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Re: Comments of Backcountry Against Dumps, *et al.*, on Staff Assessment/Draft Environmental Impact Statement and Draft California Desert Conservation Area Plan Amendment for Imperial Valley Solar Project

Dear Mr. Meyer and Mr. Stobaugh:

On behalf of Backcountry Against Dumps, the Protect Our Communities Foundation, the East County Community Action Coalition, and the Desert Protective Council, we respectfully submit the following comments regarding the Staff Assessment/Draft Environmental Impact Statement ("SA/DEIS") and Draft California Desert Conservation Area ("CDCA") Plan Amendment for the Imperial Valley Solar Project (formerly the SES Solar Two Project) ("Project"). We support the No Project/No Action Alternative (as well as the No Action/CDCA Amendment to make area unavailable for future solar development Alternative), but the SA/DEIS has a number of significant flaws which require revision and recirculation of the document before any action may be taken.

INTRODUCTION

The Yuha Desert, where the Project is to be located, is a pristine but extraordinarily sensitive landscape. Damage to it from this Project is likely to be irreversible. "Implementation of this [P]roject will forever change the landscape of this area,"[1] and also lead to "the permanent destruction of hundreds of cultural resources. . . ."[2] The environmental devastation that this Project will cause is permanent, but the Project's benefits are only temporary.[3] Nonetheless, the California Energy Commission ("CEC") and United States Bureau of Land Management ("BLM") are rushing through critical environmental reviews and omitting essential information for the sake of the Project applicant's arbitrary timetables. An applicant's supposed time constraints are not a recognized exception to the requirements of either the California Environmental Quality Act ("CEQA") or the National Environmental Policy Act ("NEPA"). It is crucial that a complete and thorough inquiry into the Project's impacts be made *before* the CEC and BLM commit themselves to allowing irreversible environmental damage.

The SA/DEIS fails to comply with CEQA and NEPA in seven distinct ways. First, it omits essential information and, as a result, fails as an informational document. Second, the SA/DEIS unlawfully defers the formulation of various studies and mitigation measures. Third, the assessment of the Project's environmental impacts is inadequate. Significant impacts are deemed insignificant and impacts that can be mitigated are mistakenly found to be unavoidable. Fourth, significant unstudied changes have been made to the Project since the SA/DEIS' release, and significant new information is planned to be added to the SA/DEIS at a future date, so the SA/DEIS must be recirculated and an additional public comment period provided. Fifth, the discussion of Alternatives is inadequate insofar as BLM declined to evaluate Site Alternatives on the sole basis that they are inconsistent with the *applicant's* purpose and need. Sixth, the SA/DEIS unlawfully segments the Project by failing to consider the impacts of the related Sunrise Powerlink project. Seventh, the Project applicant now proposes to satisfy the Project's water needs with well water, but such use of that water would violate the federal Safe Drinking Water Act because the underlying aquifer has been designated a "sole source aquifer" by the United States Environmental Protection Agency.

For these reasons, the SA/DEIS must be revised and recirculated.

I. THE SA/DEIS OMITS CRUCIAL INFORMATION AND FAILS AS AN INFORMATIONAL DOCUMENT.

NEPA "is our basic national charter for protection of the environment." 40 C.F.R. § 1500.1(a). The purpose of NEPA is "to help public officials make decisions that are based on an understanding of environmental consequences, and take actions that protect, restore, and enhance the environment." *Id.* § 1500.1(c). NEPA's "procedures . . . insure that environmental information" of "high quality" is

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1 National Park Service Comments regarding Imperial Valley Solar Project Draft EIS ("NPS Comments"), received May 4, 2010, p. 1.

