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February 9, 2021

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VIA Electronic and Overnight Mail

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**Re: Comments on the Initial Study/Mitigated Negative Declaration
for Site Plan Review 20-009 (APN's: 3022-027-016 and -017, SCH
No. 2021010230)**

Dear Mr. Sauder:

We are writing on behalf of **Citizens for Responsible Solar** to provide comments on the Initial Study/Mitigated Negative Declaration ("IS/MND")¹ prepared by the City of Palmdale ("City") for Site Plan Review 20-009 ("Project"), State Clearinghouse Number 2021010230. The Project is proposed by Lockheed Martin Aeronautics ("Applicant") and would include the construction and operation of a solar photovoltaic ("PV") power generating facility and associated facilities, that would generate a combined total of approximately 25 megawatts ("MW") of renewable electrical energy on approximately 140 acres of private land in the City.

The Applicant is seeking (a) a Site Plan Review to allow for the construction and operation of the 25 MW solar PV facility; (b) an Encroachment Permit to encroach Avenue 012; (c) a Native Desert Preservation Plan ("NDPP"); (d) a Dust Plan; (e) a Grading Permit; (f) a Building Permit; and (g) approval of the IS/MND.²

¹ City of Palmdale, Site Plan Review (SPR) 20-009 Initial Study/Mitigated Negative Declaration, (Dec. 2020) (hereafter "IS/MND").

² IS/MND, pp. 8-9.

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Based upon our review of the IS/MND, we conclude that the IS/MND fails to comply with the California Environmental Quality Act³ (“CEQA”) in numerous aspects. As explained more fully below, the IS/MND fails to accurately disclose the extent of the Project’s potentially significant impacts on air quality, biological resources, and hazards; fails to support its findings with substantial evidence; and fails to properly mitigate the Project’s potentially significant impacts. The Project is also inconsistent with several General Plan policies and City ordinances. As explained in these comments, there is more than a fair argument that the Project will result in potentially significant, unmitigated impacts relating to biological resources and hazards, which requires the City to withdraw the IS/MND and prepare an environmental impact report (“EIR”) for the Project that fully complies with CEQA.

The City may not approve the Project until it prepares an EIR that adequately analyzes the Project’s potentially significant direct, indirect and cumulative impacts, and incorporates all feasible mitigation measures to avoid or minimize these impacts to the greatest extent feasible.

We reviewed the IS/MND and its technical appendices with the assistance of environmental health, air quality and GHG expert Paul E. Rosenfield, PhD. and hazardous materials expert Matt Hagemann, P.G., C.Hg. of Soil Water Air Protection Enterprise (“SWAPE”)⁴ and expert biologist Renee Owens.⁵ We reserve the right to supplement these comments at a later date and at any later proceedings related to this Project.⁶

³ Pub. Resources Code (“PRC”) §§ 21000 et seq.

⁴ Letter from Matt Hagemann, P.G., C.Hg. and Paul E. Rosenfield, PhD., SWAPE to Kyle C. Jones, Adams, Broadwell, Joseph & Cardozo, Comments on Site Plan Review 20-009 (SCH No. 2021010230), (Feb. 8, 2021) (hereafter “SWAPE Comments”) **Exhibit A**.

⁵ Letter from Renee Owens to Kyle C. Jones, Adams, Broadwell, Joseph & Cardozo, Comments on the Draft Initial Study/ Mitigated Negative Declaration for the Lockheed Martin Palmdale Solar Project SCH # 2021010230, (Feb. 9, 2021) (hereafter “Owens’ Comments”) **Exhibit B**.

⁶ Gov. Code § 65009(b); PRC § 21177(a); *Bakersfield Citizens for Local Control v. Bakersfield (“Bakersfield”)* (2004) 124 Cal. App. 4th 1184, 1199-1203; see *Galante Vineyards v. Monterey Water Dist.* (1997) 60 Cal. App. 4th 1109, 1121.

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 (“CURE”)** and its member labor organizations, and their members and families, and other individuals that live and/or work in the City.

The individual members of Citizens and the members of the affiliated labor organizations live, work, recreate and raise their families in the City. 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.

