

Assessment for CEQA purposes. PDP01601 is hereby accepted for WCS180001. A PRIMP shall be required prior to issuance of a grading permit for this project.

015 - Transportation	ENCROACHMENT PERMIT	Status
UNKNOWN		Unsatisfied

An encroachment permit must be obtained from the Transportation Department prior to the commencement of any work within the County road right-of-way.

015 - Transportation	STD INTRO 2 (ORD 460/461)	Status
UNKNOWN		Unsatisfied

With respect to the conditions of approval for the referenced tentative exhibit, the Transportation Department recommends that the ~~Joint Water Board~~ provide all street improvements, street improvement plans and/or road dedications set forth herein in accordance with Ordinance 460 and Riverside County Road Improvement Standards (Ordinance 461). It is understood that the exhibit correctly shows acceptable centerline elevations, all existing easements, traveled ways, and drainage courses with appropriate Q's, and that their omission or unacceptability may require the exhibit to be resubmitted for further consideration. These Ordinances and all conditions of approval are essential parts and a requirement occurring in ONE is as binding as though occurring in all. All questions regarding the true meaning of the conditions shall be referred to the Transportation Department.

Formatted: Highlight

060 - BS-Grade	EASEMENTS/PERMISSION	Status
Prior To Grading Permit Issuance		Unsatisfied

Prior to the issuance of a grading permit, it shall be the sole responsibility of the owner/applicant to obtain any and all proposed or required easements and/or permissions necessary to perform the grading herein proposed. A notarized letter of permission and/or recorded easement or license from the affected property owners or easement or license holders shall be provided in instances where off site grading is proposed as part of the grading plan. In instances where the grading plan proposes drainage facilities on adjacent off-site property, the owner/ applicant shall provide a copy of the recorded drainage easement or copy of Final Map.

060 - BS-Grade	IF WQMP IS REQUIRED	Status
Prior To Grading Permit Issuance		Unsatisfied

If a Water Quality Management Plan (WQMP) is required, the owner / applicant shall submit to the Building & Safety Department, the Final Water Quality Management Plan (WQMP) site plan for comparison to the grading plan.

060 - BS-Grade	IMPROVEMENT SECURITIES	Status
Prior To Grading Permit Issuance		Unsatisfied

Prior to issuance of a Grading Permit, the applicant may be required to post a Grading and/or Erosion

Code section 1602. If CDFW determines that a Lake or Streambed Alteration Agreement is required as a result of the Notification process, the applicant shall provide the final Agreement documentation. If the agency decides no permit is required, the applicant shall provide evidence of communication to that effect from the agency.

060 - Planning-EPD

Prior To Grading Permit
Issuance

EPD

Status

Unsatisfied

Birds and their nests are protected by the Migratory Bird Treaty Act (MBTA) and California Department of Fish and Wildlife (CDFW) Codes. Since the project supports suitable nesting bird habitat, removal of vegetation or any other potential nesting bird habitat disturbances shall be conducted outside of the avian nesting season (January 1st through August 31st). If habitat must be cleared during the nesting season, a preconstruction nesting bird survey shall be conducted. The preconstruction nesting bird survey must be conducted by a biologist who holds a current MOU with the County of Riverside. If nesting activity is observed, appropriate avoidance measures shall be adopted to avoid any potential impacts to nesting birds. The nesting bird survey must be completed no more than 3 days prior to any ground disturbance. If ground disturbance does not begin within 3 days of the survey date a second survey must be conducted. Prior to issuance of a permit for rough grading, the project's consulting biologist shall prepare and submit a , documenting

Formatted: Highlight

In some cases EPD may also require a Monitoring and Avoidance Plan prior to the issuance of a rough grading permit. If the rough grading permit expires this condition will reapply, and a new survey may be required prior to issuance of future grading permits. When the requested documents/studies are completed and ready for EPD review, please upload them to our Secure File Transfer server to ensure prompt response and review. If you are unfamiliar with the process for uploading biological documents to the FTP site, please contact Matthew Poonamallee at mpoonama@rivco.org and Teresa Harness at tharness@rivco.org for instructions. Biological reports not uploaded to the FTP site may result in delayed review and approval.

Commented [RS6]: This is somewhat duplicative of and inconsistent with 015-Planning GEN - Mitigation Measures section up above. Suggest deleting this. But if it must remain, we recommend the revised language. Otherwise, it's very difficult to comply with given that survey required prior to receiving grading permit AND 3 days prior to grading.

060 - Planning-EPD

Prior To Grading Permit
Issuance

EPD

Status

Unsatisfied

Prior to issuance of any grading permit, a biologist with a Memorandum of Understanding with Riverside County will prepare a Restoration Plan to cover the restoration of new temporary disturbance found in Coachella Valley Jerusalem cricket habitat on site. In order to ensure restoration of the habitat values of temporary disturbance areas to pre-disturbance levels, the Restoration Plan will include, but may not be limited to, the following: Goals and Objectives, Success Criteria, Methods of Restoration, Establishments of Sample Plot(s) and Reference Plot(s), Timeline for Completion of Restoration, Qualifications for Personnel Implementing Restoration Plan, Onsite Biological Monitoring and Reporting Requirements, Description of the Process for Evaluating Disturbed Areas, Description of Anticipated Re-Vegetation, Description of How Invasive Plant Species Will Be Addressed. If the Restoration Plan is not executed to the satisfaction of the County of Riverside and the CVCC, a Transfer of Conservation Goals associated with the Conservation Objectives

Formatted: Highlight

Commented [RS7]: CVAG has stated that the revised disturbed acres, per their calculation, is 3.0 acres. So, it seems prudent to 'un-state' the amount until the final JPR is complete.

**Prior To Building Permit
Issuance**

Unsatisfied

Prior to the approval of any grading or building permits, whichever comes first, for any part of the Project requiring access across the Metropolitan Water District's property per Road License No. 659 (?RL 659?), the Applicant shall provide Riverside County proof that RL 659 is in effect. The Applicant shall also provide proof of written approval by Metropolitan Water District for Applicant's use of any equipment or engagement of any activity across its property associated with RL 659 which would impose loads greater than AASHTO H-20.

080 - Planning

**Prior To Building Permit
Issuance**

Gen - Stake Property

Status

Unsatisfied

PRIOR TO ISSUANCE OF BUILDING PERMITS, the permit holder shall place identified stakes at each corner of the property containing this commercial WECS permit and at the actual construction site, as shown in the APPROVED EXHIBIT "A". Additional stakes may be required, as determined by the Planning Director or Building Director. The stakes shall extend at least three (3) feet above the ground and shall be maintained during the construction, repowering and restoration period(s) of this WECS permit. The Planning Department shall require the permit holder to submit written certification from a state licensed professional and/or inspection by county staff in order to verify compliance with this condition of approval.

Formatted: Highlight

080 - Planning

**Prior To Building Permit
Issuance**

Gen - Structure

Status

Unsatisfied

Prior to the issuance of building permits for any WECS and towers, a California registered structural and electrical engineer shall certify, in writing, to the satisfaction of the Director of the Department of Building and Safety, that the WECS foundations, tower and compatibility of the tower with the rotor and the rotor related equipment, and the electrical system, conform with good engineering practice and comply with the applicable provisions of the Uniform Building and Electrical Code that have been adopted by the County of Riverside.

080 - Planning

**Prior To Building Permit
Issuance**

WECS - Bond or Security

Status

Unsatisfied

Prior to Building Permit Issuance for the WECS or towers allowed by this permit, a bond or other appropriate and sufficient security shall be filed with the County by the WECS permit holder. The bond or other security shall be in sufficient amount to cover the costs of WECS removal and site restoration (including but not limited to removal of the foundation and underground electrical cables up to three feet below grade, tower, transformer and cables) after accounting for the salvage value of the WECS and ancillary equipment should any WECS become unsafe, inoperable or abandoned within five (5) years after the issuance of the building permits. The bond shall be held for five (5) years after the issuance of building permits, but may be released sooner by the Board of Supervisors upon approval of a final demolition and site restoration inspection by the Department of Building and Safety. Thereafter, and

Ordinance, which shall mean the net area, measured in acres, from the adjacent road right-of-way to the limits of the project development. The Project Area for Commercial WECS Permit No. 180001 has been calculated to be 36.33 acres of new permanent disturbed acres.

Formatted: Highlight

Formatted: Highlight

090 - Planning

**Prior to Building Final
Inspection**

Gen - Ord. 875 (CVMSHCP Fees)

Status

Unsatisfied

Prior to building permit final inspection, the permit holder shall comply with the provisions of Riverside County Ordinance No. 875, which requires the payment of the appropriate fee set forth in the ordinance. The amount of the fee will be based on the "Project Area" as defined in the ordinance and the aforementioned condition of approval. The Project Area for Commercial WECS Permit No. 180001 is calculated to be 36.33 acres of new permanent disturbance.

Formatted: Highlight

In the event Riverside County Ordinance No. 875 is rescinded, this condition will no longer be applicable. However, in the event Riverside County Ordinance No. 875 is rescinded and superseded by a subsequent mitigation fee ordinance, payment of the appropriate fee set forth in that ordinance shall be required.

Formatted: Highlight

090 - Planning

**Prior to Building Final
Inspection**

Gen - Perimeter Fence

Status

Unsatisfied

PRIOR TO FINAL BUILDING INSPECTION APPROVAL of the first WECS and tower, a six (6) foot high chain-link fence or three (3) strand barbed-wire fence and locking portals along the perimeter of APN 516-030-014 and the western perimeter of parcels APN 516-030-008 and APN 516-030-004 shall be verified to be in good condition so as to prevent and discourage unauthorized entry at all times during the life of this WECS permit. Should the project be near I-10, Highway 62 or Highway 111, the existing/proposed fence shall be verified to be setback a minimum of 400 feet from the respective highway right-of-way unless otherwise approved by the Planning Department based on security requirements. Any changes to the existing fence shall be subject to the approval of the Department of Building and Safety.

090 - Waste Resources

**Prior to Building Final
Inspection**

Gen - Waste Reporting Form and Receipts

Status

Unsatisfied

Prior to final building inspection, evidence (i.e., waste reporting form along with receipts or other types of verification) to demonstrate project compliance with the approved Waste Recycling Plan (WRP) shall be presented by the project proponent to the Planning Division of the Riverside County Department of Waste Resources. Receipts must clearly identify the amount of waste disposed and Construction and Demolition (C&D) materials recycled.

ADAMS BROADWELL JOSEPH & CARDOZO

A PROFESSIONAL CORPORATION

ATTORNEYS AT LAW

520 CAPITOL MALL, SUITE 350
SACRAMENTO, CA 95814-4721

TEL: (916) 444-6201

FAX: (916) 444-6208

kjones@adamsbroadwell.com

SO. SAN FRANCISCO OFFICE

601 GATEWAY BLVD., SUITE 1000
SO. SAN FRANCISCO, CA 94080

TEL: (650) 589-1660

FAX: (650) 589-5082

DANIEL L. CARDOZO
CHRISTINA M. CARO
THOMAS A. ENSLOW
TANYA A. GULESSERIAN
KYLE C. JONES
MARC D. JOSEPH
RACHAEL E. KOSS
NIRIT LOTAN
MILES F. MAURINO
COLLIN S. MCCARTHY
LAURA DEL CASTILLO
Of Counsel

November 26, 2018

Via Email and Overnight Mail

Jay Olivas
Riverside County Planning Department
77588 El Duna Court Suite H,
Palm Desert, CA 92211
jolivas@rivco.org

**Re: Comments on the Initial Study/Mitigated Negative Declaration
for Painted Hills Wind Repowering Project, WECS Permit No.
180001/Variance Case No. 180003**

Dear Mr. Olivas:

We write on behalf of California Unions for Reliable Energy ("CURE") to provide comments on the Initial Study/Mitigated Negative Declaration ("IS/MND")¹ prepared by Riverside County ("County") for the Painted Hills Wind Repowering Project ("Project"), proposed by Painted Hills, LLC, which is owned by Terra-Gen ("Applicant").

The Project proposes to decommission and remove approximately 291 existing commercial wind turbines and install up to 14 new commercial wind turbines up to 499-feet in height with a per turbine generating capacity of between 2.0 megawatts ("MW") and 4.2 MW, which is up to 58.8 total MW, on land within the Wind Energy Resource Zone. The Project will also install ancillary equipment, including meteorological towers up to 309-feet in height, new access roads, collector circuits, and substation.

Based on our review of the IS/MND, and available documents, we conclude that the IS/MND fails to comply with the requirements of the California Environmental Quality Act ("CEQA"). The IS/MND fails to describe the whole

¹ Environmental Assessment Form: Initial Study Number CEQ180059, County of Riverside, at 2 (Oct. 2018) (hereafter "IS/MND").
4449-003acp

November 26, 2018

Page 2

Project, fails to describe the existing setting upon which to measure impacts, fails to disclose and analyze the Project's potentially significant environmental impacts and fails to identify enforceable measures that can reduce those impacts to a less than significant level.

As explained in these comments, there is more than a fair argument that the Project will result in potentially significant public health impacts from construction emissions. The County may not approve the Project until it prepares an environmental impact report ("EIR") that adequately analyzes the Project's potentially significant direct, indirect and cumulative impacts, and incorporates all feasible mitigation measures to avoid or minimize these impacts.

These comments were prepared with the assistance of Phyllis Fox, Ph.D., PE.² Dr. Fox provides substantial evidence of potentially significant impacts that have not been adequately disclosed, analyzed, or mitigated. Dr. Fox's technical comments are attached hereto and are submitted to the County, in addition to the comments in this letter. Accordingly, the County must address and respond to Dr. Fox's comments separately.³

I. STATEMENT OF INTEREST

CURE is a coalition of labor organizations whose members construct, operate, and maintain powerplants and other industrial facilities throughout California. CURE encourages sustainable development of California's energy and natural resources. Environmental degradation destroys cultural and wildlife areas, consumes limited water resources, causes air and water pollution, and imposes other stresses on the environmental carrying capacity of the State. Environmental degradation also jeopardizes future jobs by making it more difficult and expensive for industry to expand in Riverside County, and by making it less desirable for businesses to locate and for people to live and recreate in the area. Continued environmental degradation can, and has, caused construction moratoriums and

² P. Fox, Comments on the Initial Study for the Painted Hills Wind Energy Repowering Project (November 26, 2018) (hereinafter, "Fox Comments"), Exhibit A (Dr. Fox's letter and CV are provided via email).

³ The Commenters reserve the right to supplement these comments at later hearings and proceedings related to this Project. Gov. Code § 65009(b); PRC § 21177(a); *Bakersfield Citizens for Local Control v. Bakersfield* (2004) 124 Cal. App. 4th 1184, 1199-1203; see *Galante Vineyards v. Monterey Water Dist.* (1997) 60 Cal. App. 4th 1109, 1121.

other restrictions on growth that, in turn, reduce future employment opportunities for CURE's participating organizations and their members. CURE therefore has a direct interest in enforcing environmental laws and minimizing project impacts that would degrade the environment.

CURE's participating organizations and their members also live, recreate, work, and raise families in Riverside County. Thus, CURE, its participating organizations and their members stand to be directly affected by the Project's adverse environmental and health impacts. Members may also work on the Project itself and would therefore be first in line to be exposed to any health and safety hazards that the Project may create.

II. AN EIR IS REQUIRED

CEQA requires that lead agencies analyze any project with potentially significant environmental impacts in an EIR.⁴ "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."⁵ 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."⁶

CEQA's purpose and goals must be met through the preparation of an EIR, except in certain limited circumstances.⁷ CEQA contains a strong presumption in favor of requiring a lead agency to prepare an EIR. This presumption is reflected in the "fair argument" standard. Under that standard, a lead agency "shall" prepare an EIR whenever substantial evidence in the whole record before the agency supports a fair argument that a project may have a significant effect on the environment.⁸

⁴ See Pub. Resources Code § 21000; CEQA Guidelines § 15002.

⁵ *Citizens of Goleta Valley v. Bd. of Supervisors* (1990) 52 Cal.3d 553, 564 (internal citations omitted).

⁶ *County of Inyo v. Yorty* (1973) 32 Cal.App.3d 795, 810.

⁷ See Pub. Resources Code § 21100.

⁸ Pub. Resources Code §§ 21080(d), 21082.2(d); CEQA Guidelines §§ 15002(k)(3), 15064(f)(1), (h)(1); *Laurel Heights Improvement Assn. v. Regents of the Univ. of Cal.* (1993) 6 Cal.4th 1112, 1123; *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 75, 82; *Stanislaus Audubon Society, Inc. v. County of Stanislaus* (1995) 33 Cal.App.4th 144, 150-151; *Quail Botanical Gardens Found., Inc. v. City of Encinitas* (1994) 29 Cal.App.4th 1597, 1601-1602.

In contrast, a mitigated negative declaration may be prepared only when, after preparing an initial study, a lead agency determines that a project may have a significant effect on the environment, but:

(1) revisions in the project plans or proposals made by, or agreed to by, the applicant before the proposed negative declaration and initial study are released for public review *would avoid the effects or mitigate the effects to a point where clearly no significant effect on the environment would occur*, and (2) there is *no substantial evidence* in light of the whole record before the public agency that the project, as revised, may have a significant effect on the environment.⁹

Courts have held that if “no EIR has been prepared for a nonexempt project, but substantial evidence in the record supports a fair argument that the project may result in significant adverse impacts, the proper remedy is to order preparation of an EIR.”¹⁰ The fair argument standard creates a “low threshold” favoring environmental review through an EIR, rather than through issuance of a negative declaration.¹¹ An agency’s decision not to require an EIR can be upheld only when there is no credible evidence to the contrary.¹²

“Substantial evidence” required to support a fair argument is defined as “enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached.”¹³ According to the CEQA Guidelines, when determining whether an EIR is required, the lead agency is required to apply the principles set forth in Section 15064, subdivision (f):

⁹ Pub. Resources Code § 21064.5 (emphasis added).

¹⁰ See, e.g., *Communities for a Better Environment v. South Coast Air Quality Management Dist.* (2010) 48 Cal.4th 310, 319-320.

¹¹ *Citizens Action to Serve All Students v. Thornley* (1990) 222 Cal.App.3d 748, 754.

¹² *Sierra Club v. County of Sonoma* (1992) 6 Cal.App.4th, 1307, 1318; see also *Friends of B Street v. City of Hayward* (1980) 106 Cal.App.3d 988, 1002 (“If there was substantial evidence that the proposed project might have a significant environmental impact, evidence to the contrary is not sufficient to support a decision to dispense with preparation of an EIR and adopt a negative declaration, because it could be ‘fairly argued’ that the project might have a significant environmental impact”).

¹³ CEQA Guidelines § 15384(a).

4449-003acp

[I]n marginal cases where it is not clear whether there is substantial evidence that a project may have a significant effect on the environment, the lead agency shall be guided by the following principle: If there is disagreement among expert opinion supported by facts over the significance of an effect on the environment, the Lead Agency shall treat the effect as significant and shall prepare an EIR.

Furthermore, CEQA documents, including EIRs and MNDs, must mitigate significant impacts through measures that are "fully enforceable through permit conditions, agreements, or other legally binding instruments."¹⁴ Deferring formulation of mitigation measures to post-approval studies is generally impermissible.¹⁵ Mitigation measures adopted after Project approval deny the public the opportunity to comment on the Project as modified to mitigate impacts.¹⁶ If identification of specific mitigation measures is impractical until a later stage in the Project, specific performance criteria must be articulated and further approvals must be made contingent upon meeting these performance criteria.¹⁷ Courts have held that simply requiring a project applicant to obtain a future report and then comply with the report's recommendations is insufficient to meet the standard for properly deferred mitigation.¹⁸

With respect to this Project, the IS/MND fails to satisfy the basic purposes of CEQA. The County failed to adequately investigate, analyze, and disclose the Project's potentially significant impacts. Therefore, the County's conclusions that the Project will have less than significant air quality and public health impacts are unsupported.¹⁹ Whereas the County lacks substantial evidence to support its conclusions, Dr. Fox provides substantial evidence that the Project may result in potentially significant public health impacts from construction emissions.²⁰

¹⁴ CEQA Guidelines § 15126.4(a)(2).

¹⁵ *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 308-309; Pub. Resources Code § 21061.

¹⁶ *Gentry v. City of Murrieta* (1995) 36 Cal.App.4th 1359, 1393; *Quail Botanical*, *supra*, 29 Cal.App.4th at p. 1604, fn. 5.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Pub. Resources Code § 21064.5; MND, pp. 31-36.

²⁰ Fox Comments, p. 2.

Therefore, a fair argument can be made that the Project may cause significant impacts requiring the preparation of an EIR.

III. THE IS/MND FAILS TO INCLUDE A COMPLETE PROJECT DESCRIPTION

The IS/MND does not meet CEQA's requirements because it fails to include a complete project description, rendering the entire analysis inadequate. Without a complete project description, the environmental analysis under CEQA will be impermissibly narrow, thus minimizing the Project's impacts and undercutting public review.²¹

CEQA places the burden of environmental investigation on the government rather than the public. Accordingly, a lead agency may not hide behind its failure to obtain a complete and accurate project description.²² CEQA requires that the project description contained in a CEQA document that is circulated for public review contain sufficiently detailed information to permit a meaningful evaluation and review of the potential environmental impacts of a proposed project.²³ California courts have repeatedly held that "an accurate, stable and finite project description is the sine qua non of an informative and legally sufficient [CEQA document]."²⁴ In contrast, an inaccurate or incomplete project description renders the analysis of environmental impacts inherently unreliable. Without a complete project description, the environmental analysis under CEQA will be impermissibly narrow, thus minimizing the project's impacts and undercutting public review.²⁵

A. The IS/MND Fails to Describe the Transportation of the New Turbine Blades to the Project Site

The Project consist of numerous large components, including 213-foot wind turbine blades.²⁶ The IS/MND is silent as to how these components will be transported to the Project site. Wind turbine blades cannot be manufactured on-

²¹ See, e.g., *Laurel Heights Improvement Assn. v. Regents of the Univ. of Cal.* (1988) 47 Cal.3d 376.

²² *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 311.

²³ 14 Cal. Code Regs. § 15124 (hereafter "CEQA Guidelines").

²⁴ *County of Inyo v. City of Los Angeles* (3d Dist. 1977) 71 Cal.App.3d 185, 193.

²⁵ See, e.g., *Laurel Heights Improvement Association v. Regents of the University of California* (1988) 47 Cal.3d 376.

²⁶ IS/MND, at 2.

4449-003acp

site, thus requiring transport.²⁷ Furthermore, the nearest blade manufacturer to the Project site is in Colorado.²⁸ This means that the blades may have to travel over land, either a far distance from other states, or from a nearby port, such as Long Beach. Transportation of such long pieces of equipment is difficult, requiring careful planning to ensure they are routed through turns properly. These large blades will require several diesel-powered trucks to move and may have to operate very slowly.²⁹

Transporting large components of the Project has the potential to lead to serious impacts. Traffic could be severely delayed moving such long blades, especially if they are routed through existing congested traffic corridors, such as Los Angeles. The use of diesel engines could increase exposure sensitive populations to Toxic Air Contaminants ("TACs"), which can lead to heightened cancer risks to those who live and work along the route.³⁰

Depending on which route is selected, different homes and schools will be affected. Residents and school patrons may be required to modify their own schedules and practices to accommodate, or avoid the adverse effects of, the trucks in their neighborhood. The County must also analyze the impacts that each potential route will cause to the differently affected neighborhoods and must identify appropriate mitigation measures that will mitigate significant impacts to each neighborhood.

B. The IS/MND Fails to Accurately Describe the Decommissioning of the Existing 291 Wind Turbines

The IS/MND discusses the decommission of existing wind turbines from the Project site but does not disclose disposal of the existing wind turbines.³¹ Cutting up of wind turbines can release hazardous fibers into the air, which can negatively

²⁷ See Next-Generation Wind Energy Technologies and their Environmental Implications, California Energy Commission (Oct. 29, 2018) available at

<https://efiling.energy.ca.gov/Lists/DocketLog.aspx?docketnumber=19-ERDD-01>.

²⁸ Ryan Wiser and Mark Bolinger, 2017 Wind Technologies Market Report, United States Department of Energy, 12 (Aug. 2018) available at

https://emp.lbl.gov/sites/default/files/2017_wind_technologies_market_report.pdf.

²⁹ Fox Comments at p. 11.

³⁰ Fox Comments at p. 11.

³¹ Fox Comments at p. 8.

impact public health. The IS/MND fails to discuss where the blades will be cut up, what equipment will be used, and where material would be shipped for recycling.³² Moreover, the IS/MND discusses recycling the blade material, however this material is not suitable for recycling. The IS/MND must accurately describe the decommissioning and disposal of the existing wind turbines.

All phases of the Project — the “whole of an action” — must be evaluated in a single EIR. Accordingly, the District must revise and recirculate the environmental document to include a description of the Project transporting components to and from the Project site.

IV. THE IS/MND FAILS TO ADEQUATELY ESTABLISH THE EXISTING ENVIRONMENTAL SETTING AGAINST WHICH THE COUNTY IS REQUIRED TO ANALYZE THE PROJECT'S POTENTIALLY SIGNIFICANT IMPACTS

The IS/MND describes the existing environmental setting inaccurately and incompletely, thereby skewing the County's impact analysis. The existing environmental setting is the starting point from which the lead agency must measure whether a proposed Project may cause a significant environmental impact.³³ CEQA defines the environmental setting as the physical environmental conditions in the vicinity of the project, as they exist at the time the notice of preparation is published, from both a local and regional perspective.³⁴

Describing the environmental setting accurately and completely for each environmental condition in the vicinity of the Project is critical to an accurate and meaningful evaluation of environmental impacts. The importance of having a stable, finite and fixed environmental setting for purposes of an environmental analysis was recognized decades ago.³⁵ Today, the courts are clear that “[b]efore the impacts of a Project can be assessed and mitigation measures considered, an [EIR]

³² Fox Comments at pp. 8-9.

³³ See, e.g., *Communities for a Better Env't v. S. Coast Air Quality Mgmt. Dist.* (March 15, 2010) 48 Cal.4th 310, 316; *Fat v. City of Sacramento* (2002) 97 Cal.App.4th 1270, 1278, citing Remy, et al.; Guide to the Calif. Environmental Quality Act (1999) p. 165.

³⁴ CEQA Guidelines §15125, subd. (a); *Riverwatch v. City of San Diego* (1999) 76 Cal.App.4th 1428, 1453.

