




MEMORANDUM

RIVERSIDE COUNTY COUNSEL

DATE: March 7, 2014

TO: County of Riverside
Board of Supervisors

FROM: Tiffany N. North 
Supervising Deputy County Counsel

RE: Agenda Item 3-29 regarding the comment letter received from Gideon Kracov,
Attorney at Law, concerning the McCoy Solar Energy Project

On February 25, 2014, the Board of Supervisors held a public hearing on the McCoy Solar Energy Project (agenda items 16-1 and 16-2). Gideon Kracov, Attorney for Laborers International Union of North America (LiUNA) Local No. 1184, hand-delivered a letter to the Board during the public hearing regarding the Final Environmental Impact Report prepared for the Project. As requested by the Board, County Counsel and the County's CEQA consultant ESA, have reviewed the comments submitted by Mr. Kracov and find that they contain no significant new information. At the close of the public hearing, the Board stated that County Counsel's comments on Mr. Kracov's letter could be received at the Board's next meeting.

Attached is a memorandum from ESA, prepared in consultation with County Counsel, addressing the comments made in Mr. Kracov's letter. Also attached is a copy of Mr. Kracov's letter with the comments coded by number. There is no legal requirement to respond to Mr. Kracov's late comment letter submitted after the close of the public review period called for under CEQA. (Public Resources Code section 21091). However, we are providing these attached responses to support the conclusion that Mr. Kracov's letter merely reiterates the comments submitted on the draft EIR and does not contain any new significant information.

memorandum

date March 7, 2014

to Tiffany N. North, Deputy County Counsel, Riverside County

from Janna A. Scott

subject McCoy Solar Energy Project: LiUNA Comments of February 24, 2014

Gideon Kracov, Attorney for Laborers International Union of North America (LiUNA) Local No. 1184, hand-delivered comments dated February 24, 2014, to the Riverside County Board of Supervisors (County) at its February 25, 2014 Board meeting regarding the Final Environmental Impact Report (EIR) prepared for the McCoy Solar Energy Project (hereinafter referred to as Project or MSEP). We have reviewed the comments and find that they provide no significant new information. To the contrary, as noted below, all issues discussed in the comments have been considered in the EIR. There is no legal requirement to respond to this late comment letter. (Public Resources Code section 21091) However, we are providing these responses to support the conclusion that Mr. Kracov's letter merely reiterates the comments submitted on the draft EIR and does not contain any new significant information. We have delineated and attached the comments for ease in reference.

- 1 This comment reiterates the parties represented by the firm and identifies the CEQA project; it does not comment on the adequacy or accuracy of the EIR.
- 2 This comment summarizes details of the Project and repeats Comment O3-2 verbatim. The County provided a response on page 2-169 of the Final EIR.
- 3 This comment incorporating by reference all of the other comments received from other parties repeats a portion of Comment O3-3 verbatim. The County provided a response on page 2-169 of the Final EIR.
- 4 This comment incorrectly suggests that circulation of the Final EIR and Staff Report provided insufficient time for review and comment. Section 21092.5(a) of the Public Resources Code states, "At least 10 days prior to certifying an environmental impact report, the lead agency shall provide a written proposed response to a public agency on comments made by that agency which conform with the requirements of this division." See also, 14 Cal. Code Regs. §15088(b)). Lead agencies are not required, but as a courtesy may elect, to provide an opportunity for members of the public to review a Final EIR before the project is approved. 14 Cal. Code Regs. §15089(b) ("Lead agencies may provide an opportunity for review of the final EIR by the public or by commenting agencies before approving the project.) The County submitted the Final EIR to the State Clearinghouse and provided copies of the Final EIR to commenting agencies (including proposed responses to those agencies' comments) on February 14, 2014. Copies of the Final EIR were also made available for public review beginning February 14, 2014 at the following locations: the Riverside County Planning Department (both Riverside and Desert locations), the Lake Tamarisk Branch Library, and the Palo Verde Valley District Library. Courtesy copies of the Final EIR were sent to the entire

distribution list, including Mr. Kracov on behalf of his clients, the same day. His office's receipt of the Final EIR is acknowledged in the comment. Therefore, the County has exceeded CEQA's requirements for distribution of the FEIR.

This comment provides no evidence that the County failed to perform its statutory duty regarding the timely distribution of the Final EIR. In the absence of evidence to the contrary, the County is entitled to the general presumption that it has lawfully performed its responsibilities. See, Evid. Code §664 ("It is presumed that official duty has been regularly performed.").

Consistent with the Brown Act (Gov't Code §54950 et seq.), an agenda for a regular meeting of the County Board of Supervisors must be posted at least 72 hours before the meeting in a location that is freely accessible to members of the public and on the local agency's Internet Web site, if the local agency has one (Gov't Code §54954.2(a)(1)). Weekend hours may be counted as part of the 72-hour period (78 Op.Atty.Gen. 327, November 14, 1995). The agenda must state the meeting time and place and must contain a brief general description of each item of business to be transacted or discussed at the meeting (Gov't Code §54954.2(a)(1)). The purpose of the "brief description" requirement is to provide sufficient information to enable members of the general public to determine the general nature of subject matter of each agenda item. A summary of the Brown Act posted by the Humboldt Human Rights Commission provides the following information about the legislative purpose of the "brief description" requirement: "Brief descriptions of agenda items were first required in 1987. A letter placed in the Senate Daily Journal explained that the intent was for agendas to contain sufficient descriptions . . . to enable members of the general public to determine the general nature of subject matter of each agenda item, so that they may seek further information on items of interest. *It is not the purpose of this bill to require agendas to contain the degree of information required to satisfy constitutional due process requirements.*"¹ The Board of Supervisors agenda for Items 16-1 and 16-2 of the February 25, 2014 meeting satisfied the Brown Act's requirements for notice and was posted in sufficient time on the County's website on February 21, 2014 [http://rivcocob.org/agenda/2014/02_25_14.htm]. Further, we are unaware of any legal provision granting members of the public a right to comment on an agenda (or a staff report prepared to support a Board's consideration of the agendized item) in advance of the noticed meeting.

Accordingly, although the requested continuance of the Board's action on the MSEP was granted, we disagree that the process was "rushed" or that associated review times failed to meet statutory requirements.

- 5 One of the Supervisors responded during the February 25, 2014, hearing to the suggestion made in this comment that the Board could not possibly have had time to review the Final EIR and staff report. The Supervisor replied to the effect that he and other Supervisors review key materials and rely on the informed input of aides and assistants to assure that decisions are sufficiently well-informed. This is consistent with Riverside County Ordinance No. 803 (County Code section 1.04.040) regarding Acts by Agents ("When an act is required by an ordinance, the same being such that it may be done as well by an agent as by the principal, such requirement shall be construed to include all such acts performed by an authorized agent."). The comment provides no evidence of any failure to inform governmental decision makers and the public about the potential, significant environmental effects of the Project. To the contrary, the information in the Final EIR and staff report do just that – inform decision makers and the public. The CEQA Guidelines require that the Final EIR be reviewed and considered by the Board of Supervisors and that the Final EIR reflects the Board of Supervisor's independent judgment and analysis. (14 Cal. Code Regs. §15090(a)). That was done by the Board of Supervisors at the Public Hearing and is reflected in Resolution No. 2014-054.

¹ Humboldt Human Rights Commission, 2014. Brown Act, Regular & Special Meetings. [http://co.humboldt.ca.us/humanrightscm/law_code_policy/brown_act_meetings.htm]. Accessed March 3, 2014.

The comment cites, but does not discuss Public Resources Code section 21092(b)(1), which specifies the requirements for adequate notice, including identification of the period during which comments will be received on a draft EIR [not relevant at this stage of the Project's review]; and the date, time, and place of any public meetings or hearings on the proposed project [done]; a brief description of the proposed project and its location [done], the significant effects on the environment, if any, anticipated as a result of the project [done], the address where copies of the draft environmental impact report or negative declaration, and all documents referenced in the draft environmental impact report or negative declaration, are available for review, and a description of how the draft environmental impact report or negative declaration can be provided in an electronic format [done].

The comment also cites CEQA Guidelines section 15072, which governs notices of intent to adopt a Negative Declaration or MND, and so is not relevant to the Board's consideration of the Final EIR for this Project.

- 6 The comment acknowledges that there is no express statutory right to due process in this instance, and cites *Mohilef v. Janovici*, 51 Cal.App.4th 267 (1996) for the suggestion that standards regarding the adequacy of due process apply at land use administrative hearings. The commenter's reliance on this case is misplaced. In *Mohilef*, the City of Los Angeles brought a public nuisance abatement proceeding against two property owners operating a commercial bird farm with 400 ostriches and 400 emus on 7.5 acres within a gated residential community in Los Angeles. Although the property was zoned to allow the keeping of some birds, the City's decision in the nuisance abatement proceeding reduced the number of birds allowed on their property to zero in violation of the zoning code.

Due process principles requiring reasonable notice and opportunity to be heard attach before the government can cause the deprivation of a significant property interest. In *Mohilef*, the property owners had a protectable property interest in keeping some birds on their property and were entitled to procedural due process safeguards in the administrative process. In considering whether Constitutional due process requires the offending property owner in a nuisance abatement hearing to receive a full, judicial-type hearing, the Court held that "due process is satisfied as long as the property owner receives adequate notice of the nature of the alleged nuisance and a meaningful opportunity to respond to the charges against him. It is not necessary that he receive the full panoply of procedural protections accorded in a judicial trial, such as the ability to cross-examine witnesses under oath, to subpoena witnesses, or to engage in discovery." 51 Cal.App.4th 267. The nuisance abatement case against property owners is clearly distinguishable from the County's consideration of the Project. The commenter here would not be deprived of any property interest as a result of the Board's decision on the Project, and has not established any other constitutionally protected interest in the matter. Without it, due process protections do not attach.

Once a protectable interest has been established (which has not occurred here), the court in *Mohilef* explains that the extent to which due process protections are available "depends on a careful and clearly articulated balancing of the interests at stake in each context. In some instances this balancing may counsel formal hearing procedures that include the rights of confrontation and cross-examination, as well as a limited right to an attorney.... In others, due process may require only that the administrative agency comply with the statutory limitations on its authority." 51 Cal.App.4th at 286. In determining what due process requires in a given instance "generally requires consideration of (1) the private interest that will be affected by the official action, (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards, (3) the dignitary interest in informing individuals of the nature, grounds and consequences of the action and in enabling them to present their side of the story before a responsible governmental official, and (4) the governmental interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." 51 Cal.App.4th at 287, citing *People v. Ramirez* (1979) 25 Cal.3d 260. "In assessing what process is due ..., substantial weight must be given to the good-faith judgments of

the [agency] that [its] procedures ... assure fair consideration of the ... claims of individuals.” 51 Cal.App.4th at 289. Regarding the Project before the Board, there is no evidence that the commenter has any private constitutionally protected interest that would be affected by the Board’s decision, and therefore no risk that the commenter could be wrongly deprived of such an interest. The Final EIR and notices informed agencies and individuals of the nature, grounds and consequences of the action before the Board, and the public hearing on February 25, 2014 afforded interested parties an opportunity to present their views before the Board. Mr. Kracov provided oral testimony. Accordingly, even if due process rights were appropriate (and we do not concede in this case that they are) no basis has been established to determine that anything more than the Board’s compliance with its statutory authority would be required.

The commenter’s reliance on *Clark v. City of Hermosa Beach* (1996) 48 Cal.App.4th 1152 is even farther afield. In *Clark*, the City of Hermosa Beach denied, by a vote of three to two, property owners’ application for permits to demolish a duplex and replace it with a 35-foot-high 2-unit condominium. The owners brought a due process claim against the City alleging that they were denied a fair hearing because one of the participating council members who voted to deny the permits had a conflict of interest. The Court held that, although the City Council violated state law by failing to provide a fair hearing, it did not offend the federal Constitution on either procedural or substantive due process grounds. First, the property owners did not have a protected property interest in the requested permits. Second, although the council did allow a member with a conflict of interest to participate in the proceeding, this “was not so outrageous as to shock the conscience.” It is difficult to see the connection between this case and the point advanced by the commenter.

The comment provides a parenthetical quotation following the citation to the *Clark* decision that says, “A hearing requires that the party be apprised of the evidence against him so that he may have an opportunity to refute, test, and explain it.” In the *Clark* decision, this is attributed to the *English v. City of Long Beach* (1950) 35 Cal.2d 155, 158-159, which is about the suspension or dismissal of an employee based on whether s/he passes a physical exam before resuming work after an extended absence. As explained in *English*, 35 Cal.2d at 158:

The principal question is whether English was deprived of a fair trial. The Long Beach city charter and the rules and regulations of the civil service board require that a discharged employee be accorded a hearing. In conducting the hearing, the board acts as a local administrative tribunal, and it has power to make final adjudications of fact in connection with matters properly submitted to it. The action of such an administrative board exercising adjudicatory functions when based upon information of which the parties were not apprised and which they had no opportunity to controvert amounts to a denial of a hearing.

The commenter has no equivalent interest in the McCoy matter to the use of property at issue in *Mohilef* or the employment at stake in *English* and, if anything, *Clark* makes clear that land development in California is a privilege, not a right and that there is no protectable property interest in a permit application. In sum, the commenter appears mistaken in his suggestion that the doctrine of due process applies to land use hearings like the Board’s consideration of the conditional use permit (CUP), public use permit (PUP) and development agreement (DA) for the McCoy Project.