The organizational members of Citizens also have an interest in enforcing environmental laws that encourage sustainable development and ensure a safe working environment for the 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 Citizens are concerned about projects that risk serious environmental harm without providing countervailing economic benefits. CEQA provides a balancing process whereby economic benefits are weighed against significant impacts to the environment and it is in this spirit that we offer these comments.

II. SUBSTANTIAL EVIDENCE SUPPORTS A FAIR ARGUMENT THAT PROJECT CONSTRUCTION AND OPERATION MAY RESULT IN POTENTIALLY SIGNIFICANT IMPACTS THAT THE IS/MND FAILS TO DISCLOSE, ANALYZE AND MITIGATE

CEQA is intended to provide the fullest possible protection to the environment. CEQA requires that a lead agency prepare and certify an EIR for any discretionary project that may have a significant adverse effect on the environment and requires analysis of the “whole of an action,” including the “direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment.”⁷

CEQA has two primary purposes. First, CEQA is designed to inform decision makers and the public about the potential, significant environmental effects of a project.⁸ “Its purpose is to inform the public and its responsible officials of the environmental consequences of their decisions before they are made. Thus, the EIR “protects not only the environment but also informed self-government.”⁹ 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.”¹⁰

Second, CEQA requires public agencies to avoid or reduce environmental damage when “feasible” by requiring “environmentally superior” alternatives and all feasible mitigation measures.¹¹ 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.”¹² If the project will have a significant effect on the environment, the agency may approve the project only if it finds that it has “eliminated substantially

⁷ Pub. Resources Code §§ 21002.1(a), 21100(a), 21065, 21151(a); 14 C.C.R. §§ 15064(a)(1), (f)(1), 15367, 15378(a).

⁸ 14 CCR § 15002(a)(1).

⁹ *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal. 3d 553, 564.

¹⁰ *Berkeley Keep Jets Over the Bay v. Bd. of Port Comm’rs.* (2001) 91 Cal. App. 4th 1344, 1354 (“*Berkeley Jets*”); *County of Inyo v. Yorty* (1973) 32 Cal.App.3d 795, 810.

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

¹² 14 CCR §15002(a)(2).

lessened all significant effects on the environment where feasible” and that any unavoidable significant effects on the environment are “acceptable due to overriding concerns.”¹³

“At the heart of CEQA is the requirement that public agencies prepare an EIR for any project that may have a significant effect on the environment.”¹⁴ A negative declaration is improper, and an EIR must be prepared, whenever it can be fairly argued on the basis of substantial evidence that the project may have a significant environmental impact.¹⁵ “[S]ignificant effect on the environment” is defined as “a substantial, or potentially substantial, adverse change in the environment.”¹⁶ An effect on the environment need not be “momentous” to meet the CEQA test for significance—it is enough that the impacts are “not trivial.”¹⁷ Substantial evidence, for purposes of the fair argument standard, includes “fact, a reasonable assumption predicated upon fact, or expert opinion supported by fact.”¹⁸ The fair argument test therefore requires the preparation of an EIR whenever “there is substantial evidence that any aspect of the project, either individually or cumulatively, may cause a significant effect on the environment, regardless of whether the overall effect of the project is adverse or beneficial.”¹⁹

Whether a fair argument exists is a question of law that the court reviews de novo, with a preference for resolving doubts in favor of environmental review.²⁰ In reviewing a decision to prepare a negative declaration rather than an EIR, courts “do not defer to the agency’s determination.”²¹ Neither the lead agency nor a court may “weigh” conflicting substantial evidence to determine whether an EIR must be

¹³ Pub. Resources Code § 21081; 14 CCR § 15092(b)(2)(A) & (B).

¹⁴ *Friends of College of San Mateo Gardens v. San Mateo County Community College Dist.* (2016) 1 Cal.5th 937, 944 (internal citations and quotations omitted).

¹⁵ *Id.* at 957.

¹⁶ Pub. Resources Code § 21068; 14 C.C.R. § 15382; *County Sanitation Dist. No. 2 v. County of Kern* (2005) 127 Cal.App.4th 1544, 1581.

¹⁷ *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 83 fn. 16.

¹⁸ Pub. Res. Code § 21080(e)(1) (emphasis added); *Citizens for Responsible Equitable Environmental Development v. City of Chula Vista* (2011) 197 Cal.App.4th 327, 331 (“CREED”).

¹⁹ 14 C.C.R. § 15063(b)(1) (emphasis added).

