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

ITEM: 3.27
(ID # 13319)
MEETING DATE:
Tuesday, September 15, 2020

FROM: TLMA-PLANNING:

SUBJECT: TRANSPORTATION & LAND MANAGEMENT AGENCY/PLANNING: SET ASIDE CERTIFICATION FOR PORTIONS OF ENVIRONMENTAL IMPACT REPORT NO. 532 AND PORTIONS OF RESOLUTION NO. 2017-199 for Palo Verde Mesa Solar Project (CUP03684, PUP00916, DA00086). - Applicant: Renewable Resources Group – Representative: Power Engineers – Fourth Supervisorial District – Chuckwalla Zoning District – Palo Verde Area Plan – Agriculture (AG), Open Space: Rural (OS:RUR) – Location: northerly of Interstate-10, west of Neighbors Boulevard – Zoning: Controlled Development Areas – 10 Acre Minimum (W-2-10), Light Agriculture – 10 Acre Minimum (A-1-10) – The decertification of portions of the EIR addresses the peremptory writ of mandate issued by the court regarding the lawsuit on the EIR for the project. The EIR was originally certified by the Riverside County Board of Supervisors on August 29, 2017. District 4. [Applicant Fees 100%]

RECOMMENDED MOTION: That the Board of Supervisors:

1. Set aside and vacate certification of portions of Environmental Impact Report No. 532 analysis related to soil contamination and mitigation for burrowing owl, with all other associated project approvals and the certification of the remainder of Environmental Impact Report No. 532 remaining in effect;

2. Set aside and vacate only that portion of Resolution No. 2017-199 certifying portions of Environmental Impact Report No. 532 related to soil contamination and mitigation for burrowing owl, with all other portions of Resolution No. 2017-199 remaining in effect; and

3. Direct County Counsel's office to file a return on the writ with the Court, describing the actions taken by the Board of Supervisors.

ACTION: Policy

Charissa Leach, Assistant TLMA Director 8/31/2020

MINUTES OF THE BOARD OF SUPERVISORS

On motion of Supervisor Spiegel, seconded by Supervisor Perez and duly carried by unanimous vote, IT WAS ORDERED that the above matter is approved as recommended.

Ayes:	Jeffries, Spiegel, Washington, Perez and Hewitt
Nays:	None
Absent:	None
Date:	September 15, 2020
xc:	Planning, CoCo

Kecia R. Harper
Clerk of the Board
By: _____ Deputy

FINANCIAL DATA	Current Fiscal Year:	Next Fiscal Year:	Total Cost:	Ongoing 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:	N/A

C.E.O. RECOMMENDATION: Approve

BACKGROUND:

Summary

On August 29, 2017, Agenda Item 17.5, the Board of Supervisors (Board) adopted Resolution No. 2017-199 Certifying Environmental Impact Report No. 532 and approved Conditional Use Permit No. 3684, Public Use Permit No. 916, and Introduced Ordinance No. 664.59 approving Development Agreement No. 86. Ordinance No. 664.59 was subsequently adopted approving Development Agreement No. 86 on September 12, 2017.

After the Final EIR for this Project was certified, two lawsuits challenging the EIR were filed in the Riverside Superior Court in the cases *Citizens for Responsible Solar v. County of Riverside*, Riverside Superior Court Case No. RIC 1718458, and *Golden State Environmental v. County of Riverside*, Riverside Superior Court Case No. RIC 1718565, which both challenged the Project under the California Environmental Quality Act (CEQA, Pub. Res. Code, § 21000 et seq.) and were subsequently consolidated for limited purposes. On July 11, 2019, the Court issued a Ruling on Petition for Writ of Mandate, ruling that the County was to add further analysis of soil contamination and details on mitigation for potential impacts to burrowing owl to the EIR as well as decertify only the portions of the EIR related to analysis of soil contamination and mitigation for burrowing owl, a ruling which was later finalized in identical judgments and writs of mandate issued in the two cases.

The peremptory writs of mandate, which set forth the actions the County is required to undertake, are identical except for the names of the cases. A copy of the writ from one of the cases, and the Notice of Ruling referenced in the writ, is attached.

At this time the only action for the Board of Supervisors is to decertify those portions of the EIR as required by the court. The writ also directs the County to prepare and assess additional environmental information, and to exercise discretion regarding whether to modify or rescind some or all of the project approvals. The County is in the process of assessing additional information as required by the writs and will bring other applicable actions to the Board of Supervisors at a future meeting for consideration and decision.

Impact on Residents and Businesses

The partial decertification of the EIR is required by court order and is not expected to impact residents or businesses other than the parties to the litigation.

SUPPLEMENTAL:

Additional Fiscal Information

All fees are paid by the applicant. There is no General Fund obligation.

ATTACHMENTS:

A. Peremptory Writ of Mandate
B. Notice of Ruling

Jason Farin, Principal Management Analyst 9/8/2020

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF RIVERSIDE

TITLE:	DATE & DEPT.	NUMBER
CITIZENS FOR RESPONSIBLE SOLAR VS. COUNTY OF RIVERSIDE	July 11, 2019 Dept. 7	RIC1718458
COUNSEL None	**REPORTER** None Present	
PROCEEDING NOTICE OF RULING		

Ruling on Petition for Writ of Mandate

The Petition for Writ of Mandate of Citizens for Responsible Solar, California Unions for Reliable Energy, George Ellis, James Hennegan, and, Golden State Environmental Justice Alliance (collectively "Petitioners") is GRANTED as to the issue of analysis and mitigation of soil contamination impacts, and as to mitigation on the solar facility site for the burrowing owl. Otherwise, the Petition is DENIED.

Facts and Procedural History

This matter involves the construction, operation, and eventual decommissioning of an up to 450 megawatt (MW) solar facility on 3,400 acres (3,250 acres for solar facility site and 143 acres for a transmission line) (the Project) in the Palo Verde Mesa area of Riverside County. That is located five miles northwest of central Blythe and 40 miles east of Desert Center in Riverside County. (AR 434, 435.) The Project consists of a solar field of solar trackers, two on-site substations, an operations and maintenance building (O&M), inverters, underground interior collection power lines between inverters and substations, and interior access roads. (AR 437.) There will also be a 230 kilovolt (kV) transmission line (gen-tie)

R. STAMEN, Judge
L. Howell (vis), Clerk

that will connect to the Southern California Edison Colorado River Substation that is approximately seven miles away from the Project site. (AR 434.)

The Project site is located on former agricultural land near, but outside of the site of the Blythe Lemon Ranch. It has a history of pesticide and herbicide use. (AR 3636, 3646, 10376-10378.) The site also has a history of soil contamination from 80 underground storage tanks (USTs) that were used to fuel gasoline-powered wind turbines previously at the site. Many of the underground storage tanks leaked (LUSTs). (AR 1866, 3244, 10376-10378.) It is a cleanup site included on the State Water Resources Control Board (SWRCB) Geotracker Website known as the "Cortese List". The cleanup involved removal of the USTs. (AR 1866, 3244, 10376.) The site was the subject of a 1991 Colorado River Basin Regional Water Quality Control Board (Water Board) cleanup of shallow soil contamination from the USTs.

The Petition alleges residual gasoline concentrations remain significant in shallow soil under 44 of the 80 USTs. (*Id.*) It further alleges it will take three years to construct the Project and will require excavation, road construction, and light grading. Finally, it alleges the Project will last for thirty years and that when the Project is decommissioned, the Project site will be returned to agricultural use.

On 8/8/12, respondent County of Riverside (County) issued a Notice of Preparation (NOP) of the Draft Environmental Impact Report (DEIR) for the Project. (AR 77.) The DEIR was released on 9/29/16 for a 45-day public comment period. Petitioners submitted extensive written comments to the County. The Final Environmental Impact Report (FEIR) was released in August 2017. It included responses to the comments. The County's Board

of Supervisors conducted a hearing on the Project and the FEIR on 8/29/17 and approved the FEIR at the hearing. (AR 1.) The County then filed and posted the Notice of Determination (NOD) on 8/30/17. (AR 1.)