- 7 Regarding the timeframe for review, see Response 4. Mr. Cornett and Ms. Bauer (nee Rhymes) also assisted the commenter with his input on the Draft EIR. This comment’s introduction of these individuals does not comment on the adequacy or accuracy of the EIR or the environmental impacts of the Project.
- 8 This comment reiterates (verbatim) Comment O3-4, to which a response was provided in the Final EIR.
- 9 This comment suggests that review and analysis of prior comments (including this commenter’s input) was insufficient because not enough pages of the Draft EIR were revised. However, as noted in the Final EIR, disagreement with an EIR’s conclusions, or the fact that alternative approaches could have been used to

make them, does not establish that the analysis is deficient. *Marin Municipal Water District v. KG Land California Corporation* (1991) 235 Cal.App.3d 1652, 1663. Responses to the concerns I-IX are provided below, where each is raised in more detail.

- 10 We disagree that the process was “rushed.” Regarding the timeframe for the County’s review, see Response 4. In any event, the requested continuance of the Board’s action on the MSEP was granted.
- 11 The project applicant elected to not continue the AB 900 process and therefore its provisions are not relevant. Moreover, Judge Frank Roesch of the Alameda County Superior Court struck down Public Resources Code section 21185 of AB 900 from the bench on March 29, 2013. Based on the Alameda County Superior Court’s decision, we disagree that the Applicant’s election not to proceed with the process marks a deficiency in the CEQA process.
- 12 This comment suggests that the Final EIR and the County’s CEQA compliance process are deficient because the cumulative impacts of the Blythe Solar Power Project were inadequately considered. The adjacency of the two projects is clear in the EIR. See, for example, DEIR pages 1-2 (disclosing that the gen-tie lines for the two projects would be collocated) and 2-2 (“The MSEP is proposed on a site located adjacent to (and immediately north of) the approved ROW for the Blythe Solar Power Project (BSPP)...”).

The BSPP is described on DEIR page 6-8 as a 485 MW solar PV facility on approximately 4,138 acres. It is further described as having been approved by the California Energy Commission and the Bureau of Land Management in 2010, and subject to the suspension of project activity due to an ownership change from Solar Millennium LLC/Chevron Energy to NextEra and a solar technology change from the approved solar thermal trough to PV. Other revisions attendant to these changes are described as “reductions in the output of the proposed project from 1,000 MW to 485 MW and in the size from 6,831 approved acres to 4,138 proposed acres. NextEra filed a Plan of Development Supplement with the BLM in March 2013, and Revised Petition to Amend with the CEC in April 2013 that describes the changes.”

The BSPP is identified as a reasonably foreseeable project (DEIR Table 6-3, p. 6-8) that would cause environmental impacts that could combine with those of the McCoy Project relative to air quality, biological resources, hydrology and water quality, and other resources (DEIR Table 6-1, p. 6-2 et seq.).

Air Quality: The geographic scope considered for potential cumulative impacts to regional air quality is the Mojave Desert Air Basin (MDAB), which includes the Project and the BSPP. As explained in DEIR Section 6.3.3 (p. 6-18 et seq.), the Mojave Desert Air Quality Management District (MDAQMD) (the subject matter expert on air quality and related matters within its jurisdiction) has developed thresholds of significance for air pollutants, including emission levels for which a project’s individual emissions would be cumulatively considerable. The EIR relies on these thresholds, which are set at levels intended to ensure that projects will not: (1) cause or contribute to any new violation of any air quality standard; (2) increase the frequency or severity of any existing violation of any air quality standard; or (3) delay timely attainment of any air quality standard or any required interim emission reductions or other milestones of any federal attainment plan (MDAQMD, 2011).² If a project would exceed the MDAQMD significance thresholds, its emissions would be cumulatively considerable; alternatively, if it would not exceed the significance thresholds, its emissions would not be cumulatively considerable (DEIR, p. 6-18). The comment provides no data or other information suggesting that the MDAQMD’s significance threshold should not have been used, or that provides a defensible rationale for the implicit suggestion that, as an alternative approach, individual emissions of the BSPP should have been added to those of the Project and a conclusion reached on that basis.

² Mojave Desert Air Quality Management District, 2011. MDAQMD CEQA Guidelines. August 2011. [<http://www.mdaqmd.ca.gov/Modules/ShowDocument.aspx?documentid=2910>]

Nonetheless, the analysis of cumulative air quality impacts did expressly consider the BSPP in the context of potential impacts on sensitive receptors. As stated on DEIR p. 6-19, the geographic scope considered for potential cumulative impacts on sensitive receptors are projects located within approximately 1,000 feet of the Project that are also located within 1,000 feet of a sensitive receptor, such as a residence. The only cumulative project that satisfied both criteria “is the BSPP, which would be immediately south of the Project site and within 1,000 feet of a residence on its southern border. However, given that the residence on the BSPP southern border would be approximately 2.6 miles from the Project site, Project-related air pollutant concentrations at the residence would be negligible and not cumulatively considerable.” The comment provides no data or other information to explain how or why this analysis is believed by the commenter to be inadequate or inaccurate. We disagree with the suggestion.

Biological Resources: For biological resources (both vegetation and wildlife), proximity to the Project site is not as relevant to the cumulative analysis as whether two (or more) projects would cause impacts that could combine to cause or contribute to a potential significant adverse cumulative effect: as long as projects are both/all within the appropriate geographic scope of consideration, it doesn’t matter how close they are to one another. The analysis in DEIR Section 6.3.4 (p. 6-19 et seq.) establishes geographic scopes for resources on a species specific basis (see below). Because the BSPP is within this area, the cumulative effects analysis considers potential cumulative effects of the Project and the BSPP in a quantified way where possible (see references to specific tables, below), and otherwise on a qualitative basis. To call out the BSPP separate from other cumulative projects, to draw separate conclusions about the combination of these two projects to the exclusion of other cumulative projects, would significantly under-report cumulative effects and would be misleading to reviewers and decision-makers.

The analysis of cumulative effects to vegetation considers the combined contribution of incremental impacts of the Project, the BSPP, and other projects in the relevant geographic area for vegetation resources. It “evaluates the effects of existing and reasonably foreseeable future projects that threaten plant communities within the Palo Verde Valley” (DEIR, p. 6-19). As shown in Figure 6-2, the BSPP is within this area (DEIR, p. 6-20). “Reasonably foreseeable future projects that could impact biological resources in the cumulative analysis area characterize regional development trends. *Ongoing development in the area is dominated by renewable energy development. Major renewable projects require extensive access roads and new transmission lines to tie into the existing electrical grid system*” (DEIR, p. 6-22) (emphasis added). “The development of *numerous large-scale projects, such other solar generation facilities identified in Tables 6-2 and 6-3* [including the BSPP], would result in the permanent conversion of desert habitat to industrial and commercial uses. Table 6-4 presents the total acreage of vegetation communities within the geographic scope and the cumulative impacts on each community type from existing and foreseeable future projects. *These acreages were calculated using the list of cumulative projects that are located in the Palo Verde Valley and lower Chuckwalla Valley*” (DEIR, p. 6-22) (emphasis added). The comment does not explain what additional BSPP-specific data could or should have been considered in this analysis. The analysis clearly contemplated quantified impacts of the BSPP as part of the cumulative context. No more is required.

The analysis of cumulative effects to wildlife resources considers potential effects at different scales for different species, with the analysis generally concentrating on wildlife resources in the Palo Verde watershed and a portion of the Chuckwalla Valley watershed in eastern Riverside County (DEIR, p. 6-25). As shown in the cumulative projects figure, the BSPP is in this area. This scale was used to analyze cumulative effects on Mojave fringe-toed lizard, Couch’s spadefoot toad, migratory birds, western burrowing owl, American badger, kit fox, and Nelson’s bighorn sheep. The geographic scope for assessing cumulative effects to desert tortoise and golden eagle were somewhat larger. As was done in the analysis of cumulative impacts to vegetation, the analysis of effects to wildlife resources considers landscape level trends and refers to the collective impacts of all of the projects identified in Tables 6-2 and 6-3 located in the relevant geographic area. “These include other proposed or approved renewable energy projects, BLM

authorized actions or activities, proposed or approved projects within the counties' jurisdictions, and other actions/activities that Lead Agencies consider reasonably foreseeable" (DEIR, p. 6-25). The BSPP is located in the area, is identified in the tables cited, and is a proposed or approved renewable energy project. "Table 4.4-13 presents the estimated area of available wildlife habitat in the cumulative effects study areas, and the cumulative impacts on each species from existing projects and foreseeable future projects. *Existing and future impact areas were derived using the list of existing and reasonably foreseeable projects in the Palo Verde Valley and nearby Chuckwalla Valley*" (DEIR, p. 6-26) (emphasis added). The comment does not explain what additional BSPP-specific data could or should have been considered in this analysis. The analysis clearly contemplated quantified impacts of the BSPP as part of the cumulative context. No more is required.

Hydrology and Water Quality: Cumulative effects to Hydrology and Water Quality are analyzed in DEIR Section 6.3.10 (p. 6-39). "The geographic scope of the cumulative impacts analysis with respect to water resources includes the Colorado River Basin Region and those areas overlying the PVGB" (Id.). As with the analysis of cumulative effects to biological resources, the relevant question is whether two or more projects would cause impacts that could overlap geographically and temporally. In this analysis, the BSPP expressly is considered:

- "With respect to groundwater levels and groundwater supplies, the Project-specific groundwater model included consideration of a cumulative scenario, which included the Project and six other solar power projects in the vicinity of the Project: the Blythe Energy Project II, Blythe PV Project, BSPP, Desert Quartzite Solar Farm, Gypsum Solar, and the enXco McCoy Project. Together, these projects would result in a cumulative total pumping of approximately 131,000 AF of water over a 33-year period, including construction and operation flows. These projects all would be located on the Palo Verde Mesa." (Id.)
- "With respect to stormwater drainage, drainage system capacity, and flooding, the following projects were considered, which are located within the same watershed as the Project: renewable energy projects, including enXco McCoy, BSPP, Blythe Airport Solar I Project, Desert Quartzsite, Gypsum Solar, Palo Verde 2, Rio Mesa, Blythe PV Project; and other projects, including the Blythe Energy Project Transmission Line, City of Blythe projects, DPV2, CRS, Desert Southwest Transmission Line, Eagle Mountain Landfill Project, Palo Verde Mesa Solar Project, RCL00161R1, BGR100258, and CUP03602." (DEIR, p. 6-41 et seq.).

The comment suggests that the incremental contribution of the BSPP to potential cumulative effects "merits far more complete analysis," but provides no facts, data or other information, including expert opinion based on such information, to explain what BSPP-specific data is believed to have been left out of the analysis. As noted above, the analysis of these resource areas expressly considered potential impact contributions of the BSPP that could combine with those of the Project. No more is required.

- 13 The Draft EIR for this Project, published in July 2013, relies on an analytical baseline date of June 2012. Page 4-1 (et seq.) explains: "Pursuant to CEQA Guidelines §15125(a), the environmental setting used to determine the impacts associated with the Project and alternatives is based on the environmental conditions that existed in the study area in June 2012 when the NOP was published." Identification of the projects to be considered in the cumulative analysis were identified as of that time (see DEIR §6.2, p. 6-1 et seq.). Accordingly, for purposes of analysis, the document considers the potential cumulative impacts that could be caused by projects in the cumulative scenario as of about June 2012. Nevertheless, as an informational document, the Draft EIR did disclose those other projects' developments. See, for example, the description of the BSPP provided in Table 6-3 (DEIR, p. 6-8): "Approved by CEC and BLM in 2010; Project activity temporarily suspended due to an ownership change from Solar Millennium LLC/Chevron Energy to NextEra, a solar technology change from trough to PV, and reductions in the output of the proposed project from 1,000 MW to 485 MW and in the size from 6,831 approved acres to 4,138 proposed acres. NextEra

filed a Plan of Development Supplement with the BLM in March 2013, and Revised Petition to Amend with the CEC in April 2013 that describe the changes.” The Draft EIS cited in this comment was, as explained in the comment, issued “well after the McCoy EIR was circulated.” Accordingly, the McCoy Draft EIR could not have considered the BSPP Draft EIS.

CEQA requires an EIR to include a discussion and analysis of significant cumulative effects. The EIR for this Project does so in Chapter 6. The cumulative effects analysis may use a “list of projects” method such as the one relied on in part in this EIR (14 Cal. Code Regs. §15130(b)). Because new projects are constantly being initiated, and –like the BSPP– existing projects updated, lead agencies may set a reasonable cutoff date for the new projects (and updates) that will be considered in the analysis. *San Franciscans for Reasonable Growth v. City and County of San Francisco* (1984) 151 Cal. App. 3d 71, 74. *See also, Gray v. County of Madera* (2008) 167 Cal. App. 4th 1099 (lead agency has discretion to set a project’s application date as the reasonable cutoff date for determining what other projects will be considered in the cumulative analysis). The County selected a reasonable cutoff date for establishing the cumulative projects list for this Project: June 2012. Accordingly, CEQA does not require the EIR for this Project to include the revised BSPP in the cumulative effects analysis as requested in this comment.