²⁰ CREED, 197 Cal.App.4th at 331; *Pocket Protectors*, 124 Cal.App.4th at 927.

²¹ *Mejia v. City of Los Angeles* (2005) 130 Cal.App.4th 322, 332; *Sierra Club v. County of Sonoma* (1992) 6 Cal.App.4th 1307, 1318.

prepared in the first instance.²² “The fair argument standard thus creates a low threshold for requiring an EIR, reflecting the legislative preference for resolving doubts in favor of environmental review.”²³

Where experts have presented conflicting evidence on the extent of the environmental effects of a project, the agency must consider the effects to be significant and prepare an EIR.²⁴ In short, when “expert opinions clash, an EIR should be done.”²⁵ “It is the function of an EIR, not a negative declaration, to resolve conflicting claims, based on substantial evidence, as to the environmental effects of a project.”²⁶ Where substantial evidence is presented, “evidence to the contrary is not sufficient to support a decision to dispense with preparation of an EIR and adopt a negative declaration, because it could be 'fairly argued' that the project might have a significant environmental impact.”²⁷

As described below substantial evidence is present here which demonstrates that the Project may cause significant effects on the environment which the IS/MND fails to disclose, analyze and mitigate.

A. The IS/MND Fails to Disclose, Analyze, and Mitigate the Project’s Potentially Significant Air Quality Impacts

The IS/MND concludes that the Project would not have a significant impact on air quality from criteria pollutants emitted during Project construction.²⁸ SWAPE has reviewed the Project’s IS/MND and appendices and found several errors with the CalEEMod analysis that the IS/MND relies upon for its results. As such, the IS/MND lacks substantial evidence to support its conclusions. The City must correct the errors with the IS/MND in an EIR for the Project.

²² *Id.* at *13.

²³ *Id.* at *4.

²⁴ *Pocket Protectors v. City of Sacramento* (2004) 124 Cal.App.4th 903, 935; *Sierra Club v. County of Sonoma* (1992) 6 Cal.App.4th 1307, 1317–1318; CEQA Guidelines § 15064(f)(5).

²⁵ *Pocket Protectors*, 124 Cal.App.4th at 928; *Sierra Club*, 6 Cal.App.4th at 1317–1318.

²⁶ *Pocket Protectors*, 124 Cal.App.4th at 935.

²⁷ *Sundstrom*, 202 Cal.App.3d at 310 (citation omitted).

²⁸ IS/MND, pp. 21-25.

1. The CalEEMod Relies on Unsubstantiated Input Parameters

CalEEMod includes recommended default input values for numerous common sources of criteria air pollutant emissions.²⁹ Changes to the recommended default values are routinely done to conform the model with the specifics of a project.³⁰ Any changes to CalEEMod's default values must be supported by substantial evidence.³¹ The IS/MND relies on numerous changes to CalEEMod's default values that do not reflect the facts in the IS/MND.

a. Changes to the Project's Land Use Type

SWAPE finds that the Project's CalEEMod files failed to include all of the Project's land uses when determining Project emissions.³² The Project includes the panels, fencing, a switchyard, and an underground distribution line.³³ However, SWAPE finds that these uses are not reflected in the CalEEMod, which only includes emissions factors for "non-asphalt surfaces."³⁴ Omission of the Project's land uses could result in an underestimation of the Project's overall criteria pollutant emissions that were not accounted for in the IS/MND.³⁵

b. Incorrect Application of Mitigation Measures

The IS/MND claims that the Project would not have a significant impact on air quality and that no mitigation measures were needed for the Project. Despite this assertion, SWAPE finds that the IS/MND included common mitigation measures in the Project's unmitigated emissions calculations.³⁶ Specifically, the CalEEMod files modeled the Project relying on Level 3 diesel particulate filters for the Project's construction equipment and application of water on graded areas to reduce dust emissions.³⁷ These mitigation measures are not described in the

²⁹ SWAPE Comments, p. 4.

³⁰ SWAPE Comments, p. 4.

³¹ SWAPE Comments, p. 4.

³² SWAPE Comments, pp. 4-5.

³³ IS/MND, p. 7.

³⁴ SWAPE Comments, pp. 4-5.

³⁵ SWAPE Comments, p. 5.

³⁶ SWAPE Comments, pp. 5-7.