Petitioners challenge the Board's 8/29/17 decision to adopt Resolution No. 2017-168[1]. The Resolution certified Environmental Impact Report (EIR) No. 532 for the Palo Verde Mesa Solar Project, Conditional Use Permit (CUP) No. 3684, Public Use Permit (PUP) No. 916, Development Agreement (DA) No. 86, adopting a Mitigation Monitoring and Reporting Program (MMRP), adopting Ordinance No. 664.59 and findings for approval of the CUP, PUP, and DA pursuant to the California Environmental Quality Act (CEQA.) The Petition, which was filed on 9/29/17, also contains requests for declaratory and injunctive relief.

Petitioners allege that the FEIR fails to adequately disclose and mitigate the Project's potentially significant impacts on hazardous materials, biological resources, water resources, air quality, as well as the Project's significant cumulative impacts. (Only some of these issues were raised in the parties' briefs.) Specifically, Petitioners argue in their Opening Brief that the EIR: 1) did not disclose and mitigate hazardous waste impacts associated with the disturbance and removal of contaminated soil at the Project site; 2) failed to establish an accurate baseline for biological resources; 3) failed to disclose and mitigate significant avian mortality impacts resulting from collisions with Project components; 4) failed to adequately assess and mitigate biological resource impacts to the burrowing owl (the

[1] Resolution No. 2017-168 was incorrectly identified in the Board's approvals as "Resolution No. 2017-199"; Resolution No. 2017-168 is the correct number.

"BUOW"), desert tortoise, mojave fringe-toed lizard (MFTL), golden eagles, and bald eagles; and, 5) failed to disclose the Project's potentially significant impacts on state and federal jurisdictional waters by improperly deferring a jurisdictional wetlands delineation survey.

In their Reply, Petitioners added that the EIR lacks substantial evidence to support the conclusion that Mitigation Measure HAZ-1 will effectively reduce soil contamination to less than significant levels. They argued, for the first time, that the County is using the wrong standard of review. Petitioners argue the County incorrectly characterizes Petitioners' claims as factual disputes, when they are issues of law in that the EIR fails to make adequate disclosures. Petitioners rely on the recent opinion of *Sierra Club v. County of Fresno* (2018) 6 Cal.5th 502. (Petitioners and Respondents were permitted to file supplemental briefs regarding the proper standard of review and *Sierra Club*.)

The Court rules as set forth below. It addresses Petitoners' claims in the order Petitioners argued them in their joint Opening, Reply, and Supplemental briefs.

A

Petitioners' Contention that the EIR Improperly Deferred Analysis and Mitigation of the Project's Potentially Significant Hazardous Materials Impacts That Will be Caused by Disturbance and Removal of Contaminated Soil at the Project Site

The Court finds that the standard of review on this issue is de novo. Petitioners challenge the adequacy of the EIR. That is a procedural challenge. (*Sierra Club v. County of Fresno* (2018) 6 Cal.5th 502.) Additionally, the Court notes that:

"[U]nderlying factual determinations—including, for example, an agency's decision as to which methodologies to employ for analyzing an environmental effect—may warrant deference." (*Id.* at 516.) Nonetheless, "[w]hether or not the alleged inadequacy is the complete omission of a required discussion or a patently inadequate one-paragraph discussion devoid of analysis, the reviewing court must decide whether the EIR serves its purpose as an informational document." (*Sierra Club, supra.* at 514.)

1. Deferred Analysis of Soil Contamination Impacts

Petitioners argue that the EIR improperly defers analysis of potentially significant soil contamination to the future when a post-approval investigation will occur during a Phase II Environmental Site Assessment (ESA). (AR 418 [only mentions residual pesticides or herbicides from past agricultural uses].) They assert that the Phase I ESA in the Draft EIR (DEIR) was reviewed by an expert, Matt Hagemann, who concluded soil disturbance during construction was a potentially significant impact, should be sampled under a Phase II ESA, and disclosed in a revised DEIR. (AR 10377, 12428.) They argue that the County dismissed the Phase I ESA and Mr. Hagemann's recommendations by deferring preparation of the Phase II ESA until after Project approval, and by designating it as a mitigation measure prior to construction.

There is a critical distinction between deferred *analysis* and deferred *mitigation.* (Reply, p. 7:13-8:11.) Deferred analysis of the impacts and effects of soil disturbance during construction is prohibited by CEQA unless it is not feasible to perform the analysis or where the impact is less than significant. (*City of Maywood v. LAUSD* (2012) 208 Cal.App.4th 362,

406; *Endangered Habitats League, Inc. v. County of Orange* (2005) 131 Cal.App.4th 777, 794.) The EIR makes no showing that it is not feasible to perform the Phase II ESA analysis or that the impacts are less than significant before and after mitigation.

Petitioners argue that the soil disturbance during construction of the Project will potentially exacerbate an existing hazardous condition, which must be analyzed prior to approval of the EIR. (*Cal. Build. Indust. Ass'n (CBIA) v. BAAQMD* (2015) 62 Cal.4th 369, 389, 392 [held "that CEQA does not generally require an agency to consider the effects of existing environmental conditions on a proposed project's future users or residents. What CEQA does mandate ... is an analysis of how a project might exacerbate existing environmental hazards ...."]) .) The existing site contains soil contamination from the use of pesticides and potentially from LUSTs in the form of fuel contamination. That soil disturbance during construction will cause potentially significant impacts is acknowledged.

The EIR fails to disclose whether any of the Project's construction activities involving pile driving and excavation will occur at depths that residual contamination from LUSTs has been documented or the location and extent of residual toxins under the Project site. (AR 532, 533, 12428.) As a result, the proposed Mitigation Measure, MM HAZ-1, defers *analysis* of the Project's soil contamination impacts until after the Project has been approved. (*Madera Oversight Coalition, Inc. v. County of Madera* (2011) 199 Cal.App.4th 48, 81-82 [A "postcertification verification procedure allows for an environmental decision to be made outside an arena where public officials are accountable."])

Respondents argue that use of the Phase II ESA, which is provided for in MM HAZ-1, is not deferred analysis. They argue that the EIR indicates that the presence of hazardous

materials has already been investigated in the Phase I ESA, which determined that there is a potential for exposure to hazardous materials in the soil at the Project site. (AR 797-798, 821-826, 837, 3062-3063.) The EIR acknowledges that residual fuel constituents were identified in soil underneath the subject property from 44 USTs. (AR 798.) The EIR states that the Colorado River Basin Regional Water Quality Control Board (RWQCB) reviewed UST closure reports and found "no further action required" since levels detected did not present a potential threat to human health or the environment. (AR 798.) However, this finding by the RWQCB does not consider soil disturbance during construction, which all parties acknowledge as a potentially significant impact. The EIR acknowledges that excavation will occur down to 3 feet. There is no analysis as to the nature and magnitude of the disturbance.

The EIR also mentions the potential for pesticides and other chemicals to be present in shallow soils and concludes they will be evaluated through implementation of mitigation measures HAZ-1 and HAZ-2. (AR 822.) This reference concedes that analysis of the contaminants is deferred. It also does not specifically address residual fuel constituents. The language in HAZ-1 is limited to residual pesticides or herbicides from past agricultural land uses, and HAZ-2 only provides for a Worker Environmental Awareness Program. (AR 418, 837.)

Respondents argue that the issue is not inadequate disclosure of the soil disturbance, but the *timing of performing the mitigation,* which is a question of fact for the Board, not a question of law for the Court.[2] However, deferred *mitigation* is not the issue here. The issue

[2] Respondents assert that the Project site is not located on a site that is on the Cortese list but, the EIR

is that the EIR does not contain an adequate analysis of the nature and magnitude of the intended soil disturbance, which has been improperly deferred to a time prior to construction and post-approval. While the EIR does not completely omit the discussion of soil disturbance, the current analysis is insufficient. (*Sierra Club, supra.* at 516.)

Based on the foregoing, the Court Grants the Petition on the issue of deferred analysis of soil contamination impacts.

2. Mitigation – Investigation and Removal of Contaminated Soil

CEQA requires an EIR to propose mitigation measures that will minimize a project's significant impacts by reducing or avoiding them. (Pub. Res. Code §21002, §21100.) Courts generally defer to an agency's assessment of the effectiveness of the mitigation measures proposed in the EIR. (Kostka & Zische, Practice Under the CEQA, 2d Ed. (CEB 2018) Ch. 14, §14.9, p. 14-10.) "For projects for which an EIR has been prepared, where substantial evidence supports the approving agency's conclusion that mitigation measures will be effective, courts will uphold such measures against attacks based on their alleged inadequacy." (*Sacramento Old City Ass'n v. City Council* (1991) 229 Cal.App.3d 1011, 1027.)