³⁵ *City of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185.
4449-003acp

must describe the existing environment. It is only against this baseline that any significant environmental effects can be determined.”³⁶

An EIR must also describe the existing environmental setting in sufficient detail to enable a proper analysis of project impacts.³⁷ The CEQA Guidelines provide that “[k]nowledge of the regional setting is critical to the assessment of environmental impacts.”³⁸ This level of detail is necessary to “permit the significant effects of the project to be considered in the full environmental context.”³⁹

The IS/MND fails to accurately and adequately describe the environmental setting to enable the County to properly assess transportation, air and public health impacts from the Project. Decision makers cannot determine the Project’s impacts, and in turn, apply appropriate mitigation for those impacts, without an accurate description of the environmental setting. The County must gather the relevant data and revise the IS/MND to include an accurate and complete description of the existing environmental setting.

A. The IS/MND Fails to Establish the Environmental Setting for Traffic, the Air Basin, and Sensitive Receptors Along the Blade Transit Route

As stated above, the IS/MND is silent on how the Project will transport 213-foot-long wind turbine blades to the Project site.⁴⁰ What is also lacking is an adequate description of existing traffic patterns, the air basin, and sensitive receptors along the route so that there can be a comparison between the existing setting and effects on traffic and air quality from the Project on sensitive receptors.⁴¹ Since the IS/MND fails to describe existing traffic patterns, the air basin and sensitive receptors, the County failed to establish the existing setting and cannot make an effective determination of the Project’s impacts and mitigation required to address those impacts.⁴²

³⁶ *City of Amador v. El Dorado City Water Agency* (1999) 76 Cal.App.4th 931, 952.

³⁷ *Galante Vineyards v. Monterey Peninsula Water Mgmt. Dist.* (1997) 60 Cal.App.4th 1109, 1121-22.

³⁸ CEQA Guidelines § 15125, subd.(d).

³⁹ *Id.*

⁴⁰ Fox Comments at p. 11.

⁴¹ Fox Comments at p. 11.

⁴² Fox Comments at p. 11.

4449-003acp

V. SUBSTANTIAL EVIDENCE SUPPORTS A FAIR ARGUMENT THAT THE PROJECT MAY RESULT IN SIGNIFICANT IMPACTS THAT REQUIRE THE COUNTY TO PREPARE AN EIR

Under CEQA, a lead agency must prepare an EIR whenever substantial evidence in the whole record before the agency supports a fair argument that a project may have a significant effect on the environment.⁴³ The fair argument standard creates a “low threshold” favoring environmental review through an EIR, rather than through issuance of a negative declaration.⁴⁴ An agency’s decision not to require an EIR can be upheld only when there is no credible evidence to the contrary.⁴⁵ Substantial evidence can be provided by technical experts or members of the public.⁴⁶ “If a lead agency is presented with a fair argument that a project may have a significant effect on the environment, the lead agency shall prepare an EIR even though it may also be presented with other substantial evidence that the project will not have a significant effect.”⁴⁷

A. The IS/MND Fails to Adequately Disclose, Analyze and Mitigate the Project’s Potentially Significant Public Health Risks.

The IS/MND fails as an information disclosure document under CEQA by failing to adequately disclose, analyze, and mitigate the Project’s public health impacts. The County concludes that “the toxics impact related to construction would

⁴³ Pub. Resources Code § 21082.2; CEQA Guidelines § 15064(f), (h); *Laurel Heights II*, *supra*, 6 Cal. 4th at p. 1123; *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal. 3d 68, 75, 82; *Stanislaus Audubon Society, Inc. v. County of Stanislaus* (1995) 33 Cal.App.4th 144, 150-151; *Quail Botanical*, *supra*, 29 Cal.App.4th at pp. 1601-1602.

⁴⁴ *Citizens Action to Serve All Students v. Thornley* (1990) 222 Cal.App.3d 748, 754.

⁴⁵ *Sierra Club v. County of Sonoma* (1992) 6 Cal.App.4th, 1307, 1318; *see also Friends of B Street*, *supra*, 106 Cal.App.3d at p. 1002 (“If there was substantial evidence that the proposed project might have a significant environmental impact, evidence to the contrary is not sufficient to support a decision to dispense with preparation of an [environmental impact report] and adopt a negative declaration, because it could be ‘fairly argued’ that the project might have a significant environmental impact”).

⁴⁶ *See, e.g., Citizens for Responsible and Open Government v. City of Grand Terrace* (2008) 160 Cal.App.4th 1323, 1340 (substantial evidence regarding noise impacts included public comments at hearings that selected air conditioners are very noisy); *see also Architectural Heritage Assn. v. County of Monterey*, 122 Cal.App.4th 1095, 1117-1118 (substantial evidence regarding impacts to historic resource included fact-based testimony of qualified speakers at the public hearing); *Gabric v. City of Rancho Palos Verdes* (1977) 73 Cal.App.3d 183, 199.

⁴⁷ CEQA Guidelines § 15062(f).

4449-003acp

be less than significant.”⁴⁸ The County lacks substantial evidence to support this conclusion. Instead, Dr. Fox provides substantial evidence that the public health risk may be significant.⁴⁹

CEQA requires lead agencies to prepare risk assessments to evaluate the nature and extent of the health hazards posed by exposure to toxic materials released by a project. CEQA Guidelines section 15126.2(a) expressly requires a CEQA document to discuss the “health and safety problems caused by the physical changes that a project will precipitate.”⁵⁰ Numerous cases have held that CEQA must analyze human health impacts. For example, in *Communities for a Better Environment v. South Coast Air Quality Management District*,⁵¹ the Supreme Court held that a Mitigated Negative Declaration for a refinery was inadequate for failure to analyze nitrogen oxide emissions, pollutants known to have significant effects on human health.⁵²

The Courts of Appeal have repeatedly held that a CEQA document must analyze impacts of projects on human health. In *Communities for a Better Environment v. City of Richmond*, the court held that a CEQA document is inadequate where it “does not address the public health or other environmental consequences of processing heavier crude [thereby emitting Toxic Air Contaminants (“TAC”)], let alone analyze, quantify, or propose measures to mitigate those impacts.”⁵³ In *Bakersfield Citizens for Local Control v. City of Bakersfield*,⁵⁴ the court held that an EIR for a commercial shopping center was inadequate because it failed to correlate adverse air quality impacts to resulting adverse health impacts on surrounding communities. The court explained:

⁴⁸ DEIR, § 4.2, p. 31.

⁴⁹ Fox Comments, p. 2.

⁵⁰ CEQA Guidelines, § 15126.2(a).

⁵¹ *Communities for a Better Environment v. South Coast Air Quality Management District*, (2010) 48 Cal. 4th 310, 317.

⁵² 48 Cal.4th at 317.

⁵³ *Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70, 82. See also *Californians for Alternatives to Toxics v. Cal. Dep’t of Food & Agric.* (2006) 136 Cal.App.4th 1, 16, (EIR on statewide application of pesticide was inadequate when it failed to independently evaluate risks of toxic exposure.)

⁵⁴ (2004) 124 Cal.App.4th 1184, 1219-20 (“on remand, the health impacts resulting from the adverse air quality impacts must be identified and analyzed in the new EIR’s.”).

4449-003acp

[The] City's failure to...correlate the adverse air quality impacts to resulting adverse health consequences, cannot be dismissed as harmless or insignificant defects. As a result of these omissions, meaningful assessment of the true scope of numerous potentially serious adverse environmental effects was thwarted. No discrete or severable aspects of the projects are unaffected by the omitted analyses; the defects relate to the shopping centers in their entirety, not just to one specific retailer. These deficiencies precluded informed public participation and decision making.⁵⁵

In *Berkeley Keep Jets Over the Bay Com. v. Bd. of Port Comrs.*,⁵⁶ the court held that an EIR must include a "human health risk assessment."⁵⁷ In *Berkeley Jets*, the Port of Oakland approved a development plan for the Oakland International Airport. The EIR admitted that the Project would result in an increase in the release of TACs, which were known to cause both carcinogenic and adverse noncarcinogenic health effects.⁵⁸ The EIR adopted mitigation measures to reduce TAC emissions but failed to perform a health risk assessment to quantify the Project's impacts on human health. The court held that the mitigation measures alone were insufficient, and that the Port had a duty to analyze the health risks associated with exposure to TACs:

The Port has not cited us to any reasonably conscientious effort it took either to collect additional data or to make further inquiries of environmental or regulatory agencies having expertise in the matter. These failures flout the requirement that the lead agency consult "with all responsible agencies and with any other public agency which has jurisdiction by law over natural resources affected by the project" (§ 21080.3, subd. (a).) At the very least, the documents submitted by the public raised substantial questions about the project's effects on the environment and the unknown health risks to the area's residents...the Port has not offered any justification why more definitive information could not have been provided....The EIR's approach of simply labeling the effect "significant" without accompanying analysis of the project's impact on the health of the Airport's employees and nearby

⁵⁵ *Id.*, at 1220-21.

⁵⁶ *Berkeley Keep Jets Over the Bay Com. v. Bd. of Port Comrs.* ("Berkeley Jets") (2001) 91 Cal.App.4th 1344.

⁵⁷ *Id.*, at 1369.

⁵⁸ *Id.*, at 1364.

4449-003acp

residents is inadequate to meet the environmental assessment requirements of CEQA.⁵⁹

Here, the County is required to conduct an assessment of the Project's potentially significant public health impacts. As in *Berkeley Jets*, there is no dispute that the Project will use off-road diesel construction equipment and on-road heavy-duty diesel trucks that generate Diesel Particulate Matter ("DPM") emissions.⁶⁰ The IS/MND identifies DPM as the main TAC of concern.⁶¹ Construction would occur near sensitive receptors⁶² over a period of approximately 18 months.⁶³ There is also no dispute that the County did not prepare an assessment of the health risks associated with that exposure. This violates CEQA's requirement that the lead agency correlate the adverse air quality impacts generated by a project to their resulting adverse health consequences.⁶⁴

The courts may not look for "perfection" in a CEQA document, but do expect "adequacy, completeness, and a good faith effort at full disclosure [in an EIR]."⁶⁵ The County has failed to meet these requirements. Dr. Fox explains that health risk assessments are routinely performed for construction projects and due to the proximity to sensitive receptors and duration of construction.⁶⁶ The failure to prepare a health risk assessment is a glaring omission. The County must prepare a health risk assessment to adequately disclose, analyze, and mitigate the Project's public health risks and disclose those significant risks in a revised and recirculated document.

⁵⁹ *Id.* at 1370-71.

⁶⁰ Fox Comments, p. 2.

⁶¹ Fox Comments, p. 2.

⁶² Fox Comments, p. 2 (some sensitive receptors are less than 25 meters from excavation work).

⁶³ DEIR, § 4.2, p. 31.

⁶⁴ *Berkeley Jets*, 91 Cal.App.4th at 1370-71; DEIR, § 4.2, pp. 23-24 (identifying significant unmitigated construction emissions)

⁶⁵ CEQA Guidelines, § 15151.

⁶⁶ Fox Comments, p. 5.

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

Rather than conduct an adequate analysis of odor impacts from construction, the IS/MND merely concludes that odor impacts would be less than significant. The County's conclusion is flawed for several reasons.

First, CEQA requires a lead agency to identify all potentially significant environmental effects. Significant effects may be "both short-term and long-term."⁶⁷ Thus, even temporary Project impacts may have significant effects on the environment that require mitigation.⁶⁸ CEQA does not permit the County to dismiss odor impacts on the basis that they are "temporary."

Second, the County lacks substantial evidence to support its less-than-significant impact conclusion. Project construction will result in diesel exhaust.⁶⁹ As Dr. Fox explains, the odors associated with diesel exhaust "are characterized by offensive odors."⁷⁰ Yet, the IS/MND does not contain any analysis at all to support its conclusion that odor impacts would not be significant.⁷¹ The only way to conclude that odor impacts are insignificant is to use air dispersion modeling to estimate ambient concentrations of DPM at nearby sensitive receptors and compare the resulting concentrations to DPM odor thresholds.⁷² In any case, the County conducted no analysis whatsoever. Thus, the IS/MND fails as an informational document under CEQA and the County lacks substantial evidence to support its conclusion.

Whereas the IS/MND lacks substantial evidence to support its conclusion, Dr. Fox provides substantial evidence based on her expert opinion that odor impacts will be significant.⁷³ The County admits that the primary source of odor anticipated from the construction of the proposed Project would be exhaust emissions from the diesel equipment. Dr. Fox comments, "[b]ased on my personal experience at construction sites, residential areas are close enough to Project construction sites

⁶⁷ CEQA Guidelines, § 15126.2(a).

⁶⁸ CEQA Guidelines, § 15126.2(a).

⁶⁹ Fox Comments, p. 5.

⁷⁰ Fox Comments, p. 6.

⁷¹ Fox Comments, p. 6.

⁷² Fox Comments, p. 7.

⁷³ CEQA Guidelines, § 15384.

4449-003acp

for residents to smell noxious diesel and other exhaust fumes.”⁷⁴ Furthermore, mitigation is available and should be required to reduce the significant odor impact from all construction within at least 1,000 feet of sensitive receptors.⁷⁵ For example, the construction equipment can be equipped with diesel oxidation catalysts, which eliminate odors.⁷⁶

The IS/MND fails as an information disclosure document by failing to adequately analyze and disclose the Project’s potentially significant odor impacts. Consequently, the County must revise and recirculate the analysis in a draft EIR to adequately disclose, analyze and mitigate the Project’s significant odor impact.

C. The IS/MND Underestimates Potentially Significant Construction Emissions

The IS/MND contains numerous flaws in its air quality analysis, rendering the analysis unreliable and the impacts underestimated. The County must revise the air quality analysis to account for all sources of construction emissions and operational emissions in a recirculated environmental document.

The IS/MND omits highly relevant information from its air quality analysis. As a result, the IS/MND underestimates construction emissions. Dr. Fox explains that the CalEEMod fails to account for all sources of PM10 and PM2.5 construction emissions.

First, CalEEMod omits windblown dust from graded areas and storage piles and fugitive dust from off-road travel.⁷⁷ As Dr. Fox explains, these emissions must be separately calculated using a different tool, the U.S. EPA Compilation of Air Pollution Emissions Factors AP-42.⁷⁸ Once separately calculated, those emissions must be added to the CalEEMod total.⁷⁹ Dr. Fox provides substantial evidence that windblown dust from graded areas and storage piles and fugitive dust from off-road

⁷⁴ Fox Comments, p. 6.

⁷⁵ Fox Comments, p. 8.

⁷⁶ Fox Comments, p. 8.

⁷⁷ Fox Comments, p. 12.

⁷⁸ Fox Comments, p. 12.

⁷⁹ Fox Comments, p. 12.

travel can be the major sources of PM10 and PM2.5 emissions from construction projects.⁸⁰

Dr. Fox adds that dust emissions during construction are unique to individual sites. Here, the Project is sited on desert land in Coachella Flats, which will create greater particulate matter emissions than default conditions.⁸¹ As such, the default conditions should have been calibrated to reflect the actual site.⁸²

The IS/MND omits sources of emissions from cutting up and dismantling 291 existing wind turbines. The only source of emissions from decommissioning listed in the IS/MND addresses off-road construction impacts. A major source of emissions has been left out of decommissioning from fibers that can be released during cutting up of turbine blades, and any industrial equipment used during decommissioning.⁸³

The IS/MND states that the existing turbine blades will be recycled. No analysis is provided including the emissions from disposal of the cut-up blades.⁸⁴ If they can be recycled, then the IS/MND must determine emissions of moving the material to the recycling center.⁸⁵

Finally, the IS/MND severely underestimates emissions from moving the large new turbines to the site. These turbines would require non-standard heavy-duty transportation, including ships, barges, rail, trucks, or a combination thereof.⁸⁶ No analysis is attempted to determine the impacts from this activity.⁸⁷

This underestimation of construction emissions fails to provide the public with accurate information regarding the scope and severity of potentially significant impacts to air quality. The County must correct its analysis and recirculate the revised analysis to reflect these potentially significant impacts.

⁸⁰ Fox Comments, p. 12.

⁸¹ Fox Comments, p. 13.

⁸² Fox Comments, p. 13.

⁸³ Fox Comments, p. 13.

⁸⁴ Fox Comments, pp. 13-14.

⁸⁵ Fox Comments, p. 14.

⁸⁶ Fox Comments, p. 14.

⁸⁷ Fox Comments, p. 14.

D. The IS/MND Underestimates the Project's Potentially Significant Valley Fever Impacts and Lacks Appropriate Mitigation

The IS/MND summarily dismisses the Project's threat of Valley Fever to workers and sensitive receptors in the project area, while failing to implement feasible mitigation measures to lessen its impact. Valley Fever is a disease that can spread when people are exposed to spores during ground disturbance, such as this Project's construction.⁸⁸ Impacts to human health are severe, including possible death, and there is no known cure.⁸⁹ Sensitive receptors near the Project site, including workers and those who live nearby are at risk from exposure from disturbed dust, both during construction and during high-wind events.⁹⁰

Despite this risk, the IS/MND does not include any mitigation to protect the public.⁹¹ Dr. Fox has identified several mitigation measures that can feasibly be implemented to reduce the Project's potentially significant public health impacts from Valley Fever, including:

- 1) Reevaluating and updating the Injury and Illness Prevention Program to ensure Valley Fever safeguards are included,
- 2) Training all employees on Valley Fever related issues,
- 3) Controlling dust exposure,
- 4) Preventing transporting deadly spores out of endemic areas, and
- 5) Improving medical surveillance for all employees.⁹²

The County's lack of adequate analysis of potentially significant impacts from the Project exposing people to Valley Fever and feasible mitigation for Valley Fever

⁸⁸ Fox Comments, p. 20.

⁸⁹ Fox Comments, p. 22.

⁹⁰ Fox Comments, p. 21.

⁹¹ Fox Comments, pp. 24-25.

⁹² Fox Comments, pp. 25-27.

November 26, 2018
Page 18

renders the IS/MND insufficient under CEQA. The County must revise and recirculate an EIR to disclose and mitigate these serious impacts.

II. CONCLUSION

Substantial evidence supports more than a fair argument that the Project may result in potentially significant adverse public health impacts that were not identified in the IS/MND, and thus have not been adequately analyzed or mitigated. We urge the County to fulfill its responsibilities under CEQA by withdrawing the IS/MND and preparing a legally adequate EIR to address the potentially significant impacts described in this comment letter and the attached letter from Dr. Fox. This is the only way the County and the public will be able to ensure that the Project's potentially significant environmental impacts are mitigated to less than significant levels.

Sincerely,



Kyle Jones

KCJ:acp

Attachments

4449-003acp

ADAMS BROADWELL JOSEPH & CARDOZO

A PROFESSIONAL CORPORATION

ATTORNEYS AT LAW

520 CAPITOL MALL, SUITE 350
SACRAMENTO, CA 95814-4721

TEL: (916) 444-6201
FAX: (916) 444-6209

kjones@adamsbroadwell.com

SO. SAN FRANCISCO OFFICE

601 GATEWAY BLVD., SUITE 1000
SO. SAN FRANCISCO, CA 94080

TEL: (650) 589-1660
FAX: (650) 589-5062

DANIEL L. CARDOZO
CHRISTINA M. CARO
THOMAS A. ENSLOW
TANYA A. GULESSERIAN
KYLE C. JONES
MARC D. JOSEPH
RACHAEL E. KOSS
NIRIT LOTAN
MILES F. MAURINO
COLLIN S. MCCARTHY

LAURA DEL CASTILLO
Of Counsel

November 27, 2018

Via Email and Overnight Mail

Jay Olivas
Riverside County Planning Department
77588 El Duna Court Suite H,
Palm Desert, CA 92211
jolivas@rivco.org

**Re: Supplemental Comments on the Initial Study/Mitigated Negative
Declaration for Painted Hills Wind Repowering Project, WECS
Permit No. 180001/Variance Case No. 180003**

Dear Mr. Olivas:

We write on behalf of California Unions for Reliable Energy ("CURE") to provide supplemental comments on the Initial Study/Mitigated Negative Declaration ("IS/MND")¹ prepared by Riverside County ("County") for the Painted Hills Wind Repowering Project ("Project"), proposed by Painted Hills, LLC, which is owned by Terra-Gen ("Applicant"). These comments supplement and incorporate by reference CURE's prior comments on the Project.²

The Project proposes to decommission and remove approximately 291 existing commercial wind turbines and install up to 14 new commercial wind turbines up to 499-feet in height with a per turbine generating capacity of between 2.0 megawatts ("MW") and 4.2 MW, which is up to 58.8 total MW, on land within the Wind Energy Resource Zone near Whitewater. The Project will also install ancillary equipment, including meteorological towers up to 309-feet in height, new access roads, collector circuits, and a substation.

¹ Environmental Assessment Form: Initial Study Number CEQ180059, County of Riverside, at 2 (Oct. 2018) (hereafter "IS/MND").

² CURE submitted comments on the Project to the County of Riverside Planning Commission on November 26, 2018.

November 27, 2018

Page 2

Based on our review of the IS/MND, and available documents, we concluded in our November 26, 2018 comment that the IS/MND fails to comply with the requirements of the California Environmental Quality Act ("CEQA"). The IS/MND fails to describe the whole Project, fails to describe the existing setting upon which to measure impacts, fails to disclose and analyze the Project's potentially significant environmental impacts and fails to identify enforceable measures that can reduce those impacts to a less than significant level. Our previous comment addressed issues related to air quality, public health, and traffic.

As explained in these comments, there is more than a fair argument that the Project will also result in potentially significant impacts to biological resources. In addition, the IS/MND fails to describe the whole Project and the existing setting upon which to measure impacts to biological resources, as required by CEQA. The County may not approve the Project until it prepares an environmental impact report ("EIR") that adequately analyzes the Project's potentially significant direct, indirect and cumulative impacts, and incorporates all feasible mitigation measures to avoid or minimize these impacts.

These comments were prepared with the assistance of Biologist and Independent Environmental Consultant Renée Owens.³ Ms. Owens provides substantial evidence of potentially significant impacts that the County failed to adequately disclose, analyze, and mitigate. Ms. Owens' technical comments are attached hereto and are submitted to the County, in addition to the comments in this letter. Accordingly, the County must address and respond to Ms. Owens' comments separately.⁴

³ Letter from Renée Owens to Kyle Jones (Nov. 27, 2018) Comments for the Painted Hills Wind Repowering Project Initial Study, Commercial WECS Permit No. 180001 / Variance Case No. 180003 – Intent to Adopt a Mitigated Negative Declaration – CEQ180059 (hereinafter, "Owens' Comments"), **Exhibit A** (Ms. Owens' letter and CV are provided via email).

⁴ The Commenters reserve the right to supplement these comments at later hearings and proceedings related to this Project. Gov. Code § 65009(b); PRC § 21177(a); *Bakersfield Citizens for Local Control v. Bakersfield* (2004) 124 Cal. App. 4th 1184, 1199-1203; see *Galante Vineyards v. Monterey Water Dist.* (1997) 60 Cal. App. 4th 1109, 1121.

I. STATEMENT OF INTEREST

CURE is a coalition of labor organizations whose members construct, operate, and maintain powerplants and other industrial facilities throughout California. CURE encourages sustainable development of California's energy and natural resources. Environmental degradation destroys cultural and wildlife areas, consumes limited water resources, causes air and water pollution, and imposes other stresses on the environmental carrying capacity of the State. Environmental degradation also jeopardizes future jobs by making it more difficult and expensive for industry to expand in Riverside County, and by making it less desirable for businesses to locate and for people to live and recreate in the area. Continued environmental degradation can, and has, caused construction moratoriums and other restrictions on growth that, in turn, reduce future employment opportunities for CURE's participating organizations and their members. CURE therefore has a direct interest in enforcing environmental laws and minimizing project impacts that would degrade the environment.

CURE's participating organizations and their members also live, recreate, work, and raise families in Riverside County. Thus, CURE, its participating organizations and their members stand to be directly affected by the Project's adverse environmental and health impacts. Members may also work on the Project itself and would therefore be first in line to be exposed to any health and safety hazards that the Project may create.

II. AN EIR IS REQUIRED

CEQA requires that lead agencies analyze any project with potentially significant environmental impacts in an EIR.⁵ "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."⁶ 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."⁷

⁵ See Pub. Resources Code § 21000; CEQA Guidelines § 15002.

⁶ *Citizens of Goleta Valley v. Bd. of Supervisors* (1990) 52 Cal.3d 553, 564 (internal citations omitted).

⁷ *County of Inyo v. Yorty* (1973) 32 Cal.App.3d 795, 810.

CEQA's purpose and goals must be met through the preparation of an EIR, except in certain limited circumstances.⁸ CEQA contains a strong presumption in favor of requiring a lead agency to prepare an EIR. This presumption is reflected in the "fair argument" standard. Under that standard, a lead agency "shall" prepare an EIR whenever substantial evidence in the whole record before the agency supports a fair argument that a project may have a significant effect on the environment.⁹

In contrast, a mitigated negative declaration may be prepared only when, after preparing an initial study, a lead agency determines that a project may have a significant effect on the environment, but:

(1) revisions in the project plans or proposals made by, or agreed to by, the applicant before the proposed negative declaration and initial study are released for public review *would avoid the effects or mitigate the effects to a point where clearly no significant effect on the environment would occur*, and (2) there is *no substantial evidence* in light of the whole record before the public agency that the project, as revised, *may* have a significant effect on the environment.¹⁰

Courts have held that if "no EIR has been prepared for a nonexempt project, but substantial evidence in the record supports a fair argument that the project may result in significant adverse impacts, the proper remedy is to order preparation of an EIR."¹¹ The fair argument standard creates a "low threshold" favoring environmental review through an EIR, rather than through issuance of a negative

⁸ See Pub. Resources Code § 21100.

⁹ Pub. Resources Code §§ 21080(d), 21082.2(d); CEQA Guidelines §§ 15002(k)(3), 15064(f)(1), (h)(1); *Laurel Heights Improvement Assn. v. Regents of the Univ. of Cal.* (1993) 6 Cal.4th 1112, 1123; *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 75, 82; *Stanislaus Audubon Society, Inc. v. County of Stanislaus* (1995) 33 Cal.App.4th 144, 150-151; *Quail Botanical Gardens Found., Inc. v. City of Encinitas* (1994) 29 Cal.App.4th 1597, 1601-1602.

¹⁰ Pub. Resources Code § 21064.5 (emphasis added).

