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Attn: Docket No. 08-AFC-5
California Energy Commission
1516 Ninth Street, MS-4
Sacramento, CA 95814

Re: OPENING BRIEF OF CALIFORNA UNIONS FOR RELIABLE ENERGY ;
Imperial Valley Solar Project (08-AFC-5)

Dear Docket Clerk:

Enclosed are an original and copy of **OPENING BRIEF OF CALIFORNIA UNIONS FOR RELIABLE ENERGY**. Please process this document, conform and return the copy in the envelope provided.

Sincerely,

/s/

Loulena A. Miles

LAM:bh
Enclosure

2218-144a

**STATE OF CALIFORNIA
California Energy Commission**

In the Matter of:

The Application for Certification
for the IMPERIAL VALLEY SOLAR
PROJECT (formerly SES Solar Two)

Docket No. 08-AFC-5

**OPENING BRIEF
OF
CALIFORNIA UNIONS FOR RELIABLE ENERGY**

August 11, 2010

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I. INTRODUCTION

In the arid west, water supply is a condition-precedent for any development. The Applicant, Imperial Valley Solar, LLC, has not yet adequately identified a water source that will meet the Imperial Valley Solar Project's ("Project") construction and operation requirements.

The Applicant has had two years to obtain, permit and verify its entitlement to an adequate water supply for the Project and has thus far failed to do so. Even after the issuance of countless supplements to the application for certification and after the presentation of numerous water supply experts at two sets of evidentiary hearings, the Applicant still has not provided a reliable water supply that is adequate to meet the needs of the Project. Throughout this proceeding, CURE has repeatedly advised Staff and the Commission that, until the Applicant can provide evidence of a reliable water supply, continuing to process the application is an inefficient use of Staff and Commission resources. The Energy Commission simply cannot permit the Project without identifying a reliable water supply for Project construction and operation.

Neither of the two potential water sources identified by the Applicant, a proposed upgrade to the Seeley Waste Water Treatment Facility ("SWWTF") and groundwater from the Dan Boyer well in the Ocotillo/Coyote Wells sole source aquifer, are permitted, sufficient or reliable to meet the Project's needs and both present significant unmitigated impacts and do not comply with LORS. The bottom line is that until a reliable water supply is provided by the Applicant, the Commission cannot approve the Project.

Also in the arid west, water quality is a primary consideration for any development. The Applicant, Imperial Valley Solar, LLC, has not yet adequately identified how the Project will be designed to avoid impacts on waters of the U.S., as requested by the U.S. EPA. The Applicant's decision to build in ephemeral washes, significantly impacting surface water resources, including waters of the U.S., has led to a series of project modifications that are currently nothing more than a work in progress.

These valiant but, ultimately, failed efforts by state and federal agencies to redesign the Project for the Applicant now puts the Commission in a conundrum. The federal agencies may recommend approval of a redesigned Project that Commission Staff has not analyzed and the impacts of which are different than and do not fall within the scope of the Project or any of the alternatives analyzed by Commission Staff to date.

The Commission simply cannot permit a newly redesigned Project that has not been fully identified and that has not been analyzed by Commission Staff. It is

a basic precept of CEQA and the Warren Alquist Act, that the Project design is the starting point, not the ending point, of an environmental analysis. The analysis of impacts to air quality, soil and water, and biological resources, all flow from the design and until the design is settled upon, the Project's potentially significant impacts to environmental resources cannot be analyzed.

Thus, until the Applicant can provide a permitted, reliable, long-term water supply and a clear description of the Project for which it seeks a license, the Commission should suspend this proceeding.

II. STANDARD OF REVIEW AND BURDEN OF PROOF

The Commission itself must determine whether the proposed Project complies with "other applicable local, regional, and state, . . . standards, ordinances, or laws," and whether the proposed project is consistent with Federal standards, ordinances, or laws. (Pub. Res. Code § 25523(d); 20 Cal. Code Regs. § 1752(a).) The Commission may not certify any project that does not comply with applicable LORS unless the Commission finds both (1) that the project "is required for public convenience and necessity" and (2) that "there are not more prudent and feasible means of achieving public convenience and necessity." (Pub. Res. Code § 25525; 20 Cal. Code Regs. § 1752(k).)

The Commission also serves as lead agency for purposes of CEQA. (Pub. Res. Code § 25519(c).) Under CEQA, the Commission may not certify the Project unless it specifically finds either (1) that changes or alterations have been incorporated into the Project that "mitigate or avoid" any significant effect on the environment, or (2) that mitigation measures or alternatives to lessen these impacts are infeasible, and specific overriding benefits of the Project outweigh its significant environmental effects. (Pub. Res. Code § 21081; 20 Cal. Code Regs. § 1755.) These findings must be supported by substantial evidence in the record. (Pub. Res. Code § 21081.5; 14 Cal. Code Regs. §§ 15091(b), 15093; *Sierra Club v. Contra Costa County* (1992) 10 Cal.App.4th 1212, 1222-23.)

The Applicant "shall have the burden of presenting sufficient substantial evidence to support the findings and conclusions required for certification of the site and related facility." (20 Cal. Code Reg. § 1748(d).) Commission Staff must review the application, assess the environmental impacts and determine whether mitigation is required, and set forth this analysis in a report written to inform the public and the Commission of the Project's environmental consequences. (20 Cal. Code Reg. §§ 1744(b), 1742.5(a)-(b).) Staff's analysis must reflect the "independent judgment" of the Commission. (14 Cal. Code Regs. § 15084(e).) Before approving a project, the Commission must conclude that Staff's report has been completed in compliance with CEQA, that the Commission has reviewed and considered the information in the report prior to approving the project, and that Staff's report

reflects the Commission's independent judgment and analysis. (14 Cal. Code Regs. §15090(a); see Pub. Res. Code § 21082.1(c)(3).)

The Commission must determine whether sufficient substantial evidence is in the record to support its findings and conclusions. (Pub. Res. Code §§ 21080, 21081.5.) "Substantial evidence" is defined as:

[F]act, a reasonable assumption predicated upon fact, or expert opinion supported by fact. Substantial evidence is not argument, speculation, unsubstantiated opinion or narrative, evidence that is clearly inaccurate or erroneous...(*Id.* § 21080(e).)

California courts have made clear that "substantial evidence" is not synonymous with "any" evidence. (*Newman v. State Personnel Board* (1992) 10 Cal.App.4th 41, 47.) As defined by the courts, substantial evidence means evidence of "ponderable legal significance, reasonable in nature, credible and of solid value." (*Lucas Valley Homeowners Ass'n v. County of Marin* (1991) 233 Cal.App.3d 130, 156-7.)

This requirement also applies to expert opinions. Expert opinion does not constitute substantial evidence when it is "based on speculation and conjecture, and accordingly...not supported by substantial evidence in light of the whole record." (See, e.g., *Friends of the Old Trees v. Department of Forestry and Fire Protection* (1997) 52 Cal.App.4th 1383, 1399, fn. 10; *Coastal Southwest Dev. Corp. v. California Coastal Zone Conservation Commission* (1976) 55 Cal.App.3d 525, 532.) It does not include argument, speculation, unsubstantiated opinion or narrative, or evidence that is clearly inaccurate or erroneous. (*Id.*) Additionally, "opinion testimony of expert witnesses does not constitute substantial evidence when it is based upon conclusions or assumptions not supported by evidence in the record." (*Hongsathavij v. Queen of Angels/Hollywood Presbyterian Med. Ctr.* (1998) 62 Cal.App.4th 1123, 1137.) These requirements ensure that members of the public and interested agencies will have an opportunity to review and comment on significant impacts and proposed mitigation and identify any shortcomings. This public and agency review has been called "the strongest assurance" of the adequacy of an environmental review document under CEQA. (*Sundstrom v. Mendocino County* (1988) 202 Cal.App.3d 296, 308.)

Once substantial evidence of a potential impact is presented to the lead agency, the burden shifts to the agency to investigate the potential significance of the impact. (*Napa Citizens for Honest Government v. Napa County Board of Supervisors* (2001) 91 Cal.App.4th 342, 385 (EIR inadequate for failing to investigate substantial evidence of Project's potential to impact protected steelhead trout).)

In this case, there is insufficient evidence to support the required findings and, therefore, the Commission cannot certify the Project without additional specific analysis and mitigation.

III. THE WATER SUPPLY IS INADEQUATE, VIOLATES LORS AND WOULD RESULT IN UNANALYZED AND UNMITIGATED SIGNIFICANT IMPACTS

The Commission cannot permit the Project until the Applicant identifies, and Staff analyzes in a report prior to evidentiary hearings, an adequate and reliable water supply to meet the Project's construction and operational requirements. Staff has reviewed the Applicant's proposed water sources in a water supply assessment. The Staff's Water Supply Assessment makes it crystal clear that there is not currently an adequate water supply proposed for the Project:

“In summary, staff's analysis determined that water supplies are not sufficient to satisfy the water demands of the project for the following reasons:

1. The well is permitted by a company other than the Project Applicant to extract 40 acre-feet per year, which is less than the Project's average annual construction water requirement of 51.1 acre-feet per year.
2. Staff estimates that residential water use supplied by the well is about 6 acre-feet per year. If Imperial Valley Solar purchases the entire 40 acre-feet per year of permitted pumping these existing users will have to obtain their water from elsewhere, effectively shifting the demand to other wells in the basin.
3. Staff has determined additional groundwater use exacerbates basin overdraft, which cannot be mitigated and therefore is considered a significant negative environmental impact.
4. No firm, existing back-up or supplemental supply is identified making the project infeasible should the proposed private well fail to meet project water requirements.
5. The project applicant is proposing to replace the proposed temporary groundwater supply with recycled wastewater from the Seeley Wastewater Treatment Plant. However, the necessary upgrades and water diversion have not yet been approved or permitted, and therefore the Seeley wastewater option is not a firm and reliable existing supply at this time.”¹

¹ Exhibit 302, pp. C.7-53 and 54.

CEQA requires an EIR to assume that all phases of the Project will eventually be built and will need water, and must analyze the impacts of providing water to the entire project. (*Vineyard Area Citizens for Responsible Growth v. City of Rancho Cordova* (2002) 40 Cal.4th 412.) If it is not possible to confidently determine that anticipated future water sources for a development project will be available, CEQA requires a discussion of replacement sources or alternatives to use of the anticipated water and the environmental consequences of those contingencies. *Id.* If it is not possible to confidently determine that backup water sources will be available, CEQA requires a discussion of other replacement sources or alternatives.

The Applicant identified only two potential water sources, neither of which are permitted, sufficient or reliable and both of which present significant unmitigated impacts and do not comply with LORS: a proposed upgrade to the Seeley Waste Water Treatment Facility (“SWWTF”) and groundwater from the Dan Boyer well in the Ocotillo/Coyote Wells sole source aquifer.

The evidence in the record does not demonstrate that either of these water sources would reliably meet the water needs of the Project. The Applicant has had two years to develop a water supply and has thus far failed to do so. The Commission cannot permit this Project until the Applicant makes a showing based upon substantial evidence that there is a reliable water supply for the Project’s needs. Until a reliable water supply is provided by the Applicant, the Commission cannot approve the Project.

A. STAFF HAS NOT ANALYZED THE IMPACTS OF THE SWWTF UPGRADE AS PART OF THE “WHOLE OF THE PROJECT” BECAUSE THE BASELINE ANALYSIS IS NOT COMPLETE AND ENVIRONMENTAL IMPACTS ARE NOT IDENTIFIED

In order to provide water to the Project, the SWWTF would require a substantial upgrade to its facilities that would eliminate the current discharge of its treated effluent into Wildcat drain that flows to the New River. This effluent currently supports a 2-acre wetland that is contiguous with the riparian area along the New River that flows to the Salton Sea. Wildcat drain and the New River riparian corridor are potential habitat to a number of special status plant and animal species, including the federal and state listed endangered Southwestern willow flycatcher, a species that has been detected at the SWWTF effluent outfall. The Seeley County Water District (“SCWD”) is preparing an Environmental Impact Report that will analyze the impacts from this upgrade project. As will be described below, the baseline environmental conditions at the SWWTF have not been determined and it would be pure speculation for the Commission to find that this water supply will ever be available to meet the needs of the Project.

