory species that uses this site for nesting, foraging, or a migratory flyway.”<sup>69</sup>

The evidence presented in Ms. Owens comments clearly demonstrates that the risks of PV panel avian collisions are considerable, recognized by state and

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<sup>68</sup> Exhibit A, p. 21.

<sup>69</sup> Exhibit A, p. 19.  
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↑ 12-R  
(cont.)

12-S

12-T  
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federal agencies, measurable using scientific protocols, and quantifiable to the extent required for estimating compensatory mitigation needs. The DEIR must be revised to properly disclose, analyze and mitigate the lake effect's potentially significant impacts on birds.

12-T  
(cont.)

### **3. The DEIR fails to Disclose, Analyze and Mitigate Impacts on Swainson's Hawk**

Swainson's Hawk ("SWHA") is listed as "Threatened" under the California Endangered Species Act. The Project and surrounding habitat were not surveyed for the presence of SWHA using standard methods from Swainson's Hawk Survey Protocols, and yet the DEIR biological technical report concludes that "Based on the field survey and habitat assessment (...) none of the following special status species reported from the region will be adversely affected by site development: Swainson's hawk (...)" and recommends no mitigation measures.<sup>70</sup>

As Ms. Owens explains, this analysis is entirely flawed. The DEIR claims that there is low potential for nesting Swainson's hawks to occur but makes no analysis of the impact of operations from strikes to panels and power lines (discussed above) and from loss of habitat, discussed below.

12-U

The DEIR claim that SWHA "would not nest onsite and probably not forage there (as they tend to prefer fallow agricultural fields and other open areas in the desert)"<sup>71</sup> is not supported by the evidence. The California Department of Fish and Wildlife's Swainson's Hawk Survey Protocols specifically states that Swainson's hawks may also forage in grasslands, Joshua tree woodlands, and other desert scrub habitats that support a suitable prey base.<sup>72</sup> This is also Ms. Owens conclusion based on both her study of the specie and of three years conducting raptor surveys on a project site directly in the SWHA migratory flight path.<sup>73</sup>

<sup>70</sup> Exhibit A, p. 24.

<sup>71</sup> DEIR, p. 4.4-18.

<sup>72</sup> Exhibit A, p. 25.

<sup>73</sup> Exhibit A, p. 25.

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The high likelihood that SWHAs may use the Project site for foraging or a stopover is also supported by the evidence available from recent sightings of SWHAs within several miles of the Project area. Ms. Owens lists a number of recent sightings in the Project's vicinity. The CDFW also makes the following statement with regard to SWHA:

the Department considers conversion of foraging areas to renewable energy power plant facility sites to be habitat loss. For example, solar panel arrays are expected to eliminate most or all foraging potential. Significant habitat loss may result from individual projects and cumulatively, from multiple projects.<sup>74</sup>

Finally, Ms. Owens notes that while the DEIR refers to the SWHA as "uncommon biological resource," uncommon does not indicate low impact; in fact, often, it is the opposite. The CDFW states with respect to the low population numbers of SWHA in the region, that:

The small number of breeding Swainson's hawks in the Antelope Valley and the potential isolation from other Swainson's hawk populations makes the Antelope Valley population *particularly susceptible to extirpation*.<sup>75</sup>

The DEIR must be revised to include a discussion of the significant impacts of foraging habitat loss from the Project and require enforceable mitigation measures to reduce those impacts.

#### **4. The DEIR Fails to Disclose and Analyze Impacts on Other Special Status Avian Species**

The DEIR's biological technical report states as follows:

CMBC concludes that none of the following special status species reported from the region will be adversely affected by site development: Swainson's

<sup>74</sup> <https://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=83991&inline>, p.2.

<sup>75</sup> <https://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=83991&inline>, p.2., emphasis added.  
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12-U  
(cont.)