¹¹ See, e.g., *Communities for a Better Environment v. South Coast Air Quality Management Dist.* (2010) 48 Cal.4th 310, 319-320.

declaration.¹² An agency's decision not to require an EIR can be upheld only when there is no credible evidence to the contrary.¹³

"Substantial evidence" required to support a fair argument is defined as "enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached."¹⁴ According to the CEQA Guidelines, when determining whether an EIR is required, the lead agency is required to apply the principles set forth in Section 15064, subdivision (f):

[I]n marginal cases where it is not clear whether there is substantial evidence that a project may have a significant effect on the environment, the lead agency shall be guided by the following principle: If there is disagreement among expert opinion supported by facts over the significance of an effect on the environment, the Lead Agency shall treat the effect as significant and shall prepare an EIR.

Furthermore, CEQA documents, including EIRs and MNDs, must mitigate significant impacts through measures that are "fully enforceable through permit conditions, agreements, or other legally binding instruments."¹⁵ Deferring formulation of mitigation measures to post-approval studies is generally impermissible.¹⁶ Mitigation measures adopted after Project approval deny the public the opportunity to comment on the Project as modified to mitigate impacts.¹⁷ If identification of specific mitigation measures is impractical until a later stage in the Project, specific performance criteria must be articulated and further approvals

¹² *Citizens Action to Serve All Students v. Thornley* (1990) 222 Cal.App.3d 748, 754.

¹³ *Sierra Club v. County of Sonoma* (1992) 6 Cal.App.4th, 1307, 1318; see also *Friends of B Street v. City of Hayward* (1980) 106 Cal.App.3d 988, 1002 ("If there was substantial evidence that the proposed project might have a significant environmental impact, evidence to the contrary is not sufficient to support a decision to dispense with preparation of an EIR and adopt a negative declaration, because it could be 'fairly argued' that the project might have a significant environmental impact").

¹⁴ CEQA Guidelines § 15384(a).

¹⁵ CEQA Guidelines § 15126.4(a)(2).

¹⁶ *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 308-309; Pub. Resources Code § 21061.

¹⁷ *Gentry v. City of Murrieta* (1995) 36 Cal.App.4th 1359, 1393; *Quail Botanical*, *supra*, 29 Cal.App.4th at p. 1604, fn. 5.

must be made contingent upon meeting these performance criteria.¹⁸ Courts have held that simply requiring a project applicant to obtain a future report and then comply with the report's recommendations is insufficient to meet the standard for properly deferred mitigation.¹⁹

With respect to this Project, the IS/MND fails to satisfy the basic purposes of CEQA. The County failed to adequately investigate, analyze, and disclose the Project's potentially significant impacts. Therefore, the County's conclusions that the Project will have less than significant biological resources impacts are unsupported.²⁰ Whereas the County lacks substantial evidence to support its conclusions, Ms. Owens provides substantial evidence that the Project may result in potentially significant biological resource impacts.²¹ Therefore, a fair argument can be made that the Project may cause significant impacts requiring the preparation of an EIR.

III. THE IS/MND FAILS TO INCLUDE A COMPLETE PROJECT DESCRIPTION

The IS/MND does not meet CEQA's requirements because it fails to include a complete project description, rendering the entire analysis inadequate. Without a complete project description, the environmental analysis under CEQA will be impermissibly narrow, thus minimizing the Project's impacts and undercutting public review.²²

CEQA places the burden of environmental investigation on the government rather than the public. Accordingly, a lead agency may not hide behind its failure to obtain a complete and accurate project description.²³ CEQA requires that the project description contained in a CEQA document that is circulated for public review contain sufficiently detailed information to permit a meaningful evaluation and review of the potential environmental impacts of a proposed project.²⁴ California courts have repeatedly held that "an accurate, stable and finite project

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ Pub. Resources Code § 21064.5; MND, pp. 31-36.

²¹ See Owens' Comments.

²² See, e.g., *Laurel Heights Improvement Assn. v. Regents of the Univ. of Cal.* (1988) 47 Cal.3d 376.

²³ *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 311.

²⁴ 14 Cal. Code Regs. § 15124 (hereafter "CEQA Guidelines").

description is the sine qua non of an informative and legally sufficient [CEQA document].²⁵ In contrast, an inaccurate or incomplete project description renders the analysis of environmental impacts inherently unreliable. Without a complete project description, the environmental analysis under CEQA will be impermissibly narrow, thus minimizing the project's impacts and undercutting public review.²⁶

A. The IS/MND Fails to Adequately Describe the New Turbines to Be Installed on the Project Site

The IS/MND only provides a potential maximum length and width for new turbines that can be installed, rather than what turbines are *actually* proposed to be installed, which makes any determination of impacts to birds and bats speculative at best.²⁷ Higher, wider wind turbine blades can lead to increased avian and mortality from the Project.²⁸ Without an adequate description of the width and height, in addition to the length, of the turbines, impacts to biological resources cannot be determined. Since the Project description is incomplete, the IS/MND fails as an informational document as required by CEQA.

IV. THE IS/MND FAILS TO ADEQUATELY ESTABLISH THE EXISTING ENVIRONMENTAL SETTING FOR BIOLOGICAL RESOURCES

The IS/MND describes the existing environmental setting for biological resources inaccurately and incompletely, thereby skewing the County's impact analysis. The existing environmental setting is the starting point from which the lead agency must measure whether a proposed Project may cause a significant environmental impact.²⁹ CEQA defines the environmental setting as the physical

²⁵ County of Inyo v. City of Los Angeles (3d Dist. 1977) 71 Cal.App.3d 185, 193.

²⁶ See, e.g., *Laurel Heights Improvement Association v. Regents of the University of California* (1988) 47 Cal.3d 376.

²⁷ IS/MND, p. 2.; Owens' Comments, p. 2.

²⁸ Owens' Comments at pp. 2-3.

²⁹ See, e.g., *Communities for a Better Env't v. S. Coast Air Quality Mgmt. Dist.* (March 15, 2010) 48 Cal.4th 310, 316; *Fat v. City of Sacramento* (2002) 97 Cal.App.4th 1270, 1278, citing Remy, et al.; Guide to the Calif. Environmental Quality Act (1999) p. 165.

environmental conditions in the vicinity of the project, as they exist at the time the notice of preparation is published, from both a local and regional perspective.³⁰

Describing the environmental setting accurately and completely for each environmental condition in the vicinity of the Project is critical to an accurate and meaningful evaluation of environmental impacts. The importance of having a stable, finite and fixed environmental setting for purposes of an environmental analysis was recognized decades ago.³¹ Today, the courts are clear that “[b]efore the impacts of a Project can be assessed and mitigation measures considered, an [EIR] must describe the existing environment. It is only against this baseline that any significant environmental effects can be determined.”³²

An EIR must also describe the existing environmental setting in sufficient detail to enable a proper analysis of project impacts.³³ The CEQA Guidelines provide that “[k]nowledge of the regional setting is critical to the assessment of environmental impacts.”³⁴ This level of detail is necessary to “permit the significant effects of the project to be considered in the full environmental context.”³⁵

The IS/MND fails to accurately and adequately describe the environmental setting to enable the County to properly assess biological resources impacts from the Project. Decision makers cannot determine the Project’s impacts, and in turn, apply appropriate mitigation for those impacts, without an accurate description of the environmental setting. The County must gather the relevant data and revise the IS/MND to include an accurate and complete description of the existing environmental setting.

³⁰ CEQA Guidelines §15125, subd. (a); *Riverwatch v. City of San Diego* (1999) 76 Cal.App.4th 1428, 1453.

³¹ *City of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185.

³² *City of Amador v. El Dorado City Water Agency* (1999) 76 Cal.App.4th 931, 952.

³³ *Galante Vineyards v. Monterey Peninsula Water Mgmt. Dist.* (1997) 60 Cal.App.4th 1109, 1121-22.

³⁴ CEQA Guidelines § 15125, subd.(d).

³⁵ *Id.*

A. The IS/MND Underestimates the Amount of Habitat the Project Will Disturb

The IS/MND states that the Project will only disturb 2.59 acres of land but does not support this claim.³⁶ Construction of new access roads and widening of existing access roads to accommodate the larger turbines and cranes, a new laydown yard, and new turbine pads will all disturb the site. Ms. Owens' estimate based on the information provided by the County and the Applicant suggests that the actual area of disturbed land may be closer to 20 acres.³⁷

First, several miles of access roads will be expanded from 8 or 16 feet wide to 36 feet wide, disturbing 4.36 acres per mile.³⁸ Second, new access roads will be constructed to towers 2, 3, 13, and 14.³⁹ Third, the laydown yard itself will disturb over 5 acres.⁴⁰ Fourth, the IS/MND uses an unreasonably conservative estimate for turbine construction zones.⁴¹ Finally, the IS/MND does not discuss the disturbance related to decommissioning of the existing 291 wind turbines.⁴²

The areas that will be disturbed are, or are surrounded by, native habitat that may be occupied by sensitive species.⁴³ While the IS/MND suggests that disturbed areas will be revegetated, the County never discloses the potentially significant impacts and the extent of the potentially significant impacts and fails to require any binding legal requirement for revegetation or other impacts, making potentially significant impacts undisclosed, unanalyzed and permanent.⁴⁴

Additionally, the IS/MND fails to address the Project's potentially significant indirect impacts to biological resources, such as indirect impacts to wildlife from noise, dust, or vehicles.⁴⁵

³⁶ Owens' Comments, p. 4.

³⁷ Owens' Comments, p. 6.

³⁸ Owens' Comments, p. 6.

³⁹ Owens' Comments, p. 6.

⁴⁰ Owens' Comments, p. 6.

⁴¹ Owens' Comments, p. 6.

⁴² Owens' Comments, p. 7.

⁴³ Owens' Comments, pp. 6-7.

⁴⁴ Owens' Comments, pp. 5-6; *see below*, Section VII.

⁴⁵ Owens' Comments, p. 7.

Overall, the County's failure to accurately describe the acreage that will be disturbed by the Project renders it impossible to analyze the Project's potentially significant impacts to biological resources, as required by CEQA. State law requires the County to prepare a revised environmental review document that accurately describes where and how the Project will disturb lands and any impacts resulting therefrom and to recirculate the document for public review and comment.

B. The IS/MND Fails to Describe the Existing Levels of Impacts to Avian Species on the Project Site

The IS/MND cursorily and summarily concludes that the replacement of 291 existing wind turbines with 14 new, larger wind turbines will lead to less impacts to birds.⁴⁶ As Ms. Owens notes, this claim is unsupported by the evidence, since larger wind turbine blades can lead to increased impacts.⁴⁷ Any actual determination as to whether there will be increased or decreased impacts to birds is impossible, however, since the County provided no data on avian mortality from the existing project. The County must revise its environmental review document to include actual data on existing avian mortality, studies that model existing avian mortality or some other valid substantial evidence for public review before the County can even consider concluding that the Project would result in no significant impacts to birds.

C. The IS/MND Fails to Adequately Survey and Describe Onsite Biological Resources

The IS/MND does not include any relevant, recent focused or protocol surveys for any sensitive species that have a moderate to high potential to occur on the Project site.⁴⁸ The only survey conducted was a general, one-day field study in March of 2018.⁴⁹

Ms. Owens found that at least 30 different plant and animal species, protected at both the state and federal level, could occur at the Project site and

⁴⁶ IS/MND, p. 35.

⁴⁷ Owens' Comments, pp. 2-3.

⁴⁸ Owens' Comments, p. 7.

⁴⁹ Owens' Comments, p. 7.

must be assessed and disclosed in a revised environmental review document.⁵⁰ For example, the IS/MND completely omits any data on bats in the area and any discussion of the Project's potentially significant impacts to bats.⁵¹

By failing to require the necessary surveys, the County lacks substantial evidence to support its conclusions in the IS/MND. The County cannot possibly determine whether the Project would result any impacts to biological resources, much less determine whether those impacts are significant and what mitigation is required. The County must require the Applicant to conduct proper surveys and provide actual data on biological resources and must revise and recirculate the environmental review document to the public.

D. The IS/MND Relies on an Outdated and Improperly Conducted Survey for Golden Eagles

The abundance of research supports the claim that wind turbines can kill Golden Eagles, which are fully protected under California law.⁵² As a result, proper studies are needed to determine if the Project will lead to eagle mortality.

The County references a survey for Golden Eagles in the IS/MND, but the survey does not accurately inventory habitat and potential impacts to eagles for numerous reasons. The survey data is too old to represent current conditions for the Golden Eagle.⁵³ More recent data is needed since breeding status for a nest territory is based on whether it is being used in the current year.⁵⁴ All breeding sites in an area with eagles demonstrating pair bonding activities are deemed occupied.⁵⁵ A seven year old study cannot possibly determine whether breeding Golden Eagles are present at the proposed Project site; a focused study must be completed.⁵⁶

⁵⁰ Owens' Comments, p. 7-8.

⁵¹

⁵² Fish and Game Code § 3511(b)(7).

⁵³ Owens' Comments, p. 8.

⁵⁴ Owens' Comments, p. 8.

⁵⁵ Owens' Comments, p. 9.

⁵⁶ Owens' Comments, pp. 8-9.

The IS/MND lacks any detail on Golden Eagle prey on or near the Project site.⁵⁷ Golden Eagle presence is highly correlated with prey abundance, further limiting the description of Golden Eagle habitat at the site.⁵⁸

The study referenced is too limited in scope to be adequate to assess the Project's potentially significant impacts. Admittedly, it does not provide complete coverage of the Project site.⁵⁹ Admittedly, it failed to follow the United States Fish and Wildlife Service Protocol Guidelines.⁶⁰

The survey provided is technically invalid, since the author of the study, Dave Bittner, was working without a California state permit since 2000.⁶¹ The memo notes that Mr. Bittner lied to probation officials, failed to provide required data to wildlife agencies, and accepted \$600,000 in payment from wind facilities developers.⁶² Mr. Bittner conducted an unpermitted helicopter study of eagle nests in 2011, which may be the study cited in the IS/MND.⁶³

Because the study cited in the IS/MND is too old to assess impacts to this species, invalid and lacks relevance, among other problems, the County's IS/MND lacks any evidence to support its description of existing Golden Eagle activity at or near the Project site. The County must revise and recirculate the document with accurate studies to determine whether Golden Eagle habitat is present at the Project site.

V. SUBSTANTIAL EVIDENCE SUPPORTS A FAIR ARGUMENT THAT THE PROJECT MAY RESULT IN SIGNIFICANT IMPACTS THAT REQUIRE THE COUNTY TO PREPARE AN EIR

Under CEQA, a lead agency must prepare an EIR whenever substantial evidence in the whole record before the agency supports a fair argument that a

⁵⁷ Owens' Comments, p. 9.

⁵⁸ Owens' Comments, p. 9.

⁵⁹ Owens' Comments, p. 10.

⁶⁰ Owens' Comments, p. 10.

⁶¹ East County Magazine, Eagle Expert Bittner Sentenced to Probation, Ordered to Turn Over Missing Data (Aug. 2013) *available at* <https://www.eastcountymagazine.org/eagle-expert-bittner-sentenced-probation-ordered-turn-over-missing-data>.

⁶² *Id.*

⁶³ *Id.*

project may have a significant effect on the environment.⁶⁴ The fair argument standard creates a “low threshold” favoring environmental review through an EIR, rather than through issuance of a negative declaration.⁶⁵ An agency’s decision not to require an EIR can be upheld only when there is no credible evidence to the contrary.⁶⁶ Substantial evidence can be provided by technical experts or members of the public.⁶⁷ “If a lead agency is presented with a fair argument that a project may have a significant effect on the environment, the lead agency shall prepare an EIR even though it may also be presented with other substantial evidence that the project will not have a significant effect.”⁶⁸

A. The IS/MND Incorrectly Assumes No Potentially Significant Impacts to Birds and Bats from Taller Wind Turbines

As stated above, the County in the IS/MND fails to describe the existing environmental setting for avian and bat mortality. Instead, the County concludes, without any evidence, that a smaller number of turbines means less impacts. Ms. Owens explains that the County’s statement is unsupported and incorrect since other repowering projects have resulted in increased impacts to species.⁶⁹

Although the IS/MND does not provide substantial evidence to support its claim. Ms. Owens provides substantial evidence based on data and her expert opinion that the Project’s impacts from avian and bat mortality may be significant.

⁶⁴ Pub. Resources Code § 21082.2; CEQA Guidelines § 15064(f), (h); *Laurel Heights II*, *supra*, 6 Cal. 4th at p. 1123; *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal. 3d 68, 75, 82; *Stanislaus Audubon Society, Inc. v. County of Stanislaus* (1995) 33 Cal.App.4th 144, 150-151; *Quail Botanical*, *supra*, 29 Cal.App.4th at pp. 1601-1602.

⁶⁵ *Citizens Action to Serve All Students v. Thornley* (1990) 222 Cal.App.3d 748, 754.

⁶⁶ *Sierra Club v. County of Sonoma* (1992) 6 Cal.App.4th, 1307, 1318; *see also Friends of B Street*, *supra*, 106 Cal.App.3d at p. 1002 (“If there was substantial evidence that the proposed project might have a significant environmental impact, evidence to the contrary is not sufficient to support a decision to dispense with preparation of an [environmental impact report] and adopt a negative declaration, because it could be ‘fairly argued’ that the project might have a significant environmental impact”).

⁶⁷ *See, e.g., Citizens for Responsible and Open Government v. City of Grand Terrace* (2008) 160 Cal.App.4th 1323, 1340 (substantial evidence regarding noise impacts included public comments at hearings that selected air conditioners are very noisy); *see also Architectural Heritage Assn. v. County of Monterey*, 122 Cal.App.4th 1095, 1117-1118 (substantial evidence regarding impacts to historic resource included fact-based testimony of qualified speakers at the public hearing); *Gabric v. City of Rancho Palos Verdes* (1977) 73 Cal.App.3d 183, 199.

⁶⁸ CEQA Guidelines § 15062(f).

⁶⁹ Owens’ Comments, p. 2.

There is an increase in mortality with an increase in wind turbine hub heights.⁷⁰ Many raptors prefer higher flight paths between 300-600 feet, which would be above the height of the existing wind turbines, but directly in the range of the proposed Project's wind turbines.⁷¹

Bat mortality can also vary greatly depending on which species are present because of differences in foraging and migrating.⁷² The County cannot support its claim in the IS/MND that there will not be any impacts to bats, since the County never analyzed any bat species which could occur near the Project.

The County in the IS/MND fails to provide the public with accurate information regarding the scope and severity of the Project's potentially significant impacts from avian and bat mortality. The County must provide analysis supported by substantial evidence and must recirculate the revised analysis to disclose, analyze and mitigate these potentially significant impacts.

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

The County lacks any data to support its claims in the IS/MND that the Project will not impact sensitive species that may occur at or near the Project site, since the County never actually analyzed whether those species may exist on the Project site or impacted area. Instead, the County only suggests that the Project would be consistent with the Coachella Valley Multiple Species Habitat Conservation Plan ("CVMSHCP"), which was not developed to be used as a site-specific document at the project level.⁷³

Ms. Owens notes that a Biological Technical Report is normally provided with an environmental review document, prepared pursuant to CEQA, since the environmental review document is required to contain detailed analyses of species that may occur and a baseline from which to determine a Project's potentially

⁷⁰ Owens' Comments, p. 2.

⁷¹ Owens' Comments, p. 3.

⁷² Owens' Comments, p. 3.

⁷³ Owens' Comments, p. 12.

significant impacts.⁷⁴ Without a biological technical report, there is no substantial evidence to support the County's conclusion that the Project will not have potentially significant impacts to the many sensitive plant and animal species that are found near the site.

In addition to avian and bat mortality, Ms. Owens' expert opinion supported by data provides substantial evidence that there may be significant impacts to species, particularly during Project construction.⁷⁵ Noise, dust, and vehicles can kill or harass sensitive species that are found at or near the Project site.⁷⁶

Since the County in the IS/MND does not adequately disclose, analyze, or mitigate the Project's potentially significant impacts to species present at the Project site, the IS/MND fails as an informational document. The County must revise and recirculate the analysis to adequately disclose, analyze, and mitigate the Project's potentially significant impacts on biological resources.

VI. THE MITIGATION MEASURES IN THE IS/MND FAIL TO ADEQUATELY MITIGATE IMPACTS TO BIOLOGICAL RESOURCES

An MND must include all mitigation measures included in the project to avoid potentially significant effects.⁷⁷ The IS/MND erroneously concludes that compliance with the CVMSHCP is adequate mitigation. The CVMSHCP is not project or site specific, and the IS/MND does not detail what specific guidelines from the CVMSHCP are being adopted as conditions of Project approval.⁷⁸ Thus, the County fails to require in the IS/MND specific, enforceable, and in some cases any, mitigation for the Project's potentially significant impacts on many species. The County must revise and recirculate the analysis to identify adequate mitigation for the Project's significant biological resources impacts.

⁷⁴ Owens' Comments, p. 12.

⁷⁵ Owens' Comments, p. 7.

⁷⁶ Owens' Comments, p. 7.

⁷⁷ PRC § 21080(c); CEQA Guidelines § 15071(e).

⁷⁸ Owens' Comments, pp. 12-13.

VII. THE DEIR IMPROPERLY RELIES ON “DESIGN FEATURES” AND NONBINDING MITIGATION MEASURES

The County in the IS/MND suggests that following construction, revegetation of the area will occur.⁷⁹ However, the County fails completely to disclose the actual potentially significant impact in order for the public and decisionmakers to be able to determine whether the mitigation will actually reduce impacts. Therefore, the County improperly applies mitigation before actually disclosing the extent of the significant impact.⁸⁰ Furthermore, revegetation is non-binding and, as Ms. Owens suggests, unlikely to occur.⁸¹

A. Failure to Disclose Potentially Significant Impacts Prior to Mitigation.

The County's application of mitigation to the Project's unmitigated impacts violates CEQA's requirement that the lead agency must first determine the extent of a project's impacts before it may apply mitigation measures to reduce those impacts.⁸² Moreover, the CEQA Guidelines define “measures which are proposed by project proponents to be included in the project” as “mitigation measures” within the meaning of CEQA.⁸³

As described under CEQA Guidelines Section 15370, “Mitigation” includes:

- (a) Avoiding the impact altogether by not taking a certain action or parts of an action.
- (b) Minimizing impacts by limiting the degree or magnitude of the action and its implementation.
- (c) Rectifying the impact by repairing, rehabilitating, or restoring the impacted environment.

⁷⁹ IS/MND, p. 6.

⁸⁰ IS/MND, p. 6.

⁸¹ Owens' Comments, p. 5.

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

⁸³ 14 CCR 15126.4(a)(1)(A).

(d) Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action.

(e) Compensating for the impact by replacing or providing substitute resources or environments.

*Lotus v. Department of Transportation*⁸⁴ clarified the requirements of CEQA Guideline 15370. In *Lotus*, the court held that “avoidance, minimization and/or mitigation measures,” are not “part of the project.”⁸⁵ Rather, they are mitigation measures designed to reduce or eliminate environmental impacts of the Project and must be treated as such. Mitigation measures cannot be incorporated in an EIR’s initial calculation of the Project’s unmitigated impacts because the analysis of unmitigated impacts, by definition, must accurately assess such impacts before any mitigation measures to reduce those impacts are applied.⁸⁶

Because CEQA and *Lotus* prohibit the compressing of a mitigation measure with the Project, the IS/MND’s lack of analysis of impacts caused by the Project’s impacts from land disturbance, violates CEQA. The analysis should be revised to disclose the severity of all potentially significant impacts prior to mitigation.

B. Failure to Require Enforceable Mitigation.

Mitigation measures must be enforceable through conditions of approval, contracts or other means that are legally binding.⁸⁷ This requirement is intended to ensure that mitigation measures will actually be implemented, not merely adopted and then ignored.⁸⁸ The IS/MND reliance on revegetation fails to meet this threshold requirement because the measures are not incorporated as binding mitigation measures for the Project. As a result, the IS/MND fails to include any binding mechanism to ensure that the Applicant will be required to implement these measures for the Project.

⁸⁴ *Lotus v. Dept. of Transportation* (2013) 223 Cal.App.4th 650.

⁸⁵ *Id.* at 656.

⁸⁶ *Id.* at 651 - 52.

⁸⁷ PRC § 21081.6(b); 14 CCR § 15126.4(a)(2); *Lotus v. Dep’t of Transp.* (2014) 223 Cal. App. 4th 645, 651-52.

⁸⁸ *Fed’n of Hillside & Canyon Ass’n v. City of Los Angeles* (2000) 83 Cal. App. 4th 1252, 1261; *Anderson First Coal. v. City of Anderson* (2005) 130 Cal.4th 1173, 1186.

November 27, 2018

Page 18

Without an enforceable mechanism, the revegetation will likely not happen, and the IS/MND's conclusions that the Project's impacts will be less than significant with these measures incorporated are unsupported. The County must include revegetation of disturbed lands from the Project as a binding mitigation requirement.

VIII. CONCLUSION

Substantial evidence supports more than a fair argument that the Project may result in potentially significant adverse impacts on biological resources that were not identified in the IS/MND, and thus have not been adequately analyzed or mitigated. We urge the County to fulfill its responsibilities under CEQA by withdrawing the IS/MND and preparing a legally adequate EIR to address the potentially significant impacts described in this comment letter and the attached letter from Ms. Owens. This is the only way the County and the public will be able to ensure that the Project's potentially significant environmental impacts are mitigated to less than significant levels.

Sincerely,



Kyle Jones

KCJ:lj1

Attachments

4449-004j

EXHIBIT A

November 26, 2018

Kyle Jones
Adams Broadwell Joseph & Cardozo
520 Capitol Mall, Suite 350
Sacramento, CA 95814

Subject: Comments for the Painted Hills Wind Repowering Project Initial Study, Commercial WECS Permit No. 180001 / Variance Case No. 180003 – Intent to Adopt a Mitigated Negative Declaration – CEQ180059.

Dear Mr. Jones,

This letter contains my comments on the biological resource impact analysis for the Painted Hills Wind Repowering Project (Project) Initial Study and Mitigated Negative Declaration (IS/MND).

For the reasons outlined herein, the Project IS fails to meet the requirements of impact analysis and mitigation under the California Environmental Quality Act (CEQA).

As written, the IS/MND fails to adequately:

- Describe the Project baseline,
- Analyze the significant environmental impacts to biological resources of the Project, and
- Propose and describe sufficient mitigation measures and/or alternatives to reduce the various significant and potentially significant impacts to less than significant.