1. CEQA REQUIRES ANALYSIS OF THE WHOLE OF THE PROJECT – INCLUDING THE BASELINE AND POTENTIALLY SIGNIFICANT ENVIRONMENTAL IMPACTS AND MITIGATION

Under CEQA, the Commission must analyze potential impacts from the whole of the Project, which, in this case, includes upgrades the SWWTF. The Commission must also mitigate significant impacts from the Project in its entirety.

i. The Commission Must Analyze the Whole of the Project

CEQA applies to “discretionary projects proposed to be carried out or approved by public agencies.” (Pub. Res. Code § 21080(a).) “Project” is defined as “the whole of an action” which has the potential to result in a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment. (14 Cal. Code Reg. § 15378.) The Supreme Court in *Laurel Heights I*² set forth a two pronged test for determining whether reasonably foreseeable future activities must be analyzed as part of the Project:

We hold that an EIR must include an analysis of the environmental effects of future expansion or other action if: (1) it is a reasonably foreseeable consequence of the initial project; and (2) the future expansion or action will be significant in that it will likely change the scope or nature of the initial project or its environmental effects.

Failure to consider all phases of a Project constitutes “piecemealing” of a single project into two or more separate phases. CEQA prohibits piecemealing and requires the CEQA document to analyze the “whole project.” 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 consequences.”³

Before undertaking a project, the lead agency must assess the environmental impacts of all reasonably foreseeable phases of a project.⁴ A public agency may not

² *Laurel Heights Improvement Assn. v. Regents of the University of California* (“*Laurel Heights I*”) (1988) 47 Cal.3d 376, 390.

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

⁴ *Laurel Heights Improvement Assoc. v. Regents of the Univ. of Calif.* (1988) 47 Cal.3d 376, 396-97, 253 Cal.Rptr. 426 (EIR held inadequate for failure to assess impacts of second phase of pharmacy school's occupancy of a new medical research facility).

segment a large project into two or more smaller projects in order to mask serious environmental consequences. As the Second District stated:

The CEQA process is intended to be a careful examination, fully open to the public, of the environmental consequences of a given project, covering the entire project, from start to finish . . . the purpose of CEQA is not to generate paper, but to compel government at all levels to make decisions with environmental consequences in mind.⁵

The Courts have addressed this issue in *San Joaquin Raptor*, where the court held that an EIR was deficient because it did not consider the impacts of a sewer expansion that was necessary to serve a new residential development. (*San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713.) Since the development could not go forward without the sewer expansion, the “total project” included both the housing and the sewer project necessary to serve it. The County was required to prepare a new EIR analyzing the whole project, including the residential development, and the sewer and other services, particularly their growth-inducing capabilities that were a reasonably foreseeable component of the project.

In *Tuolumne County Citizens for Responsible Growth v. City of Sonora* (2007) 155 Cal.App.4th 1214, the Court examined a proposed home improvement center and road realignment that had been studied under separate CEQA reviews. The Court reasoned that the two actions were part of a single “project” for purposes of CEQA review, even though the City had historically recognized the advantages of realigning the road and both activities could be achieved independently of each other. The Court held that because approval of the home improvement center was conditioned upon completion of road realignment, and the activities were related in time, physical location, and entity undertaking actions, the two proposals must be studied in one CEQA document. “Their independence was brought to an end when the road realignment was added as a condition to the approval of the home improvement center project.” (*Id.* at 1231.)

Like the sewer system in *San Joaquin Raptor* and the road realignment in *Tuolumne County Citizens*, the impact of the SWWTF upgrade must be analyzed by the Commission. It is undisputed that upgrades to this facility are necessary, conditions-precedent for the Project to operate.⁶ Since operation of the Project cannot go forward without upgrades to the SWWTF, the “total project” includes both the power plant and the wastewater treatment upgrades necessary to serve it. As the Court found in *San Joaquin Raptor v. County of Stanislaus*, the Commission must analyze the whole project, including the power plant, the wastewater treatment plant upgrades, and the elimination of water that is currently used to

⁵ *Natural Resources Defense Council v. City of Los Angeles* (2002) 103 Cal.App.4th 268.

⁶ Exhibit 302, p. C.2-1.

support biological resources in the region, all of which are reasonably foreseeable components of the Project.

Also, like the development in *Tuolumne County Citizens for Responsible Growth v. City of Sonora*, since the Project is partially conditioned upon a signed agreement with a recycled water purveyor, the two actions are part of a single “project” for purposes of CEQA review, even if the power plant and waste water treatment upgrades could be achieved independently of each other.⁷ Thus, “[t]heir independence was brought to an end” when Soil and Water Condition of Certification 9 “was added as a condition to the approval” of the Project. (*Tuolumne County Citizens for Responsible Growth v. City of Sonora*, 155 Cal.App.4th at 1231.) However, unlike *Tuolumne*, the SWWTF upgrades would not occur but for the proposed power plant. The Seeley County Water District had no potential funding opportunities for upgrading the SWWTF until the Applicant approached them to provide water for the Project.⁸ Therefore, the SWWTF is even more clearly part of the Project in this case.

In sum, the Commission must independently analyze potentially significant environmental impacts from the SWWTF upgrades as a part of the “whole of the action” under CEQA. That analysis is not in the current evidentiary record.

ii. **The SWWTF May Result In Potentially Significant Unanalyzed and Unmitigated Impacts to Endangered and Special Status Species and a Wetland Along the New River Riparian Corridor**

a. **Staff failed to establish the baseline for measuring impacts.**

As a part of the CEQA analysis, the Commission must analyze the baseline conditions at the SWWTF. The environmental setting, or baseline, refers to the conditions on the ground as measured by surveys and studies, and is a starting point to measure whether a proposed project may cause a significant environmental impact. CEQA defines “baseline” as the physical environment as it exists at the time CEQA review is commenced. (14 Cal. Code Reg. §15125(a); *Riverwatch v. County of San Diego* (1999) 76 Cal.App.4th 1428, 1453.) “An EIR must focus on impacts to the existing environment, not hypothetical situations.” (*County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, 952.)

If the description of the environmental setting of the project site and surrounding area is inaccurate, incomplete or misleading, the EIR does not comply with CEQA. Without accurate and complete information pertaining to the setting of

⁷ Exhibit 302, p. C.7-85.

⁸ Hearing Transcript of July 26, 2010, p. 120-121.

the project and surrounding uses, it cannot be found that the FEIR adequately investigated and discussed the environmental impacts of the development project. (*Cadiz Land Co., Inc. v. Rail Cycle, L.P.* (2000) 83 Cal.App.4th 74, 87, quoting and citing *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus*, (1994) 27 Cal.App.4th 713, 721-722, 729.)

Describing the environmental setting is critical to an accurate, meaningful evaluation of environmental impacts. The importance of having a stable, finite, fixed environmental setting for purposes of an environmental analysis was recognized decades ago. (*County of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185.) Today, the courts are clear that, “[b]efore the impacts of a project can be assessed and mitigation measures considered, an [environmental review document] must describe the existing environment. It is only against this baseline that any significant environmental effects can be determined.” (*County of Amador, supra*, 76 Cal.App.4th at 952.) In fact, it is a central concept of CEQA, widely accepted by the courts, that the significance of a project’s impacts cannot be measured unless the EIR first establishes the actual physical conditions on the property. In other words, baseline determination is the first rather than the last step in the environmental review process. (*Save Our Peninsula Committee v. Monterey Bd. of Supervisors* (2001) 87 Cal.App.4th 99, 125.)

In describing the environmental baseline of the SWWTF, the SA/DEIS attempted to rely upon the Mitigated Negative Declaration (“MND”) that had been issued by the SCWD. However, the MND was rejected as inadequate and the SCWD is preparing an EIR.⁹ To supplement the Staff’s analysis, Commission Staff issued Appendix 1 to the SA/DEIS that purported to analyze the environmental impacts of the SWWTF upgrade. However, the Appendix concluded that the analysis was ongoing:

The analysis conducted by Dudek for the Draft MND indicated that surface water is supplied to the wetland by agricultural return flows and underdrain flow from a separate drinking water treatment plant, and that this water will be adequate to maintain the wetland after water supply from the SWWRF, totaling 0.15 cfs, is discontinued (Dudek 2009). However, as was highlighted in comments on the Draft MND, the volume of the agriculture return flows and underdrain flow was not provided and the SWWRF MND/Environmental Assessment (2003) stated that loss of effluent flows from the SWWTF could result in significant impacts to wetlands. A hydrologic study is necessary to quantify how withholding water from the emergent wetland will affect the wetland habitat and any listed species that may occupy the affected habitat, including the federally listed endangered Yuma clapper rail. This study may identify significant impacts, but

⁹ Exhibit 301.

mitigation measures may be able to reduce the impacts to less than significant.¹⁰

Thus, the vast majority of necessary survey data and information has not been provided to Staff or parties in this proceeding. At this point, Staff is unable to reach any required conclusion regarding this aspect of the proposed Project.

b. Staff failed to recognize substantial evidence of potentially significant unmitigated impacts to endangered and special status species and a wetland along the New River riparian corridor

According to the Supplemental Staff Assessment, the USFWS recommended that the following be completed for the environmental review process: 1) a hydrologic study where a quantification of the flows coming from other sources to the effluent channel wetland is provided with an assessment of the likelihood of its continued existence after the effluent flows are discontinued; 2) a vegetation composition assessment of the adjacent New River corridor with an evaluation of the effluent channel wetland in the context of the broader mosaic of habitats in the vicinity; and 3) protocol surveys for the presence/absence of Yuma clapper rail.¹¹

The hydrologic study is not complete and no results have been provided to date. Similarly no study from the vegetation composition assessment has been provided.¹² In the wildlife surveys that have been prepared to date, the federal and state listed endangered Southwestern Willow Flycatcher was found to be present in Wildcat drain. Although Staff testified that surveys for Yuma clapper rail were negative, the reports of the methodologies and scope of these surveys and other special status bird survey have not been provided to the parties in this proceeding and have not been subject to any public scrutiny. Enormous gaps remain in the record regarding the impacts that will occur from development of the SWWTF. Until that information is provided and the SWWTF upgrade is permitted, the Commission cannot reasonably conclude that the SWWTF upgrade will be approved and will ever be available as a water supply for the Project.

c. Treated effluent outfall was required as mitigation to protect wetlands and outfall cannot be eliminated without substantial evidence

Diverting the water from the Wildcat drain outfall to the Project may result in the loss of the wetland and will reduce flows to the New River and the Salton

¹⁰ *Id.* at p. AP.1-12.

¹¹ Exhibit 302, p. ES-23.

¹² Hearing Transcript, July 27, 2010, pp. 194-195.