12-V



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hawk, Cooper's hawk, sharp-shinned hawk, prairie falcon, loggerhead shrike, or LeConte's thrasher. As such, no adverse impacts have been identified and no mitigation measures are recommended.<sup>76</sup>

As explained by Ms. Owens in her comments, this statement is not supported by the evidence for several reasons. First, no adequate surveys were conducted to establish the current baseline of these species, as required by law. Second, all of these species are "widely accepted as breeding residents of the region and thus could use the site for breeding, foraging, or moving between territories."<sup>77</sup> Third, several of these species, which require special protection under the California Endangered Species Act (CESA) or are California Species of Special Concern (SSC), have been noted on eBird and the CNDDB. Due to the high potential of operational impacts, discussed above, the DEIR has failed to provide adequate analysis and mitigation for these species.

Therefore, the DEIR must be revised to conduct appropriate resident, nesting, and migratory bird surveys to establish existing conditions, acknowledge and analyze potentially significant impacts and provide adequate mitigation, as discussed in more detail in Ms. Owens comments.

#### **5. The DEIR Fails to Disclose, Analyze and Mitigate Impacts to Reptiles**

As Ms. Owens explains, "[i]t is widely accepted in the scientific community that reptiles represent a key taxon in desert habitats and are highly sensitive to anthropogenic ground disturbances."<sup>78</sup> At the same time, explains Ms. Owens, reptiles are also virtually impossible to detect without conducting comprehensive surveys, that were not conducted here, due to their behavioral characteristics.<sup>79</sup> A recent study by the USGS of reptile species in arid alluvial sand habitat, found

<sup>76</sup> DEIR Volume 2 Appendix D p. vii.

<sup>77</sup> Exhibit A, p. 29.

<sup>78</sup> Exhibit A, p. 31.

<sup>79</sup> Id.

12-V  
(cont.)

12-W

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results that were “completely unexpected” and revealed an abundance and diversity beyond what by the survey conductors have expected.<sup>80</sup>

At the same time, reptiles are susceptible to impacts from human activities and construction, including risk of direct mortality by vehicles, habitat fragmentation and potential barriers to gene flow. large concentrating solar facilities may also create localized drought conditions, or alter the microclimate of a region, impacting reptiles.

In particular, Ms. Owens notes that a major mortality cause for reptiles is that lizards of varying species and sizes are attracted to the humidity created by water-spraying trucks on roads (a common practice during construction). This results in increased mortality and injury from construction site traffic on the roads.

Ms. Owens explains that this phenomenon is under-reported because development sites rarely have biologists deliberately searching project sites and roads for lizards when the mitigation measures and resulting permits do not require such an effort. However, when the phenomenon was officially noted it required additional measures and management practices. It is important to note that that mortalities from even one project could have a “population level effect, especially if a species sub-population is isolated or part of a Distinct Population Segment.”<sup>81</sup>

The DEIR must be revised to conduct appropriate surveys for reptiles, analyze and address potential impacts, and include appropriate mitigation measures to reduce impacts. Such measures may include additional biologists present onsite during all hours of construction, enhanced traffic restrictions, and a reptile relocation Plan and Monitoring Strategy during the construction phase.<sup>82</sup>

12-W  
(cont.)

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<sup>80</sup> Exhibit A, p. 31-32.

<sup>81</sup> Exhibit A, p. 34.

<sup>82</sup> Exhibit A, p. 34.



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**B. The DEIR Fails to Adequately Disclose and Analyze Impacts on Air Quality**

In the Air Quality section of the DEIR, the agency is required to disclose, analyze and propose mitigation to reduce the Project's construction and operation emissions of pollutants to less than significant levels. However, as shown by SWAPE<sup>83</sup> and explained below, the DEIR analysis is flawed, therefore rendering its conclusion regarding air quality impacts unsupported.

As described below, the DEIR's air quality analysis relies on emissions calculated with the modeling tool of CalEEMod.2016.3.2. This modeling tool provides recommended default values based on site-specific information. Agencies may change those default values only if such changes are justified by substantial evidence. Failure to properly use the modeling tool or use the correct data results in a failure to properly estimate project's impacts. SWAPE's review found multiple errors and omissions in the air quality analysis, which may result in an underestimation of the Project's air quality impacts. The County must address these flaws prior to reaching a conclusion regarding the projects' impacts. These errors and omissions include:

1. **Failure to account for all operational air quality impacts:** As SWAPE show, the DEIR only evaluates the Project's operational emissions from three sources: water trucks, maintenance trucks and employee vehicles. However, according to the CalEEMod User's Guide, operational emissions must include a long list of additional sources, including fugitive dust associated with roads, architectural coating activities, off-road equipment used during operation, emergency generators and more.<sup>84</sup> By failing to account for all emissions sources, the DEIR underestimates the Project's operational emissions.
2. **Underestimation of land use size:** SWAPE's review found that the model failed to account for the whole of land uses proposed. The land use size of a project impacts in turn the calculations of emissions caused by architectural coatings, energy use and more.<sup>85</sup> By failing to account for the correct land use size, the DEIR underestimates the Project's emissions.