Petitioners assert that the County relies on mitigation measure HAZ-1 to conclude that the soil contamination impacts will be mitigated to less than significant levels. (AR 822, 3062-3063.) They argue that the County's reliance is contrary to law because it defers soil contamination analysis until after Project approval. (*Madera Oversight, supra.* at 81-82.) As

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disclosed the nearby Blythe Lemon Ranch, and acknowledged the potential exposure to contaminated soil at the Project site.

discussed above, the EIR fails to adequately disclose the impacts and effects of soil disturbance during construction and attempts to defer this analysis to a time before construction.

Petitioners argue that mitigation measure HAZ-1, in its current form is limited to "the potential presence of residual pesticides or herbicides from past agricultural land uses." (AR 5307.) It omits a discussion of whether other contaminants, such as residual fuel contaminants in the soils would cause significant impacts, if disturbed. Petitioners also argue that mitigation measure HAZ-1 included a performance standard related only to removal of pesticides. (*Id.*) Mitigation measure HAZ-1 does not address all soil contamination to be removed, including soil contaminated by fuel from LUSTs or other sources.

The conclusion that mitigation measure HAZ-1 is sufficient to reduce soil disturbance contamination impacts to less than significant is not supported by substantial evidence.

Based on the foregoing, the Court Grants the Petition on the issue of mitigation – investigation and removal of contaminated soil.

B

Petitoners' Contention that the EIR Failed to Establish an Accurate Baseline for the Desert Tortoise, Burrowing Owl (BUOW), Mojave Fringed-Toed Lizard (MFTL), and Golden and Bald Eagles

Protection of biological resources is a fundamental policy incorporated in the CEQA. (Pub. Res. Code §21001(c).) Petitioners argue that the DEIR fails to establish baselines for

biological resources, including the desert tortoise, the burrowing owl (BUOW), the Mojave fringed-toed lizard (MFTL), and golden and bald eagles.

"An EIR must include a description of the physical environmental conditions in the vicinity of the project ... as they exist at the time the notice of preparation is published or, if no notice of preparation is published, at the time the environmental analysis is commenced." (14 Cal. Code Regs. [CEQA Guidelines] §15125(a), (a)(1); *Communities for a Better Env't v. South Coast Air Quality Mgmt. Dist.* (2010) 48 Cal.4th 310, 320.) Lead agencies have significant discretion in determining the appropriate "existing conditions" baseline. (See *Neighbors for Smart Rail v. Exposition Metro Line Constr. Auth.* (2013) 57 Cal.4th 439, 453.)

The EIR's description of the existing environmental setting or baseline should be comprehensive enough so that the project's significant impacts can "be considered in the full environmental context." (CEQA Guidelines §15125(a).) However, while the description is important to set the starting point for the impact analysis, it is not required to be as comprehensive and detailed as the impact analysis itself. (CEQA Guidelines §15125(a),(c).)

The substantial evidence standard applies to the determination of existing physical conditions that constitute the baseline for the environmental impact analysis (*Neighbors for Smart Rail v. Exposition Metro Line Constr. Auth.* (2013) 57 Cal.4th 439, 449; *Communities for a Better Env't v. South Coast Air Quality Mgmt. Dist.* (2010) 48 Cal.4th 310, 328.)

1. Desert Tortoise

Petitioners assert that Respondents acknowledged desert tortoises were likely to be present on the Project site, but failed to conduct "protocol-level surveys for this critically threatened species" and, therefore, could not have concluded "that there was a low

probability of occurrence for that species." (AR 2844-2845, 2864, 3077, 3082.) They assert that the EIR's analysis was extremely limited and inconsistently stated "*no* impact" as well as a "potentially significant impact." (AR 693-694; 712-713.) This assertion is taken out of context. The EIR states that the site of the solar facility is agricultural land, which is not suitable habitat for the desert tortoise. (AR 693, 713.) A*t the same time* the "[h]abitat quality along the transmission line corridor [gen-tie] is higher" than the solar facility site but, is considered of marginal habitat quality for the desert tortoise. (AR 693.) The EIR characterizes the potential for desert tortoise occurrence along the "marginal habitat present along the gen-tie corridor" as "moderate." (AR 693.) Thus, the EIR adequately explains the inconsistency pointed out by Petitioners. This does not end the inquiry concerning the baseline analysis for the desert tortoise.

Petitioners argue that the EIR failed to provide an adequate baseline upon which to measure impacts because it relied on a 2012 memo from the USFWS to the Federal Bureau of Land Management (BLM), which concerned another project (the Blyth Mesa Solar Project, not the Palo Verde Mesa Solar Project project. (AR 2864 [this comment acknowledges that this Project and the BMSP share the same gen-tie line.]) They assert that the County *presumed* significant impacts on the solar facility site, and adopted mitigation measures accordingly. Petitioners rely on *Communities for a Better Environment (CBE) v. Richmond* (2010) 184 Cal.App.4th 70, 85 for the general proposition that without a baseline, it is impossible to know the actual impact and whether mitigation measures will reduce that impact. While *CBE v. Richmond* is factually distinguishable, it is accurately cited for the

general proposition. However, Petitioners did not demonstrate that no baseline was provided.

Petitioners take issue with the surveys that were conducted, claiming the scope and methodologies were inadequate. An agency is not required to undertake a protocol-level survey when assessing whether a project will affect endangered, rare, or threatened species. A lead agency may employ other survey methodologies, such as reconnaissance-level surveys, as long as its choice of methodology is supported by substantial evidence. (*Gray v County of Madera* (2008) 167 CA4th 1099, 1124; *Association of Irritated Residents v County of Madera (AIR)* (2003) 107 CA4th 1383, 1396.) Also, a quantified analysis of biological impacts is not required, as long as the supporting biological studies or analysis are sufficiently credible to support the EIR conclusions. (*Save Round Valley Alliance v County of Inyo* (2007) 157 CA4th 1437, 1468.)

Petitioners assert that no one walked "transects" or did systematic analyses of the presence or potential numbers of desert tortoises on the site or gen-tie corridor including sampling according to the USFWS survey protocol. (AR 16061-16065.) A reconnaissance-level survey of all species including plants was conducted on the 3400-acre site in October of 2011 by the EIR's experts. (AR 1684-1687.) Petitioners argue that the EIR fails to indicate that "detection surveys" were performed even to determine the presence of the desert tortoise. (AR 11909.) Significantly, the EIR does not conclude that the desert tortoise could not be present.

Respondents reasonably relied on the analysis made by the EIR's expert biologists. (See AR 670-673, 694.) Respondents point out that Petitioners are not challenging the

"findings" that the desert tortoise could be present. Rather, Petitioners want "even more evidence" based on additional surveys. The analysis relied on field surveys of various species, including plants, conducted prior to issuance of the survey report in 2012. (AR 670.) Those field surveys were not specific to the desert tortoise Protocol-level surveys are not required where the methodology chosen is supported by substantial evidence. (*Gray, supra.; AIR, supra.*)

Significantly, the EIR provides a baseline analysis as to the presence of the desert tortoise at the gen-tie corridor, which was based on a survey conducted for a nearby solar facility, the Blyth Mesa Solar Project. (AR 670.) It was reported that "there is a moderate potential for the desert tortoise to occur within the transmission line corridor." (AR 670.) This Project and the Blyth Mesa Solar Project will share the same transmission line corridor. The County was aware that a desert tortoise was sighted at the gen-tie corridor in 2014. (AR 2864.) Thus, the finding of "moderate" potential for the desert tortoise in the gen-tie corridor is supported by substantial evidence, a species-specific survey conducted on the gen-tie corridor. (AR 670; see also DEIR, Appendix D.) It is also a reasonable inference, according to this finding, that the desert tortoise "could be present" on the solar facility site.

Based on the foregoing, the Court finds that the baseline analysis for the desert tortoise is supported by substantial evidence.

2. Burrowing Owl (BUOW)

The DEIR surveyed the gen-tie corridor in 2011 and 323 acres of the 2,982-acre solar facility site in 2013 (about 11% of the site). Petitioners contend the DEIR improperly justified the omission of the remaining 2,660 acres due to lack of vegetation. Therefore the baseline

analysis was inadequate. Specifically, Petitioners argue that the decision to omit a survey of the remaining site was arbitrary because: 1) some of the areas excluded from the survey efforts had vegetation at the time of the surveys (AR 2946); 2) the BUOW habitat does not require vegetation (AR 2946); and, 3) the County's assumption that BUOWs do not burrow in lands under cultivation is incorrect (AR 3588-3589, 11910, 3084 [BUOW habitat defined in CDFW protocol as "short or sparse vegetation."]) Petitioners assert that in addition to failing to survey most of the solar facility site, the data that was collected was substandard. (AR 11890-11893.)