Sea.¹³ In a now-rejected mitigated negative declaration (“Seeley 2003 MND”) for a prior upgrade project at the SWWTF, the Seeley County Water District determined that it was necessary to keep the effluent outfall at the same location as a form of mitigation to protect the wetland resources in Wildcat drain.¹⁴ The Seeley 2003 MND concluded that moving the outfall would result in the *rapid demise* of the two-acre wetland:

Relocation of the existing point of discharge, as proposed, would potentially result in the rapid demise of an approximately 2-acre wetland area, since the [SWWTF] effluent is the major water contributor to this drainage. The proposed direct discharge point into the New River would not replace the lost wetland area. Mitigation to reduce the impact of the Proposed Project to less than significant would involve pumping the treated effluent to the existing outfall location to sustain the existing wetland area. Although the loss of the wetland is potentially significant under CEQA and/or NEPA, Section 404 of the Clean Water Act does allow for discontinuation of flows that have created artificial wetlands. However, the degree of significance that the impact would have, as well as permission for hydrologic interruption, would need to be determined by the applicable resource agencies. This can sometimes be an involved and time-consuming process. The proposed mitigation would avoid the necessity for this process, and would keep WWTP effluent flows at the same location and the same volume that exist at the present time.¹⁵

In order to eliminate the discharge that was required as mitigation in the 2003 MND, CEQA requires the Commission to find, based on substantial evidence, that the mitigation is no longer feasible or necessary. CEQA caselaw establishes a presumption that mitigation measures are only adopted by a lead agency after due investigation and consideration. (*Napa Citizens for Honest Government v. Napa Cty. Board of Supervisors* (2001) 91 Cal.App.4th 342.) Therefore, a lead agency may only delete an approved mitigation measure in a subsequent CEQA review if the subsequent document has an adequate explanation, supported by substantial evidence, as to the reasoning for eliminating the mitigation as no longer feasible or necessary. (*Id.*)

Substantial evidence is not in the record that diverting the water from the current outfall to the Project site would not significantly impact the wetland, the New River and the Salton Sea. Although a hydrologic study is underway, the results of that study have not been provided or analyzed by Commission Staff or the public. In the absence of substantial evidence to the contrary, the Commission

¹³ Exhibit 429.

¹⁴ Exhibit 462.

¹⁵ Exhibit 462.

must rely upon the finding in the 2003 MND that the effluent was determined to be necessary for maintaining the wetland, and must assume this decision was made by the SCWD after due investigation and consideration. The Commission may not disturb the findings of the 2003 MND and approve the use of the SWWTF water for the Project.

2. THE COMMISSION CANNOT MAKE A FINDING OF COMPLIANCE WITH ESA SECTION 7

The Commission cannot determine that the SWWTF will comply with Section 7 of the Endangered Species Act (“ESA”) because neither Staff nor the wildlife agencies have determined compliance with the ESA with respect to protected species that will be affected by the SWWTF outfall to the Wildcat drain and the riparian area along the New River. The reason that no agency is able to make a final determination at this time is that there is insufficient information thus far upon which to base a decision.

i. Status of Special Status Bird Surveys

A number of special status bird species are known to rely upon the wetlands along the New River including the Yuma Clapper Rail, a federal and state listed endangered species and state fully-protected species; California Black Rail a state listed threatened, fully-protected species; Southwestern Willow Flycatcher, federal and state listed endangered; and Least Bell's Vireo also federal and state listed endangered.¹⁶ According to the **Commission Staff Biologist Joy Nishida, impacts have not been determined because the surveys are not completed and mitigation requirements by U.S. Fish & Wildlife Service are unknown.**¹⁷ Until the baseline information is provided, the Commission cannot reasonably determine the significance of the impacts to special status species from the SWWTF upgrade. Moreover, no surveys have been conducted along the New River riparian corridor beyond the drain immediately adjacent to the Project site.

ii. Section 7 Of The Endangered Species Act

The ESA provides that each agency shall “in consultation with and with the assistance of the Secretary [of the Interior, acting through the FWS], ensure that any [agency action] is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species [using] the best scientific and commercial data available.” (16 U.S.C. § 1526(a)(2).)

¹⁶ Hearing Transcript, July 27, 2010, p. 193.

¹⁷ *Id.*

The agency's process begins with a determination of whether there may be an endangered/threatened species in the area to be impacted by the proposed activity, i.e., the "action area." If species are present in the action area, then the agency is required to prepare a Biological Assessment (BA). (16 U.S.C. § 1536(c)(1).) A BA may include the results of on-site inspections, the views of recognized experts on the species at issue, a review of the literature, an analysis of the effects of the action on the species and its habitat, and an analysis of alternate actions. (50 C.F.R. 402.12(f).) The action area is defined as "all areas to be affected directly or indirectly by the Federal action and not merely the immediate area involved in the action." (50 C.F.R. 402.02(d).)

To date, no BA has been provided to the Commission, the results and methodology of surveys for special status species have not been made available to the Commission or the public, and areas of indirect impacts have been largely ignored, pending the outcome of the hydrologic study. At this point, the Commission cannot make a finding that this Project will comply with Section 7 of the ESA or that the water from the SWWTF is likely to be available for Project use.

iii. Additional Concerns Of Imperial Irrigation District Have Not Been Addressed – Cumulative Impacts of Reducing Effluent From SWWTF Upgrade On The Water Conveyance System, Water Conservation Program and Salton Sea Restoration Efforts

The Imperial Irrigation District ("IID") submitted comments to the Seeley County Water District about potentially significant environmental impacts from the proposed upgrade to the SWWTF.¹⁸ IID expressed concern that the cumulative effect of this project, in addition to a number of other projects which similarly augment the reduction of drain flows on the overall drainage system, may have significant and unmitigated impacts on the IID system, the IID water conservation program and Salton Sea restoration efforts. Neither the Applicant nor Commission Staff have provided analyses of any of these issues.

iv. CEC Cannot Make A Finding Of Consistency With LORS

The SWWTF upgrade project cannot proceed until the Project receives approval of a LAFCO extension of service, a change of use permit from the State Water Board, approval from the Seeley County Water District, and an incidental take permit from the United States Fish and Wildlife Service. The Commission cannot make a finding that the SWWTF upgrades will comply with all LORS because the analyses of the Project's impacts are not complete.

¹⁸ Exhibit 469.

a. SWWTF upgrade requires a LAFCO extension of service

In order for the SWWTF to provide water to the Project, a service extension would have to be provided by the Local Agency Formation Commission (“LAFCO”). In making a determination of whether to grant a service extension, LAFCO must consider whether the proposed extension of services promotes orderly development, discourages urban sprawl, preserves open space and prime agricultural lands, provides housing for persons and families of all incomes and is an efficient extension of governmental services. (Cal. Govt. Code § 56434(b).) To date, there is no evidence that LAFCO has undertaken such a review. At the evidentiary hearing, the Applicant testified that a service extension was required for the Project and was underway (but not completed).¹⁹

b. SWWTF upgrade project requires a change of use permit from state water board

Any diversion of water from the New River must be reviewed and approved by the State Water Resources Control Board in the form of a change of use permit.²⁰ The Board will take into account all prior rights, the availability of water in the basin, and the flows needed to preserve in-stream uses, such as recreation and fish and wildlife habitat.²¹ To date, there is no evidence that this analysis has even begun.

B. THE CEC MAY NOT APPROVE USE OF THE DAN BOYER WELL AS A TEMPORARY OR PERMANENT WATER SUPPLY BECAUSE THE WELL WILL NOT MEET THE WATER REQUIREMENTS OF THE PROJECT, USE OF THE WELL POSES UNMITIGATED SIGNIFICANT IMPACTS, AND RELIANCE ON THE WELL WOULD VIOLATE LORS

The Project requires 51.1 acre feet per year (“AFY”) of water for construction and 32.7 AFY for operation. On May 5, 2010, the Applicant filed an AFC Supplement that included a tentative “will serve letter” from the Dan Boyer Water Company that is contingent upon a later formal agreement. The amount of water to be provided for the Project was not stated in the letter. The only information provided by this letter is that the Dan Boyer well has a pumping limit of 40 acre feet per year (“AFY”) and that the Dan Boyer Water Company would temporarily supply some unidentified amount of water for “approximately six to 11 months.”

¹⁹ Hearing Transcript of July 26, 2010, p. 139.

²⁰ Exhibit 302, p. C.7-85.

²¹ Cal. Water Code § 1211.

Nothing in this letter or in the Applicant's subsequent filings provides any further documentation that the Dan Boyer Water Company has committed to provide water for the duration of the Project or could provide a sufficient supply of water to meet the Project's water requirements.

1. THE DAN BOYER WELL WILL NOT MEET THE WATER SUPPLY REQUIREMENTS FOR THE PROJECT

Commission Staff concluded that the SWWTF is not a reliable water source and that the Project would need to rely upon the Dan Boyer well as the primary water supply for the Project.²² However, there is no evidence that this alternative water supply source can provide the required water under any scenario.

As stated, the Project requires 51.1 AFY of water for construction and 32.7 AFY for operation.²³ Dan Boyer Water Company did not state the amount of water to be provided to the Applicant. The only information provided was that the Dan Boyer well has a pumping limit of 40 acre feet per year ("AFY") and that the Dan Boyer Water Company would temporarily supply some unidentified amount of water for "approximately six to 11 months." Even under a hypothetical scenario in which there is evidence that the Applicant could obtain all of the water available from the Dan Boyer Water Company (which there is not), the Dan Boyer well can only provide 34 acre-feet per year.²⁴

Because the Project has no reliable water supply, the Applicant proposed at the evidentiary hearing to "slow" construction in order to use only the Dan Boyer well until the SWWTF comes online. There are two fatal flaws in the Applicant's claim at the evidentiary hearing.

First, the Applicant still states that it requires 42 acre feet of water for the first year of construction.

Second, the Applicant admitted that the Project would need water from the SWWTF within six to twelve months:

MS. HOLMES: Did you do an analysis to determine what would happen to your schedule if the Dan Boyer well needed to be relied upon for a period of time greater than six months?

²² Exhibit 302, Supplemental Staff Assessment, p. C.7-54.

²³ Exhibit 302, p. C.7-44.

²⁴ *Id.*

MR. VAN PATTEN: We did not do a very detailed analysis, but back of the envelope analysis that we did do would indicate that we could use the Dan Boyer well for up to a year and not miss our contract COD date with SDG&E.²⁵

However, Staff concluded that it is pure speculation as to whether water will ever be available from the SWWTF.

The Commission must scrutinize the Dan Boyer well as if it will be the sole water supply for the Project. The Applicant testified that it can only use the well without the SWWTF for one year without violating their contractual obligations with SDG&E. Thus, the Project may not be viable without the SWWTF, a wholly unreliable water supply. Moreover, scrutiny of the Boyer well has revealed that it is not an adequate water supply for the Project. There is no other back up water supply.²⁶

i. There is Unrebutted Expert Testimony That Additional Water Is Needed To Supply the Project

The Staff Assessment concluded that *only 34 acre-feet per year is available from the Dan Boyer well*.²⁷ No matter how you analyze the water needs of the Project, this will not be a sufficient amount of water for construction and operational water needs. The Applicant's witness Marc Van Patten testified that even if the construction schedule was reduced to a six day work week, the *Project would still need 42.4 acre-feet per year* ("AFY") and that would not be sufficient to meet the terms of the Applicant's contract with SDG&E if additional water is not identified after one year.²⁸ Dr. Bowles submitted unrebutted testimony that *water deficiencies are even greater* than what has been acknowledged in the Supplemental Staff Assessment.²⁹

First, the SSA states that the **construction phase requires 51.1 AFY** on average (or 166 AF total) based on 45,000 gallons per day ("gpd") for dust control and 90,000 gpd for 15 peak construction days during the Applicant's 39 month construction window, resulting in an average deficiency of 17.1 AFY based on an available supply of 34 AFY.³⁰ In reviewing the AFC's monthly calculations, Dr.

²⁵ Hearing Transcript of July 26, 2010, p. 116. [Note this is based upon the Applicant's Assumption that 39.5 AFY will be available from the Boyer well.]

²⁶ Exhibit 302, Supplemental Staff Assessment, p. C.7-54.

²⁷ *Id.*

²⁸ Hearing Transcript of July 26, 2010, pp. 102 and 198.

²⁹ Exhibit 499-I, Additional Rebuttal Testimony of Dr. Christopher Bowles and Christopher Campbell, pp. 2-4.

³⁰ Exhibit 302, Supplemental Staff Assessment, p. C.7-16.

