Letter #5

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Via Email and Overnight Mail

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Re: Comments on the Draft Subsequent Environmental Impact Report for the Mulqueeney Ranch Wind Repowering Project (SCH No. 2010082063), CUP Application No. PLN2019-00226

Dear Mr. Young and Mr. Lopez:

5-1

We write on behalf of Alameda Citizens for Responsible Wind Development ("Citizens") to provide comments on the Draft Subsequent Environmental Impact Report[1] ("DSEIR") (SCH No. 2010082063), prepared by Alameda County, pursuant to the California Environmental Quality Act ("CEQA"),[2] for the Mulqueeney Ranch Wind Repowering Project ("Project") proposed by Mulqueeney Wind, LLC, a subsidiary of Brookfield Renewable ("Applicant").

I. INTRODUCTION

The Applicant proposes to construct up to 36 new wind turbine generators on 29 privately owned parcels in the Altamont Pass Wind Resource Area ("APWRA") in eastern Alameda County, replacing the 518 old generation turbines that were

[1] Alameda County Planning Department, Mulqueeney Ranch Wind Repowering Project: Subsequent Environmental Impact Report (Nov. 20, 2020) (*hereinafter* "DSEIR"), *available at* https://acgov.org/cda/planning/landuseprojects/documents/MulqueeneyRanch/MulqueeneyDraftSEIRasposted.pdf.

[2] Pub. Resources Code §§ 21000 *et seq.*

5-1 cont'd

removed from the site in 2016.[3] The Project is comprised of the following components: installation of up to 36 turbines rated between 2.2 and 4.2 MW per turbine, with a maximum generating capacity of 80 MW; development of access roads (including upgrades to existing roads); installation of a temporary staging area; installation of up to three permanent meteorological towers; installation of an underground power collection system; and construction of a new substation.[4]

The DSEIR tiers from the APWRA Repowering Program Environmental Impact Report[5] ("PEIR") certified by the County in November 2014.[6] The County prepared the DSEIR based on the specific characteristics of the proposed Project, which would include turbines with a larger rotor swept area and with shorter ground-to-rotor height than those analyzed in the PEIR, factors which the DSEIR acknowledges may result in different or more severe impacts than identified in the PEIR.[7] The DSEIR focuses on differences in information and specific distinction of the proposed Project compared with the anticipated characteristics of repowering projects as described in the PEIR.[8]

We reviewed the DSEIR and PEIR, as well as each document's respective technical appendices and reference documents, with the assistance from biological expert, Shawn Smallwood, Ph.D, and hazardous materials expert, Matt Hagemann, P.G, C.Hg., and air quality expert, Paul Rosenfeld, Ph.D, whose comments and qualifications are included as Attachment A[9] and Attachment B,[10] respectively. Dr. Smallwood, Mr. Hagemann, and Dr. Rosenfeld provide substantial evidence of potentially significant impacts that have not been adequately disclosed, analyzed, or

[3] DSEIR at p. 1-1, 2-6.
[4] *Id.* at p. 2-6.
[5] Alameda County Community Development Agency, Altamont Pass Wind Resource Area Repowering: Final Program Environmental Impact Report (Oct. 2014) (hereinafter "PEIR"), *available at* https://www.acgov.org/cda/planning/landuseprojects/documents/apwra/Complete_Final_Program_EIR.pdf.
[6] DSEIR at p. 1-5.
[7] *Ibid.*
[8] *Ibid.*
[9] **Attachment A**, Letter to Andrew Young, Senior Planner, Alameda County Planning Department from Shawn Smallwood, Ph.D. re: Mulqueeney Ranch Repowering Project DSEIR (Jan. 8, 2021) (*hereinafter* "Smallwood Comments").
[10] **Attachment B**, Letter to Andrew J. Graf, Adams Broadwell Joseph & Cardozo from M. Hagemann, P.G, C.Hg., and Paul Rosenfeld, Ph.D, Soil Water Air Protection Enterprise re: Comments on the Mulqueeney Ranch Wind Repowering Project (SCH No. 2010082063) (Jan. 8, 2021) (*hereinafter* "SWAPE Comments").
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mitigated. The County must address and respond to their comments separately and fully.[11] 5-1 cont'd

II. STATEMENT OF INTEREST

Alameda Citizens for Responsible Wind Development is an unincorporated association of individuals and labor organizations with members who may be adversely affected by the potential public and worker health and safety hazards and environmental and public service impacts of the Project. The association includes Alameda County residents Brandon Evans, Robert Croley, and David Nelson and California Unions for Reliable Energy and its members and their families and other individuals that live, recreate and/or work in Alameda County.

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

The individual members of Citizens and the members of the affiliated labor organizations live, work, recreate and raise their families in the 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 would be the first in line to be exposed to any health and safety hazards which 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.

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

[11] 14 Cal. Code Regs. ("CEQA Guidelines) §§ 15088(a), (c).

5-1 cont'd

and other restrictions on growth that, in turn, reduces future employment opportunities.

Finally, Citizens is concerned with projects that can result in serious environmental harm without providing countervailing economic benefits. CEQA provides a balancing process whereby economic benefits are weighed against significant impacts to the environment.[12] It is in this spirit we offer these comments.

III. LEGAL BACKGROUND

CEQA requires public agencies to analyze the potential environmental impacts of their proposed actions in an EIR.[13] The EIR is a critical informational document, the "heart of CEQA."[14] "The foremost principle under CEQA is that the Legislature intended the act to be interpreted in such manner as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language."[15]

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.[16] "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.'"[17] 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

[12] Pub. Resources Code § 21081(a)(3); *Citizens for Sensible Development of Bishop Area v. County of Inyo* (1985) 172 Cal.App.3d 151, 171.
[13] Pub. Resources Code § 21100.
[14] CEQA Guidelines § 15003(a); *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564; *Laurel Heights Improvement Assn. v. Regents of University of Cal.* (1988) 47 Cal.3d 376, 392, ("*Laurel Heights*").
[15] *Laurel Heights,* 47 Cal.3d at 390 (internal quotations omitted).
[16] Pub. Resources Code § 21061; CEQA Guidelines §§ 15002(a)(1); 15003(b)-(e); *Sierra Club v. County of Fresno* (2018) 6 Cal.5th 502, 517 ("[T]he basic purpose of an EIR is to provide public agencies and the public in general with detailed information about the effect [that] a proposed project is likely to have on the environment; to list ways in which the significant effects of such a project might be minimized; and to indicate alternatives to such a project.").
[17] *Citizens of Goleta Valley,* 52 Cal.3d at p. 564 (quoting *Laurel Heights*, 47 Cal.3d at 392).

5-1 cont'd

reached ecological points of no return."[18] As the CEQA Guidelines explain, "[t]he EIR serves not only to protect the environment but also to demonstrate to the public that it is being protected."[19]

Second, CEQA requires public agencies to avoid or reduce environmental damage when "feasible" by requiring consideration of environmentally superior alternatives and adoption of all feasible mitigation measures.[20] 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."[21] If the project will have a significant effect on the environment, the agency may approve the project only if it finds that it has "eliminated or substantially lessened all significant effects on the environment" to the greatest extent feasible and that any unavoidable significant effects on the environment are "acceptable due to overriding concerns."[22]

While 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."[23] As the courts have explained, a prejudicial abuse of discretion occurs "if the failure to include relevant information precludes informed decisionmaking and informed public participation, thereby thwarting the statutory goals of the EIR process."[24] "The ultimate inquiry, as case

[18] *County of Inyo v. Yorty* (1973) 32 Cal.App.3d 795, 810; *see also Berkeley Keep Jets Over the Bay v. Bd. of Port Comm'rs.* (2001) 91 Cal.App.4th 1344, 1354 ("*Berkeley Jets*") (purpose of EIR is to inform the public and officials of environmental consequences of their decisions *before* they are made).
[19] CEQA Guidelines § 15003(b).
[20] CEQA Guidelines § 15002(a)(2), (3); *see also Berkeley Jets*, 91 Cal.App.4th at 1354; *Citizens of Goleta Valley*, 52 Cal.3d at p. 564.
[21] CEQA Guidelines § 15002(a)(2).
[22] Pub. Resources Code § 21081(a)(3), (b); CEQA Guidelines §§ 15090(a), 15091(a), 15092(b)(2)(A), (B); *Covington v. Great Basin Unified Air Pollution Control Dist.* (2019) 43 Cal.App.5th 867, 883.
[23] *Berkeley Jets*, 91 Cal.App.4th at p. 1355 (emphasis added) (quoting *Laurel Heights*, 47 Cal.3d at 391, 409, fn. 12).
[24] *Berkeley Jets*, 91 Cal.App.4th at p. 1355; *see also San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 722 (error is prejudicial if the failure to include relevant information precludes informed decisionmaking and informed public participation, thereby thwarting the statutory goals of the EIR process); *Galante Vineyards v. Monterey Peninsula Water Management Dist.* (1997) 60 Cal.App.4th 1109, 1117 (decision to approve a project is a nullity if based upon an EIR that does not provide decision-makers and the public with information about the project as required by CEQA); *County of Amador v. El Dorado County Water Agency* (1999) 76

law and the CEQA guidelines make clear, is whether the EIR includes enough detail 'to enable who did not participate in its preparation to understand and to consider meaningfully the issues raised by the proposed project.'"[25] 5-1 cont'd

IV. THE DSEIR FAILS TO INCLUDE A COMPLETE AND ACCURATE PROJECT DESCRIPTION 5-2

The DSEIR does not meet CEQA requirements because it fails to include a complete and accurate project description, rendering the entire impact analysis unreliable. An accurate and complete project description is necessary to perform an evaluation of the potential environmental effects of a proposed project.[26] Without a complete project description, the environmental analysis will be impermissibly narrow, thus minimizing the project's impacts and undercutting public review.[27] The 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]."[28] "Only through an accurate view of the project may affected outsiders and public decision makers balance the proposal's benefit against its environmental costs."[29]

CEQA Guidelines § 15378 defines "project" to mean "the whole of an action, which has a potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment."[30] "The term 'project' refers to the activity which is being approved and which may be subject to several discretionary approvals by governmental agencies. The term project does not mean each separate governmental approval."[31] Courts have explained that for a project description to be complete, it must address not only the immediate environmental consequences of going forward with the project, but also all "*reasonably foreseeable* consequence[s] of the initial project."[32] Accordingly, CEQA requires that the project description contain a brief statement of the intended uses of an EIR, including a list of agencies which will use the EIR,

Cal.App.4th 931, 946 (prejudicial abuse of discretion results where agency fails to comply with information disclosure provisions of CEQA).