<sup>83</sup> Exhibit B: SWAPE comments.

<sup>84</sup> Exhibit B, p.3-4.

<sup>85</sup> Exhibit B, p. 4-5.



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3. **Use of incorrect land use type** – SWAPE show that the model incorrectly categorized the Project as “User Defined Industrial”. Such categorization requires that the user will enter all necessary operational information instead of the default information (for example, vehicle fleet mix, energy intensity values, indoor and outdoor water use rates etc.) As SWAPE shows, this was not done. Therefore, the Project should not be modeled as “User Defined” and the model may underestimate Project’s emissions.<sup>86</sup>

12-A2

4. **Use of an incorrect construction schedule** – SWAPE compared the construction schedule described in the DEIR with the construction schedule of the CalEEMod output files and found them to be inconsistent with each other. Specifically, the first phase of construction, “Mobilization and Site Preparation,” or “Grading,” was underestimated by approximately 50%<sup>87</sup>. As a result, the model may underestimate the Project’s construction-related emission and should not be relied upon to determine Project significance.

12-B2

5. **Unsupported changes to construction values** – SWAPE’s review found that several manual changes were made to the Project’s anticipated off-road construction equipment horsepower values, load factor values, and usage hours. As SWAPE explain, those changes are not consistent with the information provided in the DEIR and not properly supported or justified by the evidence.<sup>88</sup>

12-C2

6. **Failure to model proposed off-road construction equipment list** – SWAPE found that the model included in the Project’s CalEEMod model both underestimates the pieces of equipment and fails to include the types of equipment indicated by the equipment list included in the DEIR. Thus, the model may underestimate the Project’s construction-related emissions and should not be relied upon to determine Project significance.<sup>89</sup>

12-D2

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<sup>86</sup> Exhibit B, p 5.

<sup>87</sup> Exhibit B, p. 9.

<sup>88</sup> Exhibit B, p. 9.

<sup>89</sup> Exhibit B, p. 9.



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7. **Underestimation of construction trips** – SWAPE found that while the traffic study anticipated construction to generate an average of 75 personnel trips and 10 heavy truck trips per day, the Project’s model included only 49 total daily worker trips and daily vendor trips. The result is that the model underestimates the Project’s construction-related emissions.<sup>90</sup>

12-E2

8. **Unsupported application of mitigation measures** – SWAPE found that the Project’s model included the measure of “Reduce Vehicle Speed on Unpaved Road” used to mitigate air quality impacts. However, the model assumed that vehicle speed will be reduced to 15 MPH, while according to the DEIR vehicles can travel up to 25 MPH. The model should have instead included a vehicle speed of 25 MPH in the model and since it did not, impacts are underestimated.<sup>91</sup>

12-F2

**C. The DEIR Fails to Adequately Disclose and Analyze Impacts on Climate Change from Greenhouse Gas (“GHG”) Emissions**

CEQA requires agencies to “make a good-faith effort, based to the extent possible on scientific and factual data, to describe, calculate or estimate the amount of greenhouse gas emissions resulting from a project.”<sup>92</sup> A lead agency can determine the significance of a project’s GHG emissions by (1) quantifying GHG emissions resulting from the project; and/or (2) relying on a qualitative analysis or performance based standards.<sup>93</sup> The “agency’s analysis also must reasonably reflect evolving scientific knowledge and state regulatory schemes.”<sup>94</sup> Finally, as with the analysis of all impact areas, the agency must employ all feasible mitigation measures to reduce or eliminate impacts.