Bowles determined that 52% of the water demand would occur in the first 12 months, 40% would occur in the next 12 months, and 8% would occur in the final 15 months.³¹ This testimony was not disputed by Staff or the Applicant. Assuming that the total demand is 166 AF as is outlined in the Supplemental Staff Assessment, then **86 AF would be needed in the first 12 months**, which would equate to a deficiency of 52 acre feet during the first 12 months.³²

Second, the Staff concluded that operations require 32.7 AFY of water supply based on average annual usage. However, Staff's calculations assumed that there are 8 normal washings (at 14 gals/solar unit) and 1 scrub washing (at 42 gals/solar unit) for a total of 9 washings annually or 14.2 AFY.³³ Dr. Bowles testified that there are numerous instances in the record where the Applicant and Staff assumed that mirror washings occur once per month for a total of 12 washings per year with possibly 8 normal washings and 4 scrub washings, requiring ***an additional 10.3 AFY above the 32.7 AFY estimate.***³⁴ These calculations demonstrate that there will be an operational deficiency in addition to the construction deficiency.

Third, the water requirements for dust control were estimated at 5.6 AFY or 5,000 gpd for 365 days per year.³⁵ However, Condition of Certification WorkerSafety-8 would require the Applicant to increase the frequency of watering and essentially double the daily rate of water use on certain days to enhance dust control for the purpose of preventing the spread of Valley Fever to workers and the public.³⁶ Reasonably assuming 20% of days require enhanced dust control, Dr. Bowles calculated that this would equate to ***6.7 AFY that was not included in the Supplemental Staff Assessment's estimated operational water needs.***³⁷ No additional water was allocated to protect workers and the public from Valley Fever on high-dust days.

Fourth, Dr. Bowles submitted undisputed testimony that the Supplemental Staff Assessment's ***Air Quality section assumes that power generation will occur during the construction window.***³⁸ ***However, the overlap of construction and operation water needs was not included in the water supply calculations.***

³¹ Exhibit 499-I, Additional Rebuttal Testimony of Dr. Christopher Bowles and Christopher Campbell, p. 3.

³² *Id.*

³³ Exhibit 302, Supplemental Staff Assessment, p. C.7-17.

³⁴ Exhibit 499-I, Additional Rebuttal Testimony of Dr. Christopher Bowles and Christopher Campbell, p. 3.

³⁵ Exhibit 302, Supplemental Staff Assessment, p. C.7-16.

³⁶ Exhibit 302, Supplemental Staff Assessment, p. C.15-25.

³⁷ Exhibit 499-I, Additional Rebuttal Testimony of Dr. Christopher Bowles and Christopher Campbell, p. 4.

³⁸ *Id.*

Considered in combination, Dr. Bowles calculated that there could be an additional need for 13.6 AFY above the 34 acre feet AFY that Staff found is potentially available from the Dan Boyer well for 6-11 months.³⁹ The SSA assumes that, in the event that demand will exceed supply, the Applicant will suspend mirror washing.⁴⁰ Dr. Bowles testified that suspension of mirror washing will not solve water deficiencies that arise from construction water needs to prevent health hazards mitigated by Condition of Certification WorkerSafety-8.⁴¹

2. USE OF THE DAN BOYER WELL VIOLATES THE IMPERIAL COUNTY GROUNDWATER ORDINANCE

The Applicant's expert Robert Scott testified that the Applicant did not have any permit for the use of the well other than well registration.⁴² The Dan Boyer well does not currently hold either an extraction facility permit or an exportation permit, both of which are required by the County groundwater ordinance.

i. The County Has Not Authorized Export Of Water From The Dan Boyer Water Well Outside of the Water Basin

The Imperial County Municipal Code states that no groundwater shall be exported from the county or from the groundwater basin or *portion of a basin* from which the groundwater is derived unless the operator of the exportation facility has applied for and obtained a permit which establishes the quantity of groundwater which may be exported and the conditions on such exportation. (Imperial County Municipal Code, Div. 22, Chap. 3, § 92203.01.) The County Code prohibits the Planning Commission from issuing a permit to export water from the County or from the groundwater basin unless the applicant has established that there is an available supply in excess of the amount currently required for reasonable and beneficial uses within the County, and that the Planning Commission determines that such export, if permitted, would not adversely affect the rights of groundwater users within the County or the groundwater basin from which the groundwater is derived. (Id. at § 92203.02.) The Ordinance defines the groundwater basin **as the basin, or portions thereof, within the boundaries of the County and any sub-basins located therein.** (Id. at § 92201.04(O).)

Testimony from Mr. Campbell established that the Ocotillo/Coyote Wells aquifer from which the Dan Boyer well extracts water is a distinct portion of the

³⁹ *Id.*

⁴⁰ Exhibit 302, Supplemental Staff Assessment, p. C.7-58.

⁴¹ Exhibit 499-I, Additional Rebuttal Testimony of Dr. Christopher Bowles and Christopher Campbell, p. 4.

⁴² Hearing Transcript of July 26, 2010, pp. 168-169.

groundwater basin that the Project does not overlie.⁴³ Therefore, an export permit is required to use water from that well for the proposed Project. In evaluating a permit application, the County would have to consider whether pumping from the Dan Boyer well would adversely affect the rights of groundwater users within the County, the basin (or the sub-basins) from which the groundwater is derived.

The Applicant has provided no indication that the County has conducted such an analysis or that appropriate permits have been obtained.

Further, use of the Dan Boyer well may result in the water table dropping below the well screens for two nearby groundwater users.⁴⁴ This would result in significant unmitigated impacts to nearby users and must be considered by the County in evaluating an application for an export permit from the Dan Boyer well.

Staff witness Christopher Dennis acknowledged that the registration only allowed export from the Dan Boyer premises in Ocotillo, not out of the basin.⁴⁵ Until an export permit is obtained, the Dan Boyer well water is not available for the Project.

**3. ALTHOUGH THE APPLICANT HAS PROPOSED USING
THE DAN BOYER WELL FOR THE LIFE OF THE
PROJECT, THERE IS NO CONTRACT OR BASIS TO
CONCLUDE THAT THE WATER WOULD BE AVAILABLE
FOR THAT QUANTITY OR FOR THAT PERIOD OF TIME**

The Dan Boyer Water Company has provided a “will serve” letter that states it will *temporarily* furnish well water to Imperial Valley Solar for an expected period of six to eleven months upon execution of an agreement.⁴⁶ The Applicant has provided no contract for water beyond this ambiguous will serve letter that does not provide a quantity of water that would be available or any commitment to provide water for the life of the Project. Finally, the Applicant testified that it could only use the Dan Boyer well for up to a year⁴⁷ and even that testimony lacks evidence. The Commission has no basis to conclude that the Dan Boyer water company is a reliable water supply.

⁴³ Hearing Transcript of July 26, 2010, pp. 249-250.

⁴⁴ Exhibit 499-I, Additional Rebuttal Testimony of Dr. Christopher Bowles and Christopher Campbell, p. 5.

⁴⁵ Hearing Transcript of July 26, 2010, p. 198.

⁴⁶ Exhibit 302, Supplemental Staff Assessment, p. C.7-52.

⁴⁷ Hearing Transcript of July 26, 2010, p. 116. [Note this is based upon the Applicant’s Assumption that 39.5 AFY will be available from the Boyer well.]

IV. THE ENERGY COMMISSION CANNOT PERMIT THE APPLICANT'S PROPOSED 709 MW ALTERNATIVE DESIGN OR CERTIFY THAT THE PROJECT IS CONSISTENT WITH FEDERAL LORS WITHOUT A FINALIZED LEDPA DETERMINATION FROM THE CORPS AND A STAFF REPORT

The Project would pose significant impacts to waters of the U.S. that would occur as a result of the removal of vegetation and the placement of the SunCatchers and associated infrastructure in the bed of the ephemeral washes.⁴⁸ According to the Staff's analysis, placement of the SunCatchers and associated maintenance roads, the electrical collection system, and the hydrogen distribution system would disrupt the physical (e.g., hydrological and sediment transport), chemical, and biological functions and processes of the ephemeral washes.⁴⁹ These activities would result in the permanent, direct loss of approximately 165 acres of waters of the U.S., temporary impacts to 5 acres of waters of the U.S., and indirect impacts to 13 acres of waters of the U.S. As a result, the Project requires a Clean Water Act Section 404 permit from the US Army Corps of Engineers ("the Corps").

In an attempt to reduce impacts to waters of the U.S., the Corps provided a Draft 404(b)(1) Alternatives Analysis developed to reduce impacts to waters of the U.S.⁵⁰ This includes the Corps analysis of the least environmentally damaging practicable alternative ("LEDPA"). An incomplete version of this alternatives analysis was docketed in the Applicant's rebuttal testimony two working days prior to the evidentiary hearings. A complete copy of the Corps draft analysis was docketed after the evidentiary hearing on August 9, 2010.

The Corps' draft 404(b)(1) alternatives analysis contains a revised Project design for a 709 Mw Project, which the Applicant now adopts and seeks a license for from the Commission. No parties other than the Applicant have had an opportunity to do more than a cursory review of, much less prepare and submit testimony on, the Corps' draft 404(b)(1) analysis, and now the proposed Project, prior to the Commission's evidentiary hearings on July 26 and 27, 2010. Staff Counsel explicitly commented on the fact that there was not time for Staff to review this document prior to the evidentiary hearing:

MS. HOLMES: I don't have cross-examination, but I want to make a statement for the committee a global statement, and that is that the applicant has requested that the commission approve what's been referred to as the LEDPA, despite our dislike of acronyms. Staff has not analyzed the LEDPA. Staff saw

⁴⁸ Exhibit 302, Supplemental Staff Assessment, p. ES-25.

⁴⁹ *Id.*

⁵⁰ Exhibit 129.

the draft LEDPA on the 21st of July. Staff has analyzed the project as originally proposed and a series of alternatives. There may be a number of times during these hearings when the question of impacts associated with the LEDPA or potential amelioration of effects associated with the LEDPA come up. Staff cannot testify to any of that. Staff has not examined the LEDPA.

If the committee wishes staff to examine the LEDPA and reach conclusions as to whether or not they're significant impacts, either new significant impacts or existing impacts that we've identified that are reduced, we can do so, but it will take additional time.

In response, the Committee directed Staff to NOT analyze the draft LEDPA.⁵¹ However, **the 709 Mw design is a new Project design that will result in new and different environmental impacts that were not analyzed by Commission Staff and as such, cannot be permitted by the Commission.**

Moreover, it is still an open question as to whether the Project will undergo further redesigns since the U.S. EPA identified the Project as requiring U.S. EPA review of the Corps's draft LEDPA analysis, which has not yet been circulated for agency and public comment.

A. CLEAN WATER ACT SECTION 404 REQUIREMENTS

The Commission must determine whether the Project complies with LORS, including the Clean Water Act. The Clean Water Act implementing regulations prohibit the Corps from permitting a discharge of dredged or fill material if there is a practicable alternative to the proposed discharge which would have a less adverse impact on the aquatic ecosystem (40 CFR 230.10(a).) "An alternative is practicable if it is available and capable of begin done after taking into consideration cost, existing technology, and logistics in light of overall project purposes." (*Id.*) The burden of proof to demonstrate compliance with the Guidelines rests with the applicant; where insufficient information is provided to determine compliance, the Guidelines require that no permit be issued. (40 CFR 230.12(a)(3)(iv).)

In addition to requiring the identification of the LEDPA, the Section 404(b)(1) Guidelines mandate that no discharge of dredged or fill material shall be permitted if it causes or contributes to violations of any applicable State water quality standard, 40 C.F.R. 230.10(b)(1), violates any applicable toxic effluent standard or

⁵¹ Hearing Transcript of July 27, 2010, p. 127.

prohibition, jeopardizes the continued existence of any endangered or threatened species, 40 C.F.R. § 230.10(b)(3), or causes or contributes to significant degradation of Waters of the US, 40 C.F.R. § 230.10(c). Prior to completing its review, the Corps also must ensure that the proposed project is not contrary to the public interest. (33 C.F.R. § 320.4.)