[25] *Sierra Club,* 6 Cal.5th at p. 516 (quoting *Laurel Heights*, 47 Cal.3d at 405).

[26] *See, e.g., Laurel Heights,* 47 Cal.3d 376.

[27] *See ibid.*

[28] *County of Inyo,* 71 Cal.App.3d at p. 193.

[29] *Id.* at 192-193.

[30] CEQA Guidelines § 15378.

[31] *Id.* § 15378(c).

[32] *Laurel Heights*, 47 Cal.3d at p. 396 (emphasis added); *see also Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 449-50.

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along with the permits and approvals required for implementation of a proposed project.[33] 5-2 cont'd

The DSEIR fails to comply with CEQA's requirement of an accurate project description in two ways. First, the DSEIR fails to adequately describe the Project's potential utilization of horizontal directional drilling ("HDD"). Second, the DSEIR fails describe reasonably foreseeable decommissioning activities.

A. The DSEIR Fails to Adequately Describe the Installation of the Underground Power Collection System 5-3

The DSEIR proposes two methods for installing the Project's power collection system. In most cases, the 35 kilovolt power lines would be installed using the cut-and-cover method.[34] To avoid surface disturbance within wetlands and streams, collection lines may be installed under wetlands and other waters using HDD techniques, where feasible.[35] But the DSEIR fails to identify where HDD will be utilized during Project construction despite possessing the information needed to make such a determination.

For example, the DSEIR includes a detailed examination the land cover types within the Project, including identification of riparian habitats, wetlands and streams.[36] As such, the DSEIR is fully capable of identifying the specific locations where HDD will be utilized because it possess all the information necessary to make such a determination.[37] The DSEIR must then analyze whether HDD is feasible at the proposed location, which would include a geotechnical investigation to identify subsurface conditions along the proposed HDD path. If HDD is not feasible, then the impacts to riparian habitat, wetlands and other streams would be significant and additional feasible mitigation is required.

Because the DSEIR fails to describe where HDD will occur, it lacks a complete and accurate project description. The DSEIR must be revised to identify the specific locations where HDD may occur and determine whether the proposed method is feasible for those locations so the significant environmental impacts are disclosed, analyzed and mitigated.

[33] CEQA Guidelines § 15124(d).
[34] DSEIR at p. 2-13.
[35] *Ibid.*
[36] *Id.* at p. 3.4-9.
[37] *Id.* at p. 3.4-128, 3.4-130.

5-4

B. The DSEIR Fails to Adequately Describe Project Decommissioning and Site Reclamation

The DSEIR fails to adequately describe the full scope of the Project being approved, and thus fails to disclose the full range and severity of the Project's environmental impacts. A project description must include all relevant parts of a project, including later phases that will foreseeably result from project approval.[38] CEQA contemplates consideration of environmental consequences at the earliest possible stage, even though more detailed environmental review may be necessary later.[39] These requirements cannot be avoided by chopping the project into many small parts or excluding reasonably foreseeable future activities that may become part of the project.[40] The DSEIR must supply enough information so that the decisionmakers and the public can fully understand the scope of the Project.[41]

The DSEIR acknowledges the specific activities that would be undertaken to decommission the Project after its 35 year lifespan, which include "removing the turbines, transformers, and related infrastructure in accordance with landowner agreements. Substations and meteorological (met) towers may be removed and the sites reclaimed; alternatively, the sites could be retained for continued use."[42] But the DSEIR does not disclose any further information because it claims the details are "unknown at this time and would be speculative."[43] While decommissioning and reclamation would occur at the end of the Project lifespan, the fact that the activities are temporally remote does not relieve the agency of its obligation to meaningfully investigate the potential impacts of future activities which are undoubtedly part of the Project.

Furthermore, the DSEIR cannot claim the details of Project decommissioning are unknown when the removal of turbines, transformers, and related infrastructure are required by landowner agreements.[44] The DSEIR sidesteps full disclosure of these activities in order avoid analyzing and mitigating the potentially significant environmental impacts. The reasonably foreseeable activities and

[38] *Laurel Heights,* 47 Cal.3d 376; *see also* CEQA Guidelines § 15126 (EIR's impact analysis must consider all phases of the project).
[39] *Rio Vista Farm Bureau Ctr. v. County of Solano* (1992) 5 Cal.App.4th 351, 370.
[40] *Ibid.;* Pub. Resources Code § 21159.27 (prohibiting piecemealing).
[41] *Dry Creek Citizens Coalition v. County of Tulare* (1990) 70 Cal.App.4th 20, 26.
[42] DSEIR at pp. 2-23 to 2-24.
[43] *Id.* at p. 2-24.
[44] *Ibid.*

environmental impacts of the decommissioning and reclamation phase must be described and analyzed in a revised and recirculated DSEIR, with the fullest degree of detail available, to provide the public with sufficient information to permit "an intelligent evaluation of the potential environmental effects of [the] proposed activity."[45] 5-4 cont'd

V. THE DSEIR FAILS TO DISCLOSE AND MEANINGFULLY DESCRIBE THE EXISTING ENVIRONMENTAL SETTING 5-5

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.[46] 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.[47] An accurate and complete description of the setting for each environmental condition in the vicinity of the Project is critical to an accurate and meaningful evaluation of environmental impacts. Courts have made it 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."[48]

A. The DSEIR Fails to Disclose and Meaningfully Analyze the Presence of Multiple Special-Status Wildlife Species 5-6

The DSEIR defines "special-status species" as "plants and animals that are legal protected under the federal Endangered Species Act ("ESA"), California Endangered Species Act ("CESA"), or other regulations, or species that are considered sufficiently rare by the scientific community to qualify for such listing."[49] The DSEIR identifies 39 special-status wildlife species with potential to occur in the project vicinity.[50] However, the DSEIR neglects to disclose and analyze 59 special-status wildlife species with documented occurrences within 5 miles of the Project

[45] *San Joaquin Raptor,* 27 Cal.App.4th at p. 730.
[46] *See, e.g., Communities for a Better Environment v. S. Coast Air Quality Mgmt. Dist.* (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).
[47] CEQA Guidelines §15125(a)(1); *Riverwatch v. City of San Diego* (1999) 76 Cal.App.4th 1428, 1453.
[48] *City of Amador,* 76 Cal.App.4th at p. 952.
[49] DSEIR at p. 3.4-14.
[50] *Id.* at p. 3.4-18.

5-6 cont'd

site, the same "project vicinity" used by the DSEIR to define baseline biological conditions.[51]

A prime example of the DSEIR's failure to provide an accurate baseline for special-status wildlife species is the peregrine falcon. This species is fully protected species in California,[52] and therefore considered a special-status species. The peregrine falcon has been observed at the Project site during avian use count surveys.[53] This species has also been observed by Dr. Smallwood, has documented fatalities with turbines in the APWRA, and has suitable aerospace habitat in the Project site.[54]

Other notable omissions from the DSEIR's baseline discussion include several raptors. Raptors are protected under California Fish and Game Code § 3503.5, which prohibits the taking, possession, or destruction of any birds in the orders *Falconiformes* or *Strigiformes* (birds of prey) and the taking, possession, or destruction of the nests or eggs of any such birds except as otherwise provided by the Fish and Game Code or other regulation implementing the code. As such, these species qualify for special-status species under CEQA. Yet, despite documented observations on the Project site and in the APWRA, the DSEIR fails to disclose or meaningfully discuss these raptors.[55]

The DSEIR also fails to disclose or meaningfully discuss several species identified by the United States Fish and Wildlife Service ("USFWS") as a Bird of Conservation Concern ("BCC") with potential to occur in the APWRA.[56] The BCC is an effort by the USFWS to "identify species, subspecies, and populations of all migratory nongame birds that, without additional conservation actions, are likely to become candidates for listing under the Endangered Species Act."[57] Species

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[51] *Id.* at pp. 3.4-14, 3.4-16 to 3.4-18, 3.4-20, 3.4-21 to 3.4-31, Table 3.4-3 (Special-Status Wildlife Species Known to Occur or with Potential to Occur in or within 5 Miles of the Mulqueeney Ranch Repowering Project Site).
[52] California Department of Fish and Wildlife, Special Animal List (Nov. 2020), *available at* https://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=109406&inline.
[53] DSEIR, appen. D at p. 3-2.
[54] Smallwood Comments at p. 14.
[55] *Id.* at pp. 9-12 (i.e., turkey vulture, osprey, ferruginous hawk, rough-legged hawk, red-shouldered hawk, sharp-skinned hawk, Cooper's hawk, America kestrel, merlin, prairie falcon, great-horned owl, long-eared owl, barn owl, western screech-owl).
[56] U.S. Fish and Wildlife Service, Birds of Conservation Concern 2008 (Dec. 2008), *available at* https://www.fws.gov/migratorybirds/pdf/management/BCC2008.pdf.
[57] 16 U.S.C § 2912(a)(3)

identified as BCC qualify for special-status under CEQA Guidelines § 15380(b)(2)(B), which permits a species to be designated as "rare" if the "species is likely to become endangered within the foreseeable portion throughout all or a significant portion of its range and may be consider 'threatened' as that term is used in the ESA."[58] Therefore, the DSEIR should have disclosed species designated by the USFWS as BCC with the potential to occur in the Project vicinity. However, the DSEIR entirely omits discussion of a multitude of BCC-designated species identified by Dr. Smallwood, in violation of CEQA.[59] 5-6 cont'd

Finally, the DSEIR erroneously excludes from its baseline discussion "[o]ther special-status birds [that] may migrate through or forage in the project site but are not expected to nest within the project site" even though it acknowledges these nnidentified species are relevant to and part of the operational impact analysis, and addressed only to the extent they have been identified through postconstruction mortality stndies in the APWRA.[60] These omissions must be corrected in a revised and recirculated DSEIR.