³⁷ SWAPE Comments, pp. 5-6.

IS/MND, nor required by the City as a condition of approval, and must not be included in an unmitigated analysis of the Project's construction emissions.³⁸

Even if the Project did include Level 3 diesel particulate filters and watering for dust suppression, The application of mitigation to the Project's unmitigated impacts violates CEQA's requirement that the lead agency must first determine and disclose the extent of a project's potentially significant impacts before it may apply mitigation measures to reduce those impacts.³⁹ Moreover, the CEQA Guidelines define "measures which are proposed by project proponents to be included in the project" as "mitigation measures" within the meaning of CEQA.⁴⁰ By including mitigation measures in the Project's CalEEMod, the City failed to follow the correct procedure for analyzing air quality impacts.

The City's CalEEMod included in the IS/MND contains unsupported changes to default values that are not justified by substantial evidence and omit part of pollutants the Project will cause. The City cannot rely on its conclusions that impacts would be less than significant.

2. The IS/MND Omits Impacts from Project Decommissioning

The IS/MND admits that the Project has a 20-year lifespan and that Project decommissioning would involve removal of Project components, restoration of impacted soils, and debris hauling.⁴¹ However, neither the IS/MND nor CalEEMod analysis include a discussion of air quality impacts from Project decommissioning.⁴² These impacts must be disclosed in order to fully estimate the Project's criteria pollutant emissions. By not doing so, the City lacks substantial evidence to support its claim that impacts are less than significant.

The IS/MND fails to disclose all sources of Project emissions. This results in the City lacking substantial evidence to support its conclusion that Project impacts are less than significant and the IS/MND failing to fulfill its role as an informational document, is in violation of CEQA. The IS/MND must be withdrawn and an EIR must be prepared that fully evaluates these issues.

³⁸ SWAPE Comments, pp. 5-7.

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

⁴⁰ 14 CCR 15126.4(a)(1)(A).

⁴¹ IS/MND, p. 8.

⁴² SWAPE Comments, p. 7.

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

The IS/MND omits the presence of numerous species that would be impacted by the Project and fails to properly analyze the Project's potential impacts. As a result, the IS/MND fails as an informational document and the City lacks substantial evidence to conclude that impacts to species are less than significant.

1. The IS/MND Fails to Adequately Describe the Existing Environmental Setting for Biological Resources

The City describes the existing environmental setting incompletely, thereby skewing the City's impact analysis in the IS/MND. The existing environmental setting is the starting point from which the lead agency must measure whether a proposed Project may cause a significant environmental impact.⁴³ CEQA defines the environmental setting as the physical environmental conditions in the vicinity of the project, as they exist at the time the notice of preparation is published, from both a local and regional perspective.⁴⁴

Describing the environmental setting accurately and completely for each environmental condition in the vicinity of the Project is critical to an accurate and meaningful evaluation of environmental impacts. The importance of having a stable, finite and fixed environmental setting for purposes of an environmental analysis was recognized decades ago.⁴⁵ Today, the courts are clear that “[b]efore the impacts of a Project can be assessed and mitigation measures considered, an [EIR] must describe the existing environment. It is only against this baseline that any significant environmental effects can be determined.”⁴⁶

An EIR must also describe the existing environmental setting in sufficient detail to enable a proper analysis of project impacts.⁴⁷ The CEQA Guidelines

⁴³ See, e.g., *Communities for a Better Env't v. S. Coast Air Quality Mgmt. Dist.* (Mar 15, 2010) 48 Cal.4th 310, 316; *Fat v. City of Sacramento* (2002) 97 Cal.App.4th 1270, 1278, citing Remy, et al.; Guide to the Calif. Environmental Quality Act (1999) p. 165.

⁴⁴ CEQA Guidelines §15125(a)(1); *Riverwatch v. City of San Diego* (1999) 76 Cal.App.4th 1428, 1453.

⁴⁵ *City of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185.

⁴⁶ *City of Amador v. El Dorado City Water Agency* (1999) 76 Cal.App.4th 931, 952.