B. THE COMMISSION CANNOT PERMIT THE CORPS' ALTERNATIVE BECAUSE STAFF HAS NOT ANALYZED THE ALTERNATIVE REDESIGNED PROJECT

The draft LEDPA is a redesign and reconfiguration of the Project. Energy Commission regulations require Staff to independently analyze a project's potential adverse environmental impacts and include its assessment in an environmental review document. Energy Commission regulation § 1742.5 provides that "staff shall review the information provided by the applicant and other sources and assess the environmental effects of the applicant's proposal..." (*Id.*, § 1742.5(a).) Further, the regulations require Staff to "present the results of its environmental assessments in a report..." (*Id.*, § 1742.5(b) (emphasis added).) "The staff report shall indicate staff's positions on the environmental issues affecting a decision on the applicant's proposal." (*Id.*, § 1742.5(c) (emphasis added).)

By Staff's own admission, Staff has not independently reviewed the Applicant's proposed Project redesign, which is the Corps' proposed LEDPA. As described below, the Project redesign may result in new and different significant environmental impacts that require new and different mitigation to reduce those impacts to less than significant. Pursuant to Commission regulations, Staff must analyze the proposed Project redesign in a report circulated to all parties.

C. PROJECT DESIGN CHANGES MAY RESULT IN NEW UNANALYZED SIGNIFICANT ENVIRONMENTAL IMPACTS

At the hearing, the Applicant's attorney Ms. Gannon argued that "*the impacts can't get greater, because we have concurred that a 709 is practical. So it cannot possibly get greater than 709.*"⁵² The problem with the Applicant's argument is that it confuses the size of megawatt output with the amount and significance of environmental impacts posed by Project redesign. The number of megawatts of electricity that a Project will provide is not in any way indicative of the environmental impact it is likely to cause.

The Applicant now requests that the Commission permit a new Project redesign that the record shows would result in new unanalyzed and unmitigated significant environmental impacts. This is a different project than the Project and the alternatives analyzed by Staff, and the redesigned project would result in

⁵² Hearing Transcript of July 27, 2010, p. 124.

significant unmitigated environmental impacts that are different than those analyzed by Staff in any of Staff's reports currently in the evidentiary record for this proceeding.

Indeed the Project redesign, as proposed in the draft LEDPA, is distinct from the proposed Project as analyzed by Staff in ways that are directly relevant to the Committee's responsibility under CEQA. One major change involves the removal of spur roads to individual SunCatchers.⁵³ In the initial design analyzed by Staff, spur roads were used to access each and every one of the thousands of SunCatcher units. The Staff Assessment concluded that **all unpaved roads** [presumably including spur roads] would be stabilized by a chemical dust suppressant.⁵⁴ The Project design in the draft LEDPA would remove those spur roads.

Although it is conceivable that removal of roads could reduce particular environmental impacts, it is equally true that other environmental impacts would increase due to **driving in undesignated areas throughout the site on surfaces that have not been stabilized**. The redesigned project's **addition of off-road driving** throughout the Project site would result in potentially significant and different environmental impacts than the impacts analyzed by Staff for every alternative, including the full build-out 750 Mw Project, since every alternative analyzed by Staff assessed the use of stabilized roads. The redesigned Project for which the Applicant now seeks a license proposed significant additional surface areas, which would be subject to repeated trampling by tires from vehicles driving to the SunCatcher units over the life of the Project.

The redesigned Project would result in potentially significant unmitigated and **unanalyzed** impacts on water and air quality. As was testified by Dr. Bowles, once the fragile crusts and pavement are disturbed, the release of fine dust into the water and air could pose significant environmental impacts.⁵⁵ The Applicant's witness Mr. Fitzgerald conceded under oath that the air quality impacts of the draft LEDPA had not been analyzed.⁵⁶

MS. HOLMES: And one of the changes is removal of spur roads to the individual SunCatchers from the maintenance road; is that correct?

MR. FITZGERALD: That's correct.

MS. HOLMES: Do you know what the purpose of those spur roads was? Was it to provide access to the individual SunCatchers from the maintenance road?

⁵³ Exhibit 129, pp. 24-25.

⁵⁴ Exhibit 302, Supplemental Staff Assessment, pp.C.1-15 and C.1-26.

⁵⁵ Exhibit 478.

⁵⁶ Hearing Transcript of July 27, 2010, pp. 375-376.

MR. FITZGERALD: Yes. The original proposal had the same type of surface road getting graded to individual SunCatchers for the purposes of long-term washing and maintenance.

MS. HOLMES: So will access to the SunCatcher now occur over roads that don't have that same level of maintenance?

MR. FITZGERALD: Access for the purposes of washing the mirrors in the waters of the U.S. will be over land travel, and that's what was analyzed in the 404B1.

MS. HOLMES: Do you know whether or not the air quality impacts associated with using those kinds of roads was analyzed?

MR. FITZGERALD: No, I don't.

Staff has not analyzed any of these new potentially significant unmitigated impacts within the scope of any of its alternatives.

In addition to additional ground disturbance and soil impacts, increases in the amount of “over land” unmaintained access throughout the site will generate additional dust resulting in significant public health and water quality impacts. Dust is not only an air quality impact in Imperial County but it may present a unique health hazard because of the incidence of Valley Fever transmitted by dust emissions.⁵⁷ According to the Staff's analysis, Valley Fever is spread through the air.⁵⁸ If soil containing the fungus is disturbed by construction or wind, the fungal spores get into the air where people can breathe in the spores.⁵⁹ The Supplemental Staff Assessment requires additional watering of surfaces or soil stabilization whenever dust is generated.⁶⁰ The Applicant's water supply is already inadequate to meet the needs of the Project. Any additional significant impacts from dust or water usage that may be caused by the new Project description have not been considered by Staff in a report, as is required by Commission regulations.

Moreover, according to the Corps' draft 404(b)(1) analysis, the new Project redesign would *increase* the temporary disturbance on the site due to the construction of 50-foot roads for the installation of the underground utility line and

⁵⁷ Exhibit 302, Supplemental Staff Assessment, p.C.15-15.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ Exhibit 302, Supplemental Staff Assessment, p.C.15-25.

hydrogen pipelines.⁶¹ Dr. Bowles' testimony explains that such disturbance is not temporary when the healing of soil surfaces can take hundreds or thousands of years in this arid desert environment.⁶² However, Staff prepared no analysis of the impacts from these increased "temporary" disturbance areas.

D. THE COMMISSION CANNOT DETERMINE COMPLIANCE WITH LORS BECAUSE THE APPLICANT'S PROPOSED REDESIGNED PROJECT MAY BE REVISED BY THE U.S. EPA AND THE CORPS

Although the USACE has released its draft LEDPA for public comment, the Commission cannot determine whether the Applicant's newly proposed Project complies with LORS because there is no indication from the U.S. EPA, which asserted oversight over the Project, that the redesigned project complies with the Clean Water Act. Staff Counsel informed the Committee that this was the case at the hearing on July 27, 2010:

MS. HOLMES: When we see the final LEDPA, then we will know what it is and we will at that point be able to ascertain whether there are differences that result in impacts that we haven't identified or different types of mitigation measures. It's not a legal issue, it will be a factual issue, and it's not one that we can really address until we see the final LEDPA.⁶³

Furthermore, the draft LEDPA may change because the U.S. EPA raised significant concerns in comments on the Corps permit and on the SA/DEIS:

The project proposes discharges of dredged or fill material that would eliminate 167 acres of jurisdictional desert streams tributary to the New River and the Salton Sea. As proposed, these discharges may result in substantial and unacceptable impacts to "aquatic resources of national importance" (ARNI). The streams at this project site perform critical hydrologic, biogeochemical and habitat functions directly affecting the integrity and functional condition of the New River and Salton Sea, both listed as impaired water bodies under the Clean Water Act (CWA) sect. 303(d). This letter identifies the permit action as a candidate for review by our respective headquarters pursuant to our agencies established procedures.⁶⁴

⁶¹ Exhibit 129, pp. 24-25.

⁶² Exhibit 478, p.9.

⁶³ Hearing Transcript of July 27, 2010, p. 122.

⁶⁴ Exhibit 498-J.

The U.S. EPA also specifically requested that the Corps evaluate an alternative that would limit the Project's power output to 300 Mw and would avoid all waters of the US.

As part of determining the LEDPA, the FEIS should further justify the elimination of the 300 MW Phase I as a practicable alternative. Based on the information in the DEIS, it appears that the Phase I alternative may be practicable and less environmentally damaging to jurisdictional waters when compared to the proposed Project alternative. It is our understanding that the Applicant has a Power Purchase Agreement with SDG&E to provide 300 MW of power once on-line. The FEIS should confirm that this is the case... As such, a single 300 MW plant would be considered an on-site less environmentally damaging, practicable alternative, pursuant to the Guidelines. Finally, the FEIS should analyze a 300 MW alternative in a design configuration that avoids all impacts to Waters on-site.⁶⁵

Despite the U.S. EPA's request, the Applicant made no effort to *reconfigure* a 300 Mw alternative to avoid all impacts to waters of the U.S. As a result, neither the Corps, the Applicant, or Commission Staff analyzed the *reconfigured* 300 Mw alternative specifically requested by the U.S. EPA.

Finally, although CURE disagrees that a 300 MW project is viable due to the Applicant's failure to identify a reliable water supply, the Corps determined that the overall project purpose could be met with a 300 Mw project. The Corps determined that the overall purpose of this Project is "[t]o provide a solar energy facility ranging in size from 300 Megawatts to 750 Megawatts in Imperial County, California."⁶⁶ The Corps' analysis concludes that the 300 Mw alternative is less environmentally damaging, meets the overall project purposes, and is logistically feasible. The reason that the Corps did not select a 300 Mw alternative as the LEDPA was because the Corps preliminarily determined that it "does not satisfy cost criteria to produce electric power at a price regulated utilities can pay." This is clearly rebutted by the Applicant's power purchase agreement with SDG&E in which the Applicant agrees to sell 300 Mw of power from the Project to the utility and there are no other PPAs.⁶⁷

In sum, at this time, the Commission cannot determine whether the Project reduces significant impacts and complies with LORS. The U.S. EPA has veto authority over the Corps' Clean Water Act §404 permitting decisions pursuant to Clean Water Act § 404(c) and has specifically determined that the Project is a

⁶⁵ www.energy.ca.gov/sitingcases/solartwo/documents/others/2010-06-03_US_EPA_Comments_re_DEIS_TN-56988.pdf

⁶⁶ Exhibit 129.

⁶⁷ Exhibit 499-M.

candidate for its review of whether impacts to waters of the US have been reduced to the extent practicable. Until this review is complete and Staff revises its analysis, the Commission cannot make required findings under CEQA and the Warren-Alquist Act.

V. SOIL AND WATER RESOURCES; THE PROJECT WOULD RESULT IN SIGNIFICANT UNMITIGATED IMPACTS TO THE NEW RIVER, SALTON SEA AND THE SALTON SEA WATERSHED

In its review and approval of the Project, the Commission must fulfill the requirements of the Warren-Alquist Act and CEQA. The Warren-Alquist Act requires a finding that a project complies with all LORS. CEQA requires that all potential environmental impacts be analyzed and that all significant impacts be mitigated, including impacts from mitigation measures themselves. The proposed Project fails on both counts. The environmental review is inadequate and cannot be relied on by the Commission in approving the Project. Further, the Commission's approval of the Project would violate the Warren-Alquist Act.

The Commission cannot approve the Project because there are significant unanalyzed and unmitigated offsite downstream impacts to the New River, the Salton Sea and the Salton Sea watershed. In some instances, Staff's assessments failed to meet the basic requirements of CEQA. For example, because Staff's assessments failed to establish an accurate baseline for soil surfaces in the watershed, Staff's conclusions that significant offsite impacts cannot be mitigated is unsupported. Consequently, if the Commission approved the Project, the Commission would violate CEQA. In addition, Staff's assessments completely failed to analyze potentially significant impacts to the New River, the Salton Sea and the Salton Sea watershed. No mitigation for these impacts was ever proposed or discussed. Staff's assessments failed to adequately analyze and mitigate significant impacts to the Salton Sea and its watershed, and therefore failed to satisfy the basic requirements of CEQA.