Petitioners take issue with the surveys that were conducted, claiming the scope and methodologies were inadequate. The EIR found a high potential for BUOW occurrence at the Project site based on reconnaissance-level surveys and protocol-level surveys from 2011 and 2013. (AR 658, 673, 695, 1693-1718 [Western Burrowing Owl Monitoring and Mitigation Plan.]) Conducting additional or different surveys would likely reach the same conclusion as to the baseline occurrence of the BUOW. Petitioners failed to show that the baseline findings for the BUOW were unsupported by substantial evidence.

Petitioners argue that the County changed its position as to the BUOW because the DEIR stated that the BUOW "may be occasionally present as foragers but unlikely to be present as residents", but the phrase "unlikely to be present as residents" was deleted in the FEIR. (AR 673, 3183.) Petitioners argue that this change of position requires recirculation. Public Resource Code §21092.1 provides for recirculation when significant new information is added to an EIR after the public comment period, but prior to certification. Petitioners did not show that significant new information was added to the EIR so as to require recirculation.

Petitioners also argue that the County did not follow protocol survey method, set forth in the CDFW 2012 BUOW Staff Report, for the small areas it did survey. (AR 11890, 11891, 11893.) A lead agency is not required to follow the recommendations of wildlife agencies on how an impact should be studied, provided that substantial evidence supports the agency's chosen methodology. (*North Coast Rivers Alliance v Marin Mun. Water Dist.* (2013) 216 CA4th 614, 643.)

Based on the foregoing, the Court finds the baseline analysis for the BUOW is supported by substantial evidence.

3. Mojave Fringe-Toed Lizard ("MFTL")

Petitioners assert that the County acknowledged a large MTFL population on the proposed gen-tie corridor; but, 1) the EIR inconsistently asserts that the MTFL was not detected on the solar facility site during three days of reconnaissance-level surveys (AR 674 [Table 3.4-4]; and, 2) that the MTFL was detected on the solar facility site, despite no actual MTFL surveys (AR 672 [Figure 3.4-3.]). Although Figure 3.4-3 depicts the presence of a MTFL on the solar facility site, this finding does not require that the entire baseline analysis of the MFTL should be disregarded. (AR 672.) Baselines do not have to be perfect. Rather, they must be supported by substantial evidence.

Petitioners assert their expert, Mr. Cashen, found reconnaissance-level surveys on the solar site were inadequate because the MTFL hibernates and because its daily activity patterns are dependent on temperature. (AR 2943.) Petitioners claim the County failed to meaningfully respond to this comment by asserting that the MTFL habitat on the *gen-tie* corridor would be compensated at a 3:1 ratio and that the Project's contribution to *cumulative*

impacts would be "incremental, given the low potential for the MFTL within the Project site." (AR 3028.) They argue that this conclusion was unsupported because MFTL was actually sighted on the solar facility site during hibernation and because of the acknowledgement that the potential MTFL habitat was detected on 3% of the solar site. (AR 12496 [Cashen comments], AR 694.) Petitioners then conclude there was an inadequate baseline for the MFTL.

Petitioners take issue with the methodology used to analyze the MFTL baseline. The EIR concludes a moderate potential for the MFTL at the solar site and a substantial population at the gen-tie corridor. (AR 673.) The EIR explains that there is potentially suitable habitat on 3% of the solar facility site and suitable habitat at the gen-tie corridor where the MFTL are present. (AR 673.) The EIR explains that Project impacts are significant based on the loss of known and potential habitat and potential effects on the MFTL. (AR 694-695.) Conducting additional or different surveys would likely lead to the same conclusion of moderate occurrence on the solar facility site.

Based on the foregoing, the Court finds the baseline analysis for the MFTL is supported by substantial evidence.

4. Golden and Bald Eagles

a. Bald Eagles

Petitioners assert that the conclusion in the EIR, that the probability of occurrence of bald eagles was "diminishingly small" due to the Project site being 8.5 miles from the Colorado River, is unsupported. (AR 1742.) They assert that Dr. Smallwood provided substantial evidence based on personal observations of bald eagles foraging many miles

from water sources and riparian habitat. (AR 3097.) Dr. Smallwood's observations were dismissed in the FEIR as "anecdotal". (AR 3145.) Petitioners assert that another expert, USFWS Raptor Ecologist Joel Pagel, criticized the McCoy Solar Project's Golden Eagle Risk Assessment that the County relied on for the same reason. (AR 2934 [C. 03-60]; AR 3267-3268 [C. 03-138.]) Petitioners contend that the issue here is not a disagreement among experts, but a lack of a baseline analysis. (CEQA Guidelines §15151).

Petitioners' contention is without merit. The EIR states a baseline for the bald eagle. Bald eagles usually forage near large bodies of water, but because the Project site is 8.5 miles away from the Colorado River, the probability of occurrence is diminishingly small. (AR 1742.) This assessment was made by Respondents' experts in the BBCS. It is a satisfactory, though not an exhaustive analysis.

Based on the foregoing, the Court finds Petitioners have not established that there is no substantial evidence to support the EIR's stated baseline for the bald eagle.

b. Golden Eagles

Petitioners content that the EIR's conclusion, that the site has no golden eagles, is not supported by substantial evidence. (AR 677.) Specifically, Petitioners argue that the survey relied upon lasted for only three days and was a simultaneous search for all species, including plants (AR 1642-1643.) They assert that: more time was needed to adequately survey the golden eagle (AR 3081 [C. 04-59]); golden eagles are present in foraging range (AR 696, 2902, 2961); a golden eagle tagged with GPS was documented flying by the Project a month before Dr. Smallwood submitted his DEIR comments; (AR 3081 [C. 04-60]; 3082, 3083 [Fig. 1, 2]); and, the baseline analysis consisted of reviewing surveys for other

projects five or more years ago that did not follow applicable protocols (AR 2959-2960 [C. 03-93].)

Importantly, the EIR found a moderate likelihood of golden eagle occurrence for foraging purposes based on 2010 and 2013 regional surveys, found one active nest 10.9 miles from the Project boundary and an inactive nest 4.5 miles north of the gen-tie line. (AR 673.) The EIR found that while there were no nests or nesting habitat in the Project area, there was foraging habitat that golden eagles may fly into. (AR 657, 677.) Petitioners want additional or different studies, despite the fact that the experts for Petitioners and Respondents agree that there is a moderate foraging habitat for the golden eagle.

Based on the foregoing, the Court finds that baseline analysis for golden eagles is supported by substantial evidence.

C

Petitioners' Contention the EIR Failed to Adequately Disclose and Mitigate the Project's Significant Avian Mortality Impacts from Collision

Petitioners argue that the EIR inadequately disclosed and mitigation of avian mortality impacts from collisions with solar panels and other components. The issue concerns the "fake lake effect" of solar facilities that causes migrating birds to perceive the reflective surfaces of solar panels as bodies of water and collide with them when trying to land on or dive into the "water". (AR 2860, 10237-10238, 12463.)

Respondents argue that the EIR concludes that avian impacts are potentially significant and that MM BIO-7 will reduce impact to a level of insignificance (AR 700, 719-

720, 3191-3193, 2989.) Respondents argue this is supported by substantial evidence and that the findings were informed by comments (including comments from USFWS and CDFW).

1. Disclosure of Avian Mortality

Petitioners assert that the DEIR initially concluded avian impacts from colliding with Project components were less than significant, requiring no mitigation. (AR 700-701.) They assert that the conclusion was based on the County's review of less than a year's worth of avian mortality studies from three solar projects, which were acknowledged to be "opportunistic" and not the best available scientific information. (AR 701, 1770-1771. 11720.) Petitioners' experts and the USFWS commented that the lake effect is causing increasingly significant impacts. (AR 10237-10238, 11502-11504, 11514.)