12-G2

Here, the County fails to adequately analyze and mitigate GHG impacts on climate change from the Project’s construction and operational activities by using an inapplicable threshold of significance to determine the impact’s significance.

The DEIR’s GHG section includes a discussion of various GHG rules and policies, and a calculation of projected GHG emissions from Project’s construction and operations, as is appropriate under CEQA. However, after calculating the

<sup>90</sup> Exhibit B, p 11.

<sup>91</sup> Exhibit B, p 12.

<sup>92</sup> CEQA Guidelines, § 15064.4 (a).

<sup>93</sup> CEQA Guidelines, § 15064.4 (a)(1) and (a)(2)

<sup>94</sup> CEQA Guidelines, § 15064.4 (b).



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Project's projected GHG emissions, the GHG moves on to argue that the projected value of 16 MTs per year of CO<sub>2</sub>e "is below the EKAPCD threshold of 25,000 MTs per year of CO<sub>2</sub>e. Therefore, the project's contribution to climate change would not be cumulatively considerable and the project would not conflict with the State's goal to reduce GHG emissions to 1990 levels by 2020."<sup>95</sup>

This conclusion is entirely flawed as it relies on the Eastern Kern Air Pollution Control District (EKAPCD) threshold of significance, which is not applicable to the Project. An agency must consider "[w]hether the project emissions exceed a threshold of significance that the lead agency determines applies to the project."<sup>96</sup> Particularly for GHG emissions analysis, while the lead agency has discretion to choose a modeling system and methodology, the selection of the methodology and its application must be supported by substantial evidence.<sup>97</sup>

The EKAPCD's threshold clearly does not apply to this Project. The DEIR cites to the EKAPCD's adopted 2012 Addendum to its CEQA Guidelines on GHG impacts, which adopts quantitative thresholds when EKAPCD is the CEQA lead agency.<sup>98</sup> As SWAPE notes, in adopting the Addendum, EKAPCD staff anticipated the applicable projects to be "large industrial projects or modifications to existing industrial projects that do not require conditional use permits from a land-use agency or a permit from the California Energy Commission."<sup>99</sup> This Project is not a large industrial project that does not require a County permit and which requires EKAPCD to be the lead agency. In fact, the Project requires a conditional use permit from Kern County as the lead land-use agency.

Notably, the EKAPCD states that the 25,000 tons per year (tpy) limit is appropriate for determining significance, in part because "ARB and EPA determined that this threshold would be appropriate for facilities whose GHG emissions may be subject to regulation" and then cites to the federal EPA's Final Rule for Mandatory Reporting of Greenhouse Gases ("EPA GHG Reporting

12-G2  
(cont.)

<sup>95</sup> DEIR, p.4-8.18.

<sup>96</sup> CEQA Guidelines, § 15064.4 (b)(2).

<sup>97</sup> CEQA Guidelines, § 15064.4 (c); see also *Center for Biological Diversity v. Dept. of Fish & Wildlife* ("Newhall Ranch") (2015) 62 Cal.4th 204.

<sup>98</sup> DEIR, p. 4.8-14. See also, "Addendum to CEQA Guidelines Addressing GHG Emission Impacts for Stationary Source Projects When Serving as Lead CEQA Agency." EKAPCD, March 8, 2012, ("Addendum"), available at:

<http://www.kernair.org/Documents/CEQA/EKAPCD%20CEQA%20GHG%20Policy%20Adopted%203-8-12.pdf>.

<sup>99</sup> Exhibit B, p. 13.



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Rule”).<sup>100, 101</sup> SWAPE notes that the types of facilities applicable to this EPA regulation, such as stationary fuel combustion sources, fossil-fueled generating units, vehicle manufacturing, and manufacturing of products and chemicals, do not apply to this Project, as a solar project.<sup>102</sup> Moreover, these facilities are subject to the EPA GHG Reporting Rule precisely because they are expected to emit above 25,000 tpy of GHGs.<sup>103</sup>

12-G2  
(cont.)