Finally, Staff's analysis did not analyze how the Project's offsite sedimentation impacts would violate the total maximum daily loads ("TMDL") that have been developed for the New River, Imperial Valley drains and Salton Sea, pursuant to the Clean Water Act. Until this analysis is done, the Commission cannot make a finding regarding whether the Project complies with LORS.

A. STAFF FAILED TO DETERMINE THE ENVIRONMENTAL BASELINE FOR CRYPTOBIOTIC CRUSTS, DESERT PAVEMENT

The environmental setting, or baseline, refers to the conditions on the ground and is a starting point to measure whether a proposed project may

cause a significant environmental impact. CEQA defines “baseline” as the physical environment as it exists at the time CEQA review is commenced. (14 Cal. Code Reg. §15125(a); *Riverwatch v. County of San Diego* (1999) 76 Cal.App.4th 1428, 1453.) “An EIR must focus on impacts to the existing environment, not hypothetical situations.” (*County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, 952.)

If the description of the environmental setting of the project site and surrounding area is inaccurate, incomplete or misleading, the EIR does not comply with CEQA...Without accurate and complete information pertaining to the setting of the project and surrounding uses, it cannot be found that the FEIR adequately investigated and discussed the environmental impacts of the development project.

(*Cadiz Land Co., Inc. v. Rail Cycle, L.P.* (2000) 83 Cal.App.4th 74, 87, quoting and citing *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus*, (1994) 27 Cal.App.4th 713, 721-722, 729.)

Describing the environmental setting is critical to an accurate, meaningful evaluation of environmental impacts. The importance of having a stable, finite, fixed environmental setting for purposes of an environmental analysis was recognized decades ago. (*County of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185.) Today, the courts are clear that, “[b]efore the impacts of a project can be assessed and mitigation measures considered, an [environmental review document] must describe the existing environment. It is only against this baseline that any significant environmental effects can be determined.” (*County of Amador, supra*, 76 Cal.App.4th at 952.) In fact, it is a central concept of CEQA, widely accepted by the courts, that the significance of a project’s impacts cannot be measured unless the EIR first establishes the actual physical conditions on the property. In other words, ***baseline determination is the first rather than the last step in the environmental review process.*** (*Save Our Peninsula Committee v. Monterey Bd. of Supervisors* (2001) 87 Cal.App.4th 99, 125.)

Staff’s failure to accurately describe the existing soil conditions on the Project site – a critical and unique resource in this desert environment – violates the requirements of CEQA. It is undisputed that desert pavement and cryptobiotic crusts occur on the Project site.⁶⁸ Additionally, there is undisputed expert testimony by Dr. Christopher Bowles and Chris Campbell that desert pavement and cryptobiotic crusts play an important role in the hydrology and sedimentation processes on the Project site.⁶⁹ Desert pavement controls infiltration, runoff, and transmission losses.⁷⁰ Cryptobiotic crusts stabilize sand and dirt, promote moisture

⁶⁸ Exhibit 302, p. C.2-119.

⁶⁹ Exhibit 478.

⁷⁰ *Id.*

retention, and fix atmospheric nitrogen.⁷¹ Wind erosion is substantially more prevalent with disruption of the crust and pavement.⁷²

Both Staff and the Applicant admit that they did not establish the existing amount of desert pavement and cyptobiotic crusts on the Project site that would be essential to evaluating significant impacts.⁷³ Staff's analysis acknowledges that, throughout the region, large expanses of nearly vegetation-free desert pavement are a characteristic element.⁷⁴ Dr. Bowles explained the need for this baseline information so that the amount of desert pavement and crusts could be incorporated into the modeling of the Project's likely environmental impacts:

Failure to undertake additional surveys, data collection and analysis, and design of appropriate mitigation actions as described below will result in significant unmitigated impacts to the desert pavement and cryptobiotic soils, with corresponding dramatic increases in sediment and wind erosion, and significant impacts to downstream receiving waters.⁷⁵

According to Dr. Bowles, determining the existing amount of desert pavement and cryptobiotic crust on the Project site should have been one of the first surveys done to establish the baseline conditions on the Project site.⁷⁶ Staff should have then factored the existing amount of desert pavement and cryptobiotic crust on the Project site into its analysis because it would result in corresponding increases in sediment and wind erosion and significant impacts to downstream waters that must be analyzed. Without an accurate description of the environmental setting, these potentially significant impacts have not been analyzed or mitigated. By failing to establish the baseline environmental setting, Staff's assessment failed to satisfy CEQA's requirement that the baseline be determined as the *first* step in the environmental review process. Consequently, if the Commission approves the Project as proposed, the Commission will violate CEQA as a matter of law. The Commission should require that the Applicant conduct surveys for the quantity, quality and type of desert pavement and cryptobiotic crust on the Project site and incorporate the information about this baseline condition into the analysis of the Project's impacts and mitigation.

⁷¹ *Id.*

⁷² *Id.*

⁷³ Hearing Transcript, July 26, 2010, pp. 323 and 349.

⁷⁴ Exhibit 302, p. C.13-4.

⁷⁵ Exhibit 478, p.16.

⁷⁶ Hearing Transcript, July 26, 2010, pp. 357.

B. STAFF FAILED TO ANALYZE THE PROJECT'S SIGNIFICANT UNMITIGATED IMPACTS ON THE NEW RIVER AND SALTON SEA WATERSHED AND COMPLIANCE WITH TMDLS UNDER THE CLEAN WATER ACT

The U.S. EPA determined that the Project site would affect “aquatic resources of national importance” and could significantly impact the Salton Sea watershed.⁷⁷ Despite this warning, Commission Staff largely failed to analyze any of the Project impacts beyond the fence line or immediate pipeline or transmission right-of-way. Dr. Bowles testified that soluble salts from soils on the project site will end up in the Salton Sea.⁷⁸ The Staff did not analyze this impact. Moreover, the Staff analysis did not analyze how the Project’s offsite sedimentation impacts would violate the total maximum daily loads (“TMDL”) that have been developed for the New River, Imperial Valley drains and Salton Sea.

1. SIGNIFICANT UNMITIGATED AND UNANALYZED IMPACTS TO THE NEW RIVER, SALTON SEA AND THE WATERSHED

According to the testimony of Dr. Bowles, the 6,500-acre area proposed for Project development is a “dynamic system” with ephemeral washes or channels that are highly susceptible to widening and channel relocation.⁷⁹ The stream contours change after major storms and a significant amount of sediment is transported through the system during these events.⁸⁰ Most of the channels tend to have deep sediment deposits composed of sand and gravel with widely scattered vegetation growing within the channel and its floodplain.⁸¹ Dr. Bowles explained that the Applicant’s one-dimensional modeling and analysis was inadequate to show the dynamic processes at work on the Project site.⁸²

Dr. Bowles further testified that the installation of SunCatchers would cause deeper incision in streams and heightened sediment transport, resulting in sediment and salinity impacts to the New River, Imperial Drains and Salton Sea watershed.⁸³ According to Dr. Bowles, these impacts were not adequately analyzed by the Applicant or Staff. Additionally, Dr. Bowles testified that construction, maintenance and grading at the Project site will destroy desert pavement and cryptobiotic crust, features on the site that naturally prevent soil erosion and sedimentation. The destruction of these natural soil stabilizers will impact air quality and water quality on and off the Project site.

⁷⁷ Exhibit 498-J.

⁷⁸Hearing Transcript, July 26, 2010, pp. 389.

⁷⁹ Hearing Transcript of July 26, 2010, pp. 360-361.

⁸⁰ Id.

⁸¹ Id.

⁸² Exhibit 478.

⁸³ Exhibits 478 and 499-A.

Staff concluded that the [Applicant’s] calculations and assumptions used to evaluate potential storm water, geomorphic, and sedimentation impacts were **imprecise and had limitations and uncertainties** associated with them.⁸⁴

Given the uncertainty associated with the calculations, the magnitude of potential impacts that could occur cannot be determined precisely without additional detailed numeric modeling of project effects. Based on an independent preliminary assessment by staff, staff has determined the proposed project could result in erosion and stream morphology impacts that would be significant. Conditions of Certification SOIL&WATER-1, SOIL&WATER-5, SOIL&WATER-7, and SOIL&WATER-10 have been developed that require development of best management practices and monitoring and reporting procedures to mitigate impacts related to flooding, erosion, sedimentation, and stream morphological changes. These conditions of certification would minimize impacts, **but due to the uncertainty associated with the existing analysis, impacts related to erosion, sedimentation and stream morphological changes are considered significant after mitigation.**⁸⁵

Although Staff concluded the impacts were significant after mitigation, Staff did not evaluate nor consider possible mitigation for the likely extent of the Project’s impacts extending off the Project site and into the Salton Sea watershed.

The Staff Assessment does hint that there will be offsite impacts to the Salton Sea watershed, but never analyzes mitigation for these impacts:

“The result of surface disturbances and the presence of SunCatchers in the flow path could be long-term erosional degradation of the soil surface within the SunCatcher array and in the intervening undisturbed areas, as well as increased sediment discharge offsite across Dunaway Road and toward the east where the Westside Main Canal and New River flow.”⁸⁶

However, Staff did not provide support for a conclusion that the Project would not result in offsite downstream impacts to the Salton Sea watershed.

Conversely, CURE provided evidence and testimony providing substantial evidence that the Project will cause significant impacts to offsite resources in the Salton Sea watershed. The U.S. EPA determined that the Project site would affect “aquatic resources of national importance” and could significantly impact the Salton

⁸⁴ Exhibit 302, pp. ES 34-35.

⁸⁵ Exhibit 302, pp. ES 34-35.

⁸⁶ Exhibit 302, p. C.7-32.

Sea watershed.⁸⁷ Dr. Bowles testified that soluble salts from soils on the project site will end up in the Salton Sea.⁸⁸ Despite this evidence, Staff failed to address the potentially significant impacts and identified no mitigation for these impacts was ever proposed or discussed. Consequently, until this analysis is done, the Commission cannot make a finding “that changes or alterations have been required in, or incorporated into, the project” to avoid or lessen a significant environmental impact, as required by CEQA. (Pub. Res. Code § 21081(a); 14 Cal. Code Reg. § 15091(a).

2. FAILURE TO ANALYZE COMPLIANCE WITH TMDLS ESTABLISHED THROUGH THE CLEAN WATER ACT

The goal of the Clean Water Act (“CWA”) is “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” (33 U.S.C §1251(a).) Under section 303(d) of the CWA, states are required to develop lists of impaired waters. These are waters for which technology-based regulations and other required controls are not stringent enough to meet applicable water quality standards. The CWA requires that states establish priority rankings for waters on the lists and develop total maximum daily loads (“TMDLs”) for these waters. A TMDL defines how much of a “pollutant” a water body can tolerate on a daily basis.

Both the New River and the Salton Sea are considered “impaired” waters. Major “pollutants” impairing these waters are silt, pesticides, salts, nutrients (mainly phosphorus), and other pollutants. Dr. Bowles testified that soluble salts from soils on the Project site will end up in the Salton Sea.⁸⁹ Some of these pollutants can be addressed by ensuring that runoff from projects will not result in further exceedances of TMDLs. Other pollutants, such as salt, cannot be addressed by TMDLs, but must be addressed on a case-by-case basis.

Staff’s analysis did not analyze how the Project’s offsite sedimentation impacts would violate the TMDLs that have been and are being developed for the New River, Imperial Valley drains and the Salton Sea, pursuant to the CWA.⁹⁰ Until this analysis is done, the Commission cannot make a finding regarding whether the Project complies with LORS.

⁸⁷ Exhibit 498-J.

⁸⁸ Hearing Transcript, July 26, 2010, pp. 389.

⁸⁹ Hearing Transcript, July 26, 2010, pp. 389.

⁹⁰ Exhibit 478, p.7.