2 Quechan Indian Tribe Comments on SA/DEIS ("Tribe Comments"), received May 19, 2010, p. 7.

3 SA/DEIS, p. ES-7 ("The planned life of the SES Solar Two Project is 40 years").

"available to public officials and citizens before decisions are made and before actions are taken." *Id.* § 1500.1(b). This is because "[a]ccurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA." *Id.* "[B]y requiring agencies to take a 'hard look' at how the choices before them affect the environment, and then to place their data and conclusions before the public, NEPA relies upon democratic processes to ensure . . . that 'the most intelligent, optimally beneficial decision will ultimately be made.'" *Oregon Natural Desert Ass'n v. Bureau of Land Mgmt.*, 531 F.3d 1114 (9th Cir. 2008) (internal citations omitted). CEQA is similarly intended to "[i]nform governmental decision makers and the public about the potential, significant environmental effects of proposed activities." CEQA Guidelines [14 C.C.R.; "Guidelines"] § 15002(a); *No Oil, Inc. v. City of Los Angeles,* 13 Cal.3d 68, 86 (1974). The Guidelines emphasize that agencies "must use [their] best efforts to find out and disclose all that [they] reasonably can." Guidelines § 15144.

In violation of these fundamental precepts, the SA/DEIS fails to include a number of critically important studies whose inclusion is necessary for both the public and CEC/BLM to fully understand the environmental consequences of the Project. For example, many viewpoint simulations were omitted "due to fast-track time constraints," so the public has no idea of the actual visual impacts of the Project on the Juan Bautista de Anza National Historic Trail ("Anza NHT"). SA/DEIS, p. C.13-18. As discussed more fully in the following section, nearly *every* section of the SA/DEIS mentions an omitted study.

Because the SA/DEIS fails to include critical studies and information necessary to fully understand the impacts that the Project will have, it violates both CEQA and NEPA.

II. THE SA/DEIS IMPROPERLY DEFERS THE FORMULATION OF MITIGATION MEASURES AND STUDIES.

Because both NEPA and CEQA are intended to make decisions *based upon* high quality information, they both prohibit agencies from relying on the contents of studies and documents that are to be developed at a future date. "Formulation of mitigation measures should not be deferred until some future time." Guidelines § 15126.4(a)(1)(B). Reliance on yet-to-be-developed studies inevitably leads to a "post hoc rationalization of agency actions" that "inevitably ha[s] a diminished influence on decisionmaking." *Sundstrom v. County of Mendocino*, 202 Cal.App.3d 296, 307 (1988). Agencies "may not 'act first and study later.'" *Western Land Exch. Proj. v. United States Bureau of Land Mgmt.* 315 F.Supp. 2d 1068, 1092 (D. Nev. 2004) (quoting *Nat'l Parks & Conserv. Ass'n. v. Babbitt*, 241 F.3d 722, 734 (9th Cir. 2001). Doing so "provides no . . . guarantee of an adequate inquiry into environmental effects." *Sundstrom, supra,* 202 Cal. App. 3d at 307. Agencies are similarly prohibited from conditioning the approval of projects upon the "adopt[ion] of mitigation measures recommended in a future study." *Id.* at 306.

Here, the SA/DEIS unlawfully relies on a number of studies whose content has yet to be formulated, and conditions project approval upon the adoption of mitigation measures that have not yet been created. For example, the Army Corps of Engineers' identification of the Least Environmentally

Damaging Alternative has not yet occurred, but "[m]itigation for unavoidable impacts to waters of the U.S. is" to be "addressed only" *after* this is completed. SA/DEIS, p. C.7-2; *see also* SA/DEIS, pp. C.7-65 through 66 (compliance with section 404 of the Clean Water Act cannot be determined). A Drainage, Erosion and Sedimentation Control Plan "that ensures protection of water quality and soil resources" is also incomplete,[4] as is the Stormwater Damage Monitoring and Response Plan. SA/DEIS C.7-56, C.7-61. Similarly, an examination of the historically significant cultural resources present at the site "has not been completed." SA/DEIS, p. C.3-136.[5] The Visual Resources section requires the applicant to (1) "develop and implement a glare mitigation plan" and (2) pay an amount that "will be determined" in the future to fund unspecified measures that are intended "to mitigate . . . visual impacts to recreational users of the Anza" NHT. SA/DEIS, p. C.13-45 through 46. The Traffic and Transportation section requires the applicant to develop and implement a plan designed to mitigate the Project's traffic impacts, and to prepare and implement a "Mirror Positioning Plan" to minimize the health and safety impacts that could result from excessive glare. SA/DEIS, p. C.11-20 through 22. A noise control program and community noise survey, and the mitigation measures they will lead to, also have yet to be developed. SA/DEIS, p. C-9-21. A Safety Management Plan, intended to reduce the likelihood of a hazardous waste spill, is unformulated, as is a Construction Security Plan and an Operation Security Plan. SA/DEIS, p. C.5-20 through 21. Impacts to paleontological resources are undisclosed because the pertinent studies are, again, incomplete. SA/DEIS, p. C.4-25 through 27. The Programmatic Agreement that is intended to ensure mitigation of certain cultural impacts was not complete when the SA/DEIS was published, so comment on it is not possible. SA/DEIS, p. C.2-145. Finally, the Biological Resources mitigation Implementation and Monitoring Plan also has yet to be developed. SA/DEIS, p. C.2-78.