The FEIR revised the analysis by: providing that avian mortality due to collisions is a potentially significant impact; identifying specific risk factors including the "fake lake effect"; and, recognizing that causes of avian injuries at commercial solar projects are still being evaluated. (AR 700-701.) Petitioners do not take issue with this conclusion. Instead, they claim more studies should have been reviewed (i.e., studies from three solar projects were not sufficient). Respondents counter that more data was reviewed, including data provided in the Bio Survey Report (AR 3002) and publicly available data for recent solar projects in the area. (AR 700, 1730, 3054-3055, 2869-2870, 11746.) The FEIR acknowledged significant impacts from the "fake lake effect" and provided substantial evidence to support the avian mortality analysis.

Petitioners assert that they obtained from the USFWS and CDFW nearly 50,000 pages of reports for numerous solar projects over four years, documenting thousands of avian deaths. (AR 51836-94014.) Petitioners only cite to a vast range of documents, without pinpointing a single page. (AR 51836-94014.) An EIR is presumed to be adequate and a petitioner in a CEQA action has the burden of proving otherwise. (*Paulek v. Department of Water Resources* (2014) 231 Cal.App.4th 35, 43; *Sierra Club v. City of Orange* (2008) 163 Cal.App.4th 523, 530. *See also Young v. Gannon* (2002) 97 Cal.App.4th 209, 225 ["The burden is on [petitioner] to prove an abuse of discretion...."]) In addition, "[a] reviewing court will not independently review the record to make up for the appellant's failure to carry his burden." (*Bay Area Clean Environment, Inc. v. Santa Clara County* (2016) 2 Cal.App.5th 1197, 1212.) Petitioners did not demonstrated a lack of substantial evidence by inviting the Court's attention to a voluminous range of documents.

Petitioners also argue that the County should have revised the EIR and recirculated it to address the evidence. Pub. Res. Code §21092.1 provides for re-circulation when significant new information is added to an EIR after the public comment period, but before certification. Petitioners did not show that significant new information was added to the EIR. Further, Petitioners have the burden of showing that the decision not to recirculate the FEIR is supported by substantial evidence. (*Beverly Hills Unified School Dist. v. Los Angeles Metropolitan Transp. Authority* (2015) 241 Cal.App.4th 627, 661.) Petitioners did not meet their burden.3

3 The Court notes Respondents' arguement that their experts considered the information, and determined that the FEIR adequately analyzed the issues raised in the voluminous records. (*San Joaquin Raptor Rescue Ctr. v. County of Merced* (2007) 149

2. BBCS

Petitioners argue that: 1) Mitigation Measure (MM) BIO-7 requires preparation of a BBCS to monitor and quantify the Project's effects on birds and bats; and, 2) the BBCS fails to meet CEQA standards because it does not comply with CDFW and USFWS guidelines for developing a BBCS, lacks substantial evidence to support its underlying mitigation assumptions, is undefined, etc.

MM BIO-7 requires protective measures, including no-disturbance buffers, preconstruction surveys for active nests by a qualified biologist, a biologist to monitor during construction, and that the BBCS will be submitted for review to the USFWS and CDFW. (AR 3199-3200.) The BBCS sets specific thresholds, that if surpassed, trigger adaptation or additional mitigation. (AR 1751, 11880; see AR 2872.) MM BIO-7 provides that the BBCS is a "living document" and it will be reviewed, modified, and updated in coordination with USFWS and CDFW. (AR 2872.) The EIR contains a preliminary BBCS, which includes a statement of coordination with the USFWS and the CDFW; recognition of avian mortality, the "fake lake effect", and how to avoid, monitor, report, and mitigate the collision-related fatalities. (AR 1728, 1737-1740, 1771-1772, 2872, 11880.)

Respondents responded to each of Petitioners' arguments with specific citations to the preliminary BBCS and to the EIR. For instance, Petitioners take issue with the statement that "birds will only 'incidentally' use the Project site" arguing it is "unsupported." However, the EIR acknowledges that the Project site may be used as a foraging habitat for raptors or

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Cal.App.4th 645, 664-667 ["a disagreement among experts over methodology does not make an EIR inadequate.]

waterfowl using the Colorado River, which is 8.5 miles away; and, that the land was previously disturbed so, it contains limited habitat for birds. (AR 1739, 1746, 3022-3023.) Thus, while Petitioners raised numerous challenges to the proposed mitigation, Respondents addressed each challenge with specific citations to the record, which show that MM BIO-7 is supported by substantial evidence.

Based on the foregoing, the Court finds that the impacts analysis and mitigation for avian mortality is supported by substantial evidence.

D

Petitioners' Contention that the EIR Inadequately Assessed, and the County Failed to Adequately Mitigate, Impacts to the BUOW, Desert Tortoise, MFTL, and Golden and Bald Eagles Biological Resources Impacts – Mitigation

Petitioners argue that in addition to the baselines discussed above, the EIR does not properly assess impacts or mitigate. Respondents argue that Petitioners' experts disagree with the EIR's findings and conclusions, but that Petitioners again fail to show that the EIR lacks substantial evidence. (*Sacramento Old City Assn. v. City Council* (1991) 229 Cal.App.3d 1011, 1027 [where substantial evidence supports the conclusion that the mitigation measure will be effective, courts will uphold them against attacks on alleged inadequacy]; *National Parks & Conservation Assn. v. County of Riverside* 71 Cal.App.4th 1341, 1366 [does "the County have a sufficient basis in expert opinion and other evidence to conclude that the potential impacts of the project on the desert tortoise had been mitigated to a level of insignificance"]; *Association of Irritated Residents v. County of Maderia (AIR)* 107 Cal.App.4th 1383, 1398 [despite differing opinions on impacts to biological resources

and effectiveness of the mitigation for impacts, the agency is entitled to resolve the conflict and find the mitigation is sufficient.])

1. Mitigation as to BUOW

Petitioners argue that Project and cumulative impacts to the BUOW were not adequately assessed because the County did not conduct an adequate survey for the BUOW. They assert that Dr. Smallwood opined that using regression models or average density estimates, the EIR should have concluded that 15 to 67 pairs of BUOW would be affected on the Project site and 38 to 1,498 pairs of BUOW would be affected by the cumulative solar project area. (AR 3086-3088.) This is clearly a different opinion on the impacts to the BUOW.

A CEQA petitioner is required to "lay out the evidence favorable to the other side and show why it is lacking. Failure to do so is fatal. A reviewing court will not independently review the record to make up for the appellant's failure to carry his burden." (*Bay Area Clean Environment, Inc. v. Santa Clara County* (2016) 2 Cal.App.5th 1197, 1212.) Petitioners did not demonstrate that the impacts analysis of the BUOW is lacking. They offer a different analysis. Petitioners did not meet their burden of showing that Project and cumulative impacts to the BUOW were inadequate.

Petitioners argue that the County found impacts would be reduced to less than significant levels by MM BIO-6. It proposes, in part, setting aside 146 acres of habitat adjacent to the Project area. Petitioners challenge the effectiveness of MM BIO-6 on three grounds. First, they assert that the proposed mitigation lands were already dedicated as mitigation for another project, the Blythe Mesa Solar Project. (AR 2969.) They argue that

using the same lands for this Project essentially splits the mitigation in half and that the EIR does not evaluate the impact of halving the value of the mitigation lands. Petitioners rely on *San Bernardino Valley Audubon Society v. Metro. Water Dist.* (1999) 74 Cal.App.4th 382, 397 for the proposition that it is ineffective, even illegal, to use mitigation already dedicated to another project.

Respondents assert that the EIR biologists opined that 146 acres would be more than sufficient and that an additional 132 acres are identified as potential mitigation lands if needed. (AR 3013-3014, 1710.) Also, the mitigation lands must be approved by CDFW before they can be disturbed. (AR 3014.) Respondents add that the EIR states impacts to BUOW can be avoided by use of several Best Management Practices: BMP-7 – Trash Abatement Plan to minimize attraction to BUOW predators by controlling trash; BMP-12 – gen-tie lines design standards to discourage predators of young BUOW from perching; BMP-10 – invasive weed management to maintain habitat; BMP-14 – travel and traffic; and, BMP-19 – plants and wildlife in order to limit traffic to existing or designated routes. (AR 695-696.) Courts do not determine if other evidence would support a competing determination.