In addition, according to the Federal Register explaining the development of this particular GHG regulation, the 25,000 tpy threshold was a figure adopted to determine applicability of a facility to the GHG *reporting regulation*:

“From these analyses, we concluded that a 25,000 metric ton threshold suited the needs of the reporting program by providing comprehensive coverage of emissions with a reasonable number of reporters, thereby creating the robust data set necessary for the quantitative analyses of the range of likely GHG policies, programs and regulations.”<sup>104</sup>

The adopted 25,000 tpy threshold is therefore not determinative of the significance of the impacts of a source’s GHG emissions. Rather the threshold was intended to determine whether a stationary source would be subject (or applicable) to the GHG reporting requirements.

12-H2

In sum, the Project does not constitute the types of facilities intended by the EKAPCD and the threshold of 25,000 tpy is not applicable to determine the significance of the Project’s GHG impacts. Moreover, the DEIR fails to provide substantial evidence to support its application of this threshold, stating only that the County did not adopt its own applicable threshold. The 25,000 MT CO<sub>2</sub>e/yr threshold should not be used in determining the Project’s GHG significant impacts and the GHG analysis must be revised to rely on an appropriate threshold and analysis.

<sup>100</sup> Addendum, p. 4.

<sup>101</sup> 74 Fed. Reg. 56260, 56273 (Oct. 30, 2009), *Mandatory Reporting of Greenhouse Gases; Final Rule* (“2009 Federal Register”), available at: <https://www.govinfo.gov/content/pkg/FR-2009-10-30/pdf/E9-23315.pdf>.

<sup>102</sup> Exhibit B, p. 13

<sup>103</sup> 2009 Federal Register, p. 56260.

<sup>104</sup> 2009 Federal Register, p. 56272 (emphasis added).

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## VI. THE DEIR FAILS TO MITIGATE IMPACTS ON BIOLOGICAL RESOURCES

An EIR must identify and describe any feasible measure that can be implemented to reduce or avoid each potentially significant environmental effect of the project.<sup>105</sup> Mitigation measures must be fully enforceable through permit conditions, agreements, or other legally binding instruments.<sup>106</sup>

CEQA requires that “[f]ormulation of mitigation measures shall not be deferred until some future time.”<sup>107</sup> CEQA allows for the specific details of a mitigation measure to be developed after project approval only under certain conditions. As discussed below, these conditions are not fulfilled here.

As described below, the DEIR violates CEQA by improperly deferring mitigation and by relying on mitigation measures that are neither enforceable nor effective.

### A. The DEIR Fails to Adequately Mitigate Impacts on Birds from the Lake Effect

As discussed above, the DEIR fails to properly disclose and analyze Project’s impacts on birds. The DEIR, however, includes some measures presented in the “mitigation measures” section that will purportedly respond to such potential impacts. As explained below, these measures do not qualify as proper mitigation measures under CEQA.

MM 4.4-12 states as follows:

During the operations and maintenance phase of the project, an Avian Mortality Monitoring Program shall be developed in coordination with California Department of Fish and Wildlife and U.S. Fish and Wildlife Service and implemented to systematically and periodically determine the

<sup>105</sup> PRC §21100(b)(3), 14 CCR §15126.4(a)(1).

<sup>106</sup> 14 CCR §15126.4(a)(2)

<sup>107</sup> 14 CCR § 15126.4, subd. (a)(1)(B).

12-12

12-J2



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extent of mortality occurring due to collisions with solar arrays. The measures listed below apply to the program.<sup>108</sup>

The measure lists several sub-measures regarding data collection and monitoring, including the following measure:

*e. Appropriate performance standards for mitigation of impacts to any species regulated by the Bald and Golden Eagle Protection Act, the Endangered Species Act, and the California Endangered Species Act exist through required consultation with the U.S. Fish and Wildlife Service and the California Department of Fish and Wildlife under their respective regulatory and permitting frameworks. If, after 2 years of mortality monitoring, project impacts to any other avian species caused by the project are shown to result in a substantial, long-term reduction in the demographic viability of the population of the species in question, then adaptive management must be implemented to reduce impacts to below this threshold.* Adaptive management measures may include but not be limited to passive avian diverter installations, the use of sound, light or other means to discourage site use consistent with legal requirements, onsite habitat management or pre control measures consistent with applicable legal requirements, or modification to support structures to exclude nesting birds.<sup>109</sup>

12-J2  
(cont.)