VI. BIOLOGICAL RESOURCES; THE PROJECT WOULD RESULT IN SIGNIFICANT UNMITIGATED IMPACTS TO WILDLIFE; STAFF FAILED TO DEMONSTRATE THAT PROPOSED COMPENSATORY MITIGATION FOR SIGNIFICANT IMPACTS WILL BE FEASIBLE, EFFECTIVE AND CAPABLE OF IMPLEMENTATION

The Project will impact approximately 6,500 acres of land that serves as valuable habitat and movement corridors for numerous species, including a distinct population segment of peninsular bighorn sheep (“PBHS”), an endangered species under the Federal Endangered Species Act (“FESA”) and a fully protected species in California; the flat-tailed horned lizard (“FTHL”), a species proposed for listing under FESA; the Colorado desert fringe-toed lizard, a California species of special concern; a number of rare plants; burrowing owls; and other sensitive natural communities and associations. Additionally, the Project area provides habitat for golden eagle, a fully protected species under the Bald and Golden Eagle Protection Act. The Applicant has admitted that the Project would destroy most of the habitat for these species on the Project site.

CEQA requires an agency to determine whether a Project will cause a significant impact because it will “substantially reduce the number or restrict the range of an endangered, rare, or threatened species.” (14 Cal. Code Reg. §16065(a)(1).) CEQA requires that a lead agency describe the physical environmental conditions in the vicinity of the project, as they exist at the time environmental review commences. (14 Cal. Code Reg. § 15125(a).) The description of the environmental setting constitutes the baseline physical conditions by which a lead agency must assess the significance of a project’s impacts. (*Id.*) CEQA then requires an analysis of direct, indirect, and cumulative impacts. (Pub. Res. Code §§ 21083, 21065, 21065.3.) CEQA also prohibits agencies from approving projects “if there are feasible alternatives or feasible mitigation measures available which would substantially lessen the significant environmental effects of such projects.” (Pub. Res. Code §§ 21002, 21081.) CEQA requires agencies to “avoid or minimize environmental damage where feasible.” (14 Cal. Code Reg. § 15021(a).)

A. THE SUPPLEMENTAL STAFF ASSESSMENT FAILED TO ESTABLISH THE BASELINE FOR GOLDEN EAGLES AND BURROWING OWLS ON THE PROJECT SITE

The Project area provides habitat for golden eagle and western burrowing owl. Despite the presence of habitat for these species, no surveys were conducted for either species in and around the proposed Project area. Without this information, Staff is unable to analyze potentially significant impacts and unable to identify appropriate mitigation and, most importantly, the Commission is unable to make findings regarding the Project’s significant impacts on the species and its habitat.

The environmental setting, or baseline, refers to the conditions on the ground and is a starting point to measure whether a proposed project may cause a significant environmental impact. CEQA defines “baseline” as the physical environment as it exists at the time CEQA review is commenced. (14 Cal. Code Reg. §15125(a); *Riverwatch v. County of San Diego* (1999) 76 Cal.App.4th 1428, 1453.)

Staff failed to establish the baseline for analysis of impacts to burrowing owl and golden eagle from the Project. Information on golden eagle and burrowing owl presence in the Project area was achieved through incidental observations. Although protocols exist for both burrowing owl and golden eagle surveys, protocol surveys (or any focused surveys) for burrowing owls or golden eagle were never conducted. Failure to conduct protocol surveys is a violation of CEC siting regulation Appendix B (g)(13)(D)(i). This regulation requires the applicant to follow protocol surveys if such protocols exist. The California Burrowing Owl Consortium Protocol and Mitigation Guidelines warn lead agencies against deferring impact evaluations, such as has been done for this Project.

Staff proposed to abdicate the Commission’s responsibility to evaluate potentially significant impacts under CEQA and ensure compliance with LORS. Surveys for golden eagles are ongoing and Commission Staff asserted that BLM will incorporate the results of golden eagle surveys that are currently underway into their analysis.⁹¹ Commission Staff attempted to avoid the survey requirements for golden eagle by agreeing to accept eagle surveys conducted for the Sunrise Powerlink project in lieu of the Imperial Valley Project Applicant conducting its own. However, **Staff never received or reviewed the results of these other surveys and therefore, the Staff’s assessment does not consider these results.** Thus, for golden eagle, it isn’t clear what Staff is proposing. Although Staff admitted that no survey report had been provided, Staff has not proposed to wait for these results prior to project approval. Consequently, by deferring establishment of the baseline environmental setting for golden eagle until after Project approval, Staff failed to satisfy CEQA’s requirement that the baseline be determined as the first step in the environmental review process. If the Commission approves the Project as proposed, the Commission will violate CEQA as a matter of law and cannot certify that the Project is consistent with the Bald and Golden Eagle Protection Act.

For burrowing owl, Staff allowed the requirement to conduct burrowing owl surveys to “slip through the cracks” and assumed that any mitigation for FTHL would also serve as mitigation for burrowing owl.⁹² Staff also proposed that burrowing owl surveys and monitoring of burrowing owl burrows within 500 feet of

⁹¹ Exhibit 302, p. C.2-97.

⁹² Hearing Transcript, July 27, 2010, pp. 267.

construction activity be conducted *after* Project approval. Consequently, by deferring establishment of the baseline environmental setting for burrowing owl until after Project approval, Staff again failed to satisfy CEQA's requirement that the baseline be determined as the first step in the environmental review process.

B. THE PROJECT WILL RESULT IN UNMITIGATED SIGNIFICANT IMPACTS TO FLAT TAILED HORNED LIZARD

“The EIR must demonstrate that the significant environmental impacts of the proposed project were adequately investigated and discussed and it must permit the significant effects of the project to be considered in the full environmental context.” (*Cadiz Land Co.*, *supra*, 83 Cal.App.4th at p. 92.) CEQA guidelines require “a sufficient degree of analysis to provide decisionmakers with information which enables them to make a decision which intelligently takes account of environmental consequences . . . [t]he courts have looked not for perfection but for adequacy, completeness, and a good faith effort at full disclosure.” (*County of Amador*, *supra*, 76 Cal.App.4th at 954, quoting CEQA Guidelines § 15151; *see also Berkeley Keep Jets Over the Bay Com. v. Bd. of Port Commrs.* (2001) 91 Cal.App.4th 1344, 1367.) Only “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 Assn. v. City Council* (1991) 229 Cal.App.3d 1011, 1027 (SOCA), citing *Laurel Heights Improvement Association v. Regents of the University of California* (1988) 47 Cal.3d 376, 407.)

The proposed Project site is within an area of FTHL habitat that is relatively undisturbed and that provides generally continuous connectivity of natural community types from the southern extent of the Yuha Desert Management Area (“MA”) to the northern extent of the West Mesa Management Area. Given the configuration of the Project, and assuming an edge effect to 450 m, CURE’s expert, Scott Cashen, estimated that the Project will have an indirect, adverse and unanalyzed impact on 2,800 acres outside of the Project boundaries and extending into the Yuha Desert Management Area, thus reducing its value as a reserve.

The Staff’s assessment provides cursory analyses of these significant impacts on connectivity between two management areas for FTHL. Moreover, Staff provides no compensatory mitigation for the Project’s significant indirect impacts on 2,800 acres outside of the Project boundaries. Thus, there is not substantial evidence in the record that Staff’s proposed mitigation for impacts to FTHL off the Project site will be effectively mitigated.

C. STAFF ASSESSMENT FAILS TO ANALYZE IMPACTS TO MIGRATING BIRDS AND SALTON SEA ECOSYSTEM

Staff fails to analyze potentially significant impacts to biological resources in the New River or Salton Sea. Given the Project's proximity to these waterbodies and their importance to the United States and the State of California, Staff's disregard for these resources is inexcusable. Because Staff fails to analyze the potentially significant impacts, Staff fails to identify any mitigation to reduce impacts to less than significant.

The Salton Sea ecosystem is an extremely valuable resource for resident and migratory birds, including a large number of threatened, endangered, and other special-status species.⁹³ Increasing salinity and declining water quality have eliminated the marine fish species, and, with inflows that will be diminishing in the future, threaten the continued ability of the Salton Sea ecosystem to support birds and other wildlife.⁹⁴ Reduced inflows will also reduce the physical size of the Salton Sea and expose lakebed sediments (playa) that, with the prevailing winds in the area, could exacerbate dust problems for an already degraded air basin.⁹⁵

River mouths, particularly in the southern part of the Salton Sea, provide areas of reduced salinity and higher dissolved oxygen.⁹⁶ These estuarine areas are relatively small, yet very productive, and they routinely support higher concentrations of birds than surrounding areas.⁹⁷ The size of the estuarine areas is influenced primarily by the amount of inflow. The New and Alamo rivers, which constitute nearly 80 percent of the inflow to the Salton Sea, support the largest estuarine areas.⁹⁸

The Project will impact the Salton Sea in two ways, one from runoff laden with sediment and soluble salts from the Project site and two, from diversion of water at the SWWTF.⁹⁹ The ephemeral washes on the western edge of the project site drain towards Coyote Wash north of the project site.¹⁰⁰ The ephemeral washes on the eastern half of the project site drain east across the project site to the Westside Main Canal. The Westside Main Canal and Coyote Wash are tributaries to the New River and eventually to the Salton Sea. The diversion of effluent from the SWWTF would compound the adverse impacts on the Salton Sea watershed.

⁹³ Exhibit 429.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

Despite this substantial evidence of potentially significant impacts on the Salton Sea, Staff failed to conduct an analysis of the impacts. The Project's direct, indirect and cumulative impacts on the Salton Sea watershed must be analyzed and mitigated in order for the Commission to make a finding regarding compliance with CEQA.

D. STAFF ASSESSMENT FAILS TO MITIGATE POTENTIALLY SIGNIFICANT IMPACTS TO PENINSULAR BIGHORN SHEEP

The Applicant observed bighorn sheep on the project site in March, 2009.¹⁰¹

The Project's impacts on PBHS habitat trigger the "incidental take" provisions of FESA. However, due to the PBHS being listed as a fully protected species in California, take cannot be authorized for this species and, instead, the species must be avoided.¹⁰²

PBHS occupy a number of areas surrounding the project site including (a) the area known as the Coyote Mountains immediately west of the project site and north of Interstate Highway 8, which supports a population of between 45 and 60 individuals; (b) the Fish Creek Mountains immediately north of the project site that are occupied by PBHS on at least a seasonal basis; (c) the Sierra Juarez located immediately south of the Jacumba Mountains near the project site; (d) the Sierra Cucapa, located immediately southeast of the project site; and (e) a portion of the Jacumba Mountains immediately south of Interstate 8.¹⁰³ These mountainous areas have been designated as the Carrizo Mountains/Tierra Blanca Mountains/Coyote Mountains Recovery Area ("CTCRA") in the Recovery Plan for PBHS in the Peninsular Ranges. According to bighorn expert Dr. Vern Bleich, the project site is likely to be part of an important movement corridor in this Recovery Area.¹⁰⁴ Dr. Bleich testified that development of the project may result in direct impacts to PBHS habitat linkage(s) in this recovery area.

The Applicant observed bighorn sheep on the project site during March, 2009. The Applicant reported that the sheep were "... following the wash in a northwest to southeast direction."¹⁰⁵ The Applicant then suggested that fencing be installed on the project site to "preclude the apparent transitory use of the proposed developed portions of the site by PBHS."

Staff concluded that Project impacts to a potential movement corridor for bighorn sheep through the Project site are speculative and are considered by Staff

¹⁰¹ Exhibit 302, p. C.2-34.

¹⁰² Exhibit 302, p. C.2-95.

¹⁰³ Exhibit 400.