- 14 CEQA tasks the EIR for the McCoy Project with analyzing the direct, indirect, and cumulative effects of the Project. As discussed in Responses 12 and 13, the incremental effects of the BSPP were considered (to the extent they could combine with those of the Project) in the cumulative effects analysis. The BSPP is a separate project, subject to independent review by the California Energy Commission under CEQA and by the BLM under NEPA. CEQA does not require the County to analyze the BSPP in any greater detail than any other cumulative project. See Response 12 regarding the analysis of cumulative impacts to Air Quality.
- 15 See Response 13 regarding the reasonable cut-off date for updating the cumulative projects list. Nonetheless, even if the cumulative analysis were redone to reduce the incremental contribution of the BSPP to cumulative conditions in accordance with the reduction in size of that project and its shift to a less environmentally impactful solar technology, cumulative effects would be reduced relative to those analyzed and documented in the McCoy EIR. With this in mind, the existing analysis is now more likely to slightly over-report potential cumulative impacts and so can be considered appropriately conservative in this regard.
- 16 See Response 12 regarding the geographic area within which potential cumulative impacts to hydrology and water quality were analyzed. Specifically regarding the Big Maria Vista Solar Project, no information is available about the application that would support a reasonable estimation of that proposal’s incremental contribution to cumulative erosion and sedimentation conditions. However, in light of the requested ROW application area for that project, it can be seen from the direction of water flow across the McCoy site (shown in DEIR Figures 4.10-5 through 4.10-8 (p. 4.10-43 et seq.) that waterborne erosion and sedimentation from the Big Maria Vista Solar Project would not be expected to combine with that of McCoy. This is consistent with the conclusion reached in the analysis of cumulative effects relating to stormwater drainage and flooding, which states (DEIR, p. 6-42): “The additional incremental contributions to cumulative effects caused by the other (non-Project, non-BSPP) projects would be dispersed throughout the watershed and so would not rely on a single tributary or drainage structure/facility in order to convey stormwater and flood flows. Therefore, the Project would not have a cumulatively considerable contribution to cumulative impacts related to stormwater, and significant cumulative impacts would not occur.” While Ms. Bauer may disagree with the conclusions reached or use a different methodology to reach her own, this disagreement does not mean that the analysis in the Project EIR is inadequate or inaccurate.
- 17 Ms. Bauer’s comment letter on the DEIR was responded to in the FEIR. The quotation from the DEIR and recitation of prior comments in this comment do not provide new or different information than previously was considered. See Response 13 regarding the reasonable cut-off date for cumulative projects.

- 18 See Response 4 regarding review of the FEIR. Mr. Cornett's input on the DEIR received a written response in the FEIR. While he may disagree with the responses, conclusions, or methodologies, such disagreement does not mean that the analysis in the Project EIR is inadequate or inaccurate. Regarding his comment on FEIR Response 3-29, the County's formal record for this Project includes extensive information about the qualifications of the people who conducted fieldwork. This and all other information in the formal record are available upon request. We are not aware that Mr. Cornett has asked for copies, and so disagree with the characterization of the County's response as a refusal to provide anything.
- 19 Night surveys were previously raised in Comment O3-65, and a response was provided in the FEIR. The question of the credibility of the professional field biologists and their work also has been asked and answered. See Response 18, above. To clarify, the Project proponent (contrary to the suggestion made in this comment) did not draft the responses to comments included in the FEIR. As stated on FEIR page 1-1, "This Final Environmental Impact Report (Final EIR) has been prepared by the County of Riverside...." Moreover, even if the Project applicant had drafted the responses to comments, this is not inconsistent with CEQA requirements. See *Friends of La Vina v. County of Los Angeles* (1991) 232 Cal. App. 3d 1446. The USFWS issued a biological opinion (BO) for this Project, which, as acknowledged in the comment, was provided for review as Appendix C-5 of the DEIR. There is no basis for the commenter's speculation as to the "most likely" meaning of the fact that the BO does not mention night surveys. The concerns expressed in this comment regarding potential impacts to kit fox and related habitat were addressed in FEIR Response O2-11. The commenter's disagreement with the methods used and conclusions reached regarding potential impacts to species does not render either the methods or the analysis to be flawed.
- 20 The suggestion that wildlife corridor studies should have been conducted in connection with bighorn sheep was addressed in FEIR Response O3-31. This comment provides no new or different information than previously was considered.
- 21 The suggestion that live trapping should have occurred for the pocket mouse was addressed in FEIR Response O3-32. The cited expression of general agency concern about the pocket mouse does not alter the response, particularly where small mammal trapping was not required by the resource agencies, who were actively involved in the work done for this Project.
- 22 The commenter appears to disagree with decisions of the USFWS regarding matters squarely within the wildlife agency's subject matter expertise. The EIR Preparers, exercising their best professional judgment, do not. The commenter is entitled to his opinion, but that difference of opinion does not render the EIR inadequate or inaccurate. The EIR analyzes data and other information supported by facts, studies, analyses, and surveys that were conducted as required by the relevant wildlife agencies. The comment provides no data or other information to support the suggestion that the EIR Preparers should speculate as to causes for why evidence was, as characterized in the comment, "almost absent."
- 23 As stated in the comment, the FEIR responded "at length" to concerns about bat surveys. See Response 18 regarding questions about the credibility of the professional field biologists and their work.
- 24 As noted in Response 19, the Project proponent did not prepare the responses to comments included in the FEIR, although this approach is allowed under CEQA. Concerns regarding creosote rings were addressed in FEIR Response O3-42. As noted therein, no creosote rings were identified during botanical surveys on the Project site. The comment provides no facts, data, or expert opinion based on facts or data demonstrating that additional surveying is required, and provides no information that has not previously been considered.
- 25 That many hummingbirds are generalists in their feeding strategies explains why they so readily take to the use of artificial hummingbird feeders, when available. The scientific literature base finds that many hummingbirds utilize a variety of common native and ornamental plants that occur throughout the desert regions to fuel their migrations. The Costa's hummingbird, for example, which was detected on site during

avian surveys (Tetra Tech EC, Inc. and Karl, 2011), is both a habitat and food source generalist. Like the ruby-throated and rufous hummingbirds, Costa's hummingbirds utilize many nectar sources and also consume small insects, which they capture by flycatching or by gleaning from vegetation. The former two species may even drink sap from drill holes and also eat willow catkins when other food sources are scarce. These species, and other resident and migratory hummingbirds, are not dependent upon ocotillo plants, or any other single plant species as their primary food source; however, the red flowers of the ocotillo are an attractant to hummingbirds. It is notable that the brief, non-scientific informational pamphlet entitled *The Splendid Ocotillo*, referenced by the commenter states that, "No one yet knows how vital the ocotillo may be or hummers and other birds." The commenter's interpretation of this statement to state, "(ocotillo) and blooming plants provide critical energy resources for migrating hummingbirds and other avian species in years of below average precipitation," is unsupported by the reference. In summary, the 17 ocotillo plants were not discussed in the Draft or Final EIR relative to hummingbird populations because the relocation of these few plants will not impact hummingbirds or other avian species. Mitigation Measure 4.4-1g, establishes a Special-Status Plant Species Impact Avoidance and Mitigation Plan that includes salvage activities for special-status plants and cacti, including ocotillo. All cacti, including ocotillo, will be salvaged.

- 26 As noted in Final EIR Response to Comment O3-46, "the large amount of private land within 10 miles of the Project site also suggests that the Project will be able to meet compensatory mitigation needs within the timeframe established in the Draft EIR." The Commenter does not provide any evidence to the contrary. Mitigation measures requiring the acquisition of compensatory habitat are effective in reducing associated impacts and are within the County's enforcement authority. CEQA does not require the demonstration requested. To the contrary, CEQA contemplates that even approved mitigation measures can be substituted for other mitigation measures demonstrated to be equally or more effective in addressing the impact if the initial measure proves to be impractical or unworkable. *See, Napa Citizens for Honest Government v Napa County Board of Supervisors* (2001) 91 Cal. App. 4th 342; *Stone v Board of Supervisors* (1988) 205 Cal. App. 927.
- 27 The stated disagreement with conclusions reached regarding potential impacts to the Colorado River and related water rights adds no new data or information to the consideration of this issue. Disagreement, without more, does not render the EIR inadequate or inaccurate.
- 28 The Accounting Surface was a draft later withdrawn by the Bureau of Reclamation. The County disagrees that it would provide a sound basis for analysis of Project impacts. See Response 27 regarding the Colorado River.
- 29 This comment provides no new or different information about consideration of McCoy Wash, the Colorado River, or the relationship between the Project and the Clean Water Act. Whether there is sufficient information to support different conclusions than those reached in the EIR does not indicate that the conclusions reached in the EIR are incorrect. Disagreement among experts does not render the EIR inadequate or inaccurate.
- 30 The FEIR analyzes potential impacts associated with the proposed shift in the generation tie line for the Project. See FEIR Section 2.6.4.1, *Analysis of Potential Impacts Created by Gen-Tie Route Option 2*, which analyzes potential effects of the shift on a resource by resource basis. Ms. Rhymes may disagree with the analytical methods or impact conclusions, but the issue has been analyzed. Not all changes to hydrology and drainage patterns constitute a significant adverse CEQA impact. For this Project, the FEIR analyzes the changes that would result from the shift and determines that they would not.

The comment also suggests that the site specific Comprehensive Drainage, Stormwater, and Sedimentation Plan required by Mitigation Measure 4.10-5 to be prepared for County review prior to construction to reduce potential drainage, erosion, or sedimentation related impacts should be available for public review as

part of the County's current decision-making process. However, such plans cannot be prepared until the specific, approved locations of Project buildings and other infrastructure are known relative to the topography and key features of the site. Nonetheless, the types of protections provided by such plans are well-established by federal and state law and include best management practices (BMPs), erosion and sediment control measures, and "good house-keeping" requirements (such as regular inspections for debris and other materials) as well as other preventative measures. Sufficient information is known about such plans to enable members of the public to evaluate whether they can be part of an effective strategy to reduce potential environmental impacts. CEQA does not require the final design details required to prepare a Comprehensive Drainage, Stormwater, and Sedimentation Plan to be known at this stage. See, *Dry Creek Citizens Coalition v. County of Tulare* (1999) 70 Cal.App.4th 20, 36. Prior comments about the Comprehensive Drainage, Stormwater, and Sedimentation Plan were addressed in FEIR Response O3-53 and O3-56.

- 31 The Project Description in the DEIR (pp. 2-23, 2-24) explains that minimal grading is proposed within the solar field to maintain anticipated on-site runoff patterns infiltration close to the existing conditions. Conceptual grading work, methods, and locations are described in DEIR Section 2.5.1.2 (p. 2-38 et seq.). The comment does not suggest that the information provided in the EIR is insufficient or inadequate to evaluate the impacts of grading but says merely that a conceptual grading plan "could be used" for this purpose. It cannot be known with certainty until the final design stage whether (and if so where) engineered drainage features would be required on the site, although the possibility that they could be constructed is acknowledged in the Project Description and addressed in Mitigation Measures included in the DEIR. See, for example the discussion of site design modifications in Mitigation Measure 4.4-1g, *Special-Status Plant Species Impact Avoidance and Minimization, and Compensation* ("If engineered diversion channels are included, their discharge points shall be designed to maintain the natural surface drainage patterns between the engineered channel and the outlet of the natural washes that flow toward the south and east, downstream of the Project These modifications shall be clearly depicted on the grading and construction plans, and on report-sized maps in the BRMIMP").
- 32 The EIR considered potential stormwater related impacts to the McCoy Wash regardless of whether AECOM's January and November 2011 reports did. See, for example, the discussion of Impact 4.10-8 on DEIR p. 4.10-50 et seq. ("The minimal increase in flood flow volumes along McCoy Wash during a 100-year event, as a result of the Project, would be conveyed by PVID flood control infrastructure, as discussed for criterion e."). See also the discussion of Impact 4.10-9 (DEIR, p. 4.10-51 et seq.):

The drainage model developed for the solar field did not quantify or consider anticipated flood flows within the McCoy Wash. For perspective in understanding the extent to which the change in flows leaving the Project site could impact the hydrology, and associated flooding potential, of the McCoy Wash along the eastern boundary of the site, a review of anticipated peak outflows in comparison to anticipated McCoy Wash flows is useful. As modeled, the peak outflow from the eastern boundary of the solar field (represented as the sum of peak flow rates across XS-1, XS-2, and XS-6 in Table 4.10-12) is slightly less than 2,600 cfs for the 100-year storm event, with maximum changes between pre- and post-development conditions (across XS-1, XS-2, and XS-6 in Table 4.10-13) in peak flow rate of less than +200 cfs. Peak flow rates through McCoy Wash east of the site for the 100-year hydrologic event have been estimated to be on the order of 27,000 cfs (Tetra Tech EC, Inc., 2011b, as cited in AECOM, 2011b). Therefore, the increase in flows associated with the installation of the solar field and associated facilities (+200 cfs), between pre- and post-development 100-year peak flow rate (across XS-1, XS-2, and XS-6 in Table 4.10-12), equates to approximately 0.7 percent of simulated peak flow rate from the northwest and northeast basins of McCoy Wash (27,000 cfs; AECOM, 2011b). This minimal level of increase is not anticipated to result in a noticeable increase in surface flooding downstream, including flood depth and flood extent.

Accordingly, the EIR adequately addresses the concern stated in this comment.

- 33 See Response 30 regarding the EIR's analysis of the proposed gen-tie line shift.
- 34 The Draft EIR analyzes flood risks in Section 4.10 (p. 4.10-1 et seq.). See the analysis of criteria d), g), h), and i). Comments regarding flood risks and concerns were addressed in the FEIR. See, e.g., FEIR Section 2.5.3 (p. 2-23 et seq.), which includes responses to comments of the Riverside County Flood Control and Water Conservation District, and FEIR Response O2-6. A lead agency is not required to accede to commenters' requests to provide additional information (Pub. Res. Code §21091(d)). While Ms. Bauer may believe that the EIR "should include" additional drawings, CEQA does not require them in order for decision-makers to be informed about the potential environmental consequences of the Project. See Response 30 regarding the Comprehensive Drainage, Stormwater, and Sedimentation Plan.
- 35 The Agency for Toxic Substances and Disease Registry advises, "Today almost everyone is exposed to environmental lead (ATSDR, 2007).³ Exposure occurs through ingestion and inhalation.⁴ Ms. Bauer's comments suggest that lead present in soil and dust has been directly related to lead levels in blood. It is possible to breathe in lead dust, mist, or fumes; or to swallow it if it gets on the hands or face or if it gets in food, drinks or tobacco. Under federal and state regulations, employers have a responsibility to ensure that workers are protected from harmful lead exposure. The Occupational Lead Poisoning Prevention Program (OLPPP) is a program in the California Department of Public Health that helps employers, workers, and others prevent lead poisoning in workers (CDPH, 2014a).⁵ Recommended safe work practices include controlling dust and washing hands and faces before eating, drinking or smoking. Existing legal requirements enforceable against employers (independent of the County's consideration of this Project) relate to the Health and Safety Program such as the Injury and Illness Prevention Programs (IIPP) and other Cal/OSHA requirements discussed in the FEIR in the context of dust-related health effects such as valley fever (CDPH, 2014b⁶; 18 Cal. Code Regs. §1532.1). To the extent that lead may exist in soils that could be disturbed by the Project, federal and state worker safety laws and the Mitigation Measures recommended to control dust would be sufficient to reduce potential worker safety risks to a less than significant level.