I. THE IS/MND'S FAILURE TO PROVIDE ACCURATE AND COMPREHENSIVE EVIDENCE OF ONSITE BIOLOGICAL RESOURCES PRECLUDES A THOROUGH ANALYSIS OF THE ENVIRONMENTAL SETTING, PROJECT BASELINE, AND IMPACTS TO SPECIES. AS SUCH, DIRECT, INDIRECT, AND CUMULATIVE IMPACTS TO MANY SPECIES REMAIN UNMITIGATED.

A. The IS/MND leaves essential details of the Project unidentified.

The IS/MND does not define what the actual size of the new turbines will be, instead providing a limit of maximum size to 500 feet height and with rotor diameters of up to 427 feet. Without

specifics, adequate baseline determinations regarding the impact by the new turbines is prohibited, thus resulting in speculation in lieu of reliable scientific analysis.

B. The IS/MND Makes Erroneous Assumptions and Conclusions Regarding Impact Analysis Based Upon Indeterminate Turbine Details.

In addition to the the size and configuration of the turbines being indeterminate in the IS/MND - described as a range and not as a specific design or size, and characterized repeatedly as what a "typical" turbine "may" look like - the Applicant goes on to ignore significant impacts to wildlife and habitats by making the erroneous assumption that swapping old turbines with larger, fewer turbines equates zero or beneficial impacts. These assumptions are unsupported by the evidence. Where wildlife and habitat are present, as is obviously the case here, size matters, both on the ground and in the sky.

Higher, wider blades are a larger accidental target for high flying migrants and raptors, including eagles and migrating Swainson's hawks (a California state Threatened species). According to the U.S. Fish and Wildlife Service's Final Environmental Assessment for the Shiloh IV Wind Repowering Project's Eagle Conservation Plan, "Because the Shiloh IV was largely a repowering project—that is, it entailed the removal of 230 old-generation wind turbines and their replacement with 50 new-generation turbines—the project resulted in vastly greater spacing between turbines and the removal of lattice towers that provided perches for eagles and other birds. **However, the total risk area to eagles also increased because of the larger size of the turbine blades. (Emphasis added.)**"¹ This project's status clearly correlates with the current Project proposal actions, and thus the conclusions of USFWS apply as well.

Other studies of different wind turbine size configurations has established that size is a key variable in bird mortalities, stating "We found support for an increase in mortality with increasing turbine hub height... Evaluation of risks to birds is warranted prior to continuing a widespread shift to taller wind turbines."² and that "Bird collision probability depended on

¹ USFWS. June 2014. Final Environmental Assessment Shiloh IV Wind Project Eagle Conservation Plan. p. 33. Retrieved from: <https://www.fws.gov/cno/conservation/MigratoryBirds/ShilohIV-FONSI/Attachment1-FEA-ShilohIV-June2014.pdf>

² Loss, S.R., Will, T., Marra, P.P. (2013). Estimates of bird collision mortality at wind facilities in the contiguous United States. *Biological Conservation*, 168: 201-209. <https://doi.org/10.1016/j.biocon.2013.10.007>.

species, turbine height (taller = more victims).³ This research is supported by my observations as a lead raptor biologist for two years on the Ocotillo Wind site in Imperial County, an industrial wind farm in the desert with a survey area over 15,000 acres. Part of our data collection included recording the flight path of raptors, including height. I observed that raptor species including red-tailed hawks, Swainson's hawks, and golden eagles tended to prefer flight paths that were higher, i.e. between 300 and 600 feet, on over 80% of recorded observations made three times a week, eight hours a day, throughout two years.

Size matters not only to birds, but bats as well, as bats are also known to be killed by proximity to turbines. Bat research has demonstrated that activity of bats near turbines, and mortality of bats by turbines, can vary significantly depending on species due to differences in behavior and typical zones of foraging and migrating height.⁴ However, the IS/MND does not even consider the entire taxa of bats when analyzing the Project's potential for significant impacts, despite the fact that is well established in the scientific literature that wind turbines kills bats, as the U.S. Geological Survey (USGS) bat biologists state, "it's estimated that tend to hundreds of thousands of bats die at wind turbines each year in North America alone."⁵ USGS also reminds us that bats are not only an essential component of ecosystem biodiversity and function, they "provide pest control services worth billions of dollars to farmers annually."⁶

The IS claims that due to the fact that they are swapping old for new turbines that impacts will not only be minimal, but beneficial. Clearly this is a fallacious claim unsupported by the evidence. The IS attempts to justify its claim by quoting the Coachella Valley Multiple Species Habitat Conservation Plan (CVMSHCP) as follows:

"Within each Permittee's jurisdiction, existing wind turbines may be replaced with new turbines. If old turbines are removed and the former impact area is restored to a natural condition, an equal new area may be disturbed without counting toward the calculation of net disturbance."

³ Maneula de Lucas, G., Janss, F.E., Whitfield, D.P., and Ferrer, M. (2008). Collision fatality of raptors in wind farms does not depend on raptor abundance. *Journal of applied Ecology*. 45: 1695–1703 doi: 10.1111/j.1365-2664.2008.01549.x

⁴ Wellig, S. D., Nusslé, S., Miltner, D., Kohle, O., Glaizot, O., Braunisch, V., Obrist, M. K., Arlettaz, R. (2018). Mitigating the negative impacts of tall wind turbines on bats: Vertical activity profiles and relationships to wind speed. *PloS one*, 13(3), e0192493. doi: 10.1371/journal.pone.0192493

⁵ USGS See https://www.usgs.gov/faqs/how-are-bats-affected-wind-turbines?qt-news_science_products=0#qt-news_science_products

⁶ Khalil, Mona, ed. (2017). U.S. Geological Survey: Energy and wildlife research annual report for 2017: U.S. Geological Survey Circular 1435, 91 p., <https://doi.org/10.3133/cir1435>.

However, the IS/MND appears to ignore the caveat in this statement, namely that if the former impact area *is restored* a new area may avoid contributing to net disturbance. According to the IS clearly no such restoration has occurred, and neither is it described for the future.

In light of these facts alone, it is clear the IS/MND fails to accurately describe significant impacts to birds and bats, thus prohibiting any adequate analysis of how any direct, indirect, or cumulative impacts may successfully be mitigated.

C. The IS/MND Underestimates and Mischaracterizes the Impacts to Onsite Habitat.

The IS/MND describes the Project as impacting a total of 2.59 acres of habitat, which happens to be all within the Coachella Valley Multiple Species Habitat Conservation Plan (CVMSHCP) Upper Mission Creek/Big Morongo Conservation Area. Based upon the realities of the Project activities, and the IS/MND's own documentation, this analysis of acreage to be impacted and destroyed is seriously underestimated.

The IS/MND maps what they define as temporary and permanent disturbances⁷, but these are mischaracterized and undervalued in respect to the impacts that will be incurred, not to mention the lack of appropriate relevant mitigation where proposed. To begin with, I have been a biologist contracted for survey and monitoring research for pre- and post-construction on various wind development sites in California, from a few hundred to several thousand acres in size (i.e. Ocotillo wind, Tehachapi Wind, Tule wind) and other energy projects. I can confirm that roads, turbine pads, and lay down yards constructed in desert habitats, whether for private or public land projects, are not successfully restored and typically not even re-vegetated whatsoever. For the most part, no attempt is made to restore them regardless of assurances or protocols scripted into impact analyses, due to various reasons including lack of incentive, oversight, and planning.

On the rare occasion that there is an attempt to revegetate them, such efforts inevitably fail due to the fact that alluvial sand, desert scrub, and other desert habitats require diligent, multifaceted restoration strategies that are not planned or sufficiently described by the responsible parties, resulting in disturbed areas being unsuccessfully restored to anything near an approximation of their original condition prior to major disturbance, especially from grading and impaction from road construction. Where successful restoration has been achieved, such as where desert tortoise habitat protections require such due diligence, researchers confirm that, "Roads [and similar] disturbances negatively affect habitat in numerous ways (e.g.,

⁷ IS/MND p. 657

compacting soil, altering hydrology). Techniques such as recontouring road berms to reestablish drainage patterns, vertical mulching ("planting" dead plant material) and creating barriers to prevent trespasses can assist natural recovery on decommissioned backcountry roads. Most habitat enhancement efforts to date have focused on only one factor at a time (e.g., providing fencing) and have not included [successful] proactive restoration activities (e.g., planting native species on disturbed soils)."⁸ Therefore, the IS/MND mischaracterizes "temporary" disturbances that should be labelled as permanent, since most if not all of the "temporary" disturbance areas that include widening roads, lay down yard(s), and construction zones around new turbines, and old turbine removal disturbance zones(not estimated in acreage) that will incur direct and long lasting impacts to any and all existing habitat affected by such construction.

According to the IS/MND site maps and construction details, the Project will therefore permanently impact much more than 2.59 acres of habitat. According to Exhibit A of the IS/MND, construction of the new turbines will require construction of both new roads and widening of existing ones along all of the "crane paths", to allow for passage of the cranes and the enormous turbine blades which may each be up to approximately 210 feet in length each. Clearly, roads built for smaller turbines constructed in the 1980s will be inadequate in width and configuration to accommodate passage of the blades. The IS/MND inadequately identifies where roads will require adding or widening; for instance, in the relevant maps in Exhibit A, "existing" roads are labelled as such, proposed turbines are denoted as such, but proposed roads are not. And yet the IS/MND confirms new roads will be necessary, specifically

"In addition to the existing roads, permanent access and maintenance roads would be constructed to provide access and circulation within the Project. These access roads would consist of 12 to 16-foot wide permanent roads to provide access to each wind turbine, met tower and ancillary component. These same permanent access roads would be used during construction, although the width of these roads may be temporarily increased to up to 36 feet wide to accommodate cranes and larger construction equipment. Access roads would consist of compacted native material but may also require approximately 4 to 6 inches of aggregate and/or geosynthetic material to provide the soil strength needed for construction. The disturbed areas outside the final roadway width would be graded and compacted for use during construction and then de-compacted and stabilized at the conclusion of construction. New permanent access roads would incorporate applicable local standards regarding internal

⁸ Abella, S.R. and Berry, K.H. (2016). Enhancing and Restoring Habitat for the Desert Tortoise. *Journal of Fish and Wildlife Management*. 7(1): 255-279. <http://fwspubs.org/doi/pdf/10.3996/052015-JFWM-046>

road design and circulation, particularly those provisions related to emergency vehicle access.”⁹

To be clear, according to the construction blueprint in the IS/MND, several miles of roads will *require* expansion to 36 feet wide from their existing 8 to 16 feet width at present, not “up to” 36 feet, to allow for the cranes and blade transport access. Just one mile of new roads at 36 feet will incur a minimum of another 4.36 acres of disturbance, and according to the maps, new crane access roads will need to be constructed to towers 2, 3, 13, and 14, while existing roads will require widening. And yet the IS/MND does not describe or detail how these permanent roads will be “partially” restored, merely stating they will be “revegetated” with no further discussion.¹⁰ And, once again, the descriptions are indeterminate, saying actions are “typical” but not defined as what will occur onsite, including the stating that certain structural segments of the road will be described only when the final geotechnical report is submitted.¹¹

The IS/MND does not specifically describe where the estimate of 2.59 acres disturbance comes from, so one must infer it comes from creation of the turbine pads and related impacts. However, the laydown yard itself, according to the site map, will comprise over 5 acres of habitat to be permanently disturbed (permanent as per reasons stated above), with the only allusion to mitigation being the claim that it will be “restored” with no further discussion. Additionally, the IS/MND claims it will create construction zones for each turbine approximately 200 by 300 square feet. This is an unreasonably conservative estimate, given the necessity of creating space for large vehicle (cranes, blade transport vehicle) turnaround at the end of the roads (= the turbine site), the potential size of the turbines (over 200 feet in length), the size of the cranes, parking for other vehicles, topsoil and other aggregate replacement if a the turbine site as predicted, “The topsoil from the crane pads...would be used at adjacent locations during restoration activities”,¹² and any other miscellaneous construction materials needed at the turbine site. However, even if this 200 by 300 foot estimate were accurate, the total space to be disturbed would amount to almost 20 acres for the entire site, given the addition of 14 new turbines. Finally, the sum disturbance by other structures and the MET towers would comprise impacts to the site, and are also not part of the disturbance estimate in the IS/MND.

Regardless of the IS/MND’s mischaracterization of permanent disturbances as temporary, they also make no little attempt to analyze their so-called temporary impacts with accuracy, not just

⁹ IS/MND p. 312

¹⁰ IS/MND Exhibit A, see also p. 312

¹¹ *Ibid.*

¹² *Ibid.*

due to their conflicting discussion of road construction, but also due to the fact they do not address the impact that removal of 291 existing turbines will have on ground-dwelling species next to and near these activities. As the IS/MND photos themselves portray, these turbines are surrounded extensively by native habitat, which could be occupied by protected species like the Desert tortoise, among many sensitive species not yet surveyed (see details, below). The disturbance to these areas necessitated by break down, removal, and transport of almost 300 turbines off-site could incur an abundance of significant impacts across the entire Project site, disturbance that cannot feasibly be limited to the existing narrow roads constructed decades ago (not to mention impacts of indirect disturbance including fugitive dust, and mortality to protected lizards (see below). This reality needs to be incorporated into the impact analysis for it to meet the minimum requirements of CEQA analysis for direct and indirect impacts to the existing habitat and related species that may abut and be in proximity to the turbines, existing roads, and roads to be expanded for these purposes.

As importantly, it should be noted these impacts discussed thus far are primarily for direct impacts, and do not take into account the indirect impacts from noise, dust, vehicle disturbance to sensitive wildlife in the form of harassment or mortality, among other sources. In short, all of this speculation, mischaracterization, and erroneous summation of site disturbance prohibits an accurate analysis of impacts to habitats and to whatever wildlife may be occupying or otherwise using those habitats for breeding, foraging, migration, over-wintering, and dispersal.

D. The IS/MND Fails to Adequately Survey and Describe the Sensitive Species that May Occur Onsite, Prohibiting Analysis of Impacts, and Thus Fails to Mitigate Significant Impacts

The sum total of the relevant, recent focused or protocol surveys for all of the sensitive species that have a moderate to high potential to occur onsite presented in the IS/MND is zero. The only survey of any kind conducted in the past several years, for this Project, amounts to one day in March, specifically "A general field survey within the Survey Area was conducted by LSA Biologist Jodi Ross-Borrego on March 1, 2018."¹³ According to the habitat present onsite, the California Natural Diversity Database (CNDDB) as well as other databases and resources for this locale (discussed further below), species that have a moderate to high potential to occur include the Federally endangered Coachella Valley milkvetch (*Astragalus lentiginosus* var. *coachellae*), Federally endangered triple-ribbed milk vetch (*Astragalus tricarinatus*), Federally and State-listed threatened Desert tortoise (*Gopherus agassizii*), Federally threatened and State-listed endangered Coachella Valley fringe-toed lizard (*Uma inornata*), the California fully protected species the Golden eagle (*Aquila chrysaetos*), the State listed threatened Swainson's

¹³ IS/MND p. 652

hawk (*Buteo swainsoni*), and the Federally listed endangered and State listed threatened, California fully protected species the Peninsular Bighorn sheep (*Ovis canadensis nelsonii*) (peninsular Distinct Population Segment). An additional 25 sensitive species have a moderate to high potential to occur onsite, including but not limited to the Little San Bernardino Mountains linanthus (*Linanthus maculatus* (*Gilia maculata*); Desert beardtongue (*Penstemon pseudospectabilis* ssp. *pseudospectabilis*); Coachella giant sand treader cricket (*Macrobaenetes valgum*); Coachella Valley Jerusalem cricket (*Stenopelmatus cahuiensis*); Orangethroat whiptail (*Aspidoscelis hyperythra*); Burrowing owl (*Athene cunicularia*); Prairie falcon (*Falco mexicanus*); and the Loggerhead shrike (*Lanius ludovicianus*). As the IS/MND stands, not one of these species has received adequate analysis of onsite status nor a resultant thorough impact mitigation assessment.

1. Impact analysis and resultant mitigation analysis for any and all species potentially onsite is precluded by a lack of surveys.

For the IS/MND to ignore the need for focused / protocol surveys for these protected species, as well as avoiding rare plant surveys, bat surveys, general avian, mammal, reptile, and herpetological surveys, demonstrates a fatal flaw in the analyses. It is impossible to analyze direct, indirect, or cumulative impacts to species without such ground-truthing or data on hand.

2. The IS/MND presents incomplete and invalid data for the Golden eagle.

It is well documented that wind facilities locally and nationally cause mortalities to eagles and other raptors, in evidence by the abundance of research, regulations, monitoring and conservation plans, other forms of oversight, and the existence of a strict permitting process for eagle take at wind facilities. The IS/MND attempts to downplay this reality by citing statistics from other project and avian mortality surveys that are anywhere from 17 to several decades old. The IS/MND also refers to golden eagle surveys by Dave Bittner of the Wildlife Research Institute (WRI) for the 2011 breeding season. Specifically, it states, "In order to comply with USFWS survey recommendations, golden eagle occupancy and productivity surveys were conducted in 2011..." In fact, the discussion herein demonstrates the eagle report is not in compliance with USFWS. Additionally, the WRI report, included in the IS, contradicts the conclusions made elsewhere in the IS/MND, where the report states how anthropogenic causes including wind facilities with increasingly larger turbines have contributed to drops in eagle reproduction rates to as low 12 % in the Mojave and Sonoran deserts.¹⁴

¹⁴ IS/MND Appendix C p. 2

a) First, these survey data are far too old to represent the current condition for the golden eagle use in and near the site. According to the USFWS' Interim Golden Eagle Inventory and Monitoring protocols, determinations regarding golden eagle breeding status for a nest territory is based upon "whether or not a location is a nest used for breeding in the current year by a pair."¹⁵ No accurate analysis of relevant nesting information can be made by a study that is seven years old. Additionally, the USFWS states that all breeding sites within a breeding territory are deemed occupied "while raptors are demonstrating pair bonding activities and developing an affinity to a given area." Again, without knowledge of recent eagle activity throughout the project site and vicinity, no valid conclusions can be made regarding impacts to breeding or foraging territories. Not only are current eagle nesting territory surveys necessary for this Project's impact analysis, so are ground surveys that assess presence and abundance of prey for foraging eagles. As the American Eagle Research Institute points out in their Protocol for golden eagle occupancy, reproduction, and prey population assessment, golden eagle reproduction and related foraging behavior is highly correlated with prey abundance of species like the black-tailed jackrabbits and ground squirrels; the primary prey of golden eagles in many areas of the western United States depending on the region. As written the IS presents no information on the presence or absence, diversity, richness, density, or abundance of eagle prey species on or bordering the site, therefore any analysis regarding potential for use of the site by golden eagles for foraging is further prohibited.¹⁶

b) Second, although outdated, the eagle surveys conducted by WRI in 2011 demonstrate the Project area has high potential to support a wide variety of not only raptors, but other sensitive species as well. As the IS/MND states, the 2011 study reported findings of no less than

"Six golden eagle nests, comprising three territories, were documented with core nesting areas within the Painted Hills spatial buffer...during additional surveys, three golden eagles, an American kestrel (*Falco sparverius sparverius*), 13 bighorn sheep (*Ovis canadensis*), 35

¹⁵ Pagel, J.E., D.M. Whittington, and G.T. Allen 2010. Interim Golden Eagle inventory and Monitoring protocols; and other recommendations. Division of Migratory Bird Management. U.S. Fish and Wildlife Service.

https://www.fws.gov/southwest/es/oklahoma/documents/te_species/wind%20power/usfws_interim_goea_monitoring_protocol_10march2010.pdf. p. 26

¹⁶ Driscoll, D.E. 2010. Protocol for golden eagle occupancy, reproduction, and prey population assessment. American Eagle Research Institute, Apache Jct., AZ. 55pp.
<https://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=83955&inline>

common ravens (*Corvus corax*), four great horned owls (*Bubo virginianus*), two peregrine falcons (*Falco peregrinus*), three prairie falcons (*Falco mexicanus*), 13 red-tailed hawks (*Buteo jamaicensis*), seven Swainson's hawks (*Buteo swainsoni*) (a state listed threatened species), a turkey vulture (*Cathartes aura*), and an unidentified falcon (*Falco* sp.) were observed comprising a total of 83 unique wildlife documentations."

These data further underscore the need for onsite focused protocol surveys for protected species as well as other sensitive species that may be impacted by installation of larger turbines.

c) Third, even if the WRI were current, it is too limited in scope to be comprehensive or adequate; the report itself lists constraints that resulted in incomplete coverage of the core target territories in and around the Project site. Specifically, it acknowledges that due to high winds, presence of protected bighorn sheep, supposed delayed receipt of a permit, and "size and complexity of the range", the surveys resulted in incomplete coverage and failure to follow USFWS protocol guidelines.¹⁷

d) Fourth, the survey is technically invalid. In August, 2013 Dave Bittner, the presumed permitted biologist conducting the WRI studies, was convicted of golden eagle "take" under the Migratory Bird Act and the Bald and Golden Eagle Protection Act, golden eagle theft, working without a state or federal permit, and banding eagles despite an officially inactive banding permit.¹⁸ Since 2000 Bittner had been working without a California state permit, thus the surveys conducted for this project in 2011 were not invalid based upon his lack of meeting state and federal requirements, and having his banding permit denied. The sentencing memorandum indicates that Bittner lied to probation officials, for years failed to provide required data to wildlife agencies, while accepting over \$600,000 in payment from industrial wind facilities developers. The memorandum also states that Bittner conducted a helicopter survey of eagle nests in Joshua Tree National Park even after being specifically denied a permit for use of a helicopter due to fears of disturbing the birds. Based upon the timing and location, it appears that the unpermitted, illegal helicopter survey was the same one cited in this IS/MND.¹⁹ In summary the WRI survey was not only unpermitted but conducted by a researcher proven by a federal court to be lacking in the integrity or veracity necessary to provide reliable data. For the IS/MND to present such data in support of their claims makes the IS/MND equally lacking in integrity and utility for impact analysis.

¹⁷ IS/MND Appendix C p. 8-9, and Figure 3.

¹⁸ See Sentencing memorandum:

<https://www.eastcountymagazine.org/sites/eastcountymagazine.org/files/2013/July/BittnerSentencingmemo.pdf> Retrieved Nov 24, 2018.

¹⁹ *Ibid.*

Based on the evidence presented above, for the IS/MND to claim "The current Project description proposes tubular monopole towers and a large reduction in the number of proposed turbines which would reduce risks to avian species [including eagles] by reducing the total rotorswept area, reducing rotor speeds, and increasing turbine spacing included on the site" is unsupported, erroneous, and thus fails to demonstrate mitigation to significant impacts to birds that may forage onsite and migrate through, including the protected golden eagle and Swainson's hawk that have been detected on and near the Project previously, according to the IS/MND's own referenced study.

II. THE IS/MND RELIES ON ABSENT, INCOMPLETE, AND DEFERRED MITIGATION STRATEGIES FOR SENSITIVE BIOLOGICAL RESOURCES RESULTING IN THE ERRONEOUS CLAIM THAT IMPACTS TO WILDLIFE AND HABITAT WILL BE LESS THAN SIGNIFICANT. THUS, IMPACTS TO VARIOUS SENSITIVE RESOURCES REMAIN UNMITIGATED.

A. The IS/MND Consistency Analysis with the CVMSHCP is Vague, Incomplete, and Erroneous in its Conclusions Regarding Impacts and Mitigation to All Species with the Potential to Occur Onsite.

Instead of providing a Biological Technical Report that provides data and analyses of biological resources identified onsite as is customary and essential for impact assessments under CEQA, the IS/MND eschews the importance of such baseline data and detailed analysis by instead repeatedly referring to what they call a consistency analysis with the CVMSHCP.²⁰ It does not even provide specific data from other standard analyses, including species detected in the region as noted in the CNDDDB. In fact, the CNDDDB lists no fewer than 145 sensitive species that may occur in the region where the Project site is located²¹, but the IS/MND offers no maps of what species accounts occur in or near the site, as is also customary for impact analyses; and instead draws erroneous conclusions²² for potential for species to occur based upon zero recent, focused project-wide surveys for rare plants or animals, while offering no maps of vegetation or habitats located onsite. Aside from the data presented being completely inadequate for mitigation analyses as discussed above, there are three major problems with this approach:

²⁰ IS/MND Exhibit S p. 643

²¹ CNDDDB see Desert Hot Springs and Whitewater Quad species lists
<https://map.dfg.ca.gov/bios/?tool=cnddbQuick> Retrieved No 23, 2018

²² IS/MND Appendix B

- As mentioned above, the IS/MND conducts virtually no actual surveys or site-relevant analyses that describe the actual, real-time environmental status of the Project. And yet the IS/MND acknowledges that the Project Survey Area "lies entirely within the boundaries of the CVMSHCP. Specifically, the 492-acre Survey Area lies within the Upper Mission Creek/Big Morongo Canyon Conservation Area."²³ As such, they cannot explain how they will maintain the integrity or consistency with the CVMSCHP without having a complete set of data for such comparisons to begin with.
- The IS/MND relies on poorly described, cursory, deferred actions as their primary mitigation for direct, indirect, and cumulative impacts to species - where such impacts are appropriately or accurately acknowledged, which is rarely, despite the many sensitive species that have a high likelihood to occur onsite, including those mentioned above. This prohibits the reviewer from assessing the validity or effectiveness of mitigation for all species discussed, and the many others not mentioned and yet part of the CVMSCHP. Meanwhile, their "consistency analysis" is almost entirely limited to a discussion of how to mitigate the erroneous and limited data point of direct disturbance to 2.59 acres.
- The CVMSCHP is not a document that provides a host of clearly defined, species-specific, Project-specific mitigation protocols as the IS/MND would have the reviewer believe. Neither does it make review of said "protocols" available to the public, as is required under CEQA. And yet it bases its conclusions of successful mitigation on the assumption that "consistency" with the CVMSCHP equates successful mitigation analyzed and described. It does not, and these conclusions are wholly unsupported. The CVMSHCP is comprised of thousands of pages of discussion regarding umbrella topics including goals of research monitoring, conservation, FAQ's, and suggestions for adaptive management for species. It does not provide specific protocols unique to specific developments with their unique array of habitats, species, and development threats. And yet the IS/MND relies on generic statements for impacts to entire taxa, such as stating, "The Project is subject to the requirements of the CVMSHCP. Based on the recommendations outlined above, the Project is consistent with the CVMSHCP...."²⁴ and yet do not actually spell out what these recommendations are, or how they apply. The burden is on the Applicant to provide the details they are referring to. They fail to meet this burden, instead merely pointing to the existence of the CVMSHCP, and saying in essence they will follow undescribed, indeterminate CVMSHCP "protocols" and therefore be "consistent" and

²³ *Ibid.* p 667

²⁴ IS/MND Exhibit S p. 15.

therefore reduce impacts to below significant. This is completely unsatisfactory, especially when one conducts a review of the actual content of the CVMSHCP: no such specific mitigation protocols exist as the IS/MND infers, certainly not for a wind farm in this region, in this mix of habitat, with this (yet to be determined) combination, density, abundance, richness, etc. of species present.