¹⁰⁴ *Id.*

¹⁰⁵ Exhibit 17.

to be less than significant. Staff relies upon a lack of telemetry data or road-kills in the vicinity of the Project site, as well as proximity of the Project site to flat terrain and the Yuha desert.¹⁰⁶

CURE's witness, Dr. Vern Bleich, a renowned expert on bighorn sheep with over 37 years of experience studying the species, provided substantial evidence that the PBHS need to move through desert flats, such as the Project site, to access more typical areas occupied by bighorn sheep.¹⁰⁷ Dr. Bleich also testified that the value of such movements through intermountain areas to metapopulation function and persistence is significant.¹⁰⁸ Further, the PBHS photographed on the project site were female, and Dr. Bleich testified that female bighorn sheep are inherently conservative in their behavior and are slow to colonize vacant areas, so the presence of female PBHS on the project site suggests those sheep were moving from one area to another within the CTCRA.

In January, 2010, bighorn sheep sign was again observed near the Project site, providing additional evidence that the area is traversed by bighorn sheep that may be moving through the Project site and contributing to metapopulation function within the CTCRA. Thus, there is substantial evidence that development of the Project will pose a significant impact to PBHS movement within the CTCRA. Staff failed to analyze and mitigate this significant impact and thus the Commission cannot make the required findings that Project impacts are less than significant.

E. APPLICANT'S PROPOSED TAMARASK REMOVAL AS MITIGATION MAY RESULT IN UNANALYZED SIGNIFICANT IMPACTS

The Applicant suggested that removal of Tamarisk in Carrizo marsh would mitigate impacts to PBHS foraging habitat. CURE presented expert testimony that this mitigation strategy could result in potentially significant indirect impacts to Southwestern Willow Flycatcher and the Least Bell's Vireo.¹⁰⁹ These impacts were not analyzed by the Applicant or Staff.

Before undertaking a project, the lead agency must assess the environmental impacts of all reasonably foreseeable phases and components of a project. (*Laurel Heights Improvement Assn., supra*, 47 Cal.3d at p. 396-97.) CEQA requires that all potential impacts be analyzed and all significant impacts be mitigated, ***including impacts from mitigation measures themselves***. Where mitigation measures

¹⁰⁶ Exhibit 302, p. C.2-211.

¹⁰⁷ Exhibit 400.

¹⁰⁸ *Id.*

¹⁰⁹ Hearing Transcript, July 27, 2010, pp. 322 and 323.

would, themselves, cause significant environmental impacts, CEQA requires an evaluation of those secondary (indirect) impacts. (14 Cal. Code Reg. § 15064(d).)

Staff must address potentially significant impacts, or explain why the impact would be less than significant based on substantial evidence in the record. However, Staff failed to do so. Thus, as the record stands, the Project's mitigation may result in potentially significant indirect impacts to Southwestern Willow Flycatcher and the Least Bell's Vireo.

VII. STAFF FAILED TO DEMONSTRATE THAT THE PROPOSED COMPENSATORY MITIGATION FOR IMPACTS TO SPECIAL-STATUS SPECIES AND THEIR HABITAT WILL BE FEASIBLE, EFFECTIVE AND CAPABLE OF IMPLEMENTATION

To mitigate significant impacts to FTHL, burrowing owl, golden eagle, American badger, and desert kit fox, Staff determined that the project owner should provide 6,619.9 acres of land as compensatory mitigation.¹¹⁰ However, Staff provided no analysis and there is nothing more than pure speculation that unidentified lands that would mitigate impacts to FTHL can also serve as effective habitat compensation for burrowing owl and other significantly impacted species and their habitat.

CEQA requires the Commission to formulate mitigation measures to address identified impacts that are defined, feasible, effective, and capable of implementation. (14 Cal. Code Reg. § 15126.4(a)(1)(B); *Federation of Hillside and Canyon Associations v. City of Los Angeles* (2000) 83 Cal.App.4th 1259, 1262.) The CESA and ESA also require formulating effective mitigation that can be implemented. Under CESA, the CDFG may issue an incidental take permit that authorizes "take" of specified endangered or threatened plants or animals during the course of an otherwise lawful activity, so long as the holder of the permit "fully" mitigates the impacts. (Fish & Game Code §§ 2080, 2081(b)(2).) The measures required to fully mitigate impacts to species "shall be capable of successful implementation." (*Id.* at § 2081(b)(2).) Under the federal ESA,

Each Federal agency shall, in consultation with and with the assistance of the Secretary [of Commerce or the Interior], insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary . . . to be critical. . . .

¹¹⁰ Exhibit 302, p. C.2-168.

(ESA § 7(a)(2); 16 U.S.C. § 1536(a)(2).) Section 9 of the federal ESA prohibits “take” (e.g., harm, harassment, pursuit, injury, kill) of federally listed wildlife. “Harm” includes habitat modification or degradation that kills or injures listed wildlife. Take incidental to otherwise lawful activities can be authorized, after consultation with the U.S. Fish and Wildlife Service (“USFWS”) under section 7. (ESA § 7(o)(2); 16 U.S.C. § 1536(o)(2).) The “Incidental Take Statement” issued by the USFWS specifies, among other things, those reasonable and prudent measures that the [agency] considers necessary or appropriate to minimize such impact.” (ESA § 7(b)(4); 16 U.S.C. § 1536(b)(4).)

Staff’s proposed mitigation requiring the acquisition of approximately 6,619.9 acres of land to mitigate significant impacts to FTHL, burrowing owl, golden eagle, American badger, and desert kit fox¹¹¹ is infeasible, ineffective and incapable of implementation. The record does not contain substantial evidence showing that the proposed acquisition of compensation lands can be implemented or will be feasible or effective.

Rather, substantial evidence shows that in light of the surge of immense solar power projects throughout the region, it is simply unrealistic to expect that the Applicant will be able to **acquire over 6,500 acres of equivalent or better habitat** to compensate for the destruction of habitat to numerous species that this Project will cause. Compensation land for the Project has not been identified.

MS. MILES: And have you evaluated the lands that are potentially -- that you believe are going to be acquired?

MS. NISHIDA: No.¹¹²

There is **no** evidence in the record that this substantial amount of privately-owned acreage of equivalent or better habitat function and value for all of the impacted species is available for purchase. In light of the current wave of renewable energy projects being proposed within the region, it is questionable that this vast amount of suitable habitat acreage can be acquired.

Proposing mitigation that requires the acquisition of suitable habitat for several species without determining whether such habitat is available and without limiting physical changes to the environment prior to habitat acquisition is a form of improper deferral of mitigation. Proposing mitigation without more of an effort to ensure the mitigation is adequate and will be implemented as advertised is a form of improper deferral of mitigation. (*Defend the Bay v. City of Irvine* (2004) 119 Cal.App.4th 1261, 1275, citing *Gentry v. City of Murrieta* (1995) 36 Cal.App.4th

¹¹¹ Exhibit 302, p. C.2-168.

¹¹² Hearing Transcript, July 27, 2010, p. 267.

1359, 1396-1397.) The details of mitigation may only be deferred until after Project approval in limited circumstances. (*San Joaquin Raptor Rescue Center v. County of Merced* (2007) 149 Cal.App.4th 645, 670-671, quoting *Endangered Habitats League Inc. v. County of Orange* (2005) 131 Cal.App.4th 777, 793.) Deferral is permissible only where the adopted mitigation: (1) commits the agency to a ***realistic performance standard or criterion*** that will ***ensure the mitigation of the significant effect***; and (2) disallows the occurrence of physical changes to the environment unless the performance standard is or will be satisfied. (See Remy et al., *Guide to the California Environmental Quality Act* (11th ed. 2007), p. 551.)

Staff's proposed compensation land scheme does not satisfy either of the above requirements. First, the proposal is unrealistic because it demands the availability of over 6,500 acres of habitat for numerous species equal to or better in quality than that of the Project site. As discussed above, given the immense number of acres slated for other projects in the region that will also require compensation lands, it is unrealistic to simply assume that there is enough suitable habitat available for all of the proposed projects.

The compensation land proposal is also unrealistic and fails to ensure that significant impacts will be mitigated because Staff assumes, without any substantial evidence, that whatever land is acquired will contain suitable habitat for all of the impacted species. While Staff's conditions do call for suitable FTHL habitat, the conditions do not require that compensation lands provide suitable habitat for the many other species for which the compensation lands will allegedly provide mitigation.

MS. MILES: Are you requiring that the land purchased have habitat for those other species, that there be some confirmation that that land have habitat for the other species?

MS. NISHIDA: According to the -- to the condition, it's mostly geared towards Flat Tailed Horned Lizard habitat.

MS. MILES: So you'd be satisfied if you found out that the land actually did not contain habitat that would meet the needs of the other species?

MS. NISHIDA: We're assuming that it probably will contain that habitat.

MS. MILES: And what do you base your assumption on?

MS. NISHIDA: Just on the -- the habitat that the project site is located on, you know, we figure that there's going to be a whole lot of things that utilize that habitat, and we figure that there's going to be, you know, any lands got in compensation will probably also support other species as well.

MS. MILES: And have you evaluated the lands that are potentially -- that you believe are going to be acquired?

MS. NISHIDA: No.¹¹³

While Staff hopes that there will be “a whole lot of things that utilize that habitat,” Staff has no evidence that that its hopes will be realized. Fortunately, CEQA requires more. The Project will significantly impact numerous special-status species and Staff failed to provide substantial evidence that its proposal for the acquisition of lands will in fact mitigate those impacts. Thus, Staff’s proposed conditions are unrealistic and fail to ensure the Project’s significant impacts to several special-status species will be mitigated.

Further, Staff’s proposal does not include a “no net loss” performance standard and does not include back-up provisions that would require alternative mitigation in the event habitat acquisition is not feasible. It also allows physical development to proceed before the Applicant has demonstrated that suitable habitat can be acquired as mitigation for Project impacts.¹¹⁴ Because there are numerous pending applications for immense solar thermal projects in the area, and these proposed projects will also impact habitat for special-status species, Staff must specifically address the feasibility of acquiring the compensatory habitat required to mitigate significant impacts to numerous species caused by this Project.

Without substantial evidence concerning the effectiveness of the proposed compensation land mitigation, the Commission cannot make required findings. Because the record does not contain substantial evidence supporting the conclusion that mitigation through the acquisition of vast acreages of compensation land is feasible and is capable of implementation, the Commission cannot find “that changes or alterations have been required in, or incorporated into, the project that avoid or substantially lessen the effect...” (Pub. Res. Code § 21081(a); 14 Cal. Code Reg. § 15091(a).) Hopes do not make it so, and do not make it legal.

¹¹³ Hearing Transcript, July 27, 2010, p. 267.

¹¹⁴ Exhibit 302 p. C.2-175.

VIII. CONCLUSION

The Commission cannot approve the Project as proposed. Until the Applicant can provide a permitted, reliable, long-term water supply and a clear description of the Project for which it seeks a license, the Commission should suspend this proceeding. Further, if the Commission approves the Project as proposed, the Commission will violate CEQA and the Warren-Alquist Act.

Dated: August 11, 2010

Respectfully submitted,

/s/

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STATE OF CALIFORNIA
California Energy Commission

In the Matter of:

The Application for Certification for the
Imperial Valley Solar Project
(formerly known as SES Solar Two)

Docket No. 08-AFC-5

PROOF OF SERVICE

I, Bonnie Heeley, declare that on August 11, 2010, I served and filed copies of the attached **OPENING BRIEF OF CALIFORNIA UNIONS FOR RELIABLE ENERGY**. The original document, filed with the Docket Unit, is accompanied by a copy of the most recent Proof of Service list, located on the web page for this project at http://www.energy.ca.gov/sitingcases/solartwo/Imperial_Valley_POS.pdf. The document has been sent to both the other parties in this proceeding as shown on the Proof of Service list and to the Commission's Docket Unit via email and by U.S. Mail with first-class postage thereon, fully prepaid and addressed as provided on the Proof of Service list to those addresses NOT marked "email preferred." An original paper copy and one electronic copy, mailed and emailed respectively, were sent to the Docket Office.

I declare under penalty of perjury that the foregoing is true and correct. Executed at South San Francisco, CA on August 11, 2010.

_____/s/_____
Bonnie Heeley

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