B. The DSEIR's Determination that Only 39 Special-Status Are Likely to Be Present in the Project Vicinity Is Not Supported by Substantial Evidence 5-7

In support of its conclusion that only 39 special-status species were identified as having potential to occur in the Project vicinity, the DSEIR relies on information obtained from the California Natural Diversity Database,[61] the unofficial USFWS species list,[62] the PEIR,[63] the East Alameda County Conservation Strategy,[64] and other environmental documents for recent repowering projects near the project site.[65] However, a review of those sources reveals considerable deficiencies in the DSEIR's conclusion.

[58] CEQA Guidelines § 15380(b)(2)(B).
[59] Smallwood Comments at pp. 9-11 (i.e., as having potential to occur in the APWRA: whimbrel, long-billed curlew, marbled godwit, mountain plover, Caspian tern, red-tailed hawk, ferruginous hawk, prairie falcon, peregrine falcon, Allen's hummingbird, Rufous hummingbird, Costa's hummingbird, Nuttall's woodpecker, Lewis's woodpecker, willow flycatcher, olive-sided flycatcher, oak titmouse, yellow-billed magpie, yellow warbler, Oregon vesper sparrow, and Lawrence's goldfinch).
[60] DSEIR at p. 3.4-19.
[61] *Id.* at p. 3.4-18 (California Department of Fish and Wildlife 2020b).
[62] *Ibid.* (U.S. Fish and Wildlife Service 2020a).
[63] *Ibid.* (Alameda County Community Development Agency 2014).
[64] *Ibid.* (ICF International 2010).
[65] *Ibid.*

5-7 cont'd

For example, the DSEIR claims it consulted the unofficial USFWS species list to determine whether a special-status species had the potential to occur the project vicinity;[66] however, the cited reference document shows that the USFWS list did not include any information regarding BCC in the project area because the data source for that specific information was offline.[67] And there is no other evidence in the record that the County attempted to obtain this data when the source was back online. This is a critical omission because, as discussed above, multiple species designated as BCC are likely to occur within the APWRA.[68] Indeed, several BCC-designated species have documented fatalities with wind turbines in the APWRA.[69] Yet, the DSEIR fails to analyze the Project's impacts on most of these species.

Notably absent from the DSEIR's list of resources utilized to determine the potential presence of special-status species at the Project site was readily available data obtained during site-specific avian surveys. For example, the ferruginous hawk, merlin, Nuttall's woodpecker, peregrine falcon, Rufous hummingbird, and the turkey vulture were each observed at the Project site, but not disclosed or analyzed in the DSEIR.[70] Because the DSEIR's description of the environmental setting fails to accurately investigate and discuss special-status birds and bats, it understates the significance of the Project's impacts to these species in violation of CEQA.

5-8

C. The DSEIR's Conclusion that Certain Special-Status Species Are Unlikely to Occur in the Project Vicinity Is Not Supported by Substantial Evidence

For the 39 special-status species identified as having potential to occur in the Project vicinity, the DSEIR delineates how likely each species is to occur within the Project site by defining the occurrence as high, moderate, low, or none.[71] The DSEIR's occurrence conclusions for several special-status avian species are not supported by substantial evidence. Specifically, the DSEIR erroneously concludes that the California condor, bald eagle, and sandhill crane have low or no potential to occur in the Project area. As a result, the DSEIR fails to meaningfully analyze or

[66] *Ibid.*
[67] U.S. Fish and Wildlife Service 2020a at p. 5 ("MIGRATORY BIRD INFORMATION IS NOT AVAILABE AT THIS TIME").
[68] Smallwood Comments at p. 9-11.
[69] *Ibid.*
[70] DSEIR, appen. D at pp. 3-2 to 3-6.
[71] *Id.* at p. 3.4-47.

mitigate the Project's impacts to these species, especially with respect to fatalities caused by collisions with turbines.[72] 5-8 cont'd

5-9

1. California condor

The DSEIR concludes that the California condor, a state and federally listed endangered species with fully protected status,[73] has "low" potential to occur on the Project site because only one individual was observed during field surveys and no suitable nesting habitat is present.[74] This conclusion is not supported by substantial evidence for two reasons.

First, a single observation of the condor is significant because there are only about 300 individuals in the wild.[75] Condors have naturally low productivity, meaning that the loss of single individual can have substantial repercussions on the survival of the species.[76] Moreover, the individual condor observed during project surveys was flying at a height of approximately 25 to 30 meters,[77] which would be within the proposed turbine's rotor swept area.[78] Condors are not as agile as other birds given their significant size and wingspans, and are therefore at greater risk of colliding with a turbine.[79]

Second, the DSEIR neglects to discuss other reasonably foreseeable and scientifically supported explanations for why condors could occur in the Project area beyond suitable nesting habitat. As condors recover from near extinction, experts are confident that this species will visit the APWRA (including the Project site) more often because the location is on the northern edge of the species range and contains suitable foraging habitat,[80] which the DSEIR acknowledges but summarily dismisses without supporting evidence.[81]

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[72] *Sierra Club,* 6 Cal.5th 502.
[73] DSEIR at p. 3.4-19.
[74] *Id.* at pp. 3.4-25 to 3.4-26, 3.4-41.
[75] Smallwood Comments at 14, 25-26; U.S. Fish and Wildlife Service, California Condor Recovery Program: 2019 Annual Population Status (2019), *available at* https://www.fws.gov/cno/es/calcondor/PDF_files/2020/2019_California_Condor_Population_Status.pdf CEQA Guidelines § 15380(a).
[76] Smallwood Comments at 25.
[77] DSEIR, appen. D at p. 3-14.
[78] Smallwood Comments at p. 26.
[79] *Ibid.*
[80] *Ibid.*
[81] DSEIR at p. 3.4-26.

5-10

2. Bald eagle

The DSEIR concludes that bald eagles have low potential to occur in the Project area because no suitable nesting habitat is present on the site and only one individual was observed during avian surveys for the Project.[82] This conclusion is facially erroneous and not supported by substantial evidence for two reasons. First, the DSEIR erroneously claims that only one bald eagle was observed during project field surveys.[83] While only one bald eagle was observed during eagle use surveys,[84] 7 additional bald eagles were observed during avian use surveys.[85]

Second, bald eagles have been documented many times in the APWRA, including to breed and forage.[86] Indeed, several bald eagle fatalities have been recorded in the APWRA, including one documented by Dr. Smallwood.[87] Therefore, the DSEIR inappropriately discounts the presence of bald eagles based solely on the lack of suitable nesting habitat.

Bald eagles are listed as endangered under the CESA and are fully protected under CESA and the federal Bald and Golden Eagle Protection Act.[88] Take of a single individual eagle or their habitat is a significant impact which requires mitigation under these laws, as well as CEQA.[89] The DSEIR's failure to disclose the potential presence of bald eagles in the vicinity of the Project site resulted in an inaccurate description of baseline conditions and a corresponding failure to disclose the Project's potentially significant impacts on this critical species. These omissions precluded the County from accurately assessing the extent of the Project's impacts in the DSEIR and thwart the public's ability to meaningfully participate in the CEQA process.[90]

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[82] *Id.* at pp. 3.4-25, 3.4-41.
[83] *Id.* at p. 3.4-41
[84] *Id.*, appen. D at pp. 3-1, D-4.
[85] *Id.*, appen. D at pp. 3-2, 3-5.
[86] Smallwood Comments at p. 6-8, 13.
[87] *Ibid.*
[88] DSEIR, p. 3.4-19.
[89] Fish & Game Code § 2081(b)(2) (CESA compels applicants to "fully mitigate[ ]" the take of threatened or endangered species); Pub. Resources Code § 21002.1(c) (lead agency may not approve project with significant unavoidable impacts unless it is "otherwise permissible under applicable laws and regulations."); CEQA Guidelines, Appendix G, § IV(a).
[90] *Madera Oversight Coalition, Inc. v. County of Madera* (2011) 199 Cal.App.4th 48; *Envt'l Prot. Info. Ctr. v. Cal. Dep't of Forestry & Fire Prot.* (2008) 44 Cal.4th 459, 485 ("We conclude that where that

5-10

3. Greater sandhill crane

The DSEIR concludes that greater sandhill crane has no potential to occur in the Project area because the site is not located within the breeding range and does not support suitable foraging habitat.[91] This conclusion is facially erroneous given the that a sandhill crane was documented during avian surveys for the proposed Project.[92] Sandhill cranes have been observed elsewhere in the APWRA. For example, a sandhill crane fatality was found while monitoring the wind turbines immediately adjacent to the project site.[93] Dr. Smallwood has also personally documented sandhill cranes in AWPRA during nocturnal surveys.[94]

CEQA prohibits the court from upholding agency conclusions, like this one, that are clearly erroneous. In such instances, the court is required to find that "argument, speculation, unsubstantiated opinion or narrative, [or] evidence which is clearly inaccurate or erroneous," is not substantial evidence,[95] and must invalidate agency conclusions, like this one, that "a reasonable person could not reach" based on the evidence before the agency.[96]

5-11

D. The Project Fails to Disclose Compliance with the Rivers and Harbors Act of 1899

Section 10 of the Rivers and Harbors Act of 1899 requires authorization from the U.S. Army Corps of Engineers ("USACE") for the construction of any structure in or affecting navigable waters of the United States.[97] For example, utility lines that are routed under Section 10 waters without a discharge of dredged or fill material require a Section 10 permit.[98] Because the Project proposes to utilize HDD to avoid permanent and temporary impacts to wetlands, and special-status species that may occupy this habitat, a Section 10 permit would be required. The DSEIR fails to disclose this requirement.