Ms. Bauer's comments (Comment Letter Exhibit B) mention but do not discuss potential risks of perchlorates in soil. The EPA advises that the Department of Defense has used perchlorate as an oxidizer in munitions and missiles since the 1940s (EPA, 2012).⁷ Accordingly, given the Project site's World War II-era history (see DEIR Section 4.5), it is possible that perchlorate may be present in soils on the site. Primary pathways for human exposure are ingestion of food and contaminated drinking water. Short-term exposure to high doses may cause eye and skin irritation, coughing, nausea, vomiting, and diarrhea. At high enough exposures, exposure can affect thyroid function. Existing legal requirements enforceable against employers (independent of the County's consideration of this Project) relate to the Health and Safety Program such as the Injury and Illness Prevention Programs (IIPP) and other Cal/OSHA requirements discussed in the FEIR. Compliance with applicable law would adequately protect workers and, secondarily their families, from potential exposure to perchlorates that may be present in on site soils. Therefore, any potential impact

³ Agency for Toxic Substances and Disease Registry (ATSDR), 2007. *Lead Toxicity: How Are People Exposed to Lead?* [<http://www.atsdr.cdc.gov/csem/csem.asp?csem=7&po=6>]. Accessed March 7, 2014.

⁴ Adsorption through the skin is a third potential exposure pathway; however, in the U.S., members of the public are not likely to encounter lead that readily enters the body through the skin because leaded gasoline additives no longer are used (ATSDR, 2007).

⁵ California Department of Public Health, 2014a. The Occupational Lead Poisoning Prevention Program (OLPPP). [<http://www.cdph.ca.gov/programs/olppp/Pages/default.aspx>]. Accessed March 7, 2014.

⁶ CDPH, 2014b. For Employers - Workplace Health and Safety Resources [<http://www.cdph.ca.gov/HealthInfo/workplace/Pages/EmployerLinks.aspx>]. Accessed March 7, 2014.

⁷ EPA, 2012. Technical Fact Sheet – Perchlorate [http://www.epa.gov/fedfac/pdf/technical_fact_sheet_perchlorate.pdf]. Accessed March 7, 2014.

associated with perchlorates, if present in soils that would be disturbed by the Project, would be less than significant.

See also, FEIR Response O6-6 regarding the Court of Appeal's November 7, 2013, decision in *Parker Shattuck Neighbors v. Berkeley City Council* (2013) 222 Cal.App.4th 768 casting doubt regarding whether the potential effects of a project that poses a risk only to the people who construct it could ever be deemed significant.

- 36 Valley fever causes, impacts, susceptible populations, and mitigation measures were thoroughly discussed in the EIR. While Ms. Bauer has identified other measures that also could be undertaken to address potential risk, the existing mitigation measures already are sufficient to reduce any potential impact below the threshold of significance. CEQA requires no more. The question of baseline in relation to construction workers was addressed in FEIR Response O3-18. Regarding the suggestion that construction workers should be entitled to greater protections under CEQA, see FEIR Response O6-6 regarding the Court of Appeal's November 7, 2013, decision in *Parker Shattuck Neighbors v. Berkeley City Council* (2013) 222 Cal.App.4th 768 casting doubt regarding whether the potential effects of a project that poses a risk only to the people who construct it could ever be deemed significant.
- 37 See Response 38.
- 38 The commenter's assertion that the EIR fails to "include many mitigation measures from the earlier McCoy Solar BLM approvals and Record of Decision is incorrect. As disclosed on page 2-52 of the Draft EIR, the mitigation measures imposed on the Project by the BLM "apply only to the BLM-administered lands." The EIR is a completely independent and fully functional document. For every significant Project impact identified in the EIR, the EIR recommends appropriate mitigation measures to reduce the impact – measures that are enforceable by the County. To the extent that there will be similar impacts of the Project on BLM-administered lands, the mitigation measures imposed by BLM in the PA/FEIR and Record of Decision will address those impacts.
- 39 The commenter's reference to a *Mitigation Measure 6-1d* must be in error. The EIR included no such Mitigation Measure. Further, there are no Mitigation Measures which reference "whenever possible," and relate to structures.

Regarding *Mitigation Measure 4.4-1f*, certain pre-requisites must be satisfied before the Biological Resources Mitigation Implementation and Monitoring Plan (BRMIMP) can be prepared for County review and approval. For example, all of the specified plans⁸ must be finalized before the mitigation measures and other requirements they contain can be aggregated in a single location. Further, "accurate and up-to-date maps depicting the location of sensitive biological resources that require temporary or permanent protection during construction and operation" will require data and other information that is current at the time of construction and operation. Pre-construction surveys and related activities must be completed before these maps can be prepared. Certification of the EIR and Applicant acceptable of the conditions of approval must occur before "all of the biological resources mitigation, monitoring, and compliance measures proposed and agreed to by the Applicant" or "identified as necessary to avoid or mitigate impacts" can be included in the BRMIMP. Performance of these and other prerequisite tasks will assure that Mitigation Measure 4.4-1f is effective in reducing or avoiding impacts to biological resources. There is no inappropriate deferral.

⁸ These include: the Invasive Weed Management Plan (Mitigation Measure 4.4-8), the Special-Status Plant Species Impact Avoidance and Mitigation Plan (Mitigation Measure 4.4-1g) and Decommissioning and Reclamation Plan (Mitigation Measure 4.4-7), the Desert Tortoise Relocation Translocation Plan (Mitigation Measure 4.4-2b), the Raven Management Plan (Mitigation Measure 4.4-3b), the Burrowing Owl Mitigation and Monitoring Plan (Mitigation Measure 4.4-8), and all other biological mitigation and/or monitoring plans associated with the Project.

Mitigation Measure 4.4-2b is the Desert Tortoise Relocation/Translocation Plan measure. It provides that “the Applicant shall develop and implement a final Desert Tortoise Relocation/Translocation Plan (Plan) that is consistent with current USFWS approved guidelines, and meets the approval of the County. The Plan shall include guidance during different phases of Project construction and shall include measures to minimize the potential for repeated translocations of individual desert tortoises. The final Plan shall include all revisions deemed necessary by the County, USFWS, and CDFW.” The USFWS Guidelines create appropriate structure for the mitigation measure and the requirement that the plan minimize potential for repeated translocations services as a performance standard for the mitigation measure. There is no inappropriate deferral. Instead, the Mitigation Measure appropriately describes the actions that will be taken to avoid or reduce a potential significant impact by setting standards that will mitigate the impact.

Mitigation Measure 4.4-3b requires development of a Raven Monitoring and Control Plan that must be “consistent with the most current USFWS-approved raven management guidelines, and which meets the approval of the County in consultation with USFWS and CDFW.” Therefore, the Mitigation Measure appropriately describes the actions that will be taken to avoid or reduce a potential significant impact by setting standards that will mitigate the impact.

Mitigation Measure 4.4-4d requires compensatory mitigation for Mojave fringe-toed lizard habitat losses. The measure uses the term “feasible” repeatedly to describe how lands will be selected. In the CEQA context (Pub. Res. Code §21061.1), “feasible” means capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, social, and technological factors.” Consistent with the court’s decision in *San Diego Citizenry Group v. County of San Diego* (2013) 219 Cal.App.4th 1, 17, “feasibility” as used in this mitigation measure encompasses “desirability” to the extent that desirability is based on a reasonable balancing of the relevant economic, environmental, social, and technological factors.

Contrary to the suggestion made in this comment, **Mitigation Measure 4.4-7**, regarding the minimization of impacts to golden eagles, does indeed include performance standards. Specifically, it requires that “If an occupied nest is detected within 1 mile of the Project boundaries, the Applicant shall prepare and implement a Golden Eagle Monitoring and Management Plan for the duration of construction to ensure that Project construction activities do not result in injury or disturbance to golden eagles. The monitoring methods shall be consistent with those described in the Interim Golden Eagle Inventory and Monitoring Protocols; and Other Recommendations (Pagel et al., 2010) or more current guidance from the USFWS. The Monitoring and Management Plan shall be prepared in consultation with the USFWS. Triggers for adaptive management shall include any evidence of Project-related disturbance to nesting golden eagles, including but not limited to: agitation behavior (displacement, avoidance, and defense), increased vigilance behavior at nest sites, changes in foraging and feeding behavior, or nest site abandonment. The Monitoring and Management Plan shall include a description of adaptive management actions, which shall include, but not be limited to, cessation of construction activities that are deemed by the Designated Biologist to be the source of golden eagle disturbance.” There is no inappropriate deferral. Instead, the Mitigation Measure appropriately describes the actions that will be taken to avoid or reduce a potential significant impact by setting standards that will mitigate the impact.

Mitigation Measure 4.10-1 provides, “The Applicant or its construction contractor shall prepare comprehensive stormwater pollution and erosion control best management practices (BMPs) for the Project to prevent all construction pollutants from contacting stormwater, with the intent of keeping sedimentation or any other pollutants from moving off-site and into receiving waters.” See Response 30. The universe of potential BMPs to address erosion and sediment is thoroughly regulated by the applicable Regional Water Quality Control Boards, who have established a wide array of acceptable means of compliance in the form of BMPs and can dictate compliance, but not the means of compliance, with water quality protection. Accordingly, there is no inappropriate deferral. Instead, the measure appropriately relies on compliance

with an established, accepted framework to avoid or reduce a potential significant impact by setting standards that will mitigate the impact.

Mitigation Measure 4.10-4, regarding the Groundwater Monitoring and Mitigation Plan, requires water sampling and testing as required by the California Department of Health for the proposed on-site potable use. These requirements provide a sufficient framework to assure that sampling and testing and resulting actions set forth in the measure would avoid or reduce potential significant impacts by setting standards that will mitigate them.

Mitigation Measure 4.10-5, regarding the Comprehensive Drainage, Stormwater, and Sedimentation Control Plan, would be prepared in accordance with standard requirements of the Regional Water Quality Control Board and the County Flood Control District. This existing regulatory framework would assure that erosion and sediment control activities would avoid or reduce potential significant impacts by setting standards that will mitigate them.

- 40 The standard for recirculation is considered in FEIR Response O2-25. Recirculation is not required in response to any input provided in this letter because the comments do not show that any new significant environmental impact would result from the Project or any substantial increase in the severity of an environmental impact already analyzed. Further, neither the comments nor the responses propose any new mitigation measures that could cause a new significant environmental impact. No feasible alternatives or mitigation measures are required, have been proposed, or have been considered by the Project applicant because none have been identified that are considerably different from others previously analyzed that would clearly lessen the significant environmental impacts of the Project. This comment does not claim that the DEIR was so fundamentally and basically inadequate and conclusory in nature that meaningful public review and comment were precluded, and so this potential basis for recirculation is irrelevant. Therefore, we disagree with the unsupported assertion that recirculation is required.
- 41 See Response 4 regarding the timing of the County's consideration of this Project. Although the requested continuance of the Board's action on the MSEP was granted, we disagree that holding the hearing as properly noticed violated CEQA.
- 42 Concerns I through IX are addressed above. The County evaluated comments received on the DEIR and Revised DEIR and included written responses in the FEIR as required by Public Resources Code Section 21091(d) and CEQA Guidelines Sections 15088 and 15132. See Response 9 regarding the suggestion that the County's review and analysis of prior comments (including this commenter's input) was insufficient because not enough pages of the Draft EIR were revised.
- 43 [Exhibit A] Mr. Cornett's concerns regarding FEIR Response O3-29 are addressed in Response 18. See also Responses 19 through 26 for responses to his concerns about additional FEIR Responses.
- 44 [Exhibit B] Ms. Bauer's concerns regarding hazards and hazardous materials, valley fever, the Colorado River and related water rights, and surface water hydrology considerations (including drainage, erosion, and flooding). As noted in the DEIR, following review of an Approved Jurisdictional Determination that was received in August 2010, the U.S. Army Corps of Engineers (USACE) determined that the proposed site does not contain waters of the United States. Accordingly, the requirements of the federal Clean Water Act do not apply to the site. The fact that implementation of the Clean Water Act's permitting requirements has been delegated to the state does not create an independent legal basis to apply Clean Water Act permitting requirements absent waters of the U.S.
- 45 [Exhibit C] Receipt of the February 24, 2014 capture of OPR's webpage about AB 900 is acknowledged. See Response 11 regarding AB 900.

- 46 [Exhibit D] Receipt of excerpts from the February 2014 Draft EIS for the Modified Blythe project are acknowledged. See Response 13.
- 47 [Exhibit E] Receipt of Pless Environmental, Inc.'s October 23, 2014 letter regarding its review of the Energy Commission's staff assessment for the Modified Blythe project is acknowledged. See Response 13. Further, we acknowledge that the CEC's staff assessment has been superseded by a decision to approve the modified project.
- 48 [Exhibit F] See Response 38.