⁴⁷ CEQA Guidelines § 15125; *Galante Vineyards v. Monterey Peninsula Water Mgmt. Dist.* (1997) 60 Cal.App.4th 1109, 1121-22.

provide that “[k]nowledge of the regional setting is critical to the assessment of environmental impacts.”⁴⁸ This level of detail is necessary to “permit the significant effects of the project to be considered in the full environmental context.”⁴⁹

An accurate description of the affected environment is an essential prerequisite for an adequate analysis of Project impacts. Here, however, some critical baseline information is incomplete, outdated, or was never provided.

a. Joshua Trees

Ms. Owens finds that the IS/MND omits any mapping or other details regarding the presence and abundance of protected Joshua trees on the Project site.⁵⁰ The location and number of trees on site must be documented prior to Project approval in order to accurately guide mitigation and inform the public and decision makers of the true extent of the Project’s impacts.⁵¹ A desktop review identified at least 60 trees on site that would be destroyed by the Project.⁵² The City must provide an accurate description of the existing Joshua trees in an EIR for the Project.

b. The Biological Study Area Lacks Buffer Zone Data

The IS/MND failed to conduct any studies outside of the Project site.⁵³ The stated reasoning for this was that buffer zones around the Project site were harder to access due to fencing and private property.⁵⁴ Ms. Owens’ explains that the IS/MND lacks sufficient justification for omitting information regarding the presence of protected species within buffer areas.⁵⁵ The fencing in the area serves as an impediment to species movement, thus limiting the analysis to the site within the fencing ignores that species could be within buffer zones and could be impacted by the dust and lighting of Project construction.⁵⁶ In her professional experience,

⁴⁸ CEQA Guidelines § 15125(c).

⁴⁹ *Id.*

⁵⁰ Owens’ Comments, p. 2.

⁵¹ Owens’ Comments, p. 2.

⁵² Owens’ Comments, p. 2.

⁵³ Owens’ Comments, pp. 2-3.

⁵⁴ IS/MND, Appendix C, p. 7.

⁵⁵ Owens’ Comments, p. 3.

⁵⁶ Owens’ Comments, pp. 3-4.

Ms. Owens explains that neighbors are often willing to allow for surveys to occur on their land.⁵⁷ The IS/MND must include data regarding the presence of protected species in buffer zones that could be impacted by the Project.

c. Baseline Studies are Incomplete and Unsupported

Ms. Owens finds that the surveys included in the IS/MND are incomplete or unsupported, calling into question their accuracy and ability to inform the public and decision makers about the Project's potential impacts. First, Ms. Owens explains that the entire Project site is likely habitat for Mohave ground squirrel.⁵⁸ Despite noting the possibility of Mohave ground squirrel to exist, the IS/MND only surveyed a small portion of the Project site.⁵⁹

Second, the IS/MND lacks supporting data needed for the public to verify the accuracy of surveys for desert tortoise and burrowing owl.⁶⁰ Ms. Owens explains that focused surveys must be conducted correctly to ensure that they complied with guidelines from the United States Fish and Wildlife Service ("USFWS") and California Department of Fish and Wildlife ("CDFW") and that the surveys are actually effective at detecting species.⁶¹ Here, the IS/MND lacks data sheets, maps of the areas surveyed, and descriptions of habitat onsite.⁶² By omitting this data, the surveys are unsupported and cannot constitute evidence to establish the existing environmental setting for these species.

d. Other Special-Status Species were not Disclosed

Ms. Owens finds that the IS/MND failed to disclose the numerous special-status species that are near the Project site and may be impacted by the Project.⁶³ Specifically, the IS/MND only discusses desert tortoise, burrowing owl, Mohave ground squirrel, and some rare plants.⁶⁴ No surveys were conducted for any other

⁵⁷ Owens' Comments, p. 3.

⁵⁸ Owens' Comments, p. 4.

⁵⁹ Owens' Comments, pp. 4-5.

⁶⁰ Owens' Comments, pp. 5-7.

⁶¹ Owens' Comments, pp. 5-7.

⁶² Owens' Comments, p. 7.

⁶³ Owens' Comments, pp. 7-10.

⁶⁴ Owens' Comments, p. 9.

species.⁶⁵ Ms. Owens describes that numerous protected birds, reptiles, and plants are near the Project site.⁶⁶ None of these species were discussed in the IS/MND, thus it fails as an informational document.