The sheer volume of omitted information is staggering. The public is prevented from assessing the adequacy of the Project's mitigation measures because most of them have not yet been created. Whether or not these unformulated mitigation measures will themselves have environmental impacts is impossible to determine. The CEC and BLM must recirculate the SA/DEIS when all of these omitted studies have been completed and included in the SA/DEIS. Without these studies, the SA/DEIS is incomplete as a matter of law.

III. THE DISCUSSION OF THE PROJECT'S ENVIRONMENTAL IMPACTS IS INADEQUATE.

Both NEPA and CEQA require agencies to identify the significant environmental effects of their actions. CEQA also requires either mitigate these impacts, or make a finding of overriding considerations. Pub. Res. Code § 21081(a). All significant impacts *must* be mitigated *unless* mitigation measures to reduce these impacts are infeasible. *Id.* Here, the SA/DEIS (1) fails to identify certain

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4 The Plan "has been developed" but "the calculations and assumptions used to evaluate potential . . . impacts are imprecise and have limitations and uncertainties associated with them." Thus, "the magnitude of potential impacts that could occur cannot be determined precisely without additional detailed numeric modeling of project effects," which, of course, has not yet occurred. SA/DEIS, p. C.7-65.

5 The pages of the Cultural Resources section are misnumbered; they read C.2-[page] instead of C.3-[page], and, as a result, certain pages in the Biological Resources section share pages numbers with pages in the Cultural Resources section. To avoid confusion, we refer to Cultural Resources pages by their intended, C.3, numbers.

impacts altogether; (2) mislabels other significant impacts as insignificant; and (3) fails to adopt mitigation measures for those impacts found to be significant.

A. *Aesthetic and Visual Impacts*

The Project "would substantially degrade the existing visual character and quality of the site and its surroundings. . . ." SA/DEIS, p. C.13-1. The SA/DEIS claims that "these impacts are . . . unavoidable." SA/DEIS, p. C.13-1. This portion of the impact assessment is deficient because (1) the specific nature and magnitude of the aesthetic and visual impacts are undisclosed and unknown; (2) some of the adopted mitigation measures could have significant impacts, but these impacts are undisclosed; and (3) it is unclear whether or not the project transmission line will be relocated or not. (As previously mentioned, the SA/DEIS also unlawfully defers formulation of the glare mitigation plan, so it is impossible to tell whether the plan actually will mitigate the potentially significant glare impacts.)

First, the discussion of aesthetic impacts is insufficient because it does not even attempt to ascertain what the *actual* aesthetic impacts of the Project will be. The Project applicant failed to include information about the Project's visual impacts on the Jacumba Wilderness, Coyote Mountain Wilderness, Painted Gorge, and Yuha Basin, and "fast-track time constraints" apparently prevented CEC and BLM from creating their own simulations, so the analysis of impacts on these areas is limited at best. SA/DEIS, pp. C.13-10, C.13-18. Staff simply assumed that the Project would have the same impacts as the Plaster City facility.6 *Id.* The contrast in the depth of analysis of aesthetic impacts to these areas *vis-à-vis* those areas that the Project applicant *has* provided information about is striking. The public is prevented from ascertaining anything about the nature of these aesthetic impacts beyond that they will be sizeable. Because the SA/DEIS fails to include simulations of these viewpoints, it is also impossible for members of the public to suggest methods of avoiding or mitigating these impacts.