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February 24, 2014

VIA HAND DELIVERY

Hon. Jeff Stone, Board Chairman
Hon. Marion Ashley, Board Vice-Chairman
Hon. Kevin Jeffries
Hon. John F. Tavaglione
John J. Benoit
Riverside County Board of Supervisors
4080 Lemon Street
Riverside, CA 92504

Riverside County Planning Department
ATTN: Adam Rush, Larry Ross
Riverside CAC, 12th Floor
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RE: Final Environmental Impact Report, Conditional Use Permit, Public Use Permit, and Proposed Development Agreement for the McCoy Solar Energy Project (SCH# 2011101007) – 2/25/14 Board Agenda Item # 16-1

Dear Chairman Stone and County Supervisors,

This letter is submitted on behalf of Blythe, California residents David Vazquez and Ralph Figueroa, and the Laborers International Union of North America, Local Union No. 1184, and its members living in Riverside County (hereinafter "LIUNA") (collectively "Commenters") concerning the California Environmental Quality Act (hereinafter "CEQA") Final Environmental Impact Report (hereinafter "FEIR") and Conditional Use Permit, Public Use Permit, and Proposed Development Agreement with Riverside County for the McCoy Solar Energy Project (SCH# 2011101007).

The proposed McCoy Solar Energy Project is a 750 megawatt photovoltaic solar energy generating facility and related infrastructure in unincorporated Riverside County, California

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(hereinafter “Project”). The Project is proposed to be constructed on approximately 7,700 acres of federal public land administrated by the Bureau of Land Management (hereinafter “BLM”), as well as 477 acres of privately owned land within Riverside County. The Project includes, among other things, a solar plant site, an 11-km transmission line, a 230 kV switchyard, two telecommunications lines, a distribution line, and an access road. The Project is located in a rural area of the Sonoran Desert in unincorporated Riverside County, located approximately 13 miles northwest of the town of Blythe, California, approximately 32 miles east of the town of Desert Center, California and approximately 6 miles north of Interstate-10. It is south of McCoy Wash, east of the McCoy Mountains and north of the Blythe Airport. The Project would be developed in the Mojave Desert Air Basin and over the Palo Verde Mesa Groundwater Basin.

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The Project, which is subject to both State and Federal approvals, received its federal approval on March 13, 2013 from BLM. Commenters previously participated in BLM’s public notice and comment process for the Project, submitting letters dated August 23, 2012 and March 4, 2013.

This comment letter incorporates by reference all written and oral comments submitted on the Project by any commenting party or agency, including all written and oral comments submitted on the Project as part of BLM’s March 13, 2013 approval.¹ All of this already is in the record.

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Let us begin by respectfully noting the rushed nature of the Project approvals before you. A continuance is necessary. Approximately 10 days ago, County staff circulated the FEIR, which totals approximately 5,000 pages. This office received the FEIR only seven days before the hearing. The public had insufficient time to review and comment on this extremely lengthy and complex document. Then, last Friday, February 21, 2014, the Staff Report, totaling well over 600 pages was published. Again, insufficient time (four days) was provided to allow public review and comment.

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The same is true for the Honorable Board of Supervisors. How could this Board possibly review all these documents in the extremely compressed time period? How can the Board assess the public’s comments on the FEIR, including this comment letter? This violates CEQA’s key requirement to inform decisionmakers and the public about the potential, significant environmental effects of a project. 14 Cal. Code Regs. § 15002(a)(1). A continuance is necessary to enable the public and decisionmakers to fully review the materials that the County relied on its environmental review, pursuant to CEQA. Pub. Res. Code § 21092(b)(1); 14 Cal. Code Regs. § 15072. Commenters respectfully insist that holding this hearing today, and acting on this Project, will violate CEQA’s rules on informed decisionmaking and public participation. Moreover, while there

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¹ It is well-established that any party, as Commenters here, who participates in the administrative process can assert all factual and legal issues raised by any commenting party or agency. *Citizens for Open Government v. City of Lodi* (2006) 144 Cal.App.4th 865, 875; *Federation of Hillside & Canyon Associations v. City of Los Angeles* (2000) 83 Cal.App.4th 1252, 1263.

is no express statute that affords the right to have notice and an opportunity to be heard, the doctrine of due process applies to land use administrative hearings of the type at issue here. *Mohlief v. Robert Janovici*, 51 Cal.App.4th 267, 302 (1996) (standards regarding adequacy of due process apply at administrative hearings); *Clark v. City of Hermosa Beach*, 48 Cal.App.4th 1152, 1171-72 (1996) (“A hearing requires that the party be apprised of the evidence against him so that he may have an opportunity to refute, test and explain it.”).

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Notwithstanding the expedited time periods provided by the County, Commenters did their best to review the FEIR and Staff Report. Without waiving any claim as to the inadequacy of the notice and opportunity to review the Project approval documents and FEIR, they have prepared these comments on the FEIR with the assistance of expert biologist James W. Cornett, M.S. and expert geologist Heidi Bauer, PG, in letters attached hereto as Exhibits A and B. Cornett is an environmental scientist with more than 30 years of experience researching and studying Riverside County’s desert environment. Cornett previously served as the Director of Natural Sciences at the Palm Springs Desert Museum. Rhymes is a Certified Geologist with over twelve years of academic and professional experience with hydrology, hazardous materials, and pollution investigation.

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Commenters strongly support the appropriate development of renewable energy. Renewable energy projects, however, must be carefully sited and designed so as to avoid unnecessary and damaging environmental impacts. They also must receive proper environmental review under CEQA. This is especially true given the recent “gold rush” of solar energy proposals in the southern California region.

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Here, Commenters are concerned that the FEIR did not give the extensive DEIR comments on the project the required review, or analyze them as carefully as needed. *Incredibly, given the volume of comments received, the FEIR only recommends minor changes to barely 12 pages of the entire DEIR.* FEIR 3-2. As a result, the FEIR and CEQA compliance for the Project have the following deficiencies:

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- I. Lack Of Clarity On AB 900 Compliance;
- II. The Cumulative Impacts Discussion Of The Contiguous Blythe Solar Project Is Inadequate;
- III. The FEIR Does Not Adequately Analyze Or Mitigate For Impacts On Biological Resources;
- IV. The FEIR Does Not Adequately Analyze Or Mitigate For The Project’s Impacts On Hydrology and Water Resources;
- V. The FEIR Does Not Adequately Analyze Or Mitigate For The Project’s Impacts On Surface Water Drainage And Flooding Risks;

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- VI. The FEIR Does Not Adequately Analyze Or Mitigate For Hazards and Hazardous Materials;
- VII. The Valley Fever Analysis is Inadequate;
- VIII. The FEIR Does Not Provide Adequate Information On Mitigation Measures For The Project, Deferring Key Mitigation; and
- IX. Recirculation Is Necessary.

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It is the County Board’s role to make the final CEQA findings, and to make County Code §§ 18.28.f and 18.29.d findings for the requested use permits that the Project “will not be detrimental to the health, safety or general welfare of the community, and that conditions be imposed “to protect the health, safety or general welfare of the community.” Commenters respectfully believe, for all the reasons set forth in this letter, that this rushed approval cannot satisfy these standards, and therefore this item should be continued, or denied at this time.

I. STANDING.

Commenters David Vazquez and Ralph Figueroa and members of the Laborers International Union of North America, Local Union No. 1184 live, work, and recreate in the vicinity of the Project site. Commenters will suffer the impacts of a poorly executed or inadequately mitigated project, just as would the members of any nearby homeowners’ association, community group or environmental group. Commenters live and work in areas that will be affected by hazardous materials and water pollution generated by the Project. Moreover, Commenters rely upon water and biological resources that may be affected by the Project. Commenters have a direct interest in ensuring that the Project is adequately analyzed and that its environmental and public health impacts are mitigated to the fullest extent possible.

LiUNA advocates for programs and policies that promote good jobs and a healthy natural and working environment in order to protect the health and safety of workers and their families. An important part of the LiUNA’s ongoing advocacy involves participating in and, where appropriate, challenging projects that would result in harmful environmental effects, or the violation of environmental laws, to the detriment of the interests of LiUNA’s members. Workers often suffer environmental impacts that are more severe than the general population.

Workers and labor organizations have a long history of engaging in the CEQA process to secure safer working conditions, reduce environmental impacts and maximize economic benefits. The courts have held that, “unions have standing to litigate environmental claims.” *Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1198.

II. LEGAL BACKGROUND

CEQA has two basic purposes. First, CEQA is designed to inform decision makers and the public about the potential, significant environmental effects of a project. 14 Cal. Code Regs. § 15002(a)(1).) “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.’ *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564 (citing *Laurel Heights Improvement Ass’n v. Regents of the University of California* (1988) 47 Cal.3d 376, 392. 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.” *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.

Second, CEQA directs public agencies to avoid or reduce environmental damage when possible by requiring alternatives or mitigation measures. 14 Cal. Code Regs. § 15002(a)(2–3); *see also Berkeley Jets*, 91 Cal.App.4th at 1354; *Citizens of Goleta Valley*, 52 Cal.3d at 564; *Laurel Heights*, 47 Cal.3d at 400. The EIR serves to provide public agencies and the public in general with information about the effect that a proposed project is likely to have on the environment and to “identify ways that environmental damage can be avoided or significantly reduced.” (14 Cal. Code of Regs. § 15002(a)(2).) If the project has a significant effect on the environment, the agency may approve the project only upon finding that it has “eliminated or substantially lessened all significant effects on the environment where feasible” and that any unavoidable significant effects on the environment are “acceptable due to overriding concerns.” Pub. Res. Code § 21081; 14 Cal. Code Regs. § 15092(b)(2)(A–B).

The preparation and circulation of an EIR is more than a set of technical hurdles for agencies and developers to overcome. The EIR’s function is to ensure that government officials who decide to build or approve a project do so with a full understanding of the environmental consequences and, equally important, that the public is assured those consequences have been taken into account. For the EIR to serve these goals it must present information so that the foreseeable impacts of pursuing the project can be understood and weighed, and the public must be given an adequate opportunity to comment on that presentation before the decision to go forward is made. *Communities for a Better Environment v. Richmond (Chevron)* (2010) 184 Cal.App.4th 70, 80 (“*CBE v. Richmond*”) (quoting *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 449–50).

CEQA requires public agencies to avoid or reduce environmental damage when “feasible” by requiring “environmentally superior” alternatives and all feasible mitigation measures. 14 Cal.

Code Regs. § 15002(a)(2-3); *see also Berkeley Jets*, 91 Cal.App.4th at 1354; *Citizens of Goleta Valley*, 52 Cal.3d at 564-65. 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.” 14 Cal. Code Regs. § 15002(a)(2). 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 where feasible” and that any unavoidable significant effects on the environment are “acceptable due to overriding concerns.” Pub. Res. Code § 21081; 14 Cal. Code of Regs. § 15092(b)(2)(A-B).

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.” *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 722 (quoting *King County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 712); *County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, 946; *Galante Vineyards v. Monterey Peninsula Water Management Dist.* (1997) 60 Cal.App.4th 1109, 1117.

III. THE PROJECT DOES NOT COME TO TERMS WITH AB 900 COMPLIANCE, AND THE APPLICANT’S AB900 COMMITMENTS

The Project has made certain commitments under California’s AB900 process. DEIR page 4.8-7. AB900, the “Jobs and Economic Improvement Through Environmental Leadership Act,” required the Governor to establish procedures for applying for streamlined environmental review for certain projects. Included is information establishing that the prevailing and living wage requirements of Pub. Res. Code section 21183(b) will be satisfied. Here, the Project applied to AB900 status, made these commitments on February 16, 2012, and received approval from Governor Brown. Exhibit C hereto. *The County Board should inquire whether the Applicant is following through, is simply ignoring these commitments.*

It is true that the Applicant did not complete the AB900 process in its entirety. http://opr.ca.gov/s_californiajobs.php. The Project received the Governor’s AB900 certification, but not the required “Legislative Concurrence.” Nevertheless, the Project’s AB900 commitments have not been formally withdrawn. Under these circumstances, the Project should not be allowed to evade the AB900 requirements, including but not limited to prevailing wages.

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IV. THE CUMULATIVE IMPACTS DISCUSSION OF THE CONTIGUOUS BLYTHE SOLAR PROJECT IS INADEQUATE

CEQA requires a mandatory finding of significance if a project will have significant cumulative impacts together with other past, present and reasonably foreseeable future projects. (CEQA sect. 21083(b)) The purpose of a cumulative impact analysis is to analyze impacts that “can result from individually minor but collectively significant projects taking place over a period of time.” (*Communities for a Better Environment v. Cal. Resources Agency* (2002) 103 Cal.App.4th 98, 117; CEQA Guidelines section 15355(b).) As the court stated in *Communities for a Better Environment v. California Resources Agency*, 103 Cal. App. 4th 98, 114 (2002):

Cumulative impact analysis is necessary because the full environmental impact of a proposed project cannot be gauged in a vacuum. One of the most important environmental lessons that has been learned is that environmental damage often occurs incrementally from a variety of small sources. These sources appear insignificant when considered individually, but assume threatening dimensions when considered collectively with other sources with which they interact.

Here, the FEIR, and DEIR, do not adequately describe the cumulative impacts of the Blythe Solar Power Project, a 485 MW, 4,183 acre project directly south and contiguous/adjacent to the McCoy Solar Project, and proposed by the same Applicant.

To begin, the FEIR and DEIR here provides very little detail, and virtually no specificity about the cumulative environmental impacts of these two huge projects, adjacent to one another, on the environment including but not limited to air quality, biological and hydrogeologic impacts, particularly during the years of construction and decommissioning of these projects. The DEIR groups the Blythe Solar project together with many other projects, but this project is directly adjacent to the McCoy Solar Project, and it therefore merits far more complete analysis.