These measures constitute an improper deferral of mitigation under CEQA for several reasons. Mitigation may be deferred “when it is impractical or infeasible to include those details during the project’s environmental review.”<sup>110</sup> As described below and in Ms. Owens comments, this is not the case here. There is substantial evidence and methodologies to properly and feasibly mitigate the lake effect impacts. One such method, described by Ms. Owens, is appropriate compensatory mitigation that contributes to a conservation grant, trust, or other relevant entity that has demonstrated successful conservation of regional migratory birds.<sup>111</sup>

12-K2

<sup>108</sup> DEIR, p. 4.4-49.

<sup>109</sup> DEIR, p. 4.4-50, emphasis added.

<sup>110</sup> 15126.4(a)(1)(B)

<sup>111</sup> Exhibit A, p. 16-17.



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CEQA only allows for deferral of mitigation under strict conditions, requiring that the agency (1) commits itself to the mitigation, (2) adopts specific performance standards the mitigation will achieve, and (3) identifies the type(s) of potential action(s) that can feasibly achieve that performance standard and that will be considered, analyzed, and potentially incorporated in the mitigation measure.<sup>112</sup>

The DEIR fails entirely to obey by these standards. First, it states that “[a]ppropriate performance standards for mitigation of impacts (...) exist through required consultation with the U.S. Fish and Wildlife Service and the California Department of Fish and Wildlife,” giving the impression that such performance standards are already written and readily available. However, as explained by Ms. Owens:

The DEIR is misleading in stating that “Appropriate performance standards for mitigation of impacts to any species...exist through required consultation.” Consultation with agencies about industrial solar site mitigation to birds may result in site-specific, Project-specific, and species-specific decisions about mitigation that are highly discretionary because such mitigation measures for operational impacts are not standardized whatsoever, largely untested, and are dependent upon the final EIR mitigation determinations as permitted.<sup>113</sup>

The DEIR thus violates the second requirement to adopt specific performance standards. These standards are yet to be determined and, as such, cannot be binding and cannot be reviewed by the public.

Second, the DEIR claims that “adaptive management must be implemented to reduce impacts to below *this* threshold”<sup>114</sup>. However, the DEIR fails to explain what exactly is “this” threshold the mitigation measure refers to, and indeed such a threshold is nowhere to be found in the DEIR. As explained by Ms. Owens:

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<sup>112</sup> 15126.4(a)(1)(B)

<sup>113</sup> Exhibit A, p. 15.

<sup>114</sup> Emphasis added.  
3902-007acp

12-L2

12-M2



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There is no species-specific “standard” for species harmed by solar Projects infrastructure, and there is no threshold defined as the DEIR infers. This is simply not accurate, and the statement and its underlying assumptions must be retracted. If not, the DEIR must present the actual standards and thresholds they are alluding to for avian species that may be impacted by the Project.<sup>115</sup>

12-M2  
(cont.)

The DEIR thus violates the first requirement to commit to mitigation. If there is no clear threshold, it is impossible to mitigate the impact below that threshold.

Third, as Ms. Owens explains, there is no evidence, and the DEIR presents no peer-reviewed evidence, that “adaptive management” measures, including diverters, sound, or light, have been scientifically demonstrated to reduce strikes by birds to solar panels. The DEIR thus violates the third requirement, that potential action(s) can feasibly achieve the standards.

12-N2

The courts have been clear that where an EIR improperly defers mitigation, the approving agency abuses its discretion by failing to proceed as required by law.<sup>116</sup> The DEIR does just that.

In addition, Ms. Owens points out that the proposed measures in the DEIR are flawed in themselves: first, because they purport to rely on two years of data collection to gather all the required data to formulate mitigation. This assumption, explains Ms. Owens, is “specious” and is not an adequate scope of data. As she explains, “[m]uch about any given species’ population viability can change over the next few decades due to impacts from climate change, development, and other pressures, and this will not be reflected predictively in two years”<sup>117</sup>

12-O2

Ms. Owens also points out that the DEIR claims in its discussion regarding birds and operational impact mitigation, that “solar photovoltaic panels consist of

12-P2

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<sup>115</sup> Exhibit A, p. 15.