For instance, their mitigation details for impacts to the protected Desert tortoise are comprised primarily of the statement that "During construction-related activities, contractors will comply with the mitigation and minimization measures contained in the CVMSHCP protocol." However, they do not provide any details about this protocol, nor do they discuss how indirect impacts will be mitigated, and do not acknowledge the reality of cumulative impacts onsite for the Desert tortoise, despite the fact that the CVMSHCP concludes one of the reasons for its existence is to address concerns regarding the high potential for cumulative impacts to regional sensitive species including the Desert tortoise.²⁵

B. Impacts to Bats Remain Unclear and Unmitigated.

As noted above, it is widely accepted by scientists and wildlife agencies that wind facilities cause significant mortalities to bats, and do not discriminate between common, sensitive, or endangered species by design.^{26,27,28} This results in the conclusion by researchers of a multi-faceted study of bat mortality at different wind facilities that, "we recommend that individual wind facilities conduct project-specific pre- and postconstruction monitoring rather than infer mortality effects based on published results from other wind facilities."²⁹ However, the IS/MND ignores this fact by conducting no surveys, no analysis, and thus no mitigation for bats. The IS/MND fails to assess or discuss an entire taxon of species, namely bats, in its analysis of impacts, despite the fact that the CVMSHCP and CNDDB identifies several protected bat species, including the Southern yellow bat (a primary conservation "covered species" for the CVMSHCP)³⁰, and the Townsend's big-eared bat (*Corynorhinus townsendii*), as occurring in the

²⁵ See http://www.cvmshcp.org/Monitoring_Management.htm Retrieved 11-25-2018.

²⁶ Wellig, S. D., Nusslé, S., Miltner, D., Kohle, O., Glaizot, O., Braunisch, V., Obrist, M. K., Arlettaz, R. (2018). Mitigating the negative impacts of tall wind turbines on bats: Vertical activity profiles and relationships to wind speed. *PloS one*, 13(3), e0192493. doi:10.1371/journal.pone.0192493

²⁷ David Drake, Christopher S. Jennelle, Jian-Nan Liu, Steven M. Grodsky, Susan Schumacher, and Mike Sponsler. Regional Analysis of Wind Turbine-Caused Bat Mortality, *Acta Chiropterologica*. Jun 2015 : Vol. 17, Issue 1, pp 179- 188 <https://doi.org/10.3161/15081109ACC2015.17.1.015>

²⁸ USFWS. 2012. Land Based Wind Energy Guidelines. OMB Control No.10-18-0148 https://www.fws.gov/ecological-services/es-library/pdfs/WEG_final.pdf

²⁹ *Ibid.*

³⁰ See http://www.cvmshcp.org/Plan_Documents_old.htm Retrieved Nov 25018

region. Even the DRECP, the massive Desert Renewable Energy Conservation Plan for the desert southwest that includes the Project site region, focuses on bats as part of their conservation priority species. According to U.S. Geological Survey (USGS) biologists, "North American bats face unprecedented threats including habitat loss and fragmentation, white-nose syndrome, wind energy development, and climate change."³¹ They also state that "It is difficult to evaluate impacts of these threats because there is a lack of basic information about the distribution and abundance of bats across the continent. A statistically robust and standardized bat monitoring program across North America would help managers estimate extinction risk, set conservation priorities and evaluate the effectiveness of conservation actions."³² Indeed, if project biological consultants including LSA would embrace the scientific reality that bats are an essential component of ecosystem biodiversity and viability by conducting the necessary surveys for CEQA and similar analyses - which they could then contribute to CNDDB and elsewhere - databases would be more complete, allowing for more efficacious conservation planning as development increases and spreads throughout the desert southwest. And yet the IS/MND makes no attempt to analyze impacts to bats, not to mention to present a Bird and Bat Monitoring Program that should be part and parcel to every wind facility that proposes to mitigate injuries and deaths that are incurred during the life of a wind development, as recommended by USFWS official wind energy guidelines for wildlife monitoring and mitigation.³³

Finally, it should be noted that although it is important for data collection that drives best management practice, a bat monitoring program does not actually reduce impacts to bats. As such a conservation plan, including compensatory mitigation, should be part of the IS/MND's analysis to reduce potential significant impacts to bird and bat species that will be incurred throughout the life of the project. However, the IS/MND completely fails to offer any such mitigation, and thus fails once again to meet the requirements for a MND.

Not only is there abundant evidence that wind turbines kill bats, research has demonstrated that artificial light and noise can increase the risk of mortality and reduce foraging success by

³¹ See https://www.usgs.gov/ecosystems/status-and-trends-program/science/bats?qt-science_center_objects=0#qt-science_center_objects Retrieved No 14, 2018.

³² *Ibid.*

³³ USFWS. 2012. Land Based Wind Energy Guidelines. OMB Control No.10-18-0148 https://www.fws.gov/ecological-services/es-library/pdfs/WEG_final.pdf

bats in both urban and rural settings.^{34,35} As such, bats could be impacted by the presence of artificial lighting by the Project, throughout the life of the Project, as well as by its other various anthropogenic disturbances in the form of noise, light, dust, barriers, negative attractants, etc.

The necessity of detailed, baseline data for bats (as well as other sensitive species mentioned above) is underscored by the fact that the definition of a substantial impact analyses under CEQA as used in the significance criteria has three principal factors: magnitude or intensity and duration of the impact; rarity and context of the affected resource; and susceptibility of the affected resource to disturbance. The evaluation of significance must also consider the interrelationship of these three factors. For example, a relatively small-magnitude impact on a state or federally listed species could be considered significant if the species is rare and highly susceptible to disturbance. This is true not only for determining significance of impact, but degree of significance in respect to what mitigation measures would be adequate. One cannot determine factors such as context and susceptibility of an entire population regarding impacts of the development of the Project if one does not know whether there may be one, ten, or one hundred or more individuals of a special status species present. It is therefore impossible to determine, without such data, if any given mitigation measure – during construction impact reduction protocol, restoration, relocation, or compensatory mitigation will reduce the Project impacts to below significant. It is especially difficult to determine the efficacy of mitigation protocols when they are not even provided, as is the case with this IS/MND. Given all of these factors, and the complete lack of any discussion regarding presence or impacts to bats, the IS/MND has completely failed to describe how and to what extent bats may likely be impacted by the Project, and as it stands any impacts to bats remain significant and unmitigated by the Project.

C. Impacts to Reptiles, including the C/ESA listed Coachella Valley fringe-toed lizard (*Uma inornata*), Remain Unmitigated.

As noted above, the IS/MND fails to analyze any impacts to lizards, and thus fails to mitigate them. This is an unacceptable oversight, especially in light of the evidence that they have high

³⁴ Warner, K. A. (2016). *Investigating the effects of noise pollution from energy development on the bat community in the Piceance basin* (Order No. 10149854). Available from ProQuest Central; ProQuest Dissertations & Theses Global. (1815584239).

³⁵ Cravens, Z. M., Brown, V. A., Divoll, T. J., & Boyles, J. G. (2018). Illuminating prey selection in an insectivorous bat community exposed to artificial light at night. *The Journal of Applied Ecology*, 55(2), 705-713. doi:<http://dx.doi.org.jerome.stjohns.edu/81/10.1111/1365-2664.13036>

potential to occur in the vicinity of the Project site, according to the CVMSHCP³⁶, the DRECP³⁷, and the following:

It is common knowledge that reptiles represent a key taxon in desert habitats and are highly sensitive to anthropogenic ground disturbances.³⁸ Many are nocturnal, fossorial, or crepuscular, and often highly secretive; most desert reptile species do not lend themselves to daytime, incidental observations as the IS/MND infers by not providing a thorough survey for onsite species. Neither can habitat type alone be a reliable source of potential for species to occur, countless records of species occurrences demonstrate that are many species of reptiles that, while having a habitat preference, are known to occur in a variety of habitats within their known range, including in disturbed habitat in the western Mojave Desert.^{39,40,41}

The USGS recently completed a detailed study of reptile species found in alluvial sand habitat, in a 500-acre area almost the same size as this Project footprint, that they characterized as “highly disturbed” due to the predominance of non-native, invasive plant species. In fact, where the Project site is only partly predominated by disturbed habitat, the USGS study site in an arid ecosystem in eastern San Diego county was almost entirely comprised of disturbed or ruderal habitat. And yet the study findings resulted in 1,208 total captures, revealing a “high species richness and diversity” and “Despite the relatively limited 12-month sampling period, a longstanding drought, and severe habitat disturbance, our study demonstrates that [alluvial

³⁶ CVMSHCP. March 2012. Coachella Valley Multiple Species Habitat Conservation & Natural Community Conservation Plan Aeolian Sand Communities and Species Monitoring Protocol <http://www.cvmshcp.org/pdf%20files/Aeolian%20Sands%20Monitoring%20Protocol%20Final.pdf>

³⁷ DUDEK and ICF. DRECP Appendix B. March 2012.

https://www.drecp.org/documents/docs/baseline_biology_report/10_Appendix_B_Species_Profiles/10a_Reptile_Amphibian/Mojave_Fringe-toed_Lizard.pdf

³⁸ Vandergast, A.G.; Bohonak, A.J.; Hathaway, S.A.; Boys, J.; Fisher, R.N. 2008. Are hotspots of evolutionary potential adequately protected in southern California? *Biol. Conserv.* 141:1648–1664.

³⁹ Vera, P., Sasa, M., Encabo, S. I., Barba, E., Belda, E. J., & Monrós, J. S. (2011). Land use and biodiversity congruences at local scale: applications to conservation strategies. *Biodiversity & Conservation*, 20(6), 1287–1317. <https://doi.org/10.1007/s10531-011-0028-x>

⁴⁰ Dutcher, K. E. (2009). *Microhabitat patch use and movement patterns in Uta stansburiana populations fragmented by a 2005 wildfire in the Mojave national preserve, California* (Order No. 1466162). Available from ProQuest Dissertations & Theses Global. (305177324). Retrieved from <http://jerome.stjohns.edu:81/login?url=https://search-proquest-com.jerome.stjohns.edu/docview/305177324?accountid=14068>

⁴¹ Heaton, J. S. (2002). *The LizLand model: Geomorphic landform and surface composition analysis of lizard habitat in the California Mojave desert* (Order No. 3029564). Available from ProQuest Dissertations & Theses Global. (305504439). Retrieved from <http://jerome.stjohns.edu:81/login?url=https://search-proquest-com.jerome.stjohns.edu/docview/305504439?accountid=14068>

and and related habitat] harbors a rich herpetofauna that includes many sensitive species."⁴² When I asked one of the USGS authors about the study findings, he said that their results were "completely unexpected" and revealed an abundance and diversity "beyond what we ever would have imagined based on the habitat alone" (C. Rochester, *pers. comm.*, Dec 15, 2016). These results underscore the need for focused, scientific surveys to truly establish the necessary faunal data to create an accurate impact assessment.

Further evidence of this fact is revealed by a study by USGS herpetologists where they explored the genetic diversity of several desert species, including shovel-nosed snake (*Chionactis occipitalis*), the collared lizard (*Crotaphytus bicinctores*), the northern desert iguana (*Dipsosaurus dorsalis dorsalis*), the desert tortoise (*Gopherus agassizii*), rosy boa (*Lichanura trivirgata*), Gilbert's skink (*Plestiodon gilberti*), desert spiny lizard (*Sceloporus magister*), fringe-toed lizard (*Uma scoparia*), and the desert night lizard (*Xantusia vigilis*). The study identified several biodiversity "hot spots" within the Mojave and Sonoran deserts, based upon high genetic divergence and diversity of species tested, in habitats similar in type and disturbance to those found on the Project site.⁴³

Even when not hibernating, the Coachella Valley fringe-toed lizard (like other similar species) are incredibly cryptic and spend a good deal of time buried under the sand for physiologic and behavioral reasons, including predator avoidance. They have been described in the species account for the BLM as having "interesting behavioral adaptations for their dune habitat. Most notable is their sand burial behavior...fringe-toed lizards tend to frequently bury themselves within 4-6 cm of the sand surface."⁴⁴ The species' morphology itself demonstrates its unique evolutionary adaptations for spending a lot of time under sand, including a countersunk lower jaw, valved nostrils, keeled supralabials, enlarged and imbricate shoulder scales, and a dorsoventrally compressed body. As fringe-toed specialists describe, "the dorsal network of dark ocelli on a yellowish ground color make these lizards extremely cryptic on the sandy substrate".⁴⁵ (See Photos 1- 3).

⁴² Richmond, J. Q., Rochester, C. J., Smith, N. W., Nordland, J. A., & Fisher, R. N. (2016). Rare Alluvial Sands Of El Monte Valley, California (San Diego County), Support High Herpetofaunal Species Richness And Diversity, Despite Severe Habitat Disturbance. *The Southwestern Naturalist*, 61(4), 294-306. Retrieved from <http://jerome.stjohns.edu:81/login?url=https://search-proquest-com.jerome.stjohns.edu/docview/1894921403?accountid=14068>

⁴³ Vandergast, A. G., Inman, R. D., Barr, K. R., Nussear, K. E., Esque, T. C., Hathaway, S. A., Fisher, R. N. (2013). Evolutionary hotspots in the Mojave Desert. *Diversity*, 5(2), 293-319. <http://dx.doi.org.jerome.stjohns.edu:81/10.3390/d5020293>

⁴⁴ Hollingsworth, B. and Beaman, K. 2001. Mojave fringe-toed lizard (*Uma scoparia*). Prepared for the Western Mojave Plan. Bureau of Land Management, Moreno Valley, California.

⁴⁵ *Ibid.*

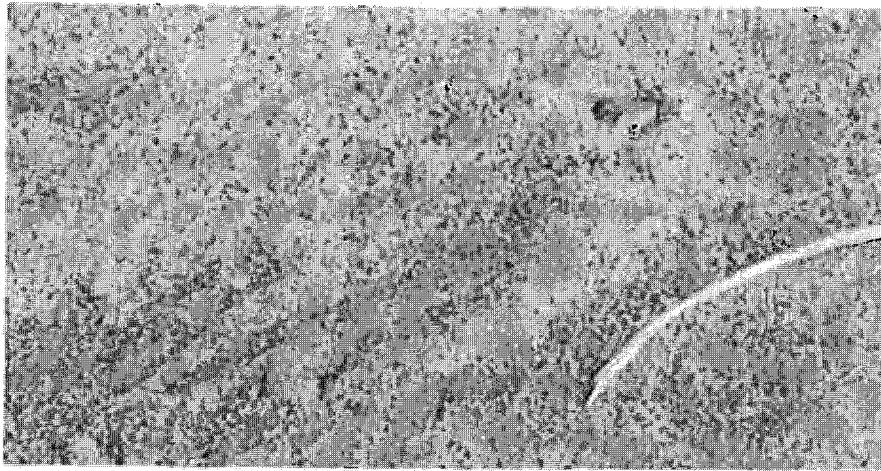


Photo 1 (USFWS)

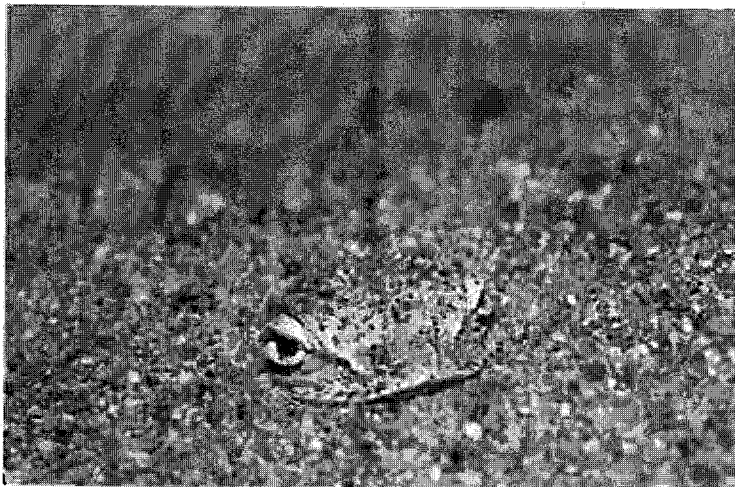


Photo 2 (W. Ervin)



Photo 3 (R. Owens)

Due to their cryptic nature and difficulty to detect without conducting focused surveys, reptiles are historically underserved in conservation management plans, including those dependent on environmental impact analyses. As co-researcher of the world's most extensive study of the world's largest snake species, the green anaconda (*Eunectes murinus*), I discovered the difficulty of visually locating a secretive species despite the fact it can be over 17 feet long. This species had not been studied to any extent previously due primarily to the false belief that they were not in high abundance anywhere and thus difficult to observe for research. However, once I and my associate conducted focused surveys where they had been anecdotally observed, we caught over 800 anacondas within a few square kilometers, using a focused technique that involved tactile searching among other methods, not visual observations⁴⁶. Visual searching alone resulted in missing over 90% of the individuals encountered via an alternative focused methodology.⁴⁷ This example keenly underscores how even one of the largest reptile species in the world can be very difficult to detect if one is not conducting surveys with a protocol and methodology designed for species-specific detection. Additionally, desert habitats that reptiles use typically include more than those identified as preferred habitats or optimal foraging habitats, and as a result environmental impact analyses that estimate the "potential to occur" of reptiles species based only such assertions of "preferred habitat" in the literature, and not focused field surveys, typically fall short of accurate site assessments regarding species presence and use.^{48,49,50,51}

New roads and access driveways constructed in most habitats, southwestern deserts included, increase the risk of direct mortality of lizards and snakes by vehicles, cause habitat fragmentation and potential barriers to gene flow, and makes previously inaccessible areas available to vehicles including off-road vehicles.⁵² Habitats on existing wind facilities are often disrupted by fencing of various kinds during and post-construction, and though serve to exclude

⁴⁶ Rivas, J. A. (1999). *The life history of the green anaconda (Eunectes murinus), with emphasis on its reproductive biology* (Order No. 9973496). Retrieved from: <http://www.anacondas.org/diss/disser.pdf>

⁴⁷ *Ibid.*

⁴⁸ Gerson, M. M. 2004. *Aspects of the ecology of a desert lizard, Callisaurus draconoides (blainville 1835), in Joshua Tree National Park with an emphasis on home range and diet* (Order No. 3146172).

⁴⁹ Heaton, J. S. 2002. *The LizLand model: Geomorphic landform and surface composition analysis of lizard habitat in the California Mojave Desert* (Order No. 3029564).

⁵⁰ Williams, A. K. 2004. *The influence of probability of detection when modeling species occurrence using GIS and survey data* (Order No. 3123715).

⁵¹ Rosen, P. C. 2000. *A monitoring study of vertebrate community ecology in the northern Sonoran Desert, Arizona* (Order No. 9965915).

⁵² *Ibid.*

some individual animals like the Desert tortoise, also serves to trap or funnel other small species - including reptiles seeking shade - within a construction site.

In light of these realities, it is not surprising that I and my colleagues have witnessed an important phenomenon on development project construction sites in arid regions where lizard species are abundant, including wind facility sites (i.e. Ocotillo Wind). Specifically, while working on several development projects in sandy desert habitats we observed that lizards of various species, sizes, and with differing behavioral repertoires are directly and immediately attracted to roads on and around construction sites where trucks spraying water and other erosion control liquids are used to reduce airborne dust. The IS/MND notes that such methods will be implemented for this Project at least three times a day. This practice serves to attract lizards of a variety of species to the higher moisture levels on the roads, resulting in increased lizard mortality and injury due to being hit by construction site traffic that use the roads subsequent to the water trucks passing.

Within the course of one month this phenomenon resulted in the mortality of over 20 flat-tailed horned lizards (*Phrynosoma mcallii*) (a rare species) (FTHL) on one construction site in the southern Sonoran desert during 2014, and where an additional 110 FTHL were relocated to avoid mortality from vehicle impacts during several weeks of the construction phase.⁵³ During the construction of the Sunrise Powerlink gen-tie line in the Sonoran Desert, from just April to November, 103 flat-tailed horned lizards were relocated and 25 mortalities were recorded.⁵⁴ It is key to note that these projects failed to anticipate significant impacts to lizards, impacts due primarily to the phenomenon described above, and as a result in one instance their facility construction had to completely stop work for at least a week mid-construction. One contractor reported his company lost over \$150,000 a week due to the unexpected delay.⁵⁵ Additionally, it remains unknown how effective the poorly conducted relocation actions were, since no follow-up was conducted to analyze long term success of translocation, a process known to often fail with various species and taxa.

In summary, observations during the construction phase of an industrial site facilities in Southern California desert reveal that lizards of varying species and sizes appear to be opportunistically attracted to the added moisture on the roads from water trucks. Such

⁵³ Wilton, Ben. Tenaska, pers. comm., March 19, 2015; P. Hord, pers. comm., Aug 27 2017.

⁵⁴ Flat-tailed Horned Lizard Interagency Coordinating Committee. (2011). Annual Progress Report: Implementation of the Flat-tailed Horned Lizard Rangewide Management Strategy, January 1, 2010 to December 31, 2010. Report prepared by the Flat-tailed Horned Lizard Interagency Coordinating Committee.

⁵⁵ Clarke, C. March 2015. Work on Solar Project Halted to Protect Lizard. KCET. Retrieved from: <http://www.kcet.org/news/define/rewire/solar/work-on-solar-project-halted-to-protect-lizard.html>

behavior observed was not restricted to any lizard species in particular. When this phenomenon was officially noted as impacting sensitive species (i.e. the FTHL), additional on-site biologists and mitigation management practices were necessary to ensure complete coverage of all construction roadways and other areas where lizards were prone to death and injury from vehicle impacts⁵⁶. It must be noted that mortalities from even one Project such as this could have a population level effect, considering several Distinct Population Segments have been identified in this region.⁵⁷ According to Murphy et. al., "many local populations of *U. scoparia* are quite small with some having perhaps fewer than 500 adults. Small patches of sand cannot support large populations of lizards. Thus, the species is considered rare according to geographic distribution, population size and habitat specificity." Further, fringe-toed lizard densities are negatively affected by sand depletion and surface stabilization.⁵⁸

In order to adequately mitigate for such high potential impacts to the fringe-toed and other lizards, the County must take into consideration the risks iterated above and require mitigation measures to reduce resultant impacts include additional biologists present onsite during all hours of construction, enhanced traffic restrictions, and a reptile relocation Plan and Monitoring Strategy during the construction phase.

⁵⁶ P. Hord, pers. comm., Sage Wildlife Biology. Aug 27, 2017.

⁵⁷ Murphy, R., Trepanier, T., Morafka, D. Conservation genetics, evolution and distinct population segments of the Mojave fringe-toed lizard, *Uma scoparia*. *Journal of Arid Environments*. Volume 67, Supplement, 2006, pp 226-247. <https://doi.org/10.1016/j.jaridenv.2006.09.023>

⁵⁸ Kaufmann, J. S. 1982. Patterns of habitat resource utilization in a population of *Uma scoparia*, the Mojave fringe-toed lizard. M. S. Thesis, Univ. Illinois, Chicago. 78pp.

CONCLUSION

Based on the issues described in this letter, it is my professional opinion that the IS/MND has not met the obligations of CEQA and that the Project would result in significant and unmitigated impacts to several sensitive biological resources. The IS/MND must be revised and resubmitted to disclose, adequately analyze, and mitigate the significant impacts. If the impacts cannot be reduced to less than significant, they are unavoidable. No further consideration should be given to the proposed Project until an IS/MND or Environmental Impact Report is prepared and circulated that fully complies with CEQA.

Sincerely,



Renée Owens, M.S.
Conservation Ecologist

Professional Background

I am a conservation biologist and environmental consultant with 25 years of professional experience in wildlife ecology and natural resource management. I have managed an independent environmental consultancy since 1993, contracted for work in the U.S. and Latin America. Since 1994 have maintained U.S. Fish and Wildlife (USFWS) Recovery permits for listed species under the federal Endangered Species Act (ESA), including species discussed herein. I also hold several California state and federal certifications for surveys and monitoring of protected and special status species. I have extensive experience monitoring and studying many species across several taxa, including reptiles and amphibians, passerines and raptors, and marine and terrestrial mammals. I have served as a biological resource expert on over a hundred projects involving water, urban and rural residential developments, mines, and industrial scale energy projects; on private, public, and military lands; in California, the southwest, and Latin America. I have extensive experience observing the species and habitats located within and in proximity to the Project presented in the DEIR.

The scope of work I have conducted as an independent environmental contractor, supervisor, and full time employee has included assisting clients to evaluate and achieve environmental

compliance, restoration, mitigation, and research as related to biological resources; as well as submitting written reports and comments for such work to oversight agencies. This work includes analyzing and reviewing actions pursuant to the California Environmental Quality Act, the National Environmental Policy Act, the Endangered Species Act, the Clean Water Act, the Migratory Bird Treaty Act, and other regulations, along with surveying for and preparing Biological Technical Reports and Assessments. I have been contracted as an environmental consultant by the USFWS, the USDA Forest Service, Ultrasystems, ICF, Helix Environmental, URS, AECOM, AMEC, GeomorphIS, DUDEK, ESA, Tetra Tech, Bridgenet, Bioacoustics, among others. I am a member of the National Sierra Club's Wildlife and Endangered Species Committee and Marine Advisory Committee.

My conservation and natural history research on endangered vertebrate species in Latin America have received various awards including the National Geographic Research and Exploration Award and the National Commission for Scientific and Technological Research Award. My research has been featured on National Geographic Television and Discovery Channel documentaries, and I have served as technical consultant for wildlife documentaries filmed by National Geographic Television, Discovery Channel, BBC, and Animal Planet; in 2017 I received a Special Commendation for contributions to environmental conservation from the City of San Diego.