Furthermore, the Blythe Solar project has changed significantly since the circulation of the McCoy DEIR. On August 30, 2013, well after the McCoy DEIR was circulated, the BLM published a Notice of Intent to Publish an Environmental Impact Statement for a revised Blythe Solar project, that proposes conversion of the previously approved project from thermal solar to photovoltaic solar technology. The new EIS was circulated on February 7, 2014. Exhibit D hereto.

As a result, neither the DEIR nor the FEIR here have any substantive analysis of the new changes to the Blythe Solar project, and how they may cumulatively impact the

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environment when the neighboring McCoy Solar Project is also taken into account. FEIR Comment Letter 04.

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references the new gen-tie line and the relationship to the Blythe Solar project, but there is no specific, substantive analysis of the Blythe Solar project, as a whole, given its proximity to McCoy Solar. For example, there is nothing in this FEIR and DEIR that describes the cumulative impacts of the revised Blythe Solar project’s air quality impacts that will violate the applicable 24-hour and annual PM10 standards, as well as the annual NOx threshold. Exhibit E hereto.

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Moreover Response to Comment O2-6 acknowledges the proximity of Blythe Solar, but its conclusions are outdated given the recent changes to Blythe Solar. Response to Comment O3-57 calls such analysis ‘speculative,’ but that is not the case as the new Blythe Solar EIS has been circulated. Doesn’t it merit at least some analysis or review by the County?

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A. The FEIR Does Not Address The Cumulative Impacts From The Site And Surrounding Projects On Erosion And Sedimentation

This deficiency regarding cumulative impacts review is particularly true in the area of erosion and sedimentation. As expert geologist Rhymes confirms:

“The project site sits directly in between two large solar projects; The Big Maria Vista Solar Project to the north which has a BLM ROW request for 23,040 acres and facility use of 1,200 acres and the Blythe Solar Power Project which has a BLM ROW request for 9,400 acres and a facility use of 5,595 acres (PSPP, 2009). In addition, the project site lies within a 25-mile radius of about 107,067 total acres of BLM ROW requested land and at least 26,000 acres of facility use for solar power related projects. The cumulative impact of these projects on the erosion, drainage patterns and sheet flow has the potential for causing significant impacts on the hydrology of the area and the ecosystem cumulatively.

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Section 6.3.10.2 of the DEIR indicates the following sites were included in the assessment of cumulative impacts with regards to water quality, erosion and sedimentation: enXco, McCoy, BSPP, Blythe Airport Solar I Project, Desert Quartzsite, Gypsum Solar, Palo Verde 2, Rio Mesa. Blythe PV Project) and other projects (e.g., Blythe Energy Project Transmission Line, City of Blythe projects, DPV2, CRS, Desert Southwest Transmission Line, Eagle Mountain, Landfill Project, Palo Verde Mesa Solar Project, RCL00161R1, BGR100258, and CUP03602). However, the DEIR (Section 6.30.10.2) responds to this by stating “However, insufficient details are known about the extent and location of any new pervious surfaces; the volume and location of grading or other earth-moving

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activities; and the size of new facilities' footprints to allow for a meaningful and informative cumulative analysis and, for the purposes of this analysis, we decline to speculate as to the significance of potential cumulative effects on erosion and sedimentation." The DEIR goes on to state in the subsequent paragraph that: "The combined impacts of the Project plus the cumulative projects would not result in a significant cumulative effect with respect to water quality degradation, erosion, and sedimentation. Therefore, the Project would not have a cumulatively considerable contribution to such impacts and significant cumulative impacts would not occur."

My original comment letter (Bauer, Sept. 2013) indicated that this was not adequate and that the project and the public deserved and full and fair analysis of this impact. FEIR responds to this comment (O3-57) with "However, specifics about the extent and location of any new pervious surfaces; the volume and location of grading or other earth-moving activities; or the size of new facilities' footprints is not available. Under these circumstances, and consistent with the Court's decision in *Laurel Heights Improvement Association v. Regents of University of California* (1993) 6 Cal.4th 1112, 1137, the Draft EIR declines to speculate as to the significance of potential cumulative effects on erosion and sedimentation. . .

The surrounding solar facilities, like the proposed project, have large areas of disturbed soil. The large surface area disturbed by surrounding solar projects is significant in that these facilities can have more of an impact on drainage patterns than smaller footprint construction projects. Assessing the combined impacts and patterns of these large altered areas in close proximity to one another seems to fall under the very purpose of the CEQA environmental review process. Furthermore, construction details of these adjacent facilities are available and should not be considered speculative and therefore the combined impact of the proposed project and the neighboring facilities can be assessed and the FEIR fails to do so." Exhibit B hereto.

V. THE DEIR DOES NOT ADEQUATELY ANALYZE OR MITIGATE FOR IMPACTS ON BIOLOGICAL RESOURCES.

Expert biologist Cornett has reviewed the response to comments in the FEIR concerning biological impacts, and concluded (in the very limited time that the County gave to FEIR reviewers) that the responses regarding deficiencies in the DEIR were unacceptable because they either did not deal specifically with the DEIR comments, or because the issues were ignored all or in part. Exhibit A hereto.

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In particular, expert Cornett notes that:

“Response 03-29. The project proponent refuses to provide any information whatsoever on the qualifications of the persons conducting fieldwork.

The project proponent failed to include the qualifications of the individuals conducting fieldwork or authoring the biological technical report in the DEIR or the FEIR. The issue was brought forward in my comment letter on the DEIR dated September 5, 2013, and reiterated by Gideon Kracov, Attorney at Law, in his letter dated September 30, 2013. Nevertheless, the project proponent continues to refuse to provide this information as no statement of qualifications was provided in their Response to Comments. I must therefore conclude the project proponent has elected to not provide the information because field workers were not qualified and this fact would have revealed information that would seriously undermine the credibility of the BRTR and FEIR.

The project proponent also failed to use county-approved biologists, as they are required to do, to conduct field surveys for biological resources. In their Response to Comments (03-29) they argue that biologists conducting field surveys and writing reports were covered because Tetra Tech EC, is an approved firm and, therefore, any other individual or company they subcontract with is “approved” as well. This is not correct. The County clearly states on their Environmental Programs website that “the Environmental Programs Division (EPD) of the

Riverside County Planning Department requires that all biological consultants, both firms and **individuals**, who prepare biological reports for review by the County, have an executed agreement on file with the Department.”² None of the individuals, including Alice Karl, are employees of Tetra Tech and therefore must be approved by the County of Riverside before participating in the development of a report.

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² <http://www.rctlma.org/epd/documents/BioConsultantsList.pdf>

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Response 03-30. Project proponent fails to justify the complete absence of standard protocol night surveys.

Many desert animals, including several sensitive species, are active at night to reduce water loss through evaporative cooling and to minimize detection by prey or predators. Night surveys are standard procedure among professional field biologists working in desert environments. However, project biologists elected to deviate from accepted standards and not conduct a single night survey. This omission further undermines the credibility of the report and may have resulted in the failure to detect the presence of several sensitive species including the kit fox and Couch's spadefoot toad.

In an attempt to justify this glaring omission, the project proponent in their responses to comments suggest neither the County, BLM nor federal and state resource agencies required nocturnal surveys. Specifically, they refer to the Draft EIR, Appendix C-5 and the Biological Opinion of the U.S. Fish & Wildlife Service.³ However, this document says nothing about nocturnal surveys and does not indicate that they are not required. As the resource agencies are well qualified to set parameters on biological field surveys, their decision to not visit this issue in their Opinion most likely reflects their assumption that professional and qualified field biologists would conduct such standard surveys.

In responding to this issue, the project proponent continues by stating that "daytime surveys are adequate to identify aquatic breeding habitat for Couch's spadefoot, potential dens for desert kit fox and roosting habitat for special-status bats."⁴ This response makes no effort to explain why this is true. The project site is located in a hyperarid desert and so of course there are no permanent aquatic habitats. But Couch's spadefoot toads in this region rely on ephemeral pools to breed.⁵ Such pools are typically associated with wash environments of which there are many more within the project boundaries than is stated in the FEIS (December, 2012). A very limited assessment of potential temporary pools was

³ Responses to Comments, page 2-182.

⁴ Responses to Comments, page 1-182.

⁵ Stebbins, R. C. 2003. Western Reptiles and Amphibians. Houghton Mifflin, Boston, Massachusetts.

undertaken but no follow up surveys were conducted because it was concluded that it did not rain in the summer of 2011.⁶ Additional surveys were apparently planned for 2012, a year in which summer thundershowers were relatively frequent and widespread, but I found no documents indicating that such surveys for the toad were undertaken. Without an accurate assessment of potential breeding pool locations and not a single nocturnal survey for the species, appropriate mitigation measures cannot be designed. Thus, impacts to Couch's spadefoot toad as a result of the project could be significant. A sincere effort must be made to map potential breeding habitat for the toad, particularly in the northwestern portion of the project site where suitable habitat likely exists but which was completely ignored during the surveys.

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The BRTR does not discuss the significance of foraging habitat for the kit fox. Because the entire project site is clearly foraging habitat for kit foxes, nighttime surveys for this small predator should have been conducted as they are most often active at night. Much of the project site is hard-packed alluvial deposits which precludes the creation of fox footprints leaving nighttime surveys as the only practical method by which foraging habitat could have been assessed. Again, the project proponent fails to respond to an important issue and mitigation is designed around kit fox burrow presence rather than areas of foraging habitat. As a result there may be significant impacts to protected kit foxes over a broad region which includes the project site.

Response 03-31. Project proponent fails to explain why wildlife corridor studies were not conducted.

Project proponent fails to explain why routine wildlife corridor studies were not conducted for such a large project which includes habitat for both medium- and large-sized mammals. They simply reiterate what they did but ignore what they did not do. The response states that "The distribution of these species was discussed in the . . ." and "No bighorn sheep were observed in the McCoy Mountains." But such responses and conclusions are not a substitute for the sweeping of washes and roads for animal tracks or the placement of infrared-triggered cameras in washes to record wildlife movements. These standard practices are designed to

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⁶ BRTR, page 39.

strengthen the kind of incidental observations made while walking transects. Without the use of formal field detection methods the results are incidental and conclusions are speculative at best. The report leaves the public with no real evidence for or against the presence of wildlife corridors with the possibility that project impacts to sensitive mammals may be significant.

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Response 03-32. In this instance the project proponent does respond to my comment regarding the little pocket mouse, but fail to correctly characterize the issue.

One of the purposes of a biological survey is to determine the presence or absence of sensitive species or subspecies. The ranges of the various subspecies of little pocket mouse are only partially known, at best, and both the California Department of Fish & Wildlife and U.S. Fish & Wildlife Service have expressed concern regarding the status and survival of several subspecies.⁷ For this reason, effective live-trapping of little pocket mice should always be conducted in the desert regions of California. It is not the abundance of a particular species in its habitat that is at issue in this case, but the severely restricted range of certain subspecies whose ranges are incompletely known.

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As described in the previous response to comment, daytime surveys alone are inadequate to determine the significance of the site to special-status species such as the kit fox.

Response 03-33. Biological consultants should demonstrate independence when decisions of the USFWS deviate from the Service's own rules and result in additional harm to a listed species.

The USFWS elected to not require additional surveys on lands immediately south of the project site in spite of approved protocols that require such surveys. In my opinion, the Service erred in their decision, a decision that may result in an even more significant impact to the officially threatened desert tortoise. Truly independent biological consultants would have at least recommended that surveys be conducted in spite of the position of the USFWS. Without current surveys the true

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⁷ USFWS at <http://ecos.fws.gov/speciesProfile/profile/speciesProfile.action?spcode=A0BY>; CDFW at <http://www.dfg.ca.gov/wildlife/nongame/ssc/docs/mammal/species/33.pdf>.

impact on the desert tortoise is unknown and mitigation may be insufficient.

The response curiously omits any mention of why tortoise evidence was almost absent north of the project site in similar habitat. Again, this supports the idea that protocols surveys were not conducted in the area as required since no attempt was made to respond to this observation.

Response 03-41. Since no focused bat surveys were conducted no conclusions can be reached regarding impacts and mitigation.

The project proponent responds at length as to why standard practices were not followed and focused bat surveys were not conducted. At the end of the day, without focused surveys no conclusions can be reached as to impacts and the necessity of mitigation. Incidental observations by apparently inexperienced or unqualified field workers can never be a substitute for formal surveys for any species or group of species. Curiously, bat roosts are most likely to be found along the western margin of the project site and beyond, yet no mention of efforts to find roosts in this area were included in the response.

Response 03-42. Surveys for ancient creosote rings must be undertaken before project approval.

The first mention of the existence of ancient creosote rings in any of the documents prepared for the McCoy Solar Energy Project are in the project proponent's response to my comment. "No creosote rings were identified during botanical surveys on the Project site" is their response.⁸ This is not surprising since one must conclude that no one involved in the preparation of the biological studies was aware of their existence, much less conducting surveys for them. Now that the project proponent is aware of ancient creosote rings, they should conduct surveys for them with experienced biologists and reveal their findings to the public. If they are found, appropriate mitigation should be implemented. Without such surveys a significant resource could be forever lost as a result of the Project.

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⁸ Responses to Comments, page 2-185.

Response 03-44. The project proponent fails to respond to the impact of ocotillo removal on migrating birds.

As mentioned in my original comment letter, seventeen ocotillo plants (*Fouquieria splendens*) were found within the project boundaries.⁹ The BRTR fails to mention that the project site is one of the most northwestern occurrences of this species and that blooming plants may provide critical energy resources for migrating hummingbirds and other avian species in years of below average precipitation.¹⁰ As the northwestern outpost of *Fouquieria splendens*, the population on the project site should be considered critical to the survival of thousands of hummingbirds and other migrating bird species.¹¹ Nonetheless, the project proponent has elected to ignore this issue and not respond in any manner.