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failure to comply with the law results in a subversion of the purposes of CEQA by omitting information from the environmental review process, the error is prejudicial.").

[91] DSEIR at p. 3.4-25.

[92] *Ibid.* ("One sandhill crane was detected flying over the project site during field surveys conducted in May 2020.").

[93] PEIR at p. 3.4-108.

[94] Smallwood Comments at pp. 6, 13.

[95] Pub. Resources Code § 21082.2(c); CEQA Guidelines § 15384(b).

[96] *Harris v. City of Costa Mesa* (1994) 25 Cal. App. 4th 963, 969.

[97] 33 U.S.C. § 403.

[98] 82 FR 1860, 1986.

5-11 cont'd

The USACE utilizes three types of general permits: nationwide permits ("NWP"), regional general permits and programmatic general permits. In cases where the proposed activity cannot be designed to meet the terms and conditions of the general permit, an individual permit is required.

NWP 12 authorizes activities required for construction, maintenance, repair, and removal of utility lines and associated facilities in waters of the United States, provided the activity does not result in the loss of greater than a half-acre of waters of the United States for each single and complete project.[99] NWP 12 also authorizes utility lines in or affecting navigable waters of the United States even if there is no associated discharge of dredged or fill material.[100] With respect to HDD, the permit "authorizes, to the extent that Department of Army authorization is required, temporary structures, fills, and work necessary for remediation of inadvertent returns of drilling fluids to the waters of the United States through sub-soil fissures or fractures that might occur during horizontal directional drilling activities conducted for the purpose of installing or replacing utility lines."[101]

NWP 12 requires that the remediation activities "be done as soon as practicable, to restore the affected waterbody."[102] The District Engineer may "add special conditions to this NWP to require a remediation plan for addressing inadvertent returns of drilling fluids to waters of the United States during horizontal directional drilling activities conducted for the purpose of installing or replacing utility lines."[103]

5-12

VI. THE DSEIR FAILS TO DISCLOSE AND MEANINGFULLY ANALYZE ALL SIGNIFICANT PROJECT IMPACTS

CEQA requires an analysis of the potential environmental impacts an agency's proposed actions may have in an EIR (except in certain limited circumstances).[104] "The foremost principle in interpreting CEQA is that the

[99] *Id.* at 1985-86; *see also* U.S. Army Corps of Engineers, 2017 Nationwide Permits, General Conditions, District Engineer's Decision, Further Information, and Definitions (2017) pp. 7-10, *available at* https://usace.contentdm.oclc.org/utils/getfile/collection/p16021coll7/id/8593.
[100] 33 C.F.R. part 322.
[101] 82 FR 1860, 1986.
[102] *Ibid.*
[103] *Ibid.*
[104] *See, e.g.*, Pub. Resources Code § 21100.
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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."[105] 5-12 cont'd

"[T]he adequacy of an EIR's discussion of environmental impacts is an issue distinct from the extent to which the agency is correct in its determination whether the impacts are significant."[106] "An adequate description of adverse environmental effects is necessary to inform the critical discussion of mitigation measures and project alternatives at the core of the EIR."[107] "[W]hether a description of an environmental impact is insufficient because it lacks analysis or omits the magnitude of the impact is not a substantial evidence question."[108] Indeed, "[a] conclusory discussion of an environmental impact that an EIR deems significant can be determined by a court to be inadequate as an informational document without reference to substantial evidence."[109] The ultimate inquiry is whether the EIR includes enough detail to enable those who did not participate in its preparation to understand and to consider meaningfully the issues raised by the proposed project.[110]

5-13

A. The DSEIR Fails to Analyze the Nature or Severity of Project's Impacts on 59 Special-Status Species

As discussed in Section V.A., the DSEIR failed to disclose or meaningfully discuss 59 special-status species which are likely to occur within the Project vicinity during implementation. Because the DSEIR failed to provide the baseline data necessary to accurately assess the Project's impacts on the 59 special status species omitted from the environmental setting discussion, the DSEIR's conclusion that impacts to biological resources are less than significant is entirely unsupported. Moreover, the DSEIR cannot rely on the premise that less than significant impacts require less detailed analysis because, in this case, the DSEIR failed to conduct an analysis in the first place to accurately assess the significance of the impact.

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[105] *Communities for a Better Environment v. Cal. Resources Agency* (2002) 103 Cal. App.4th 98, 109.
[106] *Sierra Club,* 6 Cal.5th at p. 514.
[107] *Ibid.*
[108] *Ibid.*
[109] *Ibid.*
[110] *Id.* at p. 516.

5-13 cont'd

B. The DSEIR Erroneously Omits Special-Status Species with Low Occurrence Potential from Its Impact Analysis

The DSEIR fails to analyze any wildlife species with low potential to occur at the project site.[111] It attempts to explain the omission hy stating that "[w]ildlife species listed in Table 3.4-3 as having low potential to occur at the project site were identified as such because there is very limited suitable habitat for the species or there is no suitable nesting/breeding habitat at the project site. Based on the small amount (6%) of the project site that would be disturbed, the potential for these species to be affected is considered negligible."[112] The DSEIR's explanation falls short for two reasons.

First, the DSEIR's reference to small disturbance at the Project site only accounts for impacts caused by Project construction. The impact assumption entirely disregards the potential for species to be affected by Project operation. As the DSEIR acknowledges, turbine operation could result in the direct mortality of a significant number of special-status due to collisions with turbines.[113]

Second, even assuming the DSEIR correctly categorized the special-status species as having "low" potential to occnr onsite during Project implementation, the Project's impacts on the species could still be significant. Take, for example, potential impacts to the California condor. As emphasized by Dr. Smallwood, even single death would be a significant setback for the survival of the species.[114] A single take would also violate CESA and federal ESA protections, requiring a take permit. Thus, the Project's potential impact on the California condor could hardly be characterized as "negligible" given the species' extremely low population and legally protected status.

Moreover, as discussed in Section V.C., the DSEIR's occnrrence determination for several species, including the condor, bald eagle, sandhill crane, and all special-status species erroneously omitted from the environmental setting

[111] DSEIR at p. 3.4-60 ("Therefore, wildlife species with low potential to occur at the project site are not discussed in this impact analysis.").
[112] *Ibid.*
[113] *See e.g., id.* at pp. 3.4-95 to 3.4-128 (discussing impacts to avian and bat species due to collisions with turbines).
[114] Smallwood Comments at pp. 25-26.

discuss, identified as having low or no potential is not supported by substantial evidence.[115] 5-13 cont'd

5-14

C. The DSEIR Failed to Conduct a Micrositing Analysis for Bats, as Required by PEIR MM BIO-11b and PEIR MM BIO-14a

"Mitigation conditions are not mere expressions of hope."[116] Once incorporated, mitigation measures cannot be defeated by ignoring them or "attempting to render them meaningless by moving ahead with the project in spite of them."[117] When it adopted the PEIR, the County promised to reduce avian and bat mortality by siting turbines in a manner that minimizes impacts to birds and bats. To ensure that each project approved under the PEIR achieved this goal, the PEIR included several mitigation measures requiring project proponents to utilize the best available science and methods to collect the necessary data to perform a micrositing analysis.

PEIR Mitigation Measure ("MM") BIO-11b mandates that all project proponents "conduct a siting process and prepare a siting analysis to select turbines to minimize potential impacts on bird ***and bat species***."[118] The analysis must utilize the best available scientific information to inform a site-specific field analysis that considers of the local topography and pre-construction surveys of bird and bat use, behavior and disturbing in the project site.[119] Proponents must "utilize methods (i.e., computer models) to identify dangerous locations for birds and bats based on site-specific risk factors."[120]

Similarly, PEIR MM BIO-14a requires that project proponents to utilize "the best available information to site turbines and select from turbine models in such a manner as to reduce bat collision risk."[121] The PEIR reiterates that the siting and selection process must "take into account bat use of the area and landscape features known to increase collision risk."[122] To facilitate the analysis, the proponent must "generate site-specific 'best information' to inform turbine siting and operation

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[115] *Id.* at pp. 9-11.
[116] *Lincoln Place Tenants Assn. v. City of Los Angeles* (2005) 1330 Cal.App.4th 1491, 1508.
[117] *Lincoln Place Tenants Assn. v. City of Los Angeles* (2007) 155 Cal.App.4th 425, 450.
[118] PEIR at p. 3.4-109.
[119] *Ibid.*
[120] *Id.* at p. 3.4-110.
[121] *Id.* at p. 3.4-133.
[122] *Ibid.*

5-14 cont'd

decisions" by performing a bat habitat assessment and roost survey in the project area.[123] Turbine siting decisions must incorporate relevant bat use survey data and bat fatality records published by other projects in the APWRA.[124] Despite these clear requirements, the DSEIR failed to perform a micrositing analysis which considered bats.