Second, the mitigation measures themselves could have significant impacts, but these impacts were not disclosed. The Guidelines specify that "[i]f a mitigation measure would cause one or more significant effects . . . , the[se] effects shall be discussed. . . ." Guidelines § 15126.4(a)(1)(D). The SA/DEIS requires the applicant to submit and implement "a glare mitigation plan that minimizes visibility of the" Project by "utilizing . . . 20-foot tall slatted fencing, . . ; earth berms; and/or an increase in the setbacks of the" Project from I-8. These mitigation measures, which themselves involve the construction of enormous structures, could have significant visual and other impacts, but these impacts are not disclosed or analyzed.

Finally, mitigation measure VIS-3 is unclear. One the one hand, the SA/DEIS' summary of this measure states that it would require, "**[i]f feasible**, re-alignment of the segment of the project transmission line paralleling I[-]8 to be set back from the roadway at least ½ mile." SA/DEIS, p. C.13-18. But the measure itself contains no such "if feasible" language and instead states that "the applicant **shall** set back the transmission line. . . ." SA/DEIS, p. C.13-44. This example illustrates why it is

6 The comparison is improper because, as the SA/DEIS admits, solar energy projects have visual impacts which "dwarf" the impacts of other types of projects "by orders of magnitude." SA/DEIS, p. C.13-36.

impermissible to rely on undeveloped mitigation measures – the public cannot tell if it is feasible to relocate the transmission line or not. If not, the magnitude of visual impacts will be different than what the SA/DEIS assumes.

B. *Cultural Impacts*

The Project would have significant cultural impacts and could "wholly or partially destroy all archeological sites on the surface of the project area." SA/DEIS, p. C.3-102. The discussion of impacts to cultural resources is incomplete and inadequate. Assessment of the short and long term adverse impacts to cultural resources is "[t]o [b]e [p]rovided." SA/DEIS, p. ES-15. The Project would have significant impacts on "a presently unknown subset of approximately 330 known prehistoric and historical surface archaeological resources and may have significant impacts . . . on an unknown number of buried archaeological deposits, many of which may be determined historically significant. . . ." SA/DEIS, p. C.3-1. The project would also have indirect cultural impacts, because the Flat-tailed horned lizard ("FTHL") has cultural significance to the Tribe – it is "part of the Tribe's creation story" – but, as discussed below, FTHL would be adversely affected by the Project. Tribe Comments, p. 9. Indirect cultural impacts would also result from the Project's aesthetic impacts on culturally significant areas. *Id.* at 7.

As discussed more fully in Exhibit A to the Tribe Comments, BLM has failed to satisfy its obligations under section 106 of the National Historic Preservation Act ("NHPA"), 16 U.S.C. section 470(f). Tribe Comments, Exhibit A, at 1. This section of the NHPA requires agencies to take into account the impact of effects of their actions on historical resources "*prior to the issuance of any license.*" 16 U.S.C. § 470(f). "Instead of completing this required process, BLM is opting to use a programmatic agreement to defer evaluation, mitigation, and treatment until after approval. . . ." Tribe Comments, Exhibit A, at 2.

Here again the assessment of impacts and the formulation of mitigation measures is impermissibly deferred. CEC plans to "fulfill the bulk of its obligation[s] under CEQA" by conditioning approval on the applicant's compliance with a programmatic agreement whose contents are *not* disclosed. SA/DEIS, p. C.3-12. "[F]ormal evaluations of some ethnographic resources and all archeological resources . . . will occur subsequent to [CEC/BLM] decisions on the proposed action." SA/DEIS, p. C.2-106. Although "the ideal intensity of the geographic coverage in a project area of analysis would be 100%," here the "geographic coverage . . . presently includes a . . . sample of 25% of the archaeological sites. . . ." SA/DEIS, pp. C.3-57 through 58. Moreover, the applicant's studies have been repeatedly rejected, giving little confidence in the 25% sample that was used. DEIS/SA, p. C.3-58. Before committing to the permanent destruction of irreplaceable cultural resources for the sake of a temporary project, CEC and BLM must, at the very least, determine the nature and extent of the cultural heritage they are obliterating.