Further, the mitigation bank in *San Bernardino Valley Audubon Society* was quite different from the mitigation proposed in this case in MM BIO-6. It was on a larger scale addressing 65 species. It allowed for mitigation bank lands to be sold to outside Projects. It was calculated using a very complicated "habitat value formula" which allowed compression of habitat that could have a significant effect on several species. (*Id.* at 397.) Importantly, the *San Bernardino Valley Audubon Society* Court's finding on the mitigation bank issue was made to show that petitioner's contentions as to the inadequate mitigation

were sufficient to require an EIR be prepared. Here, an EIR was already prepared. Despite differing opinions on impacts to biological resources and effectiveness of the mitigation for impacts, the County is entitled to resolve the conflict and find the mitigation is sufficient. (*AIR,* 107 Cal.App.4th at 1398.)

The Court also notes that the *San Bernardino Valley Audubon Society* Court did not hold that "compression of habitat" was illegal. Moreover, the other solar Project (BMSP) that would share the mitigation lands also shares the gen-tie corridor. Under the circumstances, the decision to share the mitigation lands for purposes of the gen-tie corridor presented is supported by substantial evidence.

Petitioners argue that the proposed mitigation lands will not be adequate because more than 3,000 acres of potential habitat are proposed to be replaced with only 146 acres. That is insufficient according to the CDFW 2012 Staff Report. It provides that an equivalent or greater habitat area is needed for the BUOW. (AR 2970.) The Court notes that the specific nexus Respondents asserted is between the 146-acre mitigation lands and the gen-tie corridor. The cited portions of the EIR do not discuss the solar facility site itself. (AR 3013-3014.) There is confusion in the EIR due to the lack of a sufficient explanation as to whether and how the 146-acre mitigation lands adjacent to the gen-tie corridor is to compensate for the loss of more than 3,000 acres of total land. As a result, on this narrow issue, the EIR lacks substantial evidence and the Petition is GRANTED.

Petitioners argue that there is no substantial evidence that the mitigation lands are "of equal value or better than the land impacted" (AR 458) or that they would be maintained for the BUOW in perpetuity. (AR 2970.) MM BIO-6 does provide that the mitigation land is

to be of equal value or better than the land impacted (AR 458). However, the EIR does not address whether the mitigation land will be maintained in perpetuity. Respondents did not discuss this issue or cite to anything in the record. As a result, on this narrow issue, the EIR lacks substantial evidence and the Petition is GRANTED.

Based on the foregoing, the Court finds that the Project and cumulative impacts analysis for the BUOW and the mitigation as to the gen-tie corridor are supported by substantial evidence. However, the mitigation as to the Project facility site (as opposed to the gen-tie corridor) is not supported by substantial evidence. The Petition is GRANTED on this narrow ground.

2. Mitigation for Desert Tortoise

Petitioners argue that: 1) the County presumed the desert tortoise was present on the solar facility site; and, 2) there was no baseline. Hence, Petitioners argue that any finding on impacts are invalid. The argument fails. As discussed above, the baseline analysis for the desert tortoise is supported by substantial evidence.

Petitioners also take issue with the mitigation proposed in the EIR for the desert tortoise. Importantly, Respondents argue that the proposed mitigation measures would avoid a take of the species. (AR 693-694.) The EIR provides that if a desert tortoise is found, construction stops and USFWS will be contacted for guidance. (AR 455). The EIR states conservation measures, including installing desert tortoise exclusion fencing, pre-construction clearance surveys, construction monitoring by a biologist, a desert tortoise education program, and trash disposal requirements to reduce ravens (which are desert

tortoise predators). (AR 693-694.) The EIR also provides for oversight by USFWS and CFWS. (AR 449, 452-457; AR 2875.)

Petitioners argue that the conclusion that impacts would be reduced to less than significant levels by MM BIO-1 and MM BIO-5 (AR 694, 452-457, 449) is unsupported because the EIR ignored the Northern and Eastern Colorado Desert Coordinated Management Plan (NECO Plan) requirement that impacts to the desert tortoise habitat be mitigated. They argue that the EIR does not require mitigation for the lost tortoise habitat. The NECO Plan was not ignored. It was determined to be irrelevant because the Project does not overlap with the NECO planning area, which is sufficiently explained in the FEIR. (AR 677-678; 3050-3051.)

Petitioners argue that the FEIR relied on a USFWS letter that had been revoked as to the BMSP. (AR 3050-3051, 2864.) However, the commenter does not state that the USFWS letter was "revoked", it stated it was "reassessing". (AR 2864.) This does not change the finding in the EIR that there is a potential for a significant impact on the desert tortoise at the Project site.

Petitioners also argue that the EIR's conclusion, that impacts on the desert tortoise would be reduced to less than significant, is not supported by substantial evidence. They base the contention on the assertion that the Project will attract ravens, which are predators to the tortoise, but there is no raven management plan. (AR 2969.) Petitioners then argue that the proposed mitigation measures and BMPs (even if the BMPs were enforceable) would be ineffective to reduce impacts to less than significant. They argue that: perch deterrents on gen-tie posts for ravens are ineffective; there are no perch deterrents for gen-

tie lines; the trash abatement plan does not include enforceable standards, such as number of receptacles and how often trash is picked up; the biologist is only on site twice a month; and, no mitigation measure provides that the biologist will locate ravens or report them to USFWS.

Petitioners did not cite any authority that requires a raven management plan. It is suggested by a USFWS commenter. The FEIR explains that the mitigation measures and BMPs specifically address Petitioners' concerns about ravens and other predators by controlling litter and using design standards to discourage perching. (AR 3051, 693-694.) As to the biologist on a "bi-weekly" basis, MM BIO-5 provides that one will be there during all construction. (AR 453.)

Based on the foregoing, the Court finds that the impacts analysis and mitigation are supported by substantial evidence.

3. MFTL Mitigation

Petitioners argue that the EIR's conclusion, that impacts to the MFTL would be reduced to less than significant after mitigation, was not based on substantial evidence. First, they argue that no baseline surveys were conducted for MFTL. The argument fails. As discussed above, the baseline analysis for the MFTL is supported by substantial evidence.

Second, Petitioners argue that the EIR relies on arbitrarily selected habitat mitigation ratio of 3:1, but does not indicate: where mitigation would occur; whether sites have any value for the species; how mitigation is to be funded; or, the County's success record for mitigating impacts to this species. (AR 2982-2983.) Petitioners argue that this is a violation of CEQA's requirement that mitigation ratios for lost habitat be supported by substantial

evidence. (*Save Panoche Valley v. San Benito County* (1999), 217 Cal.App.4th 503, 528; *Banning Ranch Conservatory v. Newport Beach* (2012) 211 Cal.App.4th 1209, 1232.) These cases do not hold that the specific details demanded by Petitioners are required to be provided. Nonetheless, Respondents revised the EIR to include additional information including the fact that the ratio is consistent with USFWS recommendations provided for the BMSP in 2014, and how funding will be provided under MM BIO-8. (AR 2878, 3017, 3057.) Petitioners do not cite to this evidence and show how it is incorrect. That is fatal to their argument.[4]

Petitioners rely on work performed by their consultant Mr. Cashen. He mapped proposed and approved similar projects with populations of the MFTL and concluded all known populations in Chuckwalla Valley would be impacted by renewable energy projects. (AR 2962.) Petitioners argue that these projects threaten the MFTL habitat, so impacts are significant and cumulatively considerable. (CEQA Guidelines 15065(a)(1), (3).)

References to the MFTL metapopulation in the entire Chuckwalla Valley does not demonstrate how the 3:1 ratio stated in the EIR lacks substantial evidence. In addition, Respondents addressed Mr. Cashen's comments from the DEIR concerning the question of availability and value of any mitigation sites[5], and funding, and explained that CEQA does

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[4] A CEQA petitioner is required to "lay out the evidence favorable to the other side and show why it is lacking. Failure to do so is fatal. A reviewing court will not independently review the record to make up for the appellant's failure to carry his burden." (*Bay Area Clean Environment, Inc. v. Santa Clara County* (2016) 2 Cal.App.5th 1197, 1212.)

[5] Construction impacts could be reduced by BMPs-7, 12, 10, 14, 19. (AR 695.) The EIR does not have to identify a specific mitigation site. (*Preserve Wild Santee v. City of Santee* (2012) 210 Cal.App. 4th 260, 279-280 ["Generally, an agency does not need to identify the exact location of offsite mitigation property for an EIR to comply with CEQA]; see also, *California Native Plant Society v. City of Rancho Cordova* (2009) 172 Cal.App.4th 602, 620-

not require the County's success record. (AR 3017, 3057.) While Mr. Cashen may disagree with the proposed ratio, a disagreement among experts is not sufficient to invalidate an EIR. (CEQA Guidelines §15151.)