The DSEIR's failure to comply with the PEIR's mitigation measures suffers from the same flaws identified in *Sierra Club v. County of San Diego*.[125] In that case, San Diego County prepared a PEIR for its general plan adopting several mitigation measures aimed at reducing GHG impacts.[126] One of the mitigation measures required the preparation of a Climate Action Plan ("CAP") that would include the baseline inventory of greenhouse gas emissions from all sources and more detailed greenhouse gas emissions reduction targets and deadlines.[127] The CAP also needed to achieve comprehensive and enforceable GHG emissions reduction of 17% from county operations from 2006 by 2020 and a 9% reduction in community emissions from 2006 by 2020.[128] The court held that San Diego County failed to adopt a CAP because the CAP did not include measures to ensure that the expressly required GHG emissions reductions targets would be achieved and did not contain any detailed deadlines, as required by the PEIR.[129]

Here, the DSEIR performed two micrositing assessments, neither of which applies to bats.[130] In fact, the initial micrositing assessment, without any supporting evidence, claims that "there is little information that would suggest micrositing of turbines in an otherwise monotypic landscape, even one with complex topography like the APRWA, would influence potential bat mortality."[131] And the supplemental micrositing assessment entirely omits bats from its discussion.[132]

The County cannot rely on its failure to conduct a required analysis to conclude that there is inadequate information to analyze impacts because, as

[123] *Ibid.*
[124] *Ibid.*
[125] *Sierra Club v. County of San Diego* (2014) 231 Cal.App.4th 1152.
[126] *Id.* at p. 1159.
[127] *Ibid.*
[128] *Ibid.*
[129] *Id.* at p. 1167-76.
[130] *See generally* DSEIR, appen. F (micrositing assessment), appen. G (supplemental micrositing assessment).
[131] *Id.*, appen F. at p. 8.
[132] *See generally id.*, appen. G.

5-14 cont'd

discussed in Section VI.D., the PEIR required that the project proponent perform bat roost surveys "[p]rior to development of any repowering project."[133] Furthermore, the relevant data necessary to perform such an analysis is readily a available from experts who work in the APRWA.[134]

Lastly, the DSEIR cannot rely on the 2020 Updated PEIR MM BIO-14a to cure this defect. The updated mitigation measure requires that the proponent utilize procedures followed with guidance provided by the California guidelines for reducing impacts on birds and bats from wind development, and deletes discussion of measures requiring siting turbines the greatest distance feasible up to 500 feet from still or flowing bodies of water, riparian habitat, known roosts, and tree stands.[135] However, the DSEIR should have already conducted site-specific bat surveys in order to conduct a micrositing analysis.

The DSEIR's failure to perform a micrositing analysis for bats renders its conclusion that Impact BIO-11, BIO-14, and BIO-19 unsupported by substantial evidence.[136] In addition, the DSEIR's conclusion that MM BIO-20 is less than significant is not supported by substantial evidence.[137]

5-15

D. The DSEIR Failed to Conduct Bat Roost Surveys, as Required by PEIR MM BIO-12a

PEIR MM BIO-12a mandates that "[***p]rior to development of any repowering project***,"[138] the project proponent must conduct a roost habitat assessment to identify potential colonial roost sites of special-status and common bat species within 750 feet of the construction area.[139] The measure then identifies specific performance standards that must be followed in implementing the surveys, including several separate survey visits, at different times of the day and year, if necessary, employing appropriate field methods and best practices.[140] After completion of the roost surveys, the proponent must prepare a report documenting

[133] PEIR at p. 3.4-127; *Berkeley Jets,* 91 Cal.App.4th at p. 1355 (unsupported studies are entitled to no deference); *Laurel Heights,* 47 Cal.3d at pp. 391 409, fn. 12.
[134] Smallwood Comments at p. 65.
[135] *Compare* DSEIR at p. 3.4-124 *with* PEIR at p. 3.4-133.
[136] DSEIR at p. 3.4-131 to 3.4-132
[137] *Id*. at p. 3.4-132 to 3.4-134.
[138] PEIR at p. 3.4-127
[139] *Ibid*.
[140] *Ibid*.

5-15 cont'd

areas surveyed, methods, results, and mapping of high-quality habitat or confirmed roost locations.[141] The DSEIR failed to comply with this requirement.

While the County prepared a biological resources report, included with the DSEIR as Appendix C, that report does not meet requirements established by PEIR MM BIO-12a. The field surveys describe in Appendix C were conducted for a variety of reasons, including delineation of aquatic resources, land cover mapping, and habitat assessment for a handful of special-status species.[142] They did not focus on the requirements of MM BIO-12a. Indeed, Appendix C does not include a report documenting areas surveyed, methods, results, and mapping of high-quality habitat or confirmed roost locations.

Moreover, a mitigation measure cannot be "interpreted" contrary to its express terms.[143] There can be no reasonable dispute that the PEIR requires bat roost surveys to be performed as part of a subsequent CEQA analysis for proposed repowering projects in the APWRA because the measure expressly states that such surveys are to be performed "[p]rior to the development of any repowering project."[144] Indeed, the County conducted avian use surveys and performed avian micrositing assessments prior to release of the DSEIR based on an equivalent mitigation measure for birds.[145] The same is required for bats.

Because the County failed to perform the requisite bat surveys, the DSEIR's conclusion that Impact BIO-12 is less than significant is not supported by substantial evidence.[146] In addition, the DSEIR's conclusion that all feasible mitigation measures to reduce the significant impacts of BIO-19 have been implemented is equally unsupported.[147]

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[141] *Ibid.*
[142] DSEIR, appen. C at p. 2-1 to 2-4.
[143] *Sierra Club*, 231 Cal.App.4th at p. 1172; *see Southern Cal. Edison Co. v. Public Utilities Co.* (2008) 85 Cal.App.4th 1086, 1105 ("an agency's interpretation of a regulation or statute does not control if an alternative reading is compelled by the plain language of the provision"); *Santa Clarita Organization for Planning the Environment v. City of Santa Clarita* (2011) 197 Cal.App.4th 1042, 1062 (agency's "view of the meaning of the scope of its own ordinance" does not enjoy deference when it is " 'clearly erroneous or unauthorized' ").
[144] Compare PEIR at p. 3.4-127 to
[145] *See generally* DSEIR, appen. C (avian use surveys), appen. F (micrositing assessment), appen. G (supplemental micrositing assessment).
[146] DSEIR at p. 3.4-118 to 3.4-120.
[147] *Id.* at p. 3.4-131 to 3.4-132.

5-16

E. The DSEIR's Avian Micrositing Assessment Fails to Comply with PEIR MM BIO-11b

PEIR MM BIO-11b mandates that all project proponent "conduct a siting process and prepare a siting analysis to select turbines to minimize potential impacts on bird and bat species."[148] The analysis must utilize the best available scientific information to inform a site-specific field analysis that considers of the local topography and pre-construction surveys of bird and bat use, behavior and disturbing in the project site.[149] Proponents must "utilize methods (i.e., ***computer models***) to identify dangerous locations for birds and bats based on site-specific risk factors."[150]

The micrositing assessment relied upon by the DSEIR utilized computer modeling to perform the analysis because the DSEIR claims there is little evidence showing that the collision risk models correspond to higher certainty regarding potential reduction in fatalities of targeted species when compared with field assessment.[151] But this is simply not accurate. The efficacy of the collision risk models was tested through peer-review publications.[152]

Moreover, these models are not intended to replace field assessment as implied by the DSEIR,[153] but rather meant to be a complementary approach to mitigating potential fatalities to birds and bats that are caused collisions with wind turbines.[154] The collision risk model represents the best available scientific method for evaluating and mitigating impacts to bird and species, particularly for golden eagles in the APWRA and is required by the MM BIO-11b.[155] Its use is therefore supported by the PEIR,[156] and the DSEIR's refusal to use the best available micrositing modeling is not supported by substantial evidence. The County's failure to conduct an micrositing assessment consistent with the MM BIO-11b renders its micro-sited alternative analysis unsupported by substantial evidence.[157]

[148] PEIR at p. 3.4-109.
[149] *Ibid.*; CEQA Guidelines § 15064(b)(1) (determination of whether a project may have a significant effect on the environment must be based to the extent possible on scientific and factual data).
[150] *Id.* at p. 3.4-110 (emphasis added).
[151] DSEIR, appen. D at p. 7.
[152] Smallwood Comments at p. 65.
[153] DSEIR, appen D at p. 7.
[154] Smallwood Comments at p. 65.
[155] PEIR at p. 3.4-109 to 3.4-110.
[156] *Ibid.*
[157] DSEIR at pp. 4-4 to 4-6, 4-13 to 4-18.
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Dr. Smallwood performed a micrositing assessment for the safest wind turhine layout consistent with the MM BIO-11b.[158] Based on the modeling data, Dr. Smallwood recommend against 26 of the proposed sites after the relocations identified in the DSEIR's micrositing assessment.[159] In fact, he recommended at least 50% of the sites be removed from the project, and the remainder laid out more safely.[160] His analysis and recommendations must be considered in a revised and recirculated DSEIR. 5-16 cont'd

F. The DSEIR Fails to Analyze Indirect Impacts to Wildlife Resulting from Wildfires Caused by Wind Facilities 5-17

The proposed Project encompasses an area which includes moderate to high fire hazard severity zones.[161] The DSEIR acknowledges that fire hazards pose considerable risk to vegetation and wildlife habitats throughout the APWRA, including the Project site, which primarily consists of grasslands.[162] The increased severity and frequency of wildfires occurring in the APWRA has caused wind operators to take measnres to prevent wind-energy caused wildfires, including repeat disking of firebreaks around wind tnrbines.[163] The DSEIR fails to analyze the additional permanent impacts to grasslands that may be caused by repeat disking to prevent wildfires. This analysis should be included in a revised and recirculated DSEIR.