Given the presence of special-status species in the area, Ms. Owens explains that more focused surveys were needed to properly establish the existing environmental setting for the Project.⁶⁷ Particularly, focused surveys were needed to capture the rarity of special-status species given the high variability of the area, corresponding with drought or other environmental factors.⁶⁸ Further, the protocols for these surveys need to be disclosed so that the public can be sure they are accurate and will detect species correctly.⁶⁹ These surveys must be conducted to accurately describe the existing environmental setting in an EIR for the Project.

2. The IS/MND Fails to Analyze the Project's Potentially Significant Impacts to Birds

The IS/MND does not discuss the potential for the Project to result in the mortality of birds. Ms. Owens explains that solar projects routinely kill birds in California and that these impacts need to be analyzed for the Project.

a. Project Collision Risk

Solar projects have been proven to kill large numbers of birds due to birds being drawn to these projects.⁷⁰ This is due to panels being perceived as bodies of water by birds, who die upon impact when trying to land on solar projects.⁷¹ Ms. Owens provides evidence of mortality of special-status birds from numerous projects in California.⁷² This risk is particularly high for this Project due to the presence of the unnamed drainage on the Project site and other water features in the area and its presence along the Pacific Flyway.⁷³ Impacts from solar projects are resulting in

⁶⁵ Owens' Comments, p. 9.

⁶⁶ Owens' Comments, p. 10.

⁶⁷ Owens' Comments, pp. 10-13.

⁶⁸ Owens' Comments, pp. 10-12.

⁶⁹ Owens' Comments, pp. 12-13.

⁷⁰ Owens' Comments, p. 14.

⁷¹ Owens' Comments, p. 14.

⁷² Owens' Comments, pp. 15-17.

⁷³ Owens' Comments, pp. 17-18.

up to over four million bird deaths by 2030.⁷⁴ Despite the risk of avian mortality the City fails to disclose, analyze, or mitigate the Project's direct and cumulative impacts to avian mortality from collision risk.

b. Project Electrocutation Risk

Ms. Owens provides evidence that golden eagle, peregrine falcon, and other raptors are present near the Project site.⁷⁵ These species can be killed by the electrical infrastructure associated with the Project due to electrocution.⁷⁶ Raptors can perch on poles near power lines and connect the lines with their wings, resulting in electrocution.⁷⁷ The IS/MND must disclose and analyze this risk in an EIR for the Project.

3. The IS/MND Includes Ineffective and Impermissibly Deferred Mitigation Measures

The IS/MND must propose mitigation measures that reduce or avoid a project's significant impacts.⁷⁸ Mitigation measures cannot be so undefined that it is impossible to judge their effectiveness.⁷⁹ Rather, they must identify the methods used to mitigate the impacts and set out standards that the agency will commit to meet.⁸⁰ Mitigation measures must be enforceable to ensure that they will not be adopted and simply ignored.⁸¹

Further, it is generally improper to defer the formulation of mitigation measures.⁸² An exception to this general rule applies when the agency has committed itself to specific performance criteria for evaluating the efficacy of the measures to be implemented in the future, and the future mitigation measures are formulated and operational before the project activity that they regulate begins.⁸³

⁷⁴ Owens' Comments, pp. 18-19.

⁷⁵ Owens' Comments, p. 21.

⁷⁶ Owens' Comments, p. 21.

⁷⁷ Owens' Comments, p. 21.

⁷⁸ Pub. Resources Code § 21100, subd. (b)(3).

⁷⁹ *Preserve Wild Santee v. City of Santee* (2012) 210 Cal.4th 260, 281.

⁸⁰ *North Coast Rivers Alliance v. Marin Mun. Water Dist.* (2013) 216 Cal.4th 614, 647.

⁸¹ Pub. Resources Code § 21081.6, subd. (b); CEQA Guidelines § 15126.4, subd.(a)(2); *Anderson First Coalition v. City of Anderson* (2005) 130 Cal.4th 1173, 1186.

⁸² CEQA Guidelines § 15126.4(a)(1)(B); *POET v. CARB*, 218 Cal.App.4th at 735.

⁸³ *POET*, 218 Cal.App.4th at 738.