I have a Master's degree in Ecology; my teaching experience includes college instruction since 1991. I have been an adjunct instructor in Biology, Zoology, Botany, and Environmental Science at Palomar Community College, San Diego State University, and Imperial Valley College. I taught field courses in Tropical Ecology in Ecuador and the Galapagos for Boston University, and was a Visiting Full Time Professor in Environmental Science and Botany at Imperial Valley College. At present I am completing a second MS degree in Environmental Studies from Green Mountain College, focusing on Environmental Education and Communication.

I have gained particular knowledge of the biological resource issues associated with the Project through my extensive work on numerous research and consulting projects throughout southern California. My comments are based upon first-hand observations, review of the environmental documents prepared for the Project, review of scientific literature pertaining to biological resources known to occur in and near the Project area, consultation with other biological resource experts, and the knowledge and experience I have acquired throughout my 25 years of working in the field of natural resources research and management.



SAN GORGONIO CHAPTER

Regional Groups Serving Riverside and San Bernardino Counties: Los Serranos, Tahquitz, San Bernardino Mountains, Mojave, Moreno Valley, Big Bear

November 27, 2018

Re: WECS 180001

Dear Mr. Olivas:

Thank you again for sending me the pdf the Mitigated Negative Declaration (MND) for the WECS 180001 project yesterday, since I was unable to locate it on the County's website while searching for it over the holiday. I send this letter on behalf of Sierra Club in advance of tomorrow's hearing, and will hand deliver the various attachments to the hearing.

The Sierra Club strongly supports re-powering wind farms as highly preferable to new projects on pristine lands. However, the MND for the above project does not adequately identify, analyze or mitigate the project's potential significant impacts to bats and resident and migratory birds. Our major concerns follow.

In light of known evidence of bird and bat mortality caused by wind turbines (both large and small), the MND cannot conclude that the impact to avian species is not significant unless it provides project-specific data, such as monitoring reports from before, to substantiate this claim. Importantly, the wing swept area of tall turbines (proposed to be up to 499' in this project) is enormous, and the turbine tips rotate at very high speeds (ACUA Wind Farm Fact Sheet March 2017 and Tarantola, Monster Machines 7.31.12, both to be hand delivered). Therefore, although there will be many fewer turbines, they will be far larger so the collision area and the high speeds involved pose their own unique risks to birds and bats.

Of note, the MND document I received did not include Appendix C, which is an avian and bat report by CH2MHILL on another project. In any event, CEQA requires project-specific data, especially since this project is located along the top of a ridge, which is a known special risk factor for avian species. Avoiding ridgelines or else micro-siting to lessen this impact is often employed in both new and re-powering of wind projects. (Altamont Winds 8.23.16 to be delivered).

To address the deficiency of the MND regarding avian impacts, a Bird Bat Conservation Strategy (BBCS) should be prepared in order to reduce the potential impacts to less than significant. California Department of Fish and Wildlife regulations provide coverage making "incidental take" illegal in California. The BBCS will outline a monitoring regime and adaptive management plans if thresholds of mortality are "alarming." We request that CDFW and/or a Technical Advisory Committee review the monitoring reports generated. Since this project began operation in the 80s the project may not have been monitored at all, so monitoring is appropriate

especially since there is a report of raptor nests near the facility.

Regarding Met towers, p, 4, the MND states:

The permanent met towers would be free-standing lattice towers constructed atop a concrete foundation. The temporary met towers would be guyed-lattice towers constructed atop a relatively smaller, temporary concrete foundation.

The permanent met towers would be free-standing lattice towers constructed atop a concrete foundation. The temporary met towers would be guyed-lattice towers constructed atop a relatively smaller, temporary concrete foundation.

The problem is that lattice towers may provide perching for raptors depending on the size of the lattice, and may attract raptors to the turbines. Towers should use a different material or provide perch deterrents. The MND admits this risk when citing a CH2MHill study on p. 35

Guy wires have a tremendous impact on migratory birds as shown in Longcore et al paper on Communications towers (to be hand delivered).


Met towers should either be un-guyed or have flight diverters installed on them according to Avian Power Line Interaction Committee (APLIC) guidance.

Conclusion

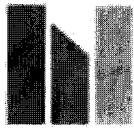
In light of the above, we urge the Planning Commission not to approve WECS 180001, but to continue the matter to allow for the preparation of a Bird Bat Conservation Strategy to mitigate potential significant impacts of the project that have not been addressed.

Thank you for the opportunity to comment.

Very truly yours,

A handwritten signature in cursive script that reads "Joan C. Taylor". The signature is written in dark ink and is positioned above the typed name and title.

Joan Taylor
Calif/Nevada Desert Energy Chair
Sierra Club



COX CASTLE
NICHOLSON

Cox, Castle & Nicholson LLP
50 California Street, Suite 3200
San Francisco, California 94111-4710
P: 415.262.5100 F: 415.262-5199

Anne E. Mudge
415.262.5107
amudge@coxcastle.com

November 27, 2018

VIA EMAIL

Jay Olivas
Riverside County Planning Department
77588 El Duna Court, Suite H
Palm Desert, CA 92211

Re: Painted Hills Repowering Project: WECS permit No. 180001; Variance Case No. 180003

Dear Mr. Olivas:

This firm represents the applicant, Painted Hills Wind, LLC, with regard to the proposed development of the above referenced wind energy project. This letter responds to a letter dated November 26, 2018 by the law firm of Adams, Broadwell, Joseph and Cardozo on behalf of California Unions for Reliable Energy ("CURE") commenting on Riverside's County's Initial Study/Mitigated Negative Declaration ("IS/MND") for the project.

Lead agencies must "consider" agency and public comments on a negative declaration but are not required to prepare responses to such comments. Pub Res C §21091(d), (f); 14 Cal Code Regs §15074(b). This letter nonetheless provides responses to the comments raised and shows why CURE has failed to make a fair argument based on substantial evidence that the project may result in a significant environmental impact. No EIR is required. In fact, CEQA makes clear that a negative declaration "shall" be adopted if the initial study shows no substantial evidence that the project may have a significant effect on the environment or if the project's effects can be mitigated to the extent that there is no substantial evidence in light of the whole record that the revised project may have a significant effect on the environment. Pub Res C §21080(c); 14 Cal Code Regs §§15063(b)(2), 15064(f)(2)-(3), 15070. The CEQA Guidelines strongly encourage mitigated negative declarations as a means of reducing delay and paperwork. 14 Cal Code Regs §§15006(h), 15063(c).

CURE has failed to submit substantial evidence that the project may significantly affect the environment. "Significant effect upon the environment" is defined as "a substantial or potentially substantial adverse change in the environment." Pub Res C §21068; 14 Cal Code Regs §15382. An argument that a project may have a significant environmental effect must be based on relevant evidence sufficient to support that conclusion. An EIR is not required if there is no substantial evidence in the record showing the project may cause significant adverse impacts. *Parker Shattuck Neighbors v Berkeley City Council* (2013) 222 CA4th 768, 785.

“Evidence” is information offered to prove the existence or nonexistence of a fact. See Evid C §140. See 1 Witkin, California Evidence, *Introduction* §18 (4th ed 2000). The term “substantial evidence” is defined by case law as evidence that is of ponderable legal significance, reasonable in nature, credible, and of solid value. See *Stanislaus Audubon Soc’y, Inc. v County of Stanislaus* (1995) 33 CA4th 144; *Lucas Valley Homeowners Ass’n v County of Marin* (1991) 233 CA3d 130, 142. The CEQA Guidelines (14 Cal Code Regs §15384(a)) include a different definition that includes similar concepts, defining “substantial evidence” as enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached.

An agency’s determination whether information in the record constitutes “substantial evidence” boils down to a determination not only that the information is relevant and material but also that it is sufficiently reliable to have solid evidentiary value. To determine the reliability of the evidence, a lead agency may consider several factors. Evidence is not “substantial” if it:

- Lacks an adequate foundation in the witness’s personal knowledge of facts. See *Lucas Valley Homeowners Ass’n v County of Marin, supra*; *Oro Fino Gold Mining Corp. v County of El Dorado* (1990) 225 CA3d 872.
- Expresses subjective concerns and personal beliefs. See *Newberry Springs Water Ass’n v County of San Bernardino* (1984) 150 CA3d 740; *Perley v Board of Supervisors* (1982) 137 CA3d 424.
- Constitutes speculation, argument, and unfounded conclusions. See, e.g., *Pala Band of Mission Indians v County of San Diego* (1998) 68 CA4th 556, 571; *Citizens Comm. to Save Our Village v City of Claremont* (1995) 37 CA4th 1157, 1171; *Citizen Action to Serve All Students v Thornley* (1990) 222 CA3d 748.
- Lacks credibility. See *Lucas Valley Homeowners Ass’n v County of Marin, supra*. A lead agency may disregard even uncontradicted testimony if the witness is biased or if the testimony is inherently improbable or not credible for other reasons. See *Bowman v City of Berkeley* (2004) 122 CA4th 572, 583; *Leonoff v Monterey County Bd. of Supervisors* (1990) 222 CA3d 1337; *Newberry Springs Water Ass’n v County of San Bernardino* (1984) 150 CA3d 740, 750; *Brentwood Ass’n for No Drilling, Inc. v City of Los Angeles* (1982) 134 CA3d 491, 504. A witness’s personal stake in the outcome can be a ground for finding testimony not credible. *Citizens Ass’n for Sensible Dev. v County of Inyo* (1985) 172 CA3d 151, 173.
- Is clearly inaccurate or erroneous. Under Pub Res C §§21080(e)(2) and 21082.2(c), evidence that is “clearly inaccurate or erroneous” is not substantial evidence. These provisions of the statute allow a lead agency to conclude that information presented to it is not substantial evidence when it is clear from a review of the entire record that the information is incorrect.

In particular, arguments made by “experts” are not automatically substantial evidence.

- A lead agency need not accept expert testimony that lacks an adequate factual foundation. *Lucas Valley Homeowners Ass'n v County of Marin* (1991) 233 CA3d 130, 157 (testimony by real estate agent on potential decline in nearby property values was properly rejected as imprecise opinion without supporting verifiable data, such as comparable sales); *Gentry v City of Murrieta* (1995) 36 CA4th 1359, 1422 (letter from engineering professor about groundwater and erosion impacts was not substantial evidence because it was based on inadequate foundation of specific information about project); *Citizens Comm. to Save Our Village v City of Claremont* (1995) 37 CA4th 1157, 1170 (no factual foundation for architect's letter claiming historically significant landscape plan had been implemented on project site).
- Expert opinion that is not directly relevant to the project's environmental impacts may be disregarded. *Citizens for Responsible Dev. v City of W. Hollywood* (1995) 39 CA4th 490, 502 (letters from state historic preservation officer relating to different site were not relevant to project before agency); *Newberry Springs Water Ass'n v County of San Bernardino* (1984) 150 CA3d 740, 750 (letter from expert commenting generally about excess nitrate loading of groundwater was irrelevant to project before agency). See also *Berkeley Hillside Preservation v City of Berkeley* (2015) 60 C4th 1086, 1119 (categorical exemption case holding that expert opinion was insufficient because it was based on project opponent's assertions about design of project rather than project as actually approved).
- An agency also need not accept expert opinion that lacks specificity or fails to adequately explain why the project might cause a significant impact. *Rominger v County of Colusa* (2014) 229 CA4th 690 (expert's opinion that mitigation for odors might be inadequate is too vague to amount to substantial evidence); *Parker Shattuck Neighbors v Berkeley City Council* (2013) 222 CA4th 768 (expert's suggestion that further investigation of health risks due to contamination be undertaken "is not evidence, much less substantial evidence, of an adverse impact"); *Lucas Valley Homeowners Ass'n v County of Marin* (1991) 233 CA3d 130, 157 (agency could disregard comments from expert that amounted to "irrelevant generalization, too vague and nonspecific to amount to substantial evidence of anything"). See also *Association for Protection of Env't'l Values v City of Ukiah* (1991) 2 CA4th 720 (in categorical exemption case, letter from geologist commenting on possible soil instability was not substantial evidence of adverse impact because it did not conflict with specific evidence that building's foundation had been properly engineered and conformed to proper construction techniques).
- Expert opinion may also be disregarded if it relates to a subject outside the expert's field. *Lucas Valley Homeowners Ass'n v County of Marin*, *supra* (real estate agent not qualified to render expert opinion on project's effect on property values and recited no specific experience with similar projects); *Cathay Mortuary, Inc. v San Francisco Planning Comm'n* (1989) 207 CA3d 275 (reports by urban planning experts not dispositive on project's cultural impacts).
- Expert opinion may be rejected because of the expert's interest in the matter. *Citizens Ass'n for Sensible Dev. v County of Inyo* (1985) 172 CA3d 151, 173; *Brentwood Ass'n for No Drilling, Inc. v City of Los Angeles*, *supra*. A lead agency also has authority to

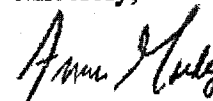
discount evidence provided by an expert on the ground that it is not credible. *Bowman v City of Berkeley* (2004) 122 CA4th 572, 583.

- Expert opinions on the ultimate issue of whether the project's impacts should be classified as "significant" do not address factual issues and are not treated as substantial evidence of a significant impact. *Citizen Action to Serve All Students v Thornley* (1990) 222 CA3d 748, 755.

Here, CURE's letter and accompanying exhibit by Dr. Fox make arguments based on speculation, generalization, error, bias, self-interest and subjective belief. The arguments are recycled from comments made on other projects are have no relevance or application here. No site-specific data or evidence is presented that this project in this location will result in a *substantial or potentially substantial* adverse change in the environment."

A point by point refutation is attached as **Exhibit A** (Memo from Dudek.)

Sincerely,


Anne E. Mudge *by JRP*

AEM

cc: Ken Baez

Attachment

078386\10235018v1

MEMORANDUM

To: Jay T. Olivas, Riverside County Planning Department
From: Adam Poll, Dudek; and Michael Greene, Dudek
Subject: Painted Hills Wind Energy Repowering Project – Response to Comments
Date: November 27, 2018
cc: Collin Ramsey, Dudek
Attachment: None

The purpose of this memorandum is to respond to comments submitted by Kyle Jones of Adams Broadwell Joseph & Cardozo, A Professional Corporation, on November 26, 2018 on the Initial Study/Mitigated Declaration (IS/MND) for Painted Hills Wind Repowering Project (project). Dudek has consolidated the response to comments by comment topic.

There is no evidence that the project will result in potentially significant public health risks

CURE alleges that the project will result in potentially significant public risks, including cancer risks. It bases this allegation on unfounded allegations, speculation and non-project-specific "evidence." The commenter fails to provide any substantial evidence that there would be significant impacts to sensitive receptors as a result of construction of the project. The overseeing air pollution control district (South Coast Air Quality Management District) does not have a recommendation or threshold at which a construction health risk assessment should be performed. The project is not proximate to sensitive receptors as stated in the IS/MND, over 600 feet away from the closest residence. The emissions of the project would be disbursed throughout the entire 600-acre project site and not concentrated in one location.

The commenter states that "Based on my experience, I expect that cancer and acute health impacts from DPM would be significant." However, the commenter does not provide any substantial evidence of this claim; it is just an opinion. Further, there is no acute Reference Exposure Level (REL) for DPM and thus you can't evaluate the acute health impacts of DPM.

Although a Health Risk Assessment was not required, a screening health risk assessment shows a cancer risk for the child MEIR (exposure starting in third trimester) of approximately 2.09 in 1 million, which would not exceed the SCAQMD significance threshold of 10 in 1 million for cancer impacts. The associated chronic hazard index for the child MEIR would be approximately 0.002, which would not exceed the SCAQMD significance threshold of 1.0 for noncarcinogenic health impacts. Since emissions of DPM generated by construction of the project would result in cancer and noncarcinogenic risk below the applicable thresholds, the impact would be less than significant.

There is no substantial evidence that the project will have significant odor impacts

CURE alleges that exposure of a single person to adverse odors is significant. This is simply wrong. The threshold of significance is whether a substantial number of people would be exposed. Further, the odors anticipated from the project were evaluated in accordance with the CEQA Guidelines and the South Coast Air Quality Management District's (SCAQMD) significance criteria (SCAQMD 2015). Commenter's "experience" that people will be exposed to odors is unfounded and conclusory.

The commenter also cites EPA documents from the 1970s and a 2002 EPA document that summarized findings from a study in 1967, 1971, and 1962 (EPA 2002). Diesel fuel has undergone substantial changes since the 1970s and even since the EPA paper was published in 2002. Since 2002 alone, CARB has required diesel fuel to meet a lubricity requirement of a maximum wear scar diameter of 520 microns by ASTM D6079, the High Frequency Reciprocating Rig and limit sulfur in diesel to 15 parts per million (TransportPolicy 2017). The major component within diesel exhaust that is odorous is the sulfur dioxide (U.S. Department of Labor n.d.). The emissions of sulfur dioxide have been reduced significantly over the last 15 years with the reduction in sulfur composition in diesel fuel. For the project, emissions of oxides of sulfur (SOx) are shown in EA-IS Table 1 for construction. The maximum SOx emissions for the project were shown to be less than 0.07% of the SCAQMD's significance threshold.

The cited 105 AADT would occur over an 8-hour shift, or an average of 13 vehicles per hour. The haul trucks are subject to CARB anti-idling policy, which limits diesel vehicles from idling for more than 5 minutes at a time (CARB 2016). This policy is also in place for all off-road engines or equipment (CARB 2009).

There is no substantial evidence that the IS/MND underestimates potentially significant construction emissions

CURE is wrong that the IS/MND underestimated fugitive dust and windblown dust emissions. This is because the CalEEMod model included hourly wind data for the Salton Sea Air Basin, where the project is located, which includes high wind events. The wind speed assumed within CalEEMod, as discussed in Chapter 2 of Appendix A of the CalEEMod Users Guide (CAPCOA 2017), is the default wind speed for the Salton Sea Air Basin which is taken from data from the Western Regional Climate Center and includes data from 1996 through 2006 (WRCC 2017). This dataset includes hourly wind data as recorded by that station for that time period, which includes high-wind events. Therefore, the commenter's opinion that the fugitive dust emissions calculated within CalEEMod did not account for high-wind events is incorrect and unfounded.

From historical records, Santa Ana winds can easily exceed 50 miles per hour, and during a high-wind event, earth-disturbing work would not occur. This would be a standard approach by the contractor to comply with SCAQMD Rules 403 (Fugitive Dust) and 403.1 (Supplemental Fugitive Dust Control Requirements for Coachella Valley Sources). As stated within the IS/MND, the project will comply with all SCAQMD applicable rules. Specifically, the project would be prevented from allowing emissions during a high-wind event by SCAQMD Rules 403 and 403.1, which require minimization of activity when wind speeds reach 25 miles per hour and monitoring for windblown dust. The rules also require the restriction of potential for windblown dust during these wind events.

The section of AP-42 cited by the commenter focuses on "wind erosion of open aggregate storage piles and exposed areas within an industrial facility." Thus, the commenter's use of this reference is incorrect and not relevant for a

construction site. Furthermore, as the comment notes, calculation of these emissions requires detailed information that is not generally available at the CEQA stage.

CalEEMod considers fugitive dust associated with the site preparation and grading phases from three major activities: haul road grading, earth bulldozing, and truck loading (CalEEMod User's Guide page 32 and Appendix A, Subchapter 4.3). Notably, CalEEMod's methods have been adapted from the U.S. Environmental Protection Agency's (EPA's) AP-42 method for Western Coal Mining, and thus account for fugitive dust consistent with AP-42 methods. Again, the commenter's opinion that the IS/MND didn't account for fugitive dust emissions is incorrect and is based on misconstruction of the data.

CURE States Erroneously That the IS/MND Should Not Have Relied on SCAQMD Localized significance thresholds

CURE is incorrect and misconstrues the guidance on when it is permissible to rely on Localized Significance Thresholds. The project site is located in SRA 30 (Coachella Valley). The SCAQMD provides guidance for applying California Emissions Estimator Model (CalEEMod) to the LSTs. LST pollutant screening level concentration data is currently published for 1-, 2-, and 5-acre sites for varying distances. The maximum number of acres disturbed on the peak day was estimated using the "Fact Sheet for Applying CalEEMod to Localized Significance Thresholds" (SCAQMD 2011), which provides estimated acres per 8-hour day for crawler tractors, graders, rubber-tired dozers, and scrapers. Based on the SCAQMD guidance, and assuming an excavator can grade 0.5 acres per 8-hour day (similar to graders, dozers, and tractors), it was estimated that the maximum daily area on the project site that would be disturbed by off-road equipment would be 4 acres per day (3 graders and 5 rubber tired dozers during the Excavation/Collector Lines phase). Therefore, in accordance with the SCAQMD LST guidance for using the CalEEMod, the LST analysis was appropriate to use for the project. CURE's arguments to the contrary are erroneous and therefore can be disregarded.

There is no substantial evidence that the IS/MND underestimated potentially significant valley fever impacts and lacks appropriate mitigation

CURE's concerns about Valley Fever are unsubstantiated and based on projects in other areas of California. As already stated in Appendix B to the IS/MND, Riverside County is not considered a highly endemic region for Valley Fever as the latest report from the California Department of Public Health listed Riverside County as having 2.7 cases per 100,000 people (California Department of Public Health 2017). Similarly, among the total reported incidents of Valley Fever in Riverside County in 2015, only 0.9% of the cases were in the project area (Riverside University Health System Public Health 2016). In contrast, the highly endemic areas of California have incidence rates over 100 cases per 100,000 people.

CURE has not presented evidence to show a high risk that the project will release Valley Fever spores during the project's construction phase is low based on the location of the project site. In addition, CURE overlooks that the applicant would comply with SCAQMD Rules 403 and 403.1, which establishes fugitive dust abatement measures, including watering disturbed areas on the project site three or more times per day during the construction phase, to minimize adverse air quality impacts. Further, the project has prepared a Dust Control Management Plan as part of its WECS project application pursuant to Riverside County Ordinance No. 348 and 484. This requires that the project include the following dust minimization controls: Roads and temporary work areas will be located away from

dry washes, and drainage bottoms, to the greatest extent possible, will be designed to minimize surface water runoff and erosion and use the flow of the natural contours. These requirements are consistent with CDPH recommendations for the implementation of dust control measures, including regular application of water during soil-disturbance activities, to reduce exposure to Valley Fever – the watering minimizes the potential that the fungal spores become airborne (CDPH 2013). CURE's speculation also overlooks regulations designed to minimize exposure to Valley Fever hazards are included in Title 8 of the California Code of Regulations and would be complied with during the project's construction phase (California Department of Industrial Relations 2018).

For the above reasons, the commenter's opinion that the IS/MND did not analyze potentially significant health impacts due to valley fever is incorrect.

CURE Fails to Sustain Any Credible Argument About Transportation Impacts

CURE alleges that the IS/MND failed to analyze all of the project's transportation impacts on air quality because it failed to explain that components would be transported to the site by truck. The air modelling for the IS/MND assumed that components for project, include oversized items like blades, nacelles and towers would arrive by truck. The Air Quality section (page 27) and Transportation/Traffic section (page 69) of the IS/MND state that:

The project would have trip generation associated with construction worker vehicles and vendor trucks. Vendor trucks includes deliveries of project components. Total average AADT for the project during construction is estimated to be 105 per day at its peak. This AADT represents only a nominal percentage of the AADT on nearby highways, including HWY 10, which supports an AADT of 88,000 trips, and HWY 62, which experiences an AADT of 20,000 trips.

This construction-related trip estimate was provided by the project applicant's construction team and based on previous project experience. These trips accounted for truck and vehicle trips generated during all phases of construction, including decommissioning, mobilization/staging, and delivery of components of the new wind turbines. The trucks also accounted for reasonable disassembly and delivery of the turbines using standard haul truck trailers within local and regional transportation weight restrictions.

The IS/MND adequately discusses transportation of project materials to the project site, including turbine components. CURE's speculation to the contrary is unfounded.

There is no substantial evidence that waste disposal impacts were not evaluated in the IS/MND

The commenter erroneously assumes that the blades, towers, and nacelles would be cut up on site to facilitate movement. While the blades would be cut up on site to facilitate transport of disassembled turbines, it is not anticipated that the disassembled nacelles and towers pieces would be of such a size that would require further cutting. Notwithstanding, all disassembly activities, including any use of industrial saws to cut up steel and fiberglass blades, would be performed in compliance with all applicable employee safety regulations, including those of the federal Occupational Safety and Health Administration (OSHA) and California OSHA. Workers performing these activities would be required to take the necessary precautions to protect themselves (i.e., wearing protective respirators and protective eyewear, etc.) from exposure to any fibers or particles that may be released into the air during cutting. These same precautions would be taken by any solid waste disposal or materials recovery

Memorandum

Subject: Painted Hills Wind Energy Repowering Project – Response to Comments

facility that further handles or processes wind turbine components from the project site, as required by applicable federal and state law. Given that steps would be taken to protect workers from any harmful materials that could be released during wind turbine decommissioning and disposal, the commenter's claim is incorrect.

The commenter also states that the wind turbine blades that would be disposed of after turbine decommissioning are regarded as unrecyclable, and the disposal of said wind turbine blades at local landfills could have significant environmental effects, particularly from the release of methane and other volatile organic compounds from wood and other organics in the blades. However, given that the turbine blades are composed of steel and glass, it is not anticipated that the disposal of steel and glass turbine blades would result in the release of methane and other volatile organic compounds. Additionally, as stated in the IS/MND, solid waste generated by the project would likely be disposed of at the Lamb Canyon Landfill or the Badlands Landfill, which have the maximum permitted throughput to accept solid waste generated as part of the decommissioning of the existing wind turbines on site.

There is no Substantial Evidence Supports A Finding of Vibration Impacts on The Colorado Aqueduct

The letter speculates that that potential groundborne vibration impacts from decommissioning and construction could adversely impact the adjacent Colorado River Aqueduct (which in the project area consists of a subsurface water pipe).

Commenter's speculation about impacts on the Colorado River Aqueduct are unfounded. The nearest existing turbine is located approximately 220 feet from the nearest point of the pipeline. Groundborne vibration from construction (and by extension, decommissioning) activities is typically attenuated over short distances. Vibration levels are expressed in terms of inches per second peak particle velocity (PPV). Based on published vibration data, the anticipated construction equipment would generate maximum vibration levels of approximately 0.210 inches per second PPV at a distance of 25 feet from the source (FTA 2006). At a distance of 220 feet – the distance to the nearest existing turbine to be removed as part of the project – the resultant PPV would be approximately 0.008 inches per second.