G. The DSEIR Fails to Analyze the Nature or Severity of Hazardous Materials Present on the Project Site 5-18

A Phase I Environmental Site Assessment ("ESA") was conducted to identify historical and current land use, operations, and environmental conditions associated with the Project and surrounding area.[164] The Phase 1 ESA identified several recognized environmental conditions ("RECs") on the Project site.[165] The Phase I ESA found, among other things:

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[158] Smallwood Comments at pp. 52-64.
[159] *Id.* at pp. 58.
[160] *Ibid.*
[161] *Id.* at p. 3.19-4.
[162] *Id.* at p. 3.19-6.
[163] Smallwood Comments at pp. 86-87.
[164] DSEIR, appen. E.
[165] *Id.* at p. 3.9-11; appen. E at p. 4-1. An REC are those conditions where the presence of any hazardous substances or petroleum products in, on, or at the property: (1) due to the release to the

5-18 cont'd

> A burn pit is located adjacent to the access road, and north of the barn, on APN # 99B-7925-2-4 and remnants of wood and metal were observed within the burn pit;[166]
>
> Multiple chemical storage containers (i.e., tanks, drums) were observed near the main residence on APN# 99B-7925-2-1, though no identifying markers were present on the containers, and no secondary containment was observed under the containers;[167]
>
> Residual staining was observed in the immediate vicinity of the hazardous material storage tanks and treated poles located south of the main residence (approximately 500 feet south of the railroad) on APN# 99B-7925-2-4.[168]

The Phase 1 ESA concluded that (1) "contamination may be present ***beneath the observed burn pit*** due to historical and continued use," (2) "spills may have occurred during movement of the storage containers," and (3) "residual petroleum products may be ***present in the underlying soil*** near the tanks, and chemical preservatives from the treated poles may be ***present in the underlying soil***."[169]

Despite potential presence of potential environmental hazards at the Project site, the DSEIR fails to analyze the nature or severity of the contaminants. Instead, the DSEIR conclusively asserts that a "Phase II investigation would not be warranted" because "the identified environmental conditions are typical conditions that would be addressed through standard construction BMPs and compliance with regulations."[170] As a result, the DSEIR concludes that construction and operation of the project would result in a less than significant impact related to the creation of a significant hazard to the public or the environment.[171]

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environment, (2) under conditions indicative of a release to the environment, or (3) under conditions that pose a material threat of future release to the environment. *Ibid.*

[166] *Id.* at p. 3.9-11; appen. E at p. 4-1.
[167] *Ibid.*
[168] *Ibid.*
[169] *Id.*, appen. E at p. 5-1 (emphasis added).
[170] DSEIR at p. 3.9-12.
[171] *Ibid.*

5-18 cont'd

Mr. Hagemann explains that the presence of a burn pit, tanks and drums are not "typical conditions" as asserted by the DSEIR.[172] As the Phase 1 ESA acknowledges, and Mr. Hagemann confirms, contamination may be present nnderneath burn pit and petroleum products or other chemicals may have leaked into the underlying soil.[173] Confirmation of these conditions would not have been discovered during a Phase 1 ESA because Phase I ESA's do not include any soil sampling.[174] That is the function of a Phase II ESA. Further environmental analysis is necessary to determine the extent of chemical release and the need for any regulatory agency notification or environmental cleanup activities.[175] Because the DSEIR failed to analyze the nature or severity of the contaminants present on the Project site, it cannot conclude that Impact HAZ-4 is less than significant.

5-19

H. The DSEIR Fails to Conduct a Quantified Health Risk Analysis

Project operation and construction would result in the release of diesel particulate matter ("DPM") by the use of diesel-fueled equipment and vehicles.[176] Short-term exposure to DPM can cause acute irritation, neuropsychological symptoms, and respiratory symptoms.[177] In addition, diesel engine exhaust has been classified as "carcinogenic to humans, based on sufficient evidence that exposure is associated with an increased risk for lung cancer."[178]

The DSEIR concludes that operation and construction of the Project would not result in a significant impact due to localized DPM emissions.[179] However, the DSEIR reached this conclusion without conducting any quantified analysis or health risk assessment (collectively, "HRA") for either phase of the Project. An EIR must analyze the impacts from human exposure to toxic substances.[180] The EIR cannot label an effect "less than significant" without accompanying analysis of the project's impacts.[181]

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[172] SWAPE Comments at p. 2.
[173] DSEIR, appen. B at p. 5-1; SWAPE Comments at p. 2.
[174] SWAPE Comments at p. 2.
[175] *Ibid.*
[176] DSEIR at p. 3.3-12.
[177] *Ibid.*
[178] *Ibid.*
[179] *Id.* at pp. 3.3-27 to 3.3-28.
[180] *Berkeley Jets*, 91 Cal.App.4th at p. 1369.
[181] *Sierra Club*, Cal.5th at p. 514; *Kings County Farm Bureau*, 221 Cal.App.3d at 732 (agency cannot conclude that impact is less than significant unless it produces rigorous analysis and concrete substantial evidence justifying the finding).
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5-19 cont'd

With respect to DPM emissions during operation, the DSEIR states: "Long-term operation of the proposed project would not result in a significant new source of DPM emissions."[182] The DSEIR failed to evaluate whether any of the diesel-fueled equipment proposed for use during Project operation could result in a significant source of DPM emissions.[183] Indeed, operation and maintenance of the Project will generate 16 daily worker trips, require 5 pieces of off-road equipment, and utilize 2 generators.[184] Therefore, the DSEIR cannot conclude DPM emissions from Project operation are less than significant without first conducting a health risk assessment.

With respect to Project construction, the DSEIR acknowledges that construction activities within 1,000 feet from a sensitive receptor pose a significant health risk.[185] It further admits that the Mulqueeney Ranch "may be exposed to increased health risks during construction that could exceed [Bay Area Air Quality Management District] thresholds."[186] The BAAQMD recommends that all receptors located within a 1,000 foot radius of a Project's fence line be assessed for potentially significant impacts from the incremental increase in risks or hazards from the proposed new source, including projects like this one which utilize off-road diesel equipment on site.[187] Yet, despite these admissions and clear regulatory guidance, the DSEIR failed to quantify the health risk to residents on the Mulqueeney Ranch.[188] As a result, the DSEIR cannot conclude the PEIR mitigation measures would reduce DPM emissions and associated health risks to a level of insignificance.

The DSEIR also concedes that on-site construction activities would generate DPM, but then discounts these emissions because Project construction will occur over a 7-month period, as opposed to the 30-year duration typically associated with chronic cancer risks identified by the Office of Environmental Health and Hazard Assessment ("OEHHA") .[189] In doing so, the DSEIR misstates and ignores

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[182] DSEIR at p. 3.3-27.
[183] SWAPE Comments at p. 4.
[184] DSEIR, appen. B at p. 4.
[185] *Id*. at p. 3.3-28.
[186] *Ibid*. at p. 3.3-28.
[187] See Bay Area Air Quality Management District, California Environmental Quality Act: Air Quality Guidelines (May 2017) pp. 5-7 to 5-8 (Section 5.2.4, Sources Not Requiring a BAAQMD Permit), *available at* https://www.baaqmd.gov/~/media/files/planning-and-research/ceqa/ceqa_guidelines_may2017-pdf.pdf?la=en.
[188] DSEIR at p. 3.3-28; SWAPE Comments at pp. 4-5.
[189] DSEIR at p. 3.3-27 to 3.3-28.

OEHHA's recommendations regarding cancer risk evaluation for short-term projects such as construction.[190] 5-19 cont'd

VII. THE DSEIR'S IMPACT ANALYSIS AND CONCLUSIONS ARE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE 5-20

An agency's conclusions must be supported by substantial evidence.[191] Substantial evidence is defined as "enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached."[192] It includes "facts, reasonable assumption predicated upon facts, and expert opinion supported by facts,"[193] but does not include "[a]rgument, speculation, unsubstantiated opinion or narrative, [or] evidence which is clearly erroneous or inaccurate."[194]

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.'"[195] As 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."[196]

A. The DSEIR Significantly Underestimates the Permanent Impacts to Potential Habitat Caused by Project Construction. 5-21

The DSEIR estimates construction of the Project would permanently disturb only 26.02 acres, but temporarily disturb 263.68 acres.[197] However, these estimates are inconsistent with disturbance levels seen at similar projects in the APRWA.[198] Dr. Smallwood estimates that ground disturbance caused by the Project would

[190] SWAPE Comments at pp. 5-6.
[191] Sierra Club, 6 Cal.5th at p. XX.
[192] CEQA Guidelines § 15384(a).
[193] *Id.* § 15384(b).
[194] *Id.* § 15384(a).
[195] *Berkeley Jets*, 91 Cal.App.4th at p. 1355 (quoting *Laurel Heights*, 47 Cal.3d at pp. 391, 409, fn. 12).
[196] *Ibid.*; *San Joaquin Raptor*, 27 Cal.App.4th at p. 722; *Galante Vineyards,* 60 Cal.App.4th at p. 1117; *County of Amador,* 76 Cal.App.4th at p. 946.
[197] DSEIR at p. 2-15.
[198] Smallwood Comments at pp. 17-22.

5-21 cont'd

likely damage 9% of plant and wildlife habitat on the site as opposed to the 1% estimated by the DSEIR because re-vegetation lags on graded surfaces and can be further impacted by gully erosion.[199] The DSEIR's failure to accurately disclose permanent grading impacts directly affect the DSEIR's conclusions regarding potential impacts to wildlife.