As the courts have explained, deferral of mitigation may be permitted only where the lead agency:

- (1) undertakes a complete analysis of the significance of the environmental impact;
- (2) proposes potential mitigation measures early in the planning process; and
- (3) articulates specific performance criteria that would ensure that adequate mitigation measures were eventually implemented.⁸⁴

Numerous mitigation measures for biological resources fail to meet these standards.

a. Mitigation Measures for Joshua tree are Ineffective and Impermissibly Deferred

Mitigation Measure (“MM”) BIO-1 proposes for compensatory mitigation, consistent with a future, undefined Incidental Take Permit from CDFW for Joshua trees destroyed during Project construction.⁸⁵ Ms. Owens explains that take will occur for Joshua tree.⁸⁶ It is impossible to construct the Project without removing at least 60 trees.⁸⁷ Thus, MM BIO-1 will necessarily require the Applicant to provide compensatory mitigation in the future. The IS/MND fails to provide any kind of performance standard for this compensatory mitigation. For example, the Palmdale Municipal Code normally requires restoration of two trees per acre of habitat converted.⁸⁸ The IS/MND must require a performance standard before it can defer replacement of Joshua trees.

MM BIO-5 proposes a plan prepared by the Applicant that shows which plants can be saved or relocated and maintenance for plants that remain on site.⁸⁹

⁸⁴ *Comtys. for a Better Env't v. City of Richmond* (2010) 184 Cal.App.4th 70, 95; *Cal. Native Plant Socy' v. City of Rancho Cordova* (2009) 172 Cal.App.4th 603, 621.

⁸⁵ IS/MND, p. 28.

⁸⁶ Owens' Comments, p. 25.

⁸⁷ Owens' Comments, p. 25.

⁸⁸ Owens' Comments, p. 26.

⁸⁹ IS/MND, pp. 31-32.

MM BIO-6 proposes a report about the success of the plan.⁹⁰ These measures do not require any replanting of plants or other measures that actually lessen impacts to Joshua tree. As such, they are ineffective.

C. The IS/MND Fails to Disclose, Analyze, and Mitigate the Project's Potentially Significant Hazards Impacts

The IS/MND fails to include an adequate discussion of impacts to public health from the construction of the Project exposing workers and sensitive receptors in the Project area to Valley Fever spores.⁹¹ The IS/MND also lacks any mitigation measures to lessen this potentially significant impact.⁹² Valley Fever is a disease that can infect people when they are exposed to fungal spores during ground disturbance, such as this Project's construction.⁹³

SWAPE provides evidence that Valley Fever spores are endemic to Los Angeles County and is often found in Palmdale and the Antelope Valley.⁹⁴ Further, Project construction will disturb soils that can lead to exposure.⁹⁵ SWAPE explains that there are no dust control mitigation measures in the IS/MND that would address Valley Fever spores, but provides recommended mitigation including:

1. Minimize Exposure to Potential Valley Fever–Containing Dust through:
 - Cleaning equipment and vehicles of dust
 - Conducting earth-moving activities downwind of worker when possible
 - Spraying areas to be graded with water
 - Ceasing work if water runs out until a water truck can return

⁹⁰ IS/MND, p. 32.

⁹¹ SWAPE Comments, pp. 1-4.

⁹² SWAPE Comments, p. 4.

⁹³ SWAPE Comments, pp. 1-4.

⁹⁴ SWAPE Comments, pp. 1-2

⁹⁵ SWAPE Comments, pp. 1-2.

- Using earth-moving vehicles with closed-cabs and equipped with a HEPA-filtered air system
 - Training workers about Valley Fever and providing informational handouts.
2. Providing respirators to workers when requested and providing training on the proper use of personal protective equipment.
 3. Payment of a monetary fee to Los Angeles County for implementation of Valley Fever public awareness programs.
 4. To require a respiratory protection program that is compliant with California Code of Regulations, Title 8, Section 5144.⁹⁶

The City fails to evaluate impacts to public health from exposure to Valley Fever, while SWAPE provides substantial evidence that the Project will create this exposure. The City's failure to include this evaluation means its conclusion that there are not impacts on public health lacks substantial evidence. The IS/MND must be withdrawn and revised with an adequate assessment of the Project's impacts to public health from exposure to Valley Fever.