Based on the foregoing, the Court finds that impacts analysis and mitigation for the MFTL is supported by substantial evidence.

4. Golden and Bald Eagles

a. Habitat Loss

Petitioners argue that the EIR's conclusion of no significant impact after mitigation was not based on substantial evidence because the County provided no mitigation for habitat loss. They are concerned that this Project has cumulative impacts by removing 3,400 acres of habitat and 75,720 acres of foraging habitat where other approved renewable energy projects are constructed in the area. (AR 3081, 3078, 2960.) Petitioners did not demonstrate a lack of substantial evidence. Petitioners assert that the FEIR relied on MM BIO-7's BBCS, and BMP-10 [controls "introduction and proliferation of non-native invasive plant species that commonly accompanies construction projects that could degrade raptor foraging habitat"], which would only "incidentally reduce damage to foraging habitat around the margins" of the Project. (AR 3043-3044, 12493-12494.) Petitioners conclude that there is a lack of substantial evidence to support that impacts would be reduced to less than significant levels. This is not a sufficient showing that the FEIR lacked substantial evidence

621.)

that these proposed mitigation measures and BMPs would reduce impacts to less than significant levels.

Respondents demonstrated that the EIR's conclusion, that MM BIO-7 would reduce significant impacts to less than significant levels (AR 697), is based on substantial evidence (i.e., that the measure requires pre-construction surveys in bird breeding season, location of active nests, and avoidance buffers.) The BBCS also requires additional protective measures based on specific recommendations from USFWS and CDFW (i.e., documentation of conservation measures; consistent, practical and up-to-date direction to staff on how to avoid reduce and monitor bird and bat fatalities; and, that the BBCS would be required for the life of the project.) (AR 697, 3199-3200.) Also, BMP-10 will reduce degradation of the foraging habitat and BMP-12 requires installation of bird flight diverters. (*Id.*) Petitioners failed to demonstrate that the proposed mitigation measure and BMPs would not mitigate habitat loss or degradation of the foraging habitat. Any conflict of opinion involved in determining the effectiveness of the chosen mitigation measure is resolved by the agency. The Court defers to the decision so long as supported by substantial evidence. (*AIR* 107 Cal.App.4th 1383, 1398.)

b. Remedial Measures

Petitioners assert that despite the DEIR's conclusions that potential significant impacts on golden and bald eagles are likely, the DEIR failed "to require any remedial actions (i.e., compensatory mitigation) if an eagle is injured or killed by the Project's transmission lines, security fence, or other infrastructure." (AR 2960.) Petitioners acknowledge that the FEIR addressed the comment indicating that remedial measures were

adopted in the BBCS in sections 6.2, and 6.3. They argue that the document is uncertain, unenforceable, and that MM BIO-7 does not require any remedial action if the Project results in a take of an eagle. (AR, 458-460, 3199-3200, 12495-12496.)

This issue was raised in comments on the DEIR and was responded to in the FEIR. If a take occurred, appropriate mitigation in sections 6.2, 6.3 would be triggered and USFWS consulted for procedures. That is remedial action. (AR 3044.) There is also a reference to compensatory measures in the BBCS (MM BIO-7), which is subject to modification. (AR 1752.) Petitioners did not establish that a specific reference of remedial action is required in the EIR. In addition, the EIR provides an explanation for the uncertainty, and requires consultation with the USFWS if a take occurs. (AR 1752.) There is substantial evidence that remedial action is required. (AR 1752, 3044.)

Based on the foregoing, the Court finds that the mitigation for golden and bald eagles is supported by substantial evidence.

E

Petitioners' Contention that the EIR Fails to Disclose the Project's Potentially Significant Impact on State and Federal Jurisdictional Waters and Improperly Defers a Jurisdictional Wetlands Determination Until After Project Approval

Petitioners argue that a potentially significant impact occurs when a project removes, fills, or interrupts hydrology or adversely affects State or jurisdictional waters of the U.S. (wetlands) as defined by the Clean Water Act (CWA.) (CEQA Guidelines, App. G (IX)(c) [hydrology/drainage], (IV)(c) [federally protected wetlands]). They argue EIR analysis fails

to include a jurisdictional wetlands delineation and fails to disclose that the Project will require a CWA section 404 permit from U.S. Army Corps of Engineers (USACE) and a section 401 permit from the Colorado River Regional Water Quality Control Board (CRRWQCB). The Project site contains jurisdictional surface water. (AR 839-841). Two washes, the Sothern Wash and McCoy Wash, are federal jurisdictional waters because they are tributaries of the Colorado River. (AR 839, 11852.)

Petitioners assert that the EIR acknowledged that such waters may be significantly impacted by the Project due to installation of temporary stream crossings during construction, site grading, blading and vegetation removal for road construction, installation of solar arrays and other Project components. (AR 858.) The EIR identified the relevant washes based on a 'preliminary assessment', topographic maps, aerial photography, and a field reconnaissance survey." (AR 1642, 2848, 2856.) Petitioners argue that EIR admits that the description of jurisdictional waters is incomplete without a wetland delineation, but improperly defers the study as mitigation under MM BIO-9. (AR 412, 2856-2857.)

The potential jurisdictional waters were identified. (AR 703-704, 839-842.) The DEIR explained that a CWA section 404 permit, and a CRRWQCB water quality certification pursuant to CWA section 401, are required. (AR 845.) Respondents assert that commenters misinterpreted the language of the DEIR as to MM BIO-9 to conclude that no delineation would be required. They also acknowledge that the DEIR "suggests a jurisdictional delineation would not be needed." (AR 720, 2856.) The FEIR explained and clarified that a formal jurisdictional delineation and permitting are required. (AR 2856-2857, 3174, 3200, 3622.) This is not improper deferral because the Project is required to obtain

permits and before a CWA section 401 permit may be issued, a formal jurisdictional delineation must be obtained. (*Clover Valley Foundation v. City of Rocklin* (2011) 197 Cal.App.4th 200, 236-237 ["Impermissible deferral of mitigation measures occurs when an EIR puts off analysis or orders a report without either setting standards or demonstrating how the impact can be mitigated in the matter described in the EIR." [Citations.] "A condition requiring compliance with environmental regulations is a common and reasonable mitigating measure..[Citation.]") There is substantial evidence that under MM BIO-9, compliance with permit procedures, which require a jurisdictional delineation, will ensure adverse impacts will be avoided.

Based on the foregoing, the Court finds that the proposed mitigation under MM BIO-9 for jurisdictional waters is supported by substantial evidence.

Petitioners' Request for Judicial Notice

Petitioners request that the Court take judicial notice of two documents: 1) Appendix D to the Northern and Eastern Colorado Desert Management (NECO) Plan, which is part of the NECO Plan already in the Administrative Record at pages 15167-15638; and, 2) California Department of Fish and Wildlife and California Attorney General Xavier Becerra's November 29, 2018 Advisory Affirming California's Protections for Migratory Birds (Advisory).

Reports and studies prepared for a project and relied on in an environmental document are part of the record if they are made available to the public during the public review period or included in the agency's files on the project. (Kostka and Zischke, Practice Under Cal. Envir. Quality Act (CEB 2018) Ch. 23, §23.73, p. 23-85.) Documents cited as

source documents in an EIR, but not included in the agency's files or made available for public review, are not ordinarily included in the record. (*Id.* at p. 23-86.) In determining whether a decision has evidentiary support, the only evidence that is relevant is that evidence that was "before the agency at the time it made its decision." (*Western States Petroleum Assn. v. Sup. Ct.* (1995) 9 Cal.4th 559, 574, fn.4.) Because extra-record evidence, not before the lead agency is inadmissible, the Request for Judicial Notice is DENIED.

R. STAMEN, Judge
L. Howell (vis), Clerk
Pages 35 of 35

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF RIVERSIDE

CITIZENS FOR RESPONSIBLE SOLAR, an unincorporated association; CALIFORNIA UNIONS FOR RELIABLE ENERGY, an unincorporated association; GEORGE ELLIS, an individual; and JAMES HENNEGAN, an individual,

Petitioners,

v.

COUNTY OF RIVERSIDE, a public agency; BOARD OF SUPERVISORS OF THE COUNTY OF RIVERSIDE, a public agency; and DOES 1 through 10, inclusive,

Respondents and Defendants.