The nearest proposed turbine is located approximately 420 feet from the nearest point of the pipeline. The corresponding vibration level from the worst-case vibration source likely to be utilized (generating approximately 0.210 inches per second at 25 feet) would be approximately 0.003 inches per second at 420 feet. These levels would be substantially less than the recommended (FTA) threshold of 0.5 inches per second PPV for potential of architectural damage to reinforced-concrete, steel or timber structures, and 0.20 inches per second to normal houses with plastered walls and ceilings. CURE has presented no data to the contrary.

Conclusions

CURE's unfounded and conclusory allegations about the project's air quality impacts lack foundation or application to this site. They are based on impacts from other projects and are generic and non-specific. Contrary to CURE's statements, emissions generated during construction of the project will not exceed SCAQMD's significance thresholds or pose a significant health impact to sensitive receptors. Similarly, the odors emitted during construction would not cause a significant impact to sensitive receptors in accordance with County and SCAQMD guidelines. The project also adequately estimated emissions from construction of the project and accounted for wind driven dust. It was shown that the LST analysis was performed in accordance with SCAQMD guidance. As

Memorandum

Subject: Painted Hills Wind Energy Repowering Project – Response to Comments

stated in the EA-IS, the project would abide by SCAQMD fugitive dust rules, employ a Dust Minimization Plan, and ensure that activities minimize fugitive dust emissions onsite during construction. Finally, the transportation impacts of the project were adequately addressed and included all available information.

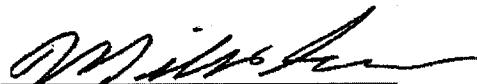
An EIR is not required where the allegations concerning significant impacts are NOT based on substantial evidence.

As such, the proposed project would not result in significant impacts to air quality as indicated in the comment letter.

Sincerely,



Adam Poll, QEP, LEED AP BD+C
Senior Air Quality Specialist



Michael Greene, INCE
Senior Noise Specialist

References

CDPH (California Department of Public Health). 2013. "Preventing Work-Related Coccidioidomycosis (Valley Fever)." June 2013. Accessed February 2, 2018.
<https://www.cdph.ca.gov/Programs/CCDCPHP/DEODC/OHB/HESIS/CDPH%20Document%20Library/CocciFact.pdf>.

California Department of Public Health. 2017. Epidemiologic Summary of Coccidioidomycosis in California, 2016. June. Accessed November 2017.
<https://www.cdph.ca.gov/Programs/CID/DCDC/CDPH%20Document%20Library/CocciEpiSummary2016.pdf>.

CAPCOA (California Air Pollution Control Officers Association). 2017. California Emissions Estimator Model (CalEEMod) User's Guide Version 2016.3.2 Prepared by Trinity Consultants and the California Air Districts. September 2016. http://www.aqmd.gov/docs/default-source/caleemod/upgrades/2016.3/01_user-39-s-guide2016-3-1.pdf?sfvrsn=2.

CARB (California Air Resources Board). 2005. Air Quality and Land Use Handbook: A Community Health Perspective. April 2005.

CARB 2016 <https://www.arb.ca.gov/msprog/truck-idling/factsheet.pdf>.

EPA (US Environmental Protection Agency). 2002. Health Assessment Document for Diesel Engine Exhaust. May. Accessed November 2018. <https://cfpub.epa.gov/ncea/risk/recordisplay.cfm?deid=29060>.

Memorandum

Subject: Painted Hills Wind Energy Repowering Project – Response to Comments

NOAA (National Oceanic and Atmospheric Administration). 2018. Storm Events Database. Accessed November 2018.

https://www.ncdc.noaa.gov/stormevents/listevents.jsp?eventType=%28Z%29+Strong+Wind&beginDate_mm=08&beginDate_dd=01&beginDate_yyyy=1950&endDate_mm=08&endDate_dd=31&endDate_yyyy=2018&county=RIVERSIDE%3A65&hailfilter=0.00&tornfilter=0&windfilter=000&sort=DT&submitButton=Search&statefips=6%2CCALIFORNIA.

OEHHA (Office of Environmental Health Hazard Assessment). 2015. Air Toxics Hot Spots Program Risk Assessment Guidelines, Guidance Manual for the Preparation of Health Risk Assessments. February 2015. http://oehha.ca.gov/air/hot_spots/2015/2015GuidanceManual.pdf.

SCAQMD (South Coast Air Quality Management District). 2015. "SCAQMD Air Quality Significance Thresholds." Originally published in CEQA Air Quality Handbook, Table A9-11-A. Revised March 2015. <http://www.aqmd.gov/docs/default-source/ceqa/handbook/scaqmd-air-quality-significance-thresholds.pdf?sfvrsn=2>.

SCAQMD. 2011. "Fact Sheet for Applying CalEEMod to Localized Significance Thresholds." Accessed November 2018. <http://www.aqmd.gov/docs/default-source/ceqa/handbook/localized-significance-thresholds/calmod-guidance.pdf?sfvrsn=2>.

SCAQMD. 2018. SCAQMD Modeling Guidance for AERMOD. Accessed November 2018. <http://www.aqmd.gov/home/air-quality/air-quality-data-studies/meteorological-data/modeling-guidance>.

USGS (US Geological Survey). 2000. Operational Guidelines (version 1.0) for Geological Fieldwork in Areas Endemic for Coccidioidomycosis (Valley Fever). Accessed November 2018. <https://pubs.usgs.gov/of/2000/0348/pdf/of00-348.pdf>.

WRCC (Western Regional Climate Center). 2017. Desert Hot Springs, California (046635) Monthly Climate Summary. <https://wrcc.dri.edu/cgi-bin/cliMAIN.pl?ca6635>. Accessed October 2017.

MEMORANDUM

To: Jay T. Olivas, Riverside County Planning Department
From: Collin Ramsey, Dudek
Subject: Painted Hills Wind Energy Repowering Project – Response to Comments Pertaining to Biological Resources
Date: November 28, 2018
cc: Jodi Ross-Borego, LSA
Attachment: None

This memorandum responds to supplemental comments submitted late on November 27, 2018, the afternoon before the Planning Commission hearing on the Painted Hills Repowering Project, by Adams, Broadwell, Joseph and Cardozo on behalf of CURE. This memorandum incorporates by reference the cover letter submitted by Cox Castle & Nicholson, LLP dated November 27, 2018 responding to the first submission of comments on the IS/MND.

1. CURE ERRONEOUSLY CLAIMS THAT THE PROJECT DESCRIPTION IS INCOMPLETE

The IS/MND describes and assumes construction of turbine of a maximum of 499 feet in height and blade length of 427 feet, representing the biggest turbine that could be potentially be installed. No data is submitted that shows that shorter turbines than the maximum height with smaller rotor diameter would have a greater impact on avian species than assumed for the project.

Nor is any credible data submitted that fewer taller turbines will have a greater impact on avian species than many more smaller turbines. Commenter fails to reveal that despite statements in the Shiloh IV Eagle Conservation Plan that more rotor swept are could increase risks to eagles, actual post construction mortality at Shiloh IV indicates no eagle takes at all since the repowering with fewer taller turbines occurred. Statements about the Ocotillo Wind Farm are simply inapposite since Ocotillo was not a repowering project,

2. CURE'S CLAIM THAT THE IS/MND UNDERESTIMATES THE PROJECT'S DISTURBANCE OF HABITAT IS INCORRECT AND IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE

The comment letter misconstrues and mischaracterizes the IS/MND's estimates of habitat disturbance and is clearly erroneous as to the facts. The surveys coincide with the disturbance area of 36.33 acres and do not underestimate impacts (p. 21 IS/MND.) The project is a covered project under the CVMSHCP ("Plan") and the habitat disturbance area was vetted with the CV Conservation Commission through the Joint Project Review Process.

3. CURE FAILS TO PROVIDE SUBSTANTIAL EVIDENCE THAT THE PROJECT WILL HAVE A SIGNIFICANT IMPACT ON AVIAN SPECIES

CURE finds fault with the survey protocols and methods but presents no substantial evidence that there are in fact sensitive species present that will be significantly impacted by the project. CURE speculates that sensitive species must occur on the site but this speculation is not supported by any data or facts. But most sensitive bird species that may be present on site are covered species under the Plan and thus impacts to those species are addressed through compliance with the Plan. CURE alleges there is no biological technical report. This is false. See Appendix C. CURE presents no substantial evidence there will be greater impacts on avian species than disclosed in the IS/MND.

4. THE COMMENTS FAIL TO ESTABLISH THAT BIOLOGICAL RESOURCE SURVEYS ARE INADEQUATE.

CURE critiques the habitat assessment which occurred on March 1, 2018 but this does not take into account the many days of field searches for a jurisdictional delineation and the many hours of review of existing reports and literature searches. The report also relied on a 4 year study produced by NREL showing that risks to avian species in the San Geronimo Pass are low. Under the Plan, no additional surveys are required except for a pre-construction desert tortoise survey. CURE simply alleges that the survey effort is adequate without any facts to support this opinion.

5. CURE DOES NOT PROVIDE EVIDENCE THAT IMPACTS TO GOLDEN EAGLES WILL BE SIGNIFICANT

Although it critiques the methods of eagle analysis in the IS/MND, CURE provides no evidence whatsoever that the project will increase risks to eagle populations in comparison to baseline conditions. In fact, CURE presents no data showing increased golden eagles mortalities from any repowering projects anywhere in California. See the Shiloh IV Wind Energy Project and High Projects in Solano County; see Tres Vaqueros and Buena Vista in the Altamont Pass, CURE has presented no evidence to support the claim that the removal of 291 towers (the majority of which have lattice towers) will increase impact to Golden Eagles.

6. THE COMMENTS DO NOT PROVIDE SUBSTANTIAL EVIDENCE THAT THE FEWER TALLER TURBINES WILL INCREASE IMPACTS OF AVIAN AND BAT SPECIES.

See 1 above.

7. CURE PROVIDES NO EVIDENCE THAT ADHERENCE TO THE COACHELLA VALLEY MULTIPLE SPECIES HABITAT CONSERVATION PLAN WILL NOT REDUCE IMPACTS TO A LESS THAN SIGNIFICANT LEVEL.

CURE alleges that the Plan is inadequate because it was prepared at a plan level. However, state and federal law are clear that the purpose of preparing such plans is for projects to later rely on for the conservation of species.

Memorandum

Subject: Painted Hills Wind Energy Repowering Project – Response to Comments Pertaining to Biological Resources

The purpose of the Plan is to relieve projects from the need to do site specific protocol surveys. The overall goal of the Plan is to maintain and enhance biological diversity. Project is required to comply with all applicable mitigation and avoidance measures specified in the CVMSHCP, which was approved by the federal and state resource agencies. These measures were exhaustively vetted by the resources agencies, who are the authorities tasked with protecting federal- and state-listed species in the Project area, to ensure that the measures will minimize impacts to special-status species.

8. NO EVIDENCE IS PRESENTED THAT PROPOSED MITIGATION FOR SPECIAL STATUS SPECIES WILL BE INEFFECTIVE.

CURE presents opinion evidence that mitigation to special status species under Plan is ineffective. The Plan is the result of 12 years of expert research data, numerous coordination effort between agencies and jurisdictions and painstaking effort to create measures that will be effective to avoid and minimize impacts to species. CURE alleges that impacts to fringe-toed lizard will be unmitigated but fails to point out that this site outside this species known range.

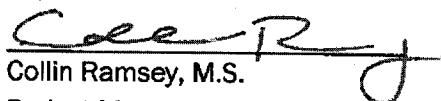
9. CURE ALLEGES UNMITIGATED IMPACTS TO BATS.

CURE relies on research applicable to other wind projects to allege there will be significant impacts to bats here. CURE presents no data whatsoever that any bat species are present at this site or that taller turbines present a greater risk. There are no listed bat species in California and the lack of roosting habitat on site did not warrant more surveys. Post construction mortality studies at other southern California wind facilities which have shown low impacts to bats.

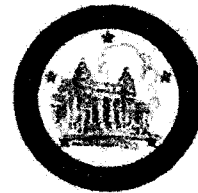
10. CURE SPECULATES THAT THE COUNTY WILL FAIL TO REQUIRE THE APPLICANT TO ADHERE TO PROJECT DESIGN FEATURES THAT MINIMIZE ENVIRONMENTAL IMPACTS.

There is no basis to allege that the County will fail to carry out its obligations to enforce mitigation measures under the IS/MND or to hold the applicant accountable to adhere to the project as described. In addition, USFWS, CDFW and CVCC will be ensuring compliance with state and federal laws to protect sensitive species.

Sincerely,


Collin Ramsey, M.S.
Project Manager

**SUBMITTAL TO THE BOARD OF SUPERVISORS
COUNTY OF RIVERSIDE, STATE OF CALIFORNIA**



ITEM
1.4
(ID # 8487)

FROM : TLMA-PLANNING:

MEETING DATE:

Tuesday, December 11, 2018

SUBJECT: TRANSPORTATION & LAND MANAGEMENT AGENCY/PLANNING: RECEIVE AND FILE THE PLANNING COMMISSION'S APPROVAL OF COMMERCIAL WECS PERMIT NO. 180001 (WCS180001) / VARIANCE CASE NO. 180003 (VAR180003) and the ADOPTION OF THE MITIGATED NEGATIVE DECLARATION FOR ENVIRONMENTAL ASSESSMENT NO. 1800059 (CEQ180059) – Applicant: Painted Hills Wind, LLC – Engineer/Representative: Westwood Professional Services - Fifth Supervisorial District – Western Coachella Valley Area Plan – Open Space: Rural (OS:RUR) – Zoning: Wind Energy (W-E) – 600-Acres – Location: The site is located in Painted Hills north of Interstate 10, west of Highway 62; more specifically, north of 16th Avenue, east of Whitewater Canyon Road, west of Windhaven Road at terminus of Painted Hills Road – REQUEST: Commercial WECS Permit No. 180001 proposes to decommission and remove approximately 291 existing commercial wind turbines and install up to 14 new commercial wind turbines up to 499-feet in height with a per turbine generating capacity of between 2.0 megawatts (MW) and 4.2 MW on land within the Wind Energy Resource (W-E) Zone (herein the "Project"). The existing wind turbines were originally installed and have been operating since the mid-1980's. The Project also proposes to install ancillary equipment, including three (3) temporary, guyed meteorological towers up to 309-feet in height, two (2) permanent, self-supported meteorological towers up to 309-feet in height, a temporary expansion of an existing laydown yard, construction of new temporary and permanent internal access roads, and a new electrical collection system integrating the proposed wind turbines to the electrical grid via one of two options. [Applicant fees 100%.]

RECOMMENDED MOTION: That the Board of Supervisors:

Continued on page 2


ACTION: Policy


Charles L. Leach, Assistant TLMA Director 12/4/2018

MINUTES OF THE BOARD OF SUPERVISORS

On motion of Supervisor Jeffries, seconded by Supervisor Ashley and duly carried by unanimous vote, IT WAS ORDERED that the above matter of approval is received and filed as recommended.

Ayes: Jeffries, Tavaglione, Washington, Perez and Ashley
Nays: None
Absent: None
Date: December 11, 2018
xc: Planning, Applicant

Kecia Harper-Ihem
Clerk of the Board
By: 
Deputy

**SUBMITTAL TO THE BOARD OF SUPERVISORS COUNTY OF RIVERSIDE,
STATE OF CALIFORNIA**

RECOMMENDED MOTION: That the Board of Supervisors:

1. **RECEIVE AND FILE** the Notice of Decision for the above referenced case acted on by the Planning Commission in Riverside on November 28, 2018.

FINANCIAL DATA	Current Fiscal Year	Next Fiscal Year	Total Cost	Spending Cost
COST	\$ N/A	\$ N/A	\$ N/A	\$ N/A
NET COUNTY COST	\$ N/A	\$ N/A	\$ N/A	\$ N/A
SOURCE OF FUNDS: Applicant Fees 100%			Budget Adjustment:	No
			For Fiscal Year:	18/19

C.E.O. RECOMMENDATION: Approve

BACKGROUND:

Commercial WECS Permit No. 180001 (WCS180001) proposes to decommission and remove approximately 291 existing commercial wind turbines (WECS) and install up to 14 new commercial wind turbines up to 499-feet in height with a per turbine generating capacity of between 2.0 megawatts (MW) and 4.2 MW on land within the Wind Energy Resource (W-E) Zone.

Variance Case No. 180003 proposed reductions in WECS safety setbacks from 1.1 times total WECS height from lot lines abutting the Colorado River Aqueduct to between 325 feet and 515 feet, reduce WECS safety setbacks from 1.1 times total WECS height to 0 feet from all internal lot lines associated with W-E zoned land, reduce WECS safety setbacks from 1.25 time total WECS height to 555 feet from the northern boundary of the Southern California Edison transmission line easement located along the southern lot line of APN 516-030-014 and eliminate wind access setbacks along the northern, southern and eastern lot lines of the Project parcels.

Commercial WECS Permit No. 180001 and **Variance Case No. 180003** were approved at the November 28, 2018, Planning Commission meeting in Riverside. Staff provided a Memorandum dated November 28, 2018, at the Planning Commission hearing, with comment letters from Adams Broadwell Joseph and Cardoza dated November 19, 2018, November 26, 2018, and November 27, 2018, and Responses to Comment letters dated November 27, 2018 and November 28, 2018 from Dudek & Associates and Cox Castle Nicholson.

Additionally, the Planning Commission added the following condition of approval to **WCS180001** as follows: "The project proponent or its representatives shall perform appropriate monitoring as part of a Post-Construction Avian and Bat Mortality Monitoring Plan in the first three years following the initial operation of the project to demonstrate to the Riverside County Planning Department Environmental Program Division ("EPD") that the level of incidental injury and mortality does not result in an unanticipated long-term decline in populations of avian or bat species in the vicinity of the project site. The plan shall be consistent with guidance from the

**SUBMITTAL TO THE BOARD OF SUPERVISORS COUNTY OF RIVERSIDE,
STATE OF CALIFORNIA**

U.S. Fish and Wildlife Service and the California Department of Fish and Wildlife on development of appropriate avian and bat protection/monitoring plans. As part of this monitoring plan, the project proponent shall provide the results of this annual survey to EPD within two weeks after each project operating year. The monitoring data shall be utilized to inform an adaptive management program, if needed, that would avoid and/or minimize project-related impacts to avian and bat species. If, after three years of monitoring under the plan, the EPD determines that the project is resulting in unanticipated significant adverse impacts on the population of an avian or bat species, the project proponent shall work with EPD to determine appropriate adaptive management measures to reduce such impacts."

Board Action

The Planning Commission's decision is final and no action by the Board of Supervisors is required unless the Board assumes jurisdiction by ordering the matter set for a future noticed public hearing, or the applicant or an interested person files a complete appeal application within 10 days of this notice appearing on the Board's agenda.

Impact on Residents and Businesses

The impacts of this project have been evaluated through the discretionary review process through the Planning Department and the project approval by the Planning Commission at the November 28, 2018, public hearing.

ATTACHMENTS:

- A. PLANNING COMMISSION REPORT OF ACTIONS (pending)**
- B. PLANNING COMMISSION STAFF REPORT 11-28-18**
- C. PLANNING COMMISSION MEMORANDUM 11-28-18**
- D. COMMENTS AND SUPPLMENTAL COMMENTS ADAMS BROADWELL JOSEPH**
- E. RESPONSES TO COMMENTS DUDEK & ASSOCIATES, COX CASTLE NICHOLSON**


Scott Bruckner 12/5/2018

ADAMS BROADWELL JOSEPH & CARDOZO

DANIEL L. CARDOZO
CHRISTINA M. CARO
THOMAS A. ENSLOW
TANYA A. GULESSERIAN
KYLE C. JONES
MARC D. JOSEPH
RACHAEL E. KOSS
NIRIT LOTAN
MILES F. MAURINO
COLLIN S. MCCARTHY

LAURA DEL CASTILLO
Of Counsel

A PROFESSIONAL CORPORATION

ATTORNEYS AT LAW

520 CAPITOL MALL, SUITE 350
SACRAMENTO, CA 95814-4721

TEL: (916) 444-6201
FAX: (916) 444-6209

kjones@adamsbroadwell.com

SO. SAN FRANCISCO OFFICE

601 GATEWAY BLVD., SUITE 1000
SO. SAN FRANCISCO, CA 94080

TEL: (650) 589-1660
FAX: (650) 589-5062

December 14, 2018

Via Hand-Delivery

Chair Chuck Washington and Board Members
c/o Kecia Harper-Ihem, Clerk of the Board
Riverside County Board of Supervisors
4080 Lemon Street, 1st Floor
Riverside, CA 92501
cob@rivco.org

**Re: Appeal of November 28, 2018 Planning Commission Decision
Initial Study/Mitigated Negative Declaration for Painted Hills
Wind Repowering Project, WECS Permit No. 180001/Variance
Case No. 180003/ Adoption of MND for EA No. 1800059**

Dear Chair Washington and Members of the Board of Supervisors:

We write on behalf of California Unions for Reliable Energy ("CURE"), Charles A. McDaniel, Kasey L. Woolridge-Caspersen, Elmer Diaz, William R. Pieper, and Juan O. Dominguez to appeal the County of Riverside Planning Commission's November 28, 2018 decision to approve the Initial Study/Mitigated Negative Declaration ("IS/MND")¹ prepared by Riverside County ("County") for the Painted Hills Wind Repowering Project ("Project"), proposed by Painted Hills, LLC, which is owned by Terra-Gen ("Applicant"). Specifically, we appeal each of the following Planning Commission approvals related to the Project:

1. Approval of Commercial WECS Permit No. 180001,
2. Approval of Variance Case No. 180003, and

¹ Environmental Assessment Form: Initial Study Number CEQ180059, County of Riverside, at 2 (Oct. 2018) (hereafter "IS/MND").

3. Adoption of the Mitigated Negative Declaration for Environmental Assessment No. 1800059.

The Project proposes to decommission and remove approximately 291 existing commercial wind turbines and install up to 14 new commercial wind turbines up to 499-feet in height with a per turbine generating capacity of between 2.0 megawatts ("MW") and 4.2 MW, which is up to 58.8 total MW, on land within the Wind Energy Resource Zone. The Project will also install ancillary equipment, including meteorological towers up to 309-feet in height, new access roads, collector circuits, and substation.

The grounds for the appeal are set forth in detail below. In sum, based on our review of the IS/MND and available documents, we conclude that the IS/MND fails to comply with the requirements of the California Environmental Quality Act ("CEQA"). The IS/MND fails to describe the whole Project, fails to describe the existing setting upon which to measure impacts, fails to disclose and analyze the Project's potentially significant environmental impacts and fails to identify enforceable measures that can reduce those impacts to a less than significant level.

As explained in these comments, there is more than a fair argument based on substantial evidence that the Project will result in potentially significant public health impacts from construction emissions and potentially significant biological resources impacts from construction and operation. The County may not approve the Project until it prepares an environmental impact report ("EIR") that adequately analyzes the Project's potentially significant direct, indirect and cumulative impacts, and incorporates all feasible mitigation measures to avoid or minimize these impacts.

December 14, 2018

Page 3

These comments were prepared with the assistance of Phyllis Fox, Ph.D., PE² and Biologist and Independent Environmental Consultant Renée Owens.³ Dr. Fox and Ms. Owens provide substantial evidence⁴ of potentially significant impacts that have not been adequately disclosed, analyzed, or mitigated. Dr. Fox's and Ms. Owens' technical comments and responses to letters received from Project consultant DUDEK are attached hereto and are submitted to the County, in addition to the comments in this letter.

I. STATEMENT OF INTEREST

CURE is a coalition of labor organizations whose members construct, operate, and maintain powerplants and other industrial facilities throughout California. CURE encourages sustainable development of California's energy and natural resources. Environmental degradation destroys cultural and wildlife areas, consumes limited water resources, causes air and water pollution, and imposes other stresses on the environmental carrying capacity of the State. Environmental degradation also jeopardizes future jobs by making it more difficult and expensive for industry to expand in Riverside County, and by making it less desirable for businesses to locate and for people to live and recreate in the area. Continued environmental degradation can, and has, caused construction moratoriums and

² P. Fox, Comments on the Initial Study for the Painted Hills Wind Energy Repowering Project (November 26, 2018) (hereinafter, "Fox Comments"), **Exhibit A**; P. Fox, Letter from Dr. Phyllis Fox to Kyle Jones (Dec. 14, 2018) Comments on the Responses to Comments on the Painted Hills Wind Energy Repowering Project Initial Study/Mitigated Negative Declaration (hereinafter, "Fox Response"), **Exhibit B** (Dr. Fox's letter and CV are provided via email).

³ R. Owens, Letter from Renée Owens to Kyle Jones (Nov. 27, 2018) Comments for the Painted Hills Wind Repowering Project Initial Study, Commercial WECS Permit No. 180001 / Variance Case No. 180003 – Intent to Adopt a Mitigated Negative Declaration – CEQ180059 (hereinafter, "Owens' Comments"), **Exhibit D**; R. Owens, Letter from Renée Owens to Kyle Jones (Dec. 14, 2018) Response to County/DUDEK Comments for the Painted Hills Wind Repowering Project Initial Study, Commercial WECS Permit No. 180001 / Variance Case No. 180003 – Intent to Adopt a Mitigated Negative Declaration – CEQ180059 (hereinafter, "Owens' Response"), **Exhibit E** (Ms. Owens' letter and CV are provided).

⁴ 14 CCR § 15384 subd. (b) identifies "reasonable assumptions predicated upon facts, and expert opinion supported by facts" as substantial evidence. Attempts to rebut the expert opinions from two highly qualified technical experts with legal argument are inappropriate since the Applicant's attorney's is not qualified to provide expert opinion to meet the standard of substantial evidence. Refutations to DUDEK responses are provided in this appeal.

other restrictions on growth that, in turn, reduce future employment opportunities for CURE's participating organizations and their members. CURE therefore has a direct interest in enforcing environmental laws and minimizing project impacts that would degrade the environment.

CURE's participating organizations and their members also live, recreate, work, and raise families in Riverside County. Thus, CURE, its participating organizations and their members stand to be directly affected by the Project's adverse environmental and health impacts. Members may also work on the Project itself and would therefore be first in line to be exposed to any health and safety hazards that the Project may create.