For example, the loss of grassland habitat on the Project site would result in significant impacts to special-status species nesting at the Project site.[200] Based on data collected at a nearby site, Dr. Smallwood estimates that the 30-year impact to species, including burrowing owl, northern harrier, and red-tailed hawk, which rely on grassland habitat at the Project site, would result in a lost capacity of breeders and annual chick production by approximately 45,144 individual birds.[201] However, this impact is not disclosed or adequacy analyzed because the DSEIR underestimates the Project's construction impacts.[202]

5-22

B. The DSEIR's Baseline Avian Mortality Thresholds Are Not Supported by Substantial Evidence

The CEQA Guidelines authorize agencies to publish the "thresholds of significance" to assist in determining whether a project's effect will be deemed significant.[203] Selection of a threshold of significance mnst be snpported by substantial evidence.[204] When an impact exceeds a CEQA significance threshold, the agency must disclose in the EIR that the impact is significant.[205] The EIR mnst then analyze mitigation measures and alternatives to rednce the impact.[206]

2020 Updated PEIR MM BIO-11 and BIO-14d require the project proponent to implement adaptive management strategies for avian and bat species, respectively, if postconstruction fatality monitoring exceeds the preconstruction

[199] *Id.* at p. 18.
[200] Smallwood Comments at p. 19.
[201] *Ibid.*
[202] *Ibid.*
[203] CEQA Guidelines § 15064.7(a).
[204] *Id.* § 15064(b).
[205] *Communities for a Better Environment,* 103 Cal.App.4th at pp. 110-11; *Schenck v. County of Sonoma* (2011) 198 Cal.App.4th 949, 960 (County applies BAAQMD's "published CEQA quantitative criteria" and "threshold level of cumulative significance"); *Communities for a Better Environment*, 48 Cal.4th at p. 327 (impact is significant because it exceeds "established significance threshold for NOx … constitue[ing] substantial evidence supporting a fair argument for a significant adverse impact").
[206] *Id.*

baseline fatality estimates. These thresholds are derived from the non-repowered mortality rates under the 450 MW program described in the PEIR and continue to be relied upon by the DSEIR.[207] The DSEIR's thresholds are not supported by substantial evidence because the thresholds were developed utilizing outdated data from older generation turbines. Significant new information regarding avian mortality in the APWRA is available since the publication of the PEIR.[208] 5-22 cont'd

Moreover, the historical data relied upon by the PEIR and DSEIR suffers several critical defects. For example, underlying data relied upon to establish the thresholds utilized methods that significantly underestimated avian fatalities in the APWRA.[209] In addition, monitoring methods implemented were inefficient and at times unreliable.[210] The County's reliance on an outdated, unsupported threshold of significance results is likely to result in a failure to disclose and mitigate potentially significant avian mortality impacts

To be comparable, the baseline fatality estimates should represent the specific turbines to be implemented at the Proposed project as opposed to utilizing averages.[211] In addition, the baseline should also be interpreted with respect to inter-annual variation in fatalities.[212] Species-specific fatality rates often cycle, so fatality rates match the same portion of the cycle in the repowered period.[213] Dr. Smallwood provides site-specific analysis of several special status species that should be utilized to establish appropriate thresholds.[214]

C. The DSEIR's Conclusion that Impact HAZ-4 Is Less Than Significant Is Not Supported by Substantial Evidence 5-23

The DSEIR's conclusion that the Project would result in a is less than significant impact because of a reasonably foreseeable upset or accident conditions involving the release of hazardous materials into the environment is not supported by substantial evidence.[215] While the Phase I ESA does not recommend a Phase 2

[207] DSEIR at p. 3.4-61.
[208] *Id.* at p 3.4-48 to 3.4-50; *see also* Smallwood Comments at pp. 27-52.
[209] *Id.* at p. 73.
[210] *Ibid.*
[211] *Ibid.*
[212] *Ibid.*
[213] *Ibid.*
[214] *See generally id.* at pp. 27-52.
[215] DSEIR at pp. 3.9-10 to 3.9-12.

ESA, this recommendation is conclusory and contrary to the Phase I ESA findings. Unsubstantiated opinion or narrative, and evidence which is clearly "inaccurate or erroneous," is not substantial evidence.[216] 5-23 cont'd

The Phase I ESA identified several RECs on the Project site and concluded that (1) contamination is may present beneath the burn pit, (2) spills may have occurred during the transport of storage containers, and (3) residual petroleum or other chemicals may be present in the underlying soil.[217] As Mr. Hagemann emphasizes, the hazards identified in the Phase I ESA are not "typical conditions" that can be addressed through standard construction BMPs and compliance with regulations.[218] They are conditions which must be fully disclosed and analyzed in the DSEIR.

The DSEIR explains that the project would involve soil disturbance, thus potentially disturbing residual contaminants.[219] The disturbance of toxic soil contamination at a project site is potentially significant impact requiring CEQA review and mitigation.[220] Because the Project involves soil disturbance in the areas where known environmental hazards exist, the Project could result in the creation of a significant hazard to the public or environment through a reasonably foreseeable upset or accident involving the release of hazardous materials. Therefore, the DSEIR's conclusion that the Impact HAZ-4 is less than significant is not supported by substantial evidence. The DSEIR must analyze the magnitude and severity of the potential hazards identified in the Phase I ESA and include feasible mitigation measures to reduce this impact to less than significant levels.[221]

VIII. THE DSEIR FAILS TO INCLUDE ALL FEASIBLE MITIGATION MEASURES TO REDUCE THE PROJECT'S SIGNIFICANT IMPACTS TO THE GREATEST EXTENT FEASIBLE 5-24

A public agency cannot approve a project if there are feasible alternatives or mitigation measures available that would substantially lessen any significant

[216] Pub. Resources Code § 21082.2(c); CEQA Guidelines § 15384(b).
[217] DSEIR at p. 3.9-11.
[218] SWAPE Comments at p. 2.
[219] DSEIR at p. 3.9-10.
[220] *Cal. Build. Indust. Ass'n v. BAAQMD* (2015) 62 Cal.4th 369, 388-90.
[221] *Id.*; CEQA Guidelines §§ 15143, 15162.2(a) (severity of project's impacts and the probability of their occurrence must be disclosed in CEQA document before project can be approved).

5-24 cont'd

effects that the project would have on the environment.[222] CEQA defines "feasible" as "capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, social, and technological factors."[223] "In deciding whether changes in a project are feasible, an agency may consider specific, economic, environmental, legal, social, and technological factors."[224]

The duty to prevent or minimize environmental damage is implemented through the findings required by Public Resources Code § 21081 and CEQA Guidelines § 15091.[225] These sections prohibit a lead agency from approving a project with significant impacts unless it makes one or more of three findings:

(1) Changes or alterations have been required in, or incorporated into, the project which mitigate or avoid the significant effects on the environment.[226]
(2) Those changes or alterations are within the responsibility and jurisdiction of another public agency and have been, or can and should be, adopted by that other agency.[227]
(3) Specific economic, legal, social, technological, or other considerations make infeasible the mitigation measures or project alternatives identified in the environmental impact report.[228]

These findings must be supported by substantial evidence.[229]

Rejected alternatives and mitigation measures must be "truly infeasible."[230] When an agency finds a specific alternative or mitigation measure to be infeasible, "its analysis must explain in meaningful detail the reasons and facts supporting the conclusion. The analysis must be sufficiently specific to permit informed decision-making and public

[222] CEQA Guidelines § 15021(a)(2).
[223] Pub. Resources Code § 21061.1; CEQA Guidelines § 15364.
[224] CEQA Guidelines § 15021(b).
[225] Pub. Resources Code § 21081(a); CEQA Guidelines § 15091(a).
[226] Pub. Resources Code § 21081(a)(1); CEQA Guidelines § 15091(a)(1).
[227] Pub. Resources Code § 21081(a)(2); CEQA Guidelines § 15091(a)(2).
[228] Pub. Resources Code § 21081(a)(3); CEQA Guidelines § 15091(a)(3).
[229] Pub. Resources Code § 21081.5; CEQA Guidelines § 15091(b).
[230] *City of Marina v. Bd. of Trustees of Cal. State Univ.* (2006) 39 Cal.4th 341, 369.

5-24 cont'd

participation."[231] Conclusory statements are inadequate.[232] As the Supreme Court recently explained in *Sierra Club v. County of Fresno*:

> When reviewing whether a discussion is sufficient to satisfy CEQA, a court must be satisfied that the EIR (1) includes sufficient detail to enable those who did not participate in its preparation to understand and to consider meaningfully the issues the proposed project raises, and (2) makes a reasonable effort to substantively connect a project's air quality impacts to likely ... consequences.[233]

This holding applies equally to an EIR's discussion of impacts and of the adequacy of mitigation measures, and restates the well-established rule that an EIR is inadequate as a matter of law where (1) it omits information required by law and (2) the omission precludes informed decision making by the lead agency or informed participation by the public.[234]

If significant effects still exist after all feasible mitigation measures and alternatives have been implemented, a project may still be approved if the "unmitigated effects are outweighed by the project's benefits."[235] However, the Supreme Court clarified that, "[e]ven when a project's benefits outweigh its unmitigated effects, agencies are still required to implement all mitigation measures unless those measures are truly infeasible."[236] "The lead agency must adopt feasible mitigation measures or project alternatives to reduce the effect to insignificance; to the extent significant impacts remain after mitigation, the agency may still approve the project with a statement of overriding considerations."[237]

A statement of overriding considerations is not a substitute for the required findings on the feasibility of mitigation measures.[238] The statement must also be supported by substantial evidence in the record.[239]

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[231] *Marin Mun. Water Dist. V. KG Land California Corp.* (1991) 235 Cal. App.3d 1652, 1664.
[232] *Village Laguna of Laguna Beach v. Bd. of Supervisors* (1982) 134 Cal.App.3d 1022, 1034-35.
[233] *Sierra Club,* 6 Cal.5th at p. 516 (citing *Laurel Heights,* 47 Cal.3d at p. 405.
[234] *Id.*; *Madera Oversight Coalition, Inc.,* 199 Cal.App.4th at pp. 76-77.
[235] *Sierra Club,* 6 Cal. 5th at p. 524, citing *Laurel Heights*, 47 Cal.3d at p. 391.
[236] *Sierra Club,* 6 Cal. 5th at pp. 524-25.
[237] *Center for Biological Diversity v. Department of Fish & Wildlife* (2015) 62 Cal.4th 204, 231.
[238] CEQA Guidelines § 15091(f).
[239] *Id.* § 15093(b).