III. THE CITY CANNOT ISSUE A SITE PLAN REVIEW BECAUSE THE PROJECT IS INCONSISTENT WITH SEVERAL GENERAL PLAN POLICIES

Site Plan Review can only be approved by the City if the City finds that the Project is consistent with the City's general plan.⁹⁷ The City's general plan includes two policies that the Project is not consistent with. First, Policy ER 2.1.5 states that the City shall "Preserve and maintain significant Joshua tree woodlands and other significant habitat areas. Early in the review of development projects, the feasibility of preserving any significant vegetation present on-site should be examined."⁹⁸ Here, as discussed in more detail below, the City has procedures to protect Joshua

⁹⁶ SWAPE Comments, pp. 3-4.

⁹⁷ Palmdale Municipal Code § 17.21.050.

⁹⁸ Palmdale General Plan Environmental Resources Element, p. ER-5.

trees but this Project does not comply with them at all. Therefore, the Project is inconsistent with this policy.

Second, Objective 2.2 states that the City shall “Ensure compliance with State and Federal Endangered Species Acts.”⁹⁹ As explained above, the IS/MND fails to demonstrate that it has surveyed the site entirely and consistently with USFWS and CDFW guidelines, failed to disclose or analyze all protected species and impacts to those species, and fails to mitigate the Project’s significant impacts. Because the Project is inconsistent with Policy 2.1.5 and Objective 2.2 of the City’s general plan, the City cannot approve a Site Plan Review for the Project.

IV. THE CITY CANNOT APPROVE A NATIVE DESERT PRESERVATION PLAN BECAUSE THE APPLICANT FAILED TO COMPLY WITH THE REQUIREMENTS OF THE PALMDALE MUNICIPAL CODE

The Palmdale Native Desert Vegetation Ordinance (“PNDVO”) prevents the removal of desert vegetation, including Joshua trees.¹⁰⁰ Development projects, like the Project here, are required to prepare a NDPP that includes a written depiction of every protected plant on the Project site and which plants will remain on site after development.¹⁰¹ The IS/MND states that the applicant will prepare an NDPP as mitigation measure BIO-8.¹⁰² However, the PNDVO requires the Applicant to prepare and submit an NDPP with their application for the Project, not in the future.¹⁰³ Thus, the City has failed to follow the procedures of the PNDVO and cannot approve the Project until an NDPP is prepared and considered by the City, prior to approval.

Further, the PNDVO sets standards by which preservation must occur for Joshua trees, which were not discussed in the IS/MND. Specifically, the Applicant is required to preserve two trees per acre of development, which would be 280 trees in this case.¹⁰⁴ The number of trees could be changed, based on a NDPP in accordance with the PNDVO but without an NDPP, the City lacks evidentiary

⁹⁹ Palmdale General Plan Environmental Resources Element, p. ER-5.

¹⁰⁰ Palmdale Municipal Code §§ 14.04.010, 14.04.020, and 14.04.040.

¹⁰¹ Palmdale Municipal Code § 14.04.050.

¹⁰² IS/MND, pp. 31-32.

¹⁰³ Palmdale Municipal Code § 14.04.050.

¹⁰⁴ See Palmdale Municipal Code § 14.04.060.

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support to deviate from these requirements. The City must require the Applicant to preserve 280 Joshua trees to meet the requirements of the PNDVO.

V. CONCLUSION

CEQA requires that an EIR be prepared if there is substantial evidence demonstrating that any aspect of a project, either individually or cumulatively, may cause a significant effect on the environment.¹⁰⁵ As discussed herein, there is substantial evidence supporting a fair argument that the Project would result in significant adverse impacts that were not identified in the IS/MND, and that are not adequately analyzed or mitigated. The IS/MND also fails to contain the basic information and analysis required by CEQA, deficiencies which “cannot be dismissed as harmless or insignificant defects.”¹⁰⁶ The City’s findings regarding Project impacts either do not comply with the law or are not supported by substantial evidence. Finally, the Project is inconsistent with General Plan policies, and the City cannot make the required findings to approve the entitlements sought. The City cannot approve the Project until it revises its land use analysis and prepares an EIR that resolves these issues and complies with CEQA’s requirements.

Sincerely,



Kyle C. Jones

KCJ:ljl

Exhibits

¹⁰⁵ Pub. Resources Code § 21151; 14 CCR §15063(b)(1).

¹⁰⁶ *Bakersfield Citizens for Local Control v. Bakersfield* (“*Bakersfield*”) (2004) 124 Cal. App. 4th 1184, 1220.