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Response 03-46. No entity has shown that compensatory habitat is available.

In spite of much rhetoric and the use of such phrases as “initially demonstrated,” “habitat modeling” and “suggests that the Project will be able to meet compensatory mitigation needs” no actual data has been provided that there is sufficient appropriate land available to accomplish all the compensation necessary to mitigate project impacts to a level of insignificance. I argue that there is insufficient land available. Demonstrate that I am incorrect before accepting the FEIS.” Exhibit A hereto.

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⁹ BRTR, page 30, C-40.

¹⁰ Cornett, J. W. 2013. The Splendid Ocotillo, Educational Bulletin #13-2, Desert Protective Council, San Diego, CA.

¹¹ Buchmann, S. L. and G. P. Nabhan. 1997. *Forgotten Pollinators*. Island Press, Washington D. C.

VI. THE DEIR DOES NOT ADEQUATELY ANALYZE OR MITIGATE FOR IMPACTS ON HYDROGEOLOGY AND WATER RESOURCES.

Expert geologist Rhymes has reviewed the response to comments in the FEIR with regard to hydrogeology and water resource impacts, and concluded that the “project FEIR fails to accurately assess the projects natural relation to the Colorado River and incorrectly determines that there is no connection between the groundwater on-site and that from the Colorado River. In order the legally extract water from beneath the project site the FEIR needs to include means to legally acquire this water and as shown above a mechanism already exists for this and these means should be included in the FEIR and the public review process.” Exhibit B hereto.

A. The FEIR Does Not Adequately Address The Applicant’s Right To Extract Water From The Groundwater Aquifer

In particular, expert Rhymes questions the FEIR conclusion in water supply:

“As indicated in the DEIR and again in the FEIR the applicant has no plans to extend municipal services for water to the project site and will therefore need to install 2-3 wells to extract groundwater from the underlying aquifer. However, as included in the FEIR in Chapter 2.5, the Metropolitan Water District of Southern California (MWD) in a letter dated October 1, 2013 (FEIR, page 2-55) and the Colorado River Board of California (CRB) in a letters dates September 27, 2013 and January 31, 2013 both contend that the water below the site is Colorado River water and requires the acquisition of entitlement rights or other legal mechanisms to extract this water from the underlying aquifer. However, the applicant asserts that the water pumped from the site is not hydraulically connected to Colorado River water . . .

[I]t was determined by the USGS, and that based the USGS 2008 Accounting Surface report (USGS, 2008), that the water beneath the site is hydraulically connected to that of the Colorado River. This is further reiterated in BLM’s DEIS (McCoy DEIS, 2012)¹² for this very project “the PVMGB is tributary to the lower Colorado River, and is part of the Colorado River aquifer.” In addition, as shown on Figure 6 of the USGS report (USGS, 2008) the project site shows and accounting surface between approximately 252-256 feet above mean seal level (amsl) and the DEIR in Section 2.4.9 shows that “the [project] wells would pump groundwater from the PVMGB, where the water table has been measured at or near 254 feet amsl.” Based on this the project is right at the groundwater elevation

¹² FEIR Response to Comment A5-3 argues that BLM’s contrary conclusions on water supply in connection with the FEIS “do not govern” the County’s determinations, but this argument is misleading. As a matter of law under CEQA, “substantial evidence includes . . . expert opinion.” Pub. Res. Code § 21080(e)(1); 14 Cal. Code Regs. § 15064(f)(5).

of the Colorado River aquifer accounting surface and any pumping below this would be subject to entitlement rights. Furthermore, since the elevation is within +/-0.84 feet at the 95-percent confidence level (USGS, 2008) the project is within the area and range of the Colorado River accounting surface and therefore subject to obtaining valid authority from the MWD and the CRB to extract this water from the underlying groundwater aquifer . . .

From the MWD letter dated October 1, 2013 'The entire project site overlies the Colorado River "Accounting Surface" area designated by U.S. Geological Survey (USGS) Scientific Investigation Report 2008-5113. The Accounting Surface is defined to represent the elevation and slope of the static water table in the river aquifer outside the flood plain and the reservoirs of the Colorado River that would exist if the water in the river aquifer were derived only from the river. The accounting surface extends outward from the edges of the flood plain or a reservoir to the subsurface boundary of the river aquifer. The USGS Report indicates that the aquifer underlying the lands is considered to be hydraulically connected to the Colorado River and groundwater withdrawn from wells located on these lands would be replaced by Colorado River water, in part or in total.'

The FEIR's comment response to this in A5-1 (Chapter 2.5) that indicates that the systems that govern the groundwater below the river are very complex is correct. Groundwater below the site may come from the mountains, the washes, direct precipitation and recharge but it may also come from the Colorado River and may also intercept water destined to recharge the Colorado River. Due to this connectivity to the Colorado River pumping from the site is subject to entitlement rights, and just as other nearby solar projects (Palen Solar Power Project, Blythe Solar Power Project, Desert Harvest Solar Project and Genesis Solar Power Project) have been requested to do so, a mechanism is in place to acquire this water legally through an existing Boulder Canyon Project Act (BCPA) Section 5 Contract Holder (BCP, 1928). Also as indicated in the MWD October 1, 2013 letter the Desert Harvest Solar Project which is further away from the Colorado River was required to include mitigation measures that requires the applicant to prepare a Colorado River Water Supply Plan prior to the onset of water-consuming construction activities which would be submitted to the BLM and the Colorado River Basin Regional Water Quality Control Board (RWQCB) for review and approval, as well as to the MWD for review and comment. As the McCoy site is closer to the Colorado River and also under BLM jurisdiction so too should it include these mitigation measures and the FEIR fails to do so.

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In addition, as shown from the AECOM report Assessment of Proposed Groundwater Use – Results of Numerical Groundwater Modeling McCoy Solar Energy Project, Palo Verde Mesa, Riverside County, California (Aecom, 2011) Figures 1 and 2 in the DEIR show the basin sediments are the same and that groundwater flow is connected beneath the site and within the river basin thereby indicating that the aquifer beneath the site and the Colorado River basin are both within the Palo Verde Mesa Groundwater Basin and as such groundwater from the numerous sources mentioned above (mountain recharge, washes, precipitation, subsurface inflow and Colorado River water) are comingled within the Palo Verde Mesa Groundwater Basin. Recharge water from the mountains will flow towards the river via underground flow and may or may not be intercepted by the PVID drains and inflow water from the river may be pumped from the Project site . . .

The assertion in the FEIR (Chapter 2.6) that the PVID drains prevent any flow of water in, around, or under them is unfounded and needs to be further developed and presented if this will be the deciding issue as to whether the site’s underlying water is connected to the Colorado River. Even if it were found to be true, these drains are man-made and can be added to, removed, and manipulated and their use in defining natural groundwater basin boundaries is questionable.” Exhibit B hereto.

VII. THE DEIR DOES NOT ADEQUATELY ANALYZE OR MITIGATE FOR IMPACTS ON SURFACE WATER HYDROLOGY, DRAINAGE AND FLOODING.

Expert Rhymes’ review of the FEIR concludes that there are several shortcomings with regard to surface water issues from this massive project.

A. The DEIR Fails To Accurately Assess The Permitting Requirements For Compliance Under The Clean Water Act

Expert Rhymes raises concerns about the FEIR’s characterization of the McCoy Wash, which is part of the Colorado River Aquifer:

“As indicated in the Section 4.10.1.3 of the DEIR for this project “When sufficient flow is present, west to-east trending washes located on site eventually merge with McCoy Wash, which is located north and east of all proposed Project facilities.” Also indicated a Department of Water Resources study (DWR, 2004) west- to-east trending washes are located on site and eventually merge with the McCoy Wash, which is a tributary of the Colorado River and the PVMGB is tributary to the lower Colorado River, and is part of the Colorado River aquifer.

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Section 4.10.1.3 of the DEIR states “The major watercourse near the Project site is McCoy Wash (east of the site) which drains approximately 210 square miles of the Palo Verde Mesa, McCoy Mountains, Little Maria.” . . .

However, later revisions to the DEIR stated that “When sufficient flow is present, west to east trending washes located on site eventually merge with McCoy Wash, which is located north and east of all proposed Project facilities, as described above. Low flows from the ephemeral washes that traverse the Project site in a west-to-east orientation transition into alluvial fans and abate into the landscape prior to connecting with the McCoy Wash (AECOM, 2011b).” As indicated in the Aecom report this conclusion was based on visual observations. . .

This reversal based on a visual observation is inadequate proof that waters from the site do not drain into the McCoy Wash. The Palo Verde Irrigation District confirms in their July 26, 2012 (PVID, 2012) comment letter on the FEIS for this project that: “during rain events, any water falling on the mesa that doesn’t infiltrate runs into the Valley causing damages and either infiltrates to the valley groundwater, flows into a PVID canal, or flows into a PVID drain.” If surface water from the Mesa can drain into the valley, it has the potential for impacting Waters of the U.S. There is sufficient evidence as indicated above showing that waters from the site, during periods of flooding or intense rainfall event, can drain to the McCoy wash and therefore they should be designated as water of the United States and subject to the Clean Water Act.” Exhibit B hereto

B. The FEIR Does Not Adequately Assess The Risks From The Project On Existing Drainage Patterns, and the New Option 2 Gen-Tie Does Constitute Significant New Information Requiring Recirculation

Expert Rhymes concludes that the Project’s impact on surface erosion and increased amount of runoff, including from new Option 2 gen-tie, is not adequately addressed in the FEIR. “When these patterns are altered, even slightly, the impacts to the surrounding ecological system can be great.” Exhibit B hereto.

“My original comment letter dated September 12, 2013 (Bauer, 2013) relayed concerns that the DEIR did not adequately assess the impacts to the environment and local ecosystems from the altered drainage patterns caused by the project. The FEIR’s response to this comment is “Measure 4.10-5 would require the Applicant to complete a site specific Comprehensive Drainage, Stormwater, and Sedimentation Plan for County review prior to construction to reduce the potential for the Project to result in altered stormwater flows (including drainage patterns), erosion, or sedimentation rates (such as the formation of rills and gullies) to a less than significant level.” However, this leaves the evaluation and assessment of any impacts in question to a later date after the CEQA process is over. The sheet flow across the site that now exists could significantly be altered by the solar panels

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and the associated infrastructure. The comment response acknowledges that altered hydrology, drainage patterns and increases in sedimentation and erosion could occur but the mitigation presented to manage this is again the submittal of a Comprehensive Drainage, Stormwater, and Sedimentation Plan to the County of Riverside for review. The objective of the CEQA review process is to review and make publicly available potential impacts from the project and this appears to defer this important piece of research and data to a later date long after the public is included in the review process.

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In addition, my original comment letter (Bauer, Sept. 2013) indicated that the project did not mention or include a proposal to prepare a Conceptual Grading Plan. My original comment letter states “The DEIR makes no mention of a Conceptual Grading Plan which could be used to evaluate impacts from the project and mitigate impacts that are discovered. For instance, the DEIR makes no mention of where or when engineered channels would be located, which washes would be most affected and how they would be protected, but leaves it to a plan (Comprehensive Drainage, Storm Water, and Sedimentation Control Plan) to be worked out at a later date.” The FEIS does not address this omission, which is a critical component to reviewing the impacts of the project on the environment and the community.

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Furthermore as indicated in my original comment letter (Bauer, Sept. 2013) “The Applicant did have a Pre/Post-Development Hydrology Report prepared by Aecom for this project (Aecom, Nov. 2011), however this report failed to include the McCoy Wash in the calculations. Storm water from the site is located directly adjacent to the McCoy Wash and it is not shown in the DEIR that storm water from the site does not get conveyed to McCoy Wash. It appears from the maps presented in both of the Aecom’s reports (Jan. and Nov. 2011) that storm water from the mountains would drain through the site and into McCoy Wash, especially during periods of intense rainfall, which is anticipated to get more severe with climate change. If the Aecom’s Nov. 2011 report concludes that McCoy Wash cannot and will not receive any storm water run off from the project site, the scientific basis for such needs to be directly included in the DEIR or an appendix thereof and the DEIR fails to do this.” As stated above it appears that the FEIR does not include the McCoy wash in its calculations and again without this data the FEIS fails to present a fair and full review for the public.

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In addition, in the FEIR Chapter 2.6.4 Nextera Energy submits a letter proposing to move the gen-tie line approximately 1,100 feet west (called Option 2) on the Blythe Solar Plant Project site. This option has not been adequately included in the review process. The FEIR erroneously states “Option 2 is not “significant new information” and does not change the EIR in a way that deprives the public of a meaningful opportunity to comment upon a substantial adverse environmental effect of the project or a feasible way to mitigate or avoid such an effect (CEQA

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Guidelines §15088.5(a).” This option moves the gen-tie line 1,200 feet west into an area of more significant ephemeral washes. The effects of a gen-tie line in this area on local drainage patterns have not been thoroughly included in this FEIR. The FEIR responds to this issue on page 2-209 of the FEIS “Hydrology and Water Quality. Option 2 would not substantially change the size or type of facilities to be constructed. It would be slightly longer and result in slightly more overall land disturbance, but would differ from Option 1 only over 1-mile section, and would result in similar potential impacts with respect to existing water quality standards and the potential for increasing erosion and/or flooding during construction, operation and maintenance, and decommissioning. For these reasons, Option 2 would not result in any change to the significance conclusions made for the Project in Draft EIR Section 4.10 or Section 6.3.” This response does not constitute a thorough review. The models and studies completed for the original project should be updated to include this change and a corresponding impact assessment done prior to approving this revision and the current FEIS fails to do this.” Exhibit B hereto.