Case No. RIC 1718458 MF

[Filed under the California Environmental Quality Act]

RESPONDENT AND REAL PARTIES IN INTERESTS' ~~[PROPOSED]~~ PEREMPTORY WRIT OF MANDATE IN CASE NO. RIC 1718565

Judge: Randall S. Stamen
Department: 7
Action Filed: September 28, 2017

RENEWABLE RESOURCES GROUP; RENEWABLE RESOURCES GROUP, LLC, a Delaware Limited Liability Company; and RENEWABLE RESOURCES GROUP HOLDING COMPANY, INC., a California Corporation, and ROES 1 through 10, inclusive,

Real Parties in Interest.

Partially Consol. Case No. RIC1718565

GOLDEN STATE ENVIRONMENTAL JUSTICE ALLIANCE,

Petitioner,

v.

COUNTY OF RIVERSIDE, et al.

Respondents

RENEWABLE RESOURCES GROUP,

Real Parties in Interest.

PEREMPTORY WRIT OF MANDATE

Judgment having been entered in this proceeding, ordering that a peremptory writ of mandate be issued from this Court,

IT IS ORDERED that, immediately on service of this peremptory writ:

1. Respondent County of Riverside ("Respondent") shall add to its Final Environmental Impact Report ("EIR") a further analysis of soil contamination that (a) discloses whether and to what extent excavation and pile driving would disturb residual toxins under the Palo Verde Mesa Solar Project (the "Project") site and (b) revises Mitigation Measure HAZ-1 to address all soil contamination to be disturbed or removed, including soil contaminated by fuel from underground storage tanks, all as needed to comply with the Court's Notice of Ruling dated July 11, 2019 ("Notice of Ruling").

2. Respondent shall add to its EIR, a further analysis of the issue of mitigation on the solar facility site for the burrowing owl sufficient to explain (a) whether and how the mitigation lands are adequate to compensate for the total loss of potential habitat on the solar facility site and (b) whether and how the mitigation lands would be maintained for the burrowing owl in perpetuity, all as needed to comply with the Notice of Ruling.

3. Respondent shall decertify only the portions of the EIR referenced in Paragraphs 1 and 2, above, and prepare a revised environmental analysis, addressing only those two issues, as follows:

a. Prepare an Addendum to the EIR if, based on the further analysis necessary to comply with the ruling, Respondent finds that any of the conditions described in 14 CCR section 15162 (a)(3) calling for preparation of a subsequent or supplemental EIR do not exist; or

b. Prepare a Supplement to the EIR if, based on the further analysis necessary to comply with the ruling, Respondent finds that any of the conditions described in 14 CCR section 15162 (a)(3) calling for preparation of a subsequent or supplemental EIR exist. If a Supplement is prepared, circulate it for public comment if recirculation is required under 14 CCR section 15088.5(a)(1), (2), or (3) with respect to the additional analysis required above.

4. Upon consideration of the Addendum or Supplement, the Board of Supervisors of the County of Riverside shall exercise its discretion to determine whether to:

a. Find that no modifications to any of the Board's project approvals are required based upon the further analysis described in Paragraphs 1 and 2;

b. Modify some or all of the project approvals to incorporate changes to the Project or to its conditions of approval or mitigation measures based upon the further analysis described in Paragraphs 1 and 2; or

c. Rescind some or all of the project approvals based upon the further analysis described in Paragraphs 1 and 2.

Project approvals are stayed, and no construction of the Project shall commence unless and until Respondent completes corrective action to address the two deficiencies in the EIR and Respondent has complied with this writ.

Under California Public Resources Code Section 21168.9(b), this peremptory writ shall be limited to the two issues referenced above, which two issues are severable from the remainder of the EIR and Respondent's findings and approvals in connection with the Project; severance will not prejudice complete and full compliance with the California Environmental Quality Act ("CEQA"). The further review and action required relates only to the feasibility of mitigation for two discrete potential impacts, and the specifics of the measures to be required, if mitigation is found to be feasible. Other than the two issues referenced above, the Project, Project approvals, and the EIR were found to be in compliance with CEQA.

Under California Public Resources Code Section 21168.9(c), this Court does not direct Respondent to exercise its lawful discretion in any particular way in complying with this peremptory writ.

Under California Public Resources Code Section 21168.9(b), this Court will retain jurisdiction over Respondent's proceedings by way of a return to this peremptory writ until the Court has determined that Respondent has complied with the provisions of CEQA.

Respondent must file a return to this peremptory writ no later than 180 days after the issuance of this writ describing the steps Respondent has taken to comply with the judgment and

writ. Any objections to the return shall be filed no later than 30 days after service of the return. If any objections to the return are filed, Respondent and Real Parties in Interest shall have 30 days to respond to such objections, and the Court will conduct a hearing on the return to the writ as soon as such hearing can be calendared.

DATED: 9/26/2019

Randall S. Stamen, Judge of the Superior Court

SUPERIOR COURT OF CALIFORNIA, COUNTY OF RIVERSIDE
4050 Main Street
Riverside, CA 92501
www.riverside.courts.ca.gov

CLERK'S CERTIFICATE OF MAILING

CITIZENS FOR RESPONSIBLE SOLAR

vs. CASE NO. RIC1718458

COUNTY OF RIVERSIDE

TO: PERKINS COIE
11988 EL CAMINO REAL
STE 350
SAN DIEGO CA 92130

I certify that I am currently employed by the Superior Court of California, County of Riverside and I am not a party to this action or proceeding. In my capacity, I am familiar with the practices and procedures used in connection with the mailing of correspondence. Such correspondence is deposited in the outgoing mail of the Superior Court. Outgoing mail is delivered to and mailed by the United States Postal Service, postage prepaid, the same day in the ordinary course of business. I certify that I served a copy of the attached Court's own motion minute order on this date, by depositing said copy as stated above.

Court Executive Officer/Clerk

Dated: 10/01/19 by: _____
LISA A HOWELL, Deputy Clerk

From: COB
Sent: Tuesday, September 15, 2020 7:50 AM
To: George Johnson (GAJohnson@RIVCO.ORG) <GAJohnson@RIVCO.ORG>; Priamos, Greg <GPriamos@RIVCO.ORG>; District 4 Supervisor V. Manuel Perez (District4@RIVCO.ORG) <District4@RIVCO.ORG>; District2 <District2@Rivco.org>; District3 <District3@Rivco.org>; District5 <District5@Rivco.org>; Supervisor Jeffries - 1st District (district1@rivco.org) <district1@rivco.org>
Cc: Russell Brady (rbrady@RIVCO.ORG) <rbrady@RIVCO.ORG>; Leach, Charissa <cleach@rivco.org>
Subject: September 15 2020 Item No 3.27 Public Comment on Palo Verde Mesa Solar (John Light)

Good morning,

Forwarding COB web comment received for your review.

Added to Agenda back-up.

Sincerely,

Clerk of the Board of Supervisors
4080 Lemon Street, 1st Floor, Room 127
Riverside, CA 92501
(951) 955-1060 Fax (951) 955-1071
cob@rivco.org
website: http://rivcocob.org/
https://www.facebook.com/RivCoCOB/

TOGETHER, *Everybody Counts!*
Inland Empire Census 2020 IECounts.org
IECounts.org

From: cob@rivco.org <cob@rivco.org>
Sent: Monday, September 14, 2020 4:46 PM
To: COB <COB@RIVCO.ORG>; jwlight@local1184.com
Subject: Board comments web submission

First Name:	John
Last Name:	Light
Address (Street, City and Zip):	72-732 Ramon Road, Thousand Palms CA 92276
Phone:	7602756175
Email:	jwlight@local1184.com
Agenda Date:	09/15/2020
Agenda Item # or Public Comment:	3.27
State your position below:	Support
Comments:	I am a business agent for Laborers Local 1184 in the Blythe area. This project would provide good paying jobs for my members and their families in the Blythe area.

Thank you for submitting your request to speak. The Clerk of the Board office has received your request and will be prepared to allow you to speak when your item is called. To attend the meeting, please call (669) 900-6833 and use Meeting ID #864-4411-6015. Password is 965847. You will be muted until your item is pulled and your name is called. Please dial in at 9:00 am with the phone number you provided in the form so you can be identified during the meeting.

9/15/20 3.27