Charles A. McDaniel lives in, and works and recreates in and around, Desert Hot Springs, California. Kasey L. Woolridge-Caspersen lives in, and works and recreates in and around, Morongo Valley, California. Elmer Diaz lives in, and works and recreates in and around, Cathedral City, California. William R. Pieper lives in, and works and recreates in and around, Desert Hot Springs, California. Juan O. Dominguez lives in, and works and recreates in and around, Cathedral City, California. Mr. McDaniel, Ms. Woolridge-Caspersen, Mr. Diaz, Mr. Pieper and Mr. Dominguez are each concerned about impacts on public health and the environment in the affected areas where they live, work and recreate.

II. AN EIR IS REQUIRED

CEQA requires that lead agencies analyze any project with potentially significant environmental impacts in an EIR.⁵ "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."⁶ 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."⁷

⁵ See Pub. Resources Code § 21000; CEQA Guidelines § 15002.

⁶ *Citizens of Goleta Valley v. Bd. of Supervisors* (1990) 52 Cal.3d 553, 564 (internal citations omitted).

⁷ *County of Inyo v. Yorty* (1973) 32 Cal.App.3d 795, 810.

CEQA's purpose and goals must be met through the preparation of an EIR, except in certain limited circumstances.⁸ CEQA contains a strong presumption in favor of requiring a lead agency to prepare an EIR. This presumption is reflected in the "fair argument" standard. Under that standard, a lead agency "shall" prepare an EIR whenever substantial evidence in the whole record before the agency supports a fair argument that a project may have a significant effect on the environment.⁹

In contrast, a mitigated negative declaration may be prepared only when, after preparing an initial study, a lead agency determines that a project may have a significant effect on the environment, but:

- (1) revisions in the project plans or proposals made by, or agreed to by, the applicant before the proposed negative declaration and initial study are released for public review *would avoid the effects or mitigate the effects to a point where clearly no significant effect on the environment would occur,* and
- (2) there is *no substantial evidence* in light of the whole record before the public agency that the project, as revised, *may* have a significant effect on the environment.¹⁰

Courts have held that if "no EIR has been prepared for a nonexempt project, but substantial evidence in the record supports a fair argument that the project may result in significant adverse impacts, the proper remedy is to order preparation of an EIR."¹¹ The fair argument standard creates a "low threshold" favoring environmental review through an EIR, rather than through issuance of a negative

⁸ See Pub. Resources Code § 21100.

⁹ Pub. Resources Code §§ 21080(d), 21082.2(d); CEQA Guidelines §§ 15002(k)(3), 15064(f)(1), (h)(1); *Laurel Heights Improvement Assn. v. Regents of the Univ. of Cal.* (1993) 6 Cal.4th 1112, 1123; *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 75, 82; *Stanislaus Audubon Society, Inc. v. County of Stanislaus* (1995) 33 Cal.App.4th 144, 150-151; *Quail Botanical Gardens Found., Inc. v. City of Encinitas* (1994) 29 Cal.App.4th 1597, 1601-1602.

¹⁰ Pub. Resources Code § 21064.5 (emphasis added).

¹¹ See, e.g., *Communities for a Better Environment v. South Coast Air Quality Management Dist.* (2010) 48 Cal.4th 310, 319-320.

declaration.¹² An agency's decision not to require an EIR can be upheld only when there is no credible evidence to the contrary.¹³

"Substantial evidence" required to support a fair argument is defined as "enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached."¹⁴ According to the CEQA Guidelines, when determining whether an EIR is required, the lead agency is required to apply the principles set forth in Section 15064, subdivision (f):

[I]n marginal cases where it is not clear whether there is substantial evidence that a project may have a significant effect on the environment, the lead agency shall be guided by the following principle: If there is disagreement among expert opinion supported by facts over the significance of an effect on the environment, the Lead Agency shall treat the effect as significant and shall prepare an EIR.

Furthermore, CEQA documents, including EIRs and MNDs, must mitigate significant impacts through measures that are "fully enforceable through permit conditions, agreements, or other legally binding instruments."¹⁵ Deferring formulation of mitigation measures to post-approval studies is generally impermissible.¹⁶ Mitigation measures adopted after Project approval deny the public the opportunity to comment on the Project as modified to mitigate impacts.¹⁷ If identification of specific mitigation measures is impractical until a later stage in the Project, specific performance criteria must be articulated and further approvals

¹² *Citizens Action to Serve All Students v. Thornley* (1990) 222 Cal.App.3d 748, 754.

¹³ *Sierra Club v. County of Sonoma* (1992) 6 Cal.App.4th, 1307, 1318; see also *Friends of B Street v. City of Hayward* (1980) 106 Cal.App.3d 988, 1002 ("If there was substantial evidence that the proposed project might have a significant environmental impact, evidence to the contrary is not sufficient to support a decision to dispense with preparation of an EIR and adopt a negative declaration, because it could be 'fairly argued' that the project might have a significant environmental impact").

¹⁴ CEQA Guidelines § 15384(a).

¹⁵ CEQA Guidelines § 15126.4(a)(2).

¹⁶ *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 308-309; Pub. Resources Code § 21061.

¹⁷ *Gentry v. City of Murrieta* (1995) 36 Cal.App.4th 1359, 1393; *Quail Botanical*, *supra*, 29 Cal.App.4th at p. 1604, fn. 5.

must be made contingent upon meeting these performance criteria.¹⁸ Courts have held that simply requiring a project applicant to obtain a future report and then comply with the report's recommendations is insufficient to meet the standard for properly deferred mitigation.¹⁹

With respect to this Project, the IS/MND fails to satisfy the basic purposes of CEQA. The County failed to adequately investigate, analyze, and disclose the Project's potentially significant impacts. Therefore, the County's conclusions that the Project will have less than significant air quality and public health impacts are unsupported.²⁰ Whereas the County lacks substantial evidence to support its conclusions, Dr. Fox and Ms. Owens provide substantial evidence that the Project may result in potentially significant public health impacts from construction emissions and potentially significant impacts to biological resources.²¹ Therefore, a fair argument can be made that the Project may cause significant impacts requiring the preparation of an EIR.

III. THE IS/MND FAILS TO INCLUDE A COMPLETE PROJECT DESCRIPTION

The IS/MND does not meet CEQA's requirements because it fails to include a complete project description, rendering the entire analysis inadequate. Without a complete project description, the environmental analysis under CEQA will be impermissibly narrow, thus minimizing the Project's impacts and undercutting public review.²²

CEQA places the burden of environmental investigation on the government rather than the public. Accordingly, a lead agency may not hide behind its failure to obtain a complete and accurate project description.²³ CEQA requires that the project description contained in a CEQA document that is circulated for public review contain sufficiently detailed information to permit a meaningful evaluation

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ Pub. Resources Code § 21064.5; MND, pp. 31-36.

²¹ See Fox Comments; Owens' Comments

²² See, e.g., *Laurel Heights Improvement Assn. v. Regents of the Univ. of Cal.* (1988) 47 Cal.3d 376.

²³ *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 311.

and review of the potential environmental impacts of a proposed project.²⁴ California courts have repeatedly held that “an accurate, stable and finite project description is the sine qua non of an informative and legally sufficient [CEQA document].”²⁵ In contrast, an inaccurate or incomplete project description renders the analysis of environmental impacts inherently unreliable. Without a complete project description, the environmental analysis under CEQA will be impermissibly narrow, thus minimizing the project’s impacts and undercutting public review.²⁶

A. The IS/MND Fails to Describe the Transportation of the New Turbine Blades to the Project Site

The Project consists of numerous large components, including 213-foot wind turbine blades.²⁷ However, the IS/MND is silent as to how these components will be transported to the Project site. Wind turbine blades cannot be manufactured on-site, thus requiring transport.²⁸ Furthermore, the nearest blade manufacturer to the Project site is in Colorado.²⁹ This means that the blades may have to travel over land, either a far distance from other states, or from a nearby port, such as Long Beach. Transportation of such long pieces of equipment is difficult, requiring careful planning to ensure they are routed through turns properly.³⁰ These large blades will require several diesel-powered trucks to move and may have to operate very slowly.³¹

Transporting large components of the Project has the potential to lead to serious impacts. Traffic could be severely delayed moving such long blades, especially if they are routed through existing congested traffic corridors, such as Los

²⁴ 14 Cal. Code Regs. § 15124 (hereafter “CEQA Guidelines”).

²⁵ *County of Inyo v. City of Los Angeles* (3d Dist. 1977) 71 Cal.App.3d 185, 193.

²⁶ *See, e.g., Laurel Heights Improvement Association v. Regents of the University of California* (1988) 47 Cal.3d 376.

²⁷ IS/MND, at 2.

²⁸ *See* Next-Generation Wind Energy Technologies and their Environmental Implications, California Energy Commission (Oct. 29, 2018) available at <https://efiling.energy.ca.gov/Lists/DocketLog.aspx?docketnumber=19-ERDD-01>.

²⁹ Ryan Wiser and Mark Bolinger, 2017 Wind Technologies Market Report, United States Department of Energy, 12 (Aug. 2018) available at https://emp.lbl.gov/sites/default/files/2017_wind_technologies_market_report.pdf.

³⁰ Fox Comments, p. 11.

³¹ Fox Comments, p. 11.

Angeles. The use of diesel engines could increase exposure of sensitive populations to Toxic Air Contaminants (“TACs”), which can lead to heightened cancer risks to those who live and work along the route.³²

Depending on which route is selected, different homes and schools will be affected. Residents and school patrons may be required to modify their own schedules and practices to accommodate, or avoid the adverse effects of, the trucks in their neighborhood. The County must also analyze the impacts that each potential route will cause to the differently affected neighborhoods and must identify appropriate mitigation measures that will mitigate significant impacts to each neighborhood.

The Memorandum responding to our November 26, 2018 comments (“Response Memorandum”) admits that the IS/MND contains no analysis of traffic or air impacts beyond the Project site.³³ The Response Memorandum then assumes that standard haul trucks would be used and concludes the Project would not result in significant impacts on air quality, public health, or traffic.³⁴ This response misses the point of our comments. Because these blades are so large, standard haul trucks cannot move them to the Project site.³⁵ Different equipment, with potentially greater emissions, would have to be used.³⁶ The maneuvering of such large materials may result in lane closures or other transportation-adjusting methods to accommodate them.³⁷ The IS/MND does not consider the unique circumstances of this Project at all.³⁸ Further, given the limited sources of large wind turbine blades, the location of traffic and air quality impacts will be far beyond Highways 10 and 62, which are the only highways addressed in the IS/MND.

³² Fox Comments, p. 11.

³³ Memorandum from Adam Poll and Michael Greene to Jay T. Olivas, (Nov. 27, 2018), p. 4 (*hereafter* Response Memo).

³⁴ Response Memo, p. 4.

³⁵ Fox Comments, p. 11.

³⁶ Fox Comments, p. 11.

³⁷ Fox Comments, p. 11.

³⁸ Fox Comments, p. 11.

B. The IS/MND Fails to Accurately Describe the Decommissioning of the Existing 291 Wind Turbines

The IS/MND discusses the decommissioning of existing wind turbines from the Project site, but does not disclose disposal of the existing wind turbines.³⁹ Cutting up of wind turbines can release hazardous fibers into the air, which can negatively impact public health.⁴⁰ The IS/MND fails to discuss where the blades will be cut up, what equipment will be used, and where material would be shipped for recycling.⁴¹ Moreover, the IS/MND discusses recycling the blade material; however, the blade material is not suitable for recycling.⁴² The IS/MND must accurately describe the decommissioning and disposal of the existing wind turbines.

The Response Memorandum attempts to address this issue by asserting that the materials that will be cut up on the Project site will be steel and glass only, and existing state and federal Occupational Safety and Health Administration (“OSHA”) regulations would protect workers.⁴³ Dr. Fox notes that there is no Material Safety Data Sheet or chemical composition report in the record; therefore, there is no evidence to support the claims in the Response Memorandum that no release of methane or other volatile organic compounds would occur, or that the turbines will be recycled.⁴⁴ Instead, Dr. Fox provides substantial evidence through cited, published studies that show that turbine blades normally consist of materials that can result in releases of methane and other volatile organic compounds when cut, and are unrecyclable.⁴⁵ Additionally, the IS/MND does not identify specific details on applicable OSHA regulations and how they would protect workers and the environment from exposure.⁴⁶

³⁹ Fox Comments, p. 8.

⁴⁰ Fox Comments, pp. 8-9.

⁴¹ Fox Comments, pp. 8-9.

⁴² Fox Comments, p. 9.

⁴³ Response Memo, pp. 4-5.

⁴⁴ Fox Response, pp. 8-9; Response Memo, pp. 4-5.

⁴⁵ Fox Response, p. 9.

⁴⁶ Fox Response, p. 9.

C. The IS/MND Fails to Adequately Describe the New Turbines to Be Installed on the Project Site

The IS/MND provides a potential maximum height for new turbines that can be installed, rather than what turbines are *actually* proposed to be installed, which makes any determination of impacts to birds and bats speculative at best.⁴⁷ Higher, wider wind turbine blades can lead to increased avian and mortality from the Project.⁴⁸ Some birds, such as Golden Eagles, fly in ranges that are higher than the wind turbines that are being replaced.⁴⁹ Should raptors be present at elevations where the proposed turbines are operating, but not at lower elevations where existing turbines are operating, a greater risk of collision and take for those species will occur.

The Memorandum that responds to our November 27, 2018 comments (“Bio Memorandum”) suggests that higher turbines will not increase risks to eagles because “actual mortality at Shiloh IV indicates no eagle takes at all since the repowering with fewer taller turbines occurred.”⁵⁰ The fact that no take has been observed at the Shiloh IV project post-construction does not support the claim that repowering decreased overall take at the site, since the data does not include the past six years.⁵¹ Furthermore, the fact that there has not been documented take of Golden Eagles at one project in a different part of the state does not disprove the fact that the *risk* associated with taller turbines increases impacts to raptors.⁵²

The Bio Memorandum also states that Ms. Owens’ observations at the “Octotillo Wind Farm are simply inapposite since it was not a repowering project.”⁵³ This statement misses the point of Ms. Owens’ evidence, which was that raptors prefer flying ranges that put them in greater risk of collision with taller turbines.⁵⁴

⁴⁷ IS/MND, p. 2.; Owens’ Comments, p. 2.

⁴⁸ Owens’ Comments, pp. 2-3.

⁴⁹ Owens’ Comments, p. 3.

⁵⁰ Memorandum from Collin Ramsey to Jay T. Olivas, (Nov. 28, 2018), p. 1 (*hereafter* Bio Memo).

⁵¹ Owens’ Response, pp. 3-4.

⁵² Owens’ Response, pp. 4-5.

⁵³ Bio Memo, p. 1.

⁵⁴ Owens’ Comments, p. 3.

Whether or not the project was a new project or a repowering project does not refute Ms. Owens' substantial evidence of collision risk posed by taller wind turbines.⁵⁵

The Bio Memo asserts that comments regarding turbine specifications are irrelevant because the largest possible turbine size was assumed, and that there is no data that smaller turbines with a smaller rotor diameter would have a greater impact on birds.⁵⁶ This misstates the issue with the IS/MND, which is that no specifics on turbine size were provided, preventing accurate analysis by the public and decisionmakers as to the significance of Project impacts.⁵⁷ Because the IS/MND never attempted to calculate the amount of avian mortality from the proposed Project, nor compared that data with the baseline, then the assumption of the largest possible blades without any numbers of data does not further the analysis or provide information the public can use to assess the Project's potentially significant impacts.⁵⁸

Without an adequate description of the width and height, in addition to the length, of the turbines, impacts to biological resources cannot be determined. Since the Project description is incomplete, the IS/MND fails as an informational document as required by CEQA.

D. The Project Description is Not Complete Because the Project has Not Completed Joint Project Review as Required by the Coachella Valley Multiple Species Habitat Conservation Plan

The Coachella Valley Multiple Species Habitat Conservation Plan ("CVMSHCP") requires projects within its boundaries to undergo a Joint Project Review ("JPR") between the Coachella Valley Conservation Commission ("CVCC"), the United States Fish and Wildlife Service ("USFWS"), and California Department of Fish and Wildlife ("CDFW") in order to determine if the project can be approved consistent with the existing take permits provided to the plan.⁵⁹

⁵⁵ Owens' Response, pp. 4-5.

⁵⁶ Bio Memo, p. 1.

⁵⁷ Owens' Response, pp. 1-2.

⁵⁸ Owens' Response, p. 2.

⁵⁹ Final Recirculated Coachella Valley Multiple Species Habitat Conservation Plan and Natural Community Conservation Plan (Sept. 2007), pp. 1-2-1-3 (*hereafter* "HCP").

At this time, the JPR process has not been completed. The IS/MND conditions a determination of no adverse effects on “successful completion of the JPR process.”⁶⁰ An e-mail from a GIS Technician with the Coachella Valley Association of Governments (“CVAG”) to USFWS and CDFW staff provided a November 30, 2018 deadline for comments from those agencies, which would be needed to finalize the JPR and which would occur at some unknown later time, potentially after further Project review by the County.⁶¹ Because the JPR has not been finalized, additional changes to the Project may be mandated by USFWS or CDFW in order to be certain there will be consistency with the CVMSHCP and its take authorization. If the JPR process cannot be completed successfully, premature consideration and approval of the Project will have significant unmitigated impacts to habitats and species.

Without a finalized JPR, the Project fails to provide an accurate or stable project description, rendering the consistency analysis with the CVMSHCP unreliable. The IS/MND must be withdrawn and recirculated with correct information from after the JRP process.

All phases of the Project — the “whole of an action” — must be evaluated in a single EIR. Accordingly, the County must revise and recirculate the environmental document to include a description of the Project transporting components to and from the Project site.

IV. THE IS/MND VIOLATES CEQA’S PROHIBITION ON PIECEMEAL ENVIRONMENTAL REVIEW

A public agency may not segment a large project into two or more smaller projects in order to mask serious environmental consequences. CEQA prohibits such a “piecemeal” approach and requires review of a project’s impacts as a whole.⁶² CEQA mandates “that environmental considerations do not become submerged by chopping a large project into many little ones – each with a minimal potential impact on the environment – which cumulatively may have disastrous

⁶⁰ IS/MND, p. 37.

⁶¹ E-mail from Oscar Vizcarra to Heather Pert, KBAEZ@rivco.org, Jenness McBride, and Applicant (Oct. 31, 2018), **Exhibit G**.

⁶² 14 CCR § 15378(a); *Burbank- Glendale-Pasadena Airport Authority v. Hensler* (1991) 233 Cal.App.3d 577, 592.

consequences.”⁶³ Before approving a project, a lead agency must assess the environmental impacts of all reasonably foreseeable phases of a project.⁶⁴

The IS/MND notes that there may not be sufficient habitat needed to mitigate impacts to the Coachella Valley Jerusalem Cricket within the Upper Mission Creek/Big Morongo Conservation Area.⁶⁵ The CVMSHCP allows for a Transfer of Conservation Goals; however, it is subject to subsequent approval by USFWS and CDFW.⁶⁶

This future part of the Project will occur if the JPR does not find adequate habitat within the existing Conservation Area and will require further discretionary approval by the CVCC. Without a completed JPR process, it is impossible to determine whether this action will occur, what areas it will impact, or whether it will even be approved. There may be potential significant impacts from future actions to provide sufficient habitat for this Project to conform to the CVMSHCP take permits, or no sufficient habitat available to reduce the impact from the Project to a less-than-significant level.

The IS/MND also notes that there must be a Restoration Plan to revegetate the Project site and restore habitat.⁶⁷ This plan will be submitted to the CVCC and County prior to any site disturbance for approval. This plan is part of this Project and needed to be disclosed and analyzed prior to Project approval to prevent fragmenting the analysis, limiting the amount of revegetation that will occur, and to ensure that revegetation will happen.

The proposed Restoration Plan must be developed and disclosed to the public prior to consideration by the County. The IS/MND must be withdrawn and a revised analysis must be recirculated for public review once the analysis is complete, disclosed to the public and adequate mitigation has been identified.

⁶³ *Bozung v. Local Agency Formation Commission* (1975) 13 Cal.3d 263, 283-84; *City of Santee v. County of San Diego* (1989) 214 Cal.App.3d 1438, 1452.

⁶⁴ *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 396-397 (EIR held inadequate for failure to assess impacts of second phase of pharmacy school's occupancy of a new medical research facility).

⁶⁵ IS/MND, p. 34.

⁶⁶ HCP, p. 6-52.

⁶⁷ IS/MND, p. 34.

V. THE IS/MND FAILS TO ADEQUATELY ESTABLISH THE EXISTING ENVIRONMENTAL SETTING AGAINST WHICH THE COUNTY IS REQUIRED TO ANALYZE THE PROJECT'S POTENTIALLY SIGNIFICANT IMPACTS

The IS/MND describes the existing environmental setting inaccurately and incompletely, thereby skewing the County's impact analysis. The existing environmental setting is the starting point from which the lead agency must measure whether a proposed Project may cause a significant environmental impact.⁶⁸ CEQA defines the environmental setting as the physical environmental conditions in the vicinity of the project, as they exist at the time the notice of preparation is published, from both a local and regional perspective.⁶⁹

Describing the environmental setting accurately and completely for each environmental condition in the vicinity of the Project is critical to an accurate and meaningful evaluation of environmental impacts. The importance of having a stable, finite and fixed environmental setting for purposes of an environmental analysis was recognized decades ago.⁷⁰ Today, the courts are clear that "[b]efore the impacts of a Project can be assessed and mitigation measures considered, an [EIR] must describe the existing environment. It is only against this baseline that any significant environmental effects can be determined."⁷¹

An EIR must also describe the existing environmental setting in sufficient detail to enable a proper analysis of project impacts.⁷² The CEQA Guidelines provide that "[k]nowledge of the regional setting is critical to the assessment of environmental impacts."⁷³ This level of detail is necessary to "permit the significant effects of the project to be considered in the full environmental context."⁷⁴

⁶⁸ See, e.g., *Communities for a Better Env't v. S. Coast Air Quality Mgmt. Dist.* (March 15, 2010) 48 Cal.4th 310, 316; *Fat v. City of Sacramento* (2002) 97 Cal.App.4th 1270, 1278, citing *Remy, et al.*; *Guide to the Calif. Environmental Quality Act* (1999) p. 165.

⁶⁹ CEQA Guidelines § 15125, subd. (a); *Riverwatch v. City of San Diego* (1999) 76 Cal.App.4th 1428, 1453.

⁷⁰ *City of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185.

⁷¹ *City of Amador v. El Dorado City Water Agency* (1999) 76 Cal.App.4th 931, 952.

⁷² *Galante Vineyards v. Monterey Peninsula Water Mgmt. Dist.* (1997) 60 Cal.App.4th 1109, 1121-22.

⁷³ CEQA Guidelines § 15125, subd. (d).

⁷⁴ *Id.*

The IS/MND fails to accurately and adequately describe the environmental setting to enable the County to properly assess transportation, air and public health impacts from the Project. Decision makers cannot determine the Project's impacts, and in turn, apply appropriate mitigation for those impacts, without an accurate description of the environmental setting. The County must gather the relevant data and revise the IS/MND to include an accurate and complete description of the existing environmental setting.

A. The IS/MND Fails to Establish the Environmental Setting for Traffic, the Air Basin, and Sensitive Receptors Along the Blade Transit Route

As stated above, the IS/MND is silent on how the Project will transport 213-foot-long wind turbine blades to the Project site.⁷⁵ What is also lacking is an adequate description of existing traffic patterns, the air basin, and sensitive receptors along the route so that there can be a comparison between the existing setting and effects on traffic and air quality from the Project on sensitive receptors.⁷⁶ Since the IS/MND fails to describe existing traffic patterns, the air basin and sensitive receptors, the County failed to establish the existing setting and cannot make an effective determination of the Project's impacts and mitigation required to address those impacts.⁷⁷

The Response Memorandum suggests that the analysis is complete because the County estimated impacts from standard haul truck trips on Highways 10 and 62.⁷⁸ As explained above, this does not cover the full scope of the Project, since turbine blades cannot be sourced locally. The IS/MND analysis wrongly assumes standard haul trucks will be used, instead of the uniquely large equipment that may have a difficult time navigating existing routes that are needed to deliver the turbine blades to the site.

⁷⁵ Fox Comments, p. 11.

⁷⁶ Fox Comments, p. 11.

⁷⁷ Fox Comments, p. 11.

⁷⁸ Response Memo, p. 4.

B. The IS/MND Underestimates the Amount of Habitat the Project Will Disturb

The Bio Memorandum suggests that our previous comment letter is not supported by substantial evidence.⁷⁹ This is incorrect, as our comment letter was supported by Ms. Owens' expert opinion, which determined after reviewing the IS/MND and cited materials that total lands disturbed were underestimated.⁸⁰

The IS/MND states that the Project will only permanently disturb 2.59 acres of land but does not support this claim.⁸¹ Construction of new access roads and widening of existing access roads to accommodate the larger turbines and cranes, a new laydown yard, and new turbine pads will all disturb the Project site. Ms. Owens' estimate based on the information provided by the County and the Applicant suggests that the actual area of permanently disturbed land may be closer to 20 acres.⁸²

First, several miles of access roads will be expanded from 8 or 16 feet wide to 36 feet wide, disturbing 4.36 acres per mile.⁸³ Second, new access roads will be constructed to towers 2, 3, 13, and 14.⁸⁴ Third, the laydown yard itself will disturb over 5 acres.⁸⁵ Fourth, the IS/MND uses an unreasonably conservative estimate for turbine construction zones.⁸⁶ Finally, the IS/MND does not discuss the disturbance related to decommissioning of the existing 291 wind turbines.⁸⁷

The areas that will be disturbed are, or are surrounded by, native habitat that may be occupied by sensitive species.⁸⁸ While the IS/MND suggests that disturbed areas will be revegetated, the County never discloses the potentially significant impacts, the extent of the potentially significant impacts and the

⁷⁹ Bio Memo, p. 1.

⁸⁰ Owens' Response, p. 7.

⁸¹ Owens' Comments, p. 4.

⁸² Owens' Comments, p. 6.

⁸³ Owens' Comments, p. 6.

⁸⁴ Owens' Comments, p. 6.

⁸⁵ Owens' Comments, p. 6.

⁸⁶ Owens' Comments, p. 6.

⁸⁷ Owens' Comments, p. 7.

⁸⁸ Owens' Comments, pp. 6-7.