5-25

A. The DSEIR Fails to Adequately Mitigate Significant Impacts to Wetlands, and Special-Status Species that Rely on Wetland Habitat

The Project propose to utilize HDD to minimize surface disturbance within wetlands and streams.[240] The HDD bore machine uses a drilling fluid in the process that is typically a mixture of fine clay (such as bentonite) and fresh water.[241] An inadvertent return may occnr if drilling fluids are released through fractures in the bedrock and flow to the surface, and possibly into a river, stream, wetland or other type of waterbody.[242] The drilling fluids are not a toxic or hazardous substance, but can adversely affect aquatic organisms if released into bodies of water.[243] While the drilling fluids are not "fill material" subject to regulation under Section 404 of the Clean Water Act, activities necessary to contain and clean np the drilling fluids may require temporary fills in the waters of the United States or fills to repair a fracture in a stream bed.[244]

The DSEIR acknowledges that a spill of drilling fluid containing bentonite could cause mortality of vernal pool brachiopods, curved-foot hygrotus diving beetle, California tiger salamander, western spadefoot, and California red-legged frog, western pond turtle or contaminate habitat.[245] In addition, the DSEIR recognizes the indirect impacts of installing the power collection system (such as an inadvertent return) could adversely impact riparian habitat and wetlands and streams.[246]

However, the DSEIR's mitigation measures do not reduce the potentially significant impacts of an inadvertent return. For example, the DSEIR does not require any site-specific drill plan, contingency plan, spill detection plan, or other remediation measures prior to commencement of HDD activities. Nor does the DSEIR require any mitigation for potential impacts to special-status species from inadvertent returns.

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[240] DSEIR at p. 2-13.
[241] *Ibid.*
[242] *Ibid.*
[243] 82 FR 1860, 1886; *see also* U.S. Army Corps of Engineers, Decision Document: Nationwide Permit 12 (2017) (hereinafter "NWP 12") p. 13, *available at* https://usace.contentdm.oclc.org/utils/getfile/collection/p16021coll7/id/6725.
[244] *Ibid.*
[245] DSEIR at pp. 3.4-75; 3.4-79, 3.4-82.
[246] *Id.* at pp. 3.4-128 to 3.4-129.

Instead, the DSEIR only requires after-the-fact compensation and restoration of riparian habitat if it is "filled or removed" or to wetlands or streams if it is "filled or disturbed."[247] These measures are wholly inadequate to ensure the impacts of an inadvertent return are less than significant. At a minimum, the DSEIR should require the preparation of an inadvertent return plan that (1) minimizes the potential for inadvertent release of drilling fluids associated with HDD activities, (2) provides for timely detection of inadvertent returns, (3) protects environmentally sensitive areas while responding to an inadvertent returned, (4) ensures a timely and minimum impact response to an inadvertent return and releases of drilling fluids, and (5) ensures that all appropriate notifications are immediately made. 5-25 cont'd

Because the DSEIR fails to adequately mitigate significant impacts to wetlands, and special-status species which occupy wetland habitat, the DSEIR's conclusion that Impacts BIO-3, BIO-5, BIO-6, BIO-16, and BIO-18 are less than significant is not supported by substantial evidence.

B. The DSEIR Fails to Adopt All Feasible Mitigation Measures to Reduce the Project's Significant and Unavoidable Cumulative Air Quality Impacts 5-26

The DSEIR concludes the Project's construction related emissions of ROG and NOx would be substantial, resulting in a significant and unavoidable cumulative impact after mitigation.[248] However, the DSEIR fails to adopt all feasible mitigation measures to reduce ROG and NOx emissions. Dr. Rosenfeld identified several feasible mitigation measures available to reduce the Project's ROG and NOx emissions.[249] The DSEIR must adopt the recommended mitigation measures or explain why, based on substantial evidence, the proposed measures are infeasible before it can approve the Project.[250]

[247] *Id.* at pp. 3.4-129 to 3.4-131 (PEIR Mitigation Measure BIO-16 and BIO-18).
[248] DSEIR at p. 5-5.
[249] SWAPE Comments at pp. 7-10.
[250] *Covington,* 43 Cal.App.5th at p. 883.

5-27

C. The DSEIR Fails to Include Mitigation Measures to Ensure the Project's Long-Term Land Use Impacts Remain Less Than Significant

The DSEIR fails to include any mitigation measures to ensure that the long-term impacts to land uses within the Project area remain less than significant. The American Wind Energy Association, a national trade association for the U.S. wind energy, recommends that developers create a plan for removing equipment and restoring landowners' property to its previous condition when the project is no longer operational **before the project is built.**[251] The National Research Council makes similar recommendations in its puhlication *Environmental Impacts of Wind-Energy Projects.*[252]

To ensure long term environmental impacts caused by the proposed Project remain less than significant, the DSEIR should include mitigation measure requiring the submission of a decommissioning and reclamation plan. Core elements of decommissioning include (1) development of a decommissioning plan, (2) identification of decommissioning requirements, (3) assessment of estimated costs, (4) financial assurances, and (5) decommissioning implementation timeline.[253]

5-28

IX. THE DSEIR'S CUMULATIVE IMPACT ANALYSIS FOR BIOLOGICAL RESOURCES IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE

Because significant new information was obtained since certification of the PEIR, the DSEIR updated PEIR's cumulative impact analysis for biological resources.[254] Specifically, the DSEIR relied on new data to revise estimated avian and bat fatality rates in the APWRA and redefine the geographic scope for its analysis of most avian special-status species.[255] The DSEIR's selected methods are not supported hy substantial evidence.

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[251] American Wind Energy Association, Wind Project Decommissioning: Industry Recommendations (Sept. 2020), *available at* https://www.awea.org/Awea/media/Public-Affairs/Decommissioning-Fact-Sheet-FINAL.pdf.
[252] National Research Council, Environmental Impacts of Wind-Energy Projects (2007) p. 10, 153, 183, *available at* https://www.nap.edu/read/11935/chapter/1.
[253] *Ibid.*
[254] DSEIR at p. 5-6 to 5-9.
[255] *Id.* at p. 5-5 to 5-6.

5-28 cont'd

The DSEIR updated the PEIR's cumulative impact analysis by extrapolating currently available fatality rate data to the 450 MW repowered capacity originally contemplated by the PEIR.[256] The DSEIR claims that the proposed Project represents approximately 18% of the approved increases in the capacity in the entire APWRA, and thus represents approximately 18% of the contribution to the fatalities anticipated by the PEIR.[257] But this assumption is disproven by the DSEIR's own data.[258]

Repowered wind projects cannot be assumed to contribute proportionally equivalent impacts to birds and bats because each project has unique interactions with these species based on their location relative to animal activity patterns, density of generation capacity, turbine size, construction impacts, and micro-siting efficacy.[259] As presented, the DSEIR's updated analysis fails to adequately disclose the cumulative impacts on avian and bat mortality and is unsupported by substantial evidence.

The DSEIR also updated the PEIR's geographic scope for analysis of cumulative impacts associated with avian and bat fatalities through turbine collisions in the APWRA and Montezuma Hills Wind Resource Area in Solano County.[260] For avian species other than golden eagles, the DSEIR relied on population status and trends established by Partners in Flight ("PIF").[261] However, the PIF estimator suffers three critical defects rendering it unreliable for purposes of evaluating cumulative impacts.

First, it mischaracterizes the population concept as a term of convenience, not a biologically determined unit of demography.[262] Second, the spatial scale relied upon by the PIF estimator far exceeds the local population directly affected by collision mortality.[263] Third, the PIF relies too heavily on extrapolation from roadside bird counts, which leads to overestimated population counts.[264] As a

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[256] *Id.* at p. 5-5.
[257] *Ibid.*
[258] Smallwood Comments at p. 88.
[259] *Ibid.*
[260] DSEIR at p. 5-5 to 5-6.
[261] *Id.* at p. 5-5.
[262] Smallwood Comments at p. 88.
[263] *Id.*
[264] *Id.* at p. 89.

result, the DSEIR fails to meaningfully analyze the cumulative impacts to avian species other than golden eagles. 5-28 cont'd

X. CONCLUSION 5-29

We urge the County to fulfill its responsibilities under CEQA by revising the DSEIR and preparing a legally adequate document rectifying the legal errors and addressing the potentially significant impacts described in this comment letter, the attached letters from Dr. Smallwood, Mr. Hagemann, Dr. Rosenfeld, and the other public comments in the record. This is the only way the County and the public will be able to ensure that the Project's potentially significant environmental and public health impacts are mitigated to less than significant levels.

Sincerely,

Andrew J. Graf

AJG:acp
Attachments

4838-013acp