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C. The DEIR Does Not Adequately Address The Risk To The Environment From Flooding On The Project Site

Expert Rhymes concludes that the FEIR’s analysis of flood risk is incomplete:

“My original comment (Bauer, Sept. 2013) expressed concerns that the Project DEIR did not address the risks and present mitigations sufficient enough to manage environmental threats in the event of a flood. As indicated in my referenced comment letter Genesis Solar Power Project, located 8 miles away from the project, failed in the planning and execution of their project resulting the release of hazardous chemicals into the fragile desert environment from significant flooding and lack of preparation (BAR, 2012). The FEIR for the McCoy project should include drawings showing where the areas most prone to flooding exist and include mitigations showing that vehicles, equipment and other hazards will not be placed in these areas. The FEIR responds to this by stating, “Figures depicting the proposed site layout have not been altered to include a delineation of areas of concentrated flow or of frequent flood flow areas; the latter would be delineated during final engineering.”

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As indicated, flooding in this area is a significant risk and when facilities are placed in areas of significant flows environmental damage can occur. The FEIR/DEIR fail to show that this will not happen as it defers the design until a later date when the public cannot review the documents to assess the risks. Comment A3-6 to the Riverside County Flood Control and Water Conservation District states that the “Draft EIR Figure 2-3 has not been revised to depict the post-mitigation site layout because like all Project information presented in Chapter 2, it describes the Applicant’s proposal (pre-mitigation). Further, because

final design has not been completed, the final locations and elevations of such facilities are not known. Final site design would be consistent with the EIR's analysis and all mitigation measures and conditions of approval. Additionally, please note that, as described on Draft EIR page 4.10-6 and on Draft EIR Figures 4.10-5 through 4.10-8, areas of maximum concentrated flow, shown outlined in blue on these figures, correspond to areas of flow with water depths greater than 0.3 feet and do not necessarily depict severe and frequent flow areas." Thus, the FEIR still fails to include an adequate review and mitigation to ensure that significant environmental damages do not occur as a result of the project." Exhibit B hereto.

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VIII. THE FEIR DOES NOT ADEQUATELY ANALYZE OR MITIGATE FOR HAZARDS AND HAZARDOUS MATERIALS

Expert Rhymes comments on the inadequate review of risks of lead and perchlorate in soil:

"Section 4.9.1.1 of the DEIR it states that: "Scattered trash and debris were observed in the gen-tie line corridor, particularly near I-10, that could include lead debris from shooting target practice." And as noted in the Project Final Environmental Impact Statement (McCoy DEIS, 2012) prepared for the Bureau of Land Management (BLM) for this project lead (Pb) debris was noticed in the gen-tie corridor . . .

As indicated in my original September 2013 comment letter (Bauer, 2013) "Lead overexposure is one of the most common overexposures found in industry and is a leading cause of workplace illness (OSHA, 2013). When lead is deposited in soil from anthropogenic sources, it does not biodegrade or decay and is not rapidly absorbed by plants, and thus it remains in the surface soils at elevated levels for extended periods of time. Lead is estimated to have a half-time of residence in soil of 1,000 years (EPA, 2001). Lead can also be brought home on worker's shoes and a child's exposure to lead is much more severe and significant than that of an adult due to their smaller body size, increase of floor contact and also increase in hand to mouth contact." . . .

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The FEIR states in the response comment (Chapter 2.6.3) that the identification in lead in the soil from the shooting range is part of the UXO identification and training program, as well as the identification of perchlorates. Typical UXO identification training will include the visual identification of munitions and unexploded ordnances. An example of an Unexploded Ordnance Identification, Training, and Reporting Plan (UXO ITRP) for a similar solar project which was

developed for SolarReserve, LLC for the Rice Solar Energy Project in September 2011 (SolarReserve, 2011) shows that training is given for the identification and management of hazards associated with UXOs or munitions or explosives of concern (MECs) when they are “visually or physically encountered.” . . .

The hazards associated with degraded lead in soil and perchlorates are not something that typically can be seen with the naked eye. They require the collection of soil samples to confirm. The FEIR’s response is inadequate in that a UXO plan does not include the proper identification of these hazards and therefore the impacts to the environment, the community and the workers from disturbing soils in these areas remain unknown. Therefore, prior to the FEIR being finalized a thorough investigation, which includes soil sampling, to determine the presence of soil contaminants, specifically lead and perchlorates needs to be done in areas where these contaminants may exist. This is the only way to ensure that contaminated soil is adequately handled and that the environment, workers, their families and the public are protected.” Exhibit B hereto.

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IX. THE VALLEY FEVER ANALYSIS IS INADEQUATE

Expert geologist Rhymes concludes that additional, feasible measures, can be implemented to protect against Valley Fever:

“The Revised DEIR includes several mitigations set forth to reduce the exposure to Valley Fever. These mitigations listed in the Revised DEIR are somewhat of an improvement over the those detailed in the original DEIR, however my comment letter to these revisions dated December 11, 2013 (Bauer, Dec. 2013) points out that the DEIR does not indicate how the risk of contracting Valley Fever based on environmental conditions (wind, rain, work activity) will be assessed, if at all and this is again omitted in the FEIR. Therefore, the FEIR fails to adequately assess the risk from the disturbance of soil containing Coccidioides spores on the public and workers . . .

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In addition, the Revised DEIR in Impact 4.3-4A (page 2-48) states “based on the types of occupations required for the Project (see for example, in DEIR Table 4.14-4 (p. 4.14-6)), the Project construction workforce could be drawn from as far away as Brawley and El Centro in Imperial County, California, or Cibola and Phoenix in Arizona (Draft EIR Section 4.17.5, p. 4.17-10). Even at the farthest reasonable commute, these workers already are living and working in areas that have the potential to have soils affected by the valley fever fungus. Accordingly, for a

substantial majority of Project workers, there would be no change in the baseline construction site health risk related to valley fever whether they report to work at the Project site or elsewhere in Riverside, San Bernardino, Imperial, or Los Angeles counties.”

While it may be true that workers will be commuting from areas also endemically high in Valley Fever the baseline should still be set higher for work being conducted on solar projects over other projects employing workers involved in earthwork activities. This is because the large-scale utility solar project will disturb a greater percentage of surface soil, where *Coccidioides* spores reside, than for typical construction projects (parking lots, buildings, roadways). Few other projects require grading of such a large surface area than the large utility-scale solar installations. For this reason the exposure of workers involved in the McCoy Solar Project will be greater than that of another non-solar projects and the FEIR fails to assess these risks.” Exhibit B hereto.

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X. THE DEIR DOES NOT PROVIDE ADEQUATE INFORMATION ON MITIGATION MEASURES FOR THE PROJECT, FAILING TO INCLUDE OR DEFERRING KEY MITIGATION.

The DEIR omits or defers formulation of a host of mitigation measures, denying critical information to decisionmakers and the public as to whether the Project will in fact be able to adequately mitigate its environmental impacts. A lead agency is precluded from making the required CEQA findings unless the record shows that all uncertainties regarding the mitigation of impacts have been resolved; an agency may not rely on mitigation measures of uncertain efficacy or feasibility. *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 727 (finding groundwater purchase agreement inadequate mitigation because there was no evidence that replacement water was available). This approach helps “insure the integrity of the process of decisionmaking by precluding stubborn problems or serious criticism from being swept under the rug.” *Concerned Citizens of Costa Mesa, Inc. v. 32nd Dist. Agricultural Assn.* (1986) 42 Cal.3d 929, 935.

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CEQA requires public agencies to avoid or reduce environmental damage when “feasible” by requiring “environmentally superior” alternatives and all feasible mitigation measures. 14 Cal. Code Regs. § 15002(a)(2–3); *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564.

Also, CEQA disallows deferring the formulation of mitigation measures to post-approval studies. 14 Cal. Code Regs. § 15126.4(a)(1)(B); *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 308-309. An agency may only defer the formulation of mitigation measures when

it possesses “‘meaningful information’ reasonably justifying an expectation of compliance.” *Sundstrom* at 308; *see also Sacramento Old City Association v. City Council of Sacramento* (1991) 229 Cal.App.3d 1011, 1028-29 (mitigation measures may be deferred only “for kinds of impacts for which mitigation is known to be feasible”).

Here, by deferring the development of specific mitigation measures, the Applicant has effectively precluded public input into the development of those measures. CEQA prohibits this approach. As explained by the *Sundstrom* court:

An EIR . . . [is] subject to review by the public and interested agencies. This requirement of “public and agency review” has been called “the strongest assurance of the adequacy of the EIR.” The final EIR must respond with specificity to the “significant environmental points raised in the review and consultation process.” . . . Here, the hydrological studies envisioned by the use permit would be exempt from this process of public and governmental scrutiny. *Sundstrom*, 202 Cal.App.3d at 308.

For example, the FEIR and DEIR fail to include many mitigation measures from the earlier McCoy Solar BLM approvals and Record of Decision, including measures relating to air quality (AIR-1), visual resources (VIS-4) and cultural resources (CUL 4.5-1, 4.5-3). Exhibit F hereto. These BLM mitigation measures are *per se* feasible, and therefore must be incorporated into the County CEQA approvals as well. 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.” 14 Cal. Code Regs. § 15002(a)(2). 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 where feasible” and that any unavoidable significant effects on the environment are “acceptable due to overriding concerns.” Pub. Res. Code § 21081; 14 Cal. Code Regs. § 15092(b)(2)(A–B).

The FEIR and DEIR also fail to provide sufficient specificity regarding a host of mitigation measures. Too much mitigation deferral is allowed, and sufficient performance standards are not put in place. The DEIR does not come to terms with any of this, but more specificity must be included on measures including:

- Measure 6-1d – which structures will be allowed to remain in the ground, what is standard to be used to determine feasibility or “whenever possible”
- Measure 4.4-1f – performance standards are not yet developed, leaving them ambiguous
- Measure 4.4-2b – performance standards are not yet developed, leaving them ambiguous
- Measure 4.4-3b – performance standards are not yet developed, leaving them ambiguous

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- Measure 4.4-4d – what is standard to be used to determine feasibility
- Measure 4.4-7 – performance standards are not yet developed, leaving them ambiguous
- Measure 4.10-1 – BMPs and performance standards are not yet developed, leaving them ambiguous
- Measure 4.10-4 – performance standards are not yet developed, leaving them ambiguous
- Measure 4.10-5 – performance standards are not yet developed, leaving them ambiguous

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XI. THE EIR SHOULD BE REVISED AND RECIRCULATED.

In light of all this, recirculation of the Project CEQA documents is warranted. Recirculating an EIR prior to certification is required when “significant new information” comes to light concerning a Project. 14 Cal. Code Regs. § 15088.5(a)(1–2). “Significant new information” requiring recirculation includes, for example, a disclosure showing that: (1) A new significant environmental impact would result from the project or from a new mitigation measure proposed to be implemented. (2) A substantial increase in the severity of an environmental impact would result unless mitigation measures are adopted that reduce the impact to a level of insignificance. (3) A feasible project alternative or mitigation measure considerably different from other previously analyzed would clearly lessen the significant environmental impacts of the project, but the project’s proponents decline to adopt it. (4) The draft EIR was so fundamentally and basically inadequate and conclusory in nature that meaningful public review and comment were precluded.” 14 Cal. Code Regs. § 15088.5; *see also Laurel Heights Improvement Assn. v. Regents of University of California* (1993) 6 Cal.4th 1112, 1130 (“*Laurel Heights IP*”) (citing *Mountain Lion Coalition v. Fish & Game Comm’n* (1989) 214 Cal.App.3d 1043).

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VIII. CONCLUSION.

It is the County Board’s role to make the final CEQA findings, and to make County Code §§ 18.28.f and 18.29.d findings for the requested use permits that the Project “will not be detrimental to the health, safety or general welfare of the community, and that conditions be imposed “to protect the health, safety or general welfare of the community.” Commenters respectfully believe, for all the reasons set forth in this letter, that this rushed approval cannot satisfy these standards, and therefore this item should be continued, or denied at this time. Commenters respectfully insist that holding this hearing today, and acting on this Project, will violate CEQA’s rules on informed decisionmaking and public participation.

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As set forth herein, the FEIR and CEQA compliance for the Project have the following deficiencies:

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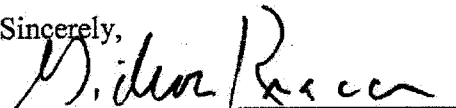
- I. Lack Of Clarity On AB 900 Compliance;
- II. The Cumulative Impacts Discussion Of The Contiguous Blythe Solar Project Is Inadequate;
- III. The FEIR Does Not Adequately Analyze Or Mitigate For Impacts On Biological Resources;
- IV. The FEIR Does Not Adequately Analyze Or Mitigate For The Project's Impacts On Hydrology and Water Resources;
- V. The FEIR Does Not Adequately Analyze Or Mitigate For The Project's Impacts On Surface Water Drainage And Flooding Risks;
- VI. The FEIR Does Not Adequately Analyze Or Mitigate For Hazards and Hazardous Materials;
- VII. The Valley Fever Analysis is Inadequate;
- VIII. The FEIR Does Not Provide Adequate Information On Mitigation Measures For The Project, Deferring Key Mitigation; and
- IX. Recirculation Is Necessary.

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cont.

Commenters are very concerned that the FEIR did not give the extensive DEIR comments on the project the required review, or analyze them as carefully as needed. Incredibly, given the volume of comments received, the FEIR only recommends minor changes to barely 12 pages of the entire DEIR.

For the foregoing reasons, the County may not approve the Project as currently proposed. Commenters urge the County to decline to approve the Project and require the staff to go back and perform legally adequate environmental review for the Project and properly mitigate its significant impacts. Please continue to include this Office on the mailing list for all CEQA and local land use notices for the Project. Thank you for your attention to these comments.

Sincerely,



Gideon Kracov

Attorneys for LiUNA Local No. 1184