<sup>116</sup> *Golden Door Properties, LLC v. Cty. of San Diego*, 50 Cal. App. 5th 467, 264 Cal. Rptr. 3d 309, 349 (2020)

<sup>117</sup> Exhibit A, p. 14-15.

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non-reflective glass that minimizes the “fake lake-effect.” However, the DEIR provides no substantial evidence to support the claim that non-reflective coating can, or does, serve to reduce impacts to birds. Ms. Owens adds that she personally documented bird collisions panels despite being covered with thick layer of dust. Finally, Ms. Owens also explains that not enough is known about what actual physical characteristics in solar projects cause the lake effect phenomenon in different species, and therefore not enough is known to support the assumption that non-reflective surfaces will mitigate the impact.<sup>118</sup>

12-P2  
(cont.)

### **B. The DEIR fails to Mitigate Impacts on Fully Protected Species**

The DEIR acknowledges the likelihood of foraging eagles on the project site and that electrocution is a risk for avian species.<sup>119</sup> However, Ms. Owens notes that the DEIR’s proposed mitigation for impacts on the golden eagle, a California Fully Protected species amount to following the Avian Power Line Interaction Committee Guidelines specifications, and creating a monitoring program, discussed above. However, explains Ms. Owens,

if a golden eagle is injured or killed by any aspect of the Project infrastructure at any time, this amounts to “take”, which is prohibited and cannot be permitted for Fully Protected species without a detailed, approved habitat conservation plan, which does not exist for this Project . As such, the applicant must explain, specifically, how death or injury to any golden eagles will be avoided for the life of the Project<sup>120</sup>

12-Q2

This is especially important, explains Ms. Owens, in light of the fact that APLIC recommended mitigation has not proven to be highly effective in reducing eagle mortality.

Ms. Owens states that the same is true for another Fully Protected species not even mentioned by the DEIR, the peregrine falcon. She points to recent

12-R2

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<sup>118</sup> Exhibit A, p. 17

<sup>119</sup> DEIR p. 4.4-36

<sup>120</sup> Exhibit A, p. 28.



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documentation of this species on eBird in the Project's vicinity and to the fact it is a regular resident of the western Mojave / greater Antelope Valley, and like other raptors is at risk of strikes and electrocution by wires.<sup>121</sup>

2-R2  
(cont.)

**C. The DEIR Relies on Unenforceable and Ineffective Mitigation Measures**

MM 4.4-6 proposes to reduce construction impacts to below significant by, among other things, requiring construction workers to attend Environmental Awareness Training and Education Program that will be presented by an authorized biologist.<sup>122</sup>

Ms. Owens explains that the effectiveness of this measure is not supported by evidence. She also states that in her professional experience as an environmental consultant, having personally observed these trainings dozens of times, she has “not observed these presentations for enhanced worker awareness translate into measurable actions that have been determined to significantly reduce project impacts to wildlife.”<sup>123</sup>

12-S2

The DEIR states that “[t]he construction crews and contractor(s) shall be responsible for preventing unauthorized impacts from construction activities to sensitive biological resources.”<sup>124</sup> However, Ms. Owens explains, “there is no realistic mechanism or legal framework by which employees can be held responsible for impacts whether “unauthorized” can be clearly defined or not.”<sup>125</sup> Therefore, MM 4.4-6 does not comply with CEQA’s mandate that mitigation measures should be effective and enforceable.

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<sup>121</sup> Exhibit A, p. 28-29.

<sup>122</sup> DEIR, p. 4.4-40

<sup>123</sup> Exhibit A, p. 35.

<sup>124</sup> DEIR, p. 4.4-41

<sup>125</sup> Exhibit A, p. 35.

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## VII. CONCLUSION

The DEIR is inadequate as an environmental document because it lacks a legally adequate project description, it fails to establish the existing setting for biological resources and hazards, and it fails to properly disclose, analyze and mitigate the Project's significant impacts on biological resources, air quality and from GHG emissions. The County cannot certify the EIR or approve the Project until it prepares a revised DEIR that resolves these issues and complies with CEQA.

12-T2

Thank you for your consideration of these comments.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Nirit Lotan', with a stylized flourish at the end.

Nirit Lotan

NL:acp

Attachments