C. *Biological Impacts*

The SA/DEIS fails to disclose potentially significant impacts to the Peninsular bighorn sheep ("PBHS") and the FTHL. Both PBHS and FTHL have been "observed on [the] project site" SA/DEIS, pp. C.2-16, C.2-18. PBHS is listed under the federal Endangered Species Act (61 FR 13134, 13136) and a proposed listing of FTHL is currently under review. SA/DEIS, p. C.2-40 (detailing process that led to a federal court order requiring USFWS to consider listing FTHL). The SA/DEIS also fails to disclose significant impacts to special-status plant species. The deficiencies are exemplified by the SA/DEIS' statement that the significance of biological impacts is "to be provided," in violation of both CEQA and NEPA. ES-15.

Although PBHS was observed on the Project site, the SA/DEIS claims that PBHS' use of the project site "is transitory at best" and that therefore impacts to PBHS would be less than significant. SA/DEIS, p. C.2-40. This conclusion is based solely upon BLM's and the applicant's "speculat[ion] that the [PBHS] sited [*sic*] at the Project location could have been flushed by OHV activity and possibly became disoriented and wandered onto the project site." SA/DEIS, p. C.2-24. This is "pure speculation" that "is contradicted by the evidence regarding known [PBHS] behavior." Testimony of Dr. Vernon Bleich on behalf of California Unions for Reliable Energy ("CURE"), Exhibit 400 to opening testimony for CURE, p. 4. It is quite likely that PBHS appear in the Project vicinity on a regular basis. In fact, just three days ago (May 24, 2010), a group of five adult PBHS ewes were seen about 4-5 miles west of the Project site. Comment letter by Denis Trafecanty, sent May 27, 2010, p. 1.

As Dr. Bleich testified, on behalf of California Unions for Reliable Energy ("CURE"), "the SA fails to adequately analyze the *potential reason(s)* that PBHS were using [the Project site] and, as a result," its conclusions that PBHS' appearance was a mere coincidence are "indefensible." *Id.* at 1, 5. The SA/DEIS also fails to identify or mitigate impacts to forage habitat, and fails to identify and mitigate the loss of 6,063 acres of bighorn sheep habitat within the CTCRA. *See generally id.* 5-9. The SA/DEIS' "fail[ure] to adequately identify the[se] significant impacts" is unlawful. *Id.* at 1.

Furthermore, consultation with the Fish and Wildlife Service regarding the Project's impacts on PBHS is required. The Endangered Species Act specifies that "[t]he agency taking the action must assess the project's effects on endangered or threatened species and consult with the FWS to assure the project's compliance with the ESA." *Sierra Club v. Marsh*, 816 F.2d 1376 (9th Cir. 1987). "The consultation process is triggered when a federal agency . . . undertakes *any* activity which *could* impact an endangered species or threaten its critical habitat." *Florida Key Deer v. Stickney,* 864 F.Supp. 1222, 1228 (S.D. Fla. 1994) (*citing* 16 U.S.C. § 1536(a)(2)) (emphasis in original). Here, as discussed above, the Project "could" affect the PBHS. Thus, consultation with FWS is mandated.

Scott Cashen, an expert biologist, testified as to the Project's undisclosed impacts on special status plant species and the FTHL. Exhibit 429 to opening testimony for CURE. In his professional opinion, the SA/DEIS contains "inadequate information on the presence of special-status plant species within the Project area" and "as a result . . . the SA/DEIS cannot conclude [that] proposed mitigation

would reduce Project impacts" on these species "to less than significant levels." *Id.* at 2; *see also* mitigation measure BIO-19, SA/DEIS pp. C.2-97 through 100. The size of the buffer zone for special-status plant species is unknown and likely insufficient.[7] *Id.* at 2-3. Mr. Cashen also testified that the proposed mitigation measures to mitigate impact to *non*-listed species are unenforceable and that impacts to these species would be significant as well. *Id.* at 3-4. Unless all required plant surveys are completed *before* the mitigation measures are adopted, it is impossible to tell whether the mitigation measures will be effective. *Id.* at 5. Moreover, fall surveys for special-status plant species have not yet been prepared. *Id.* at 6. Because of these informational inadequacies, the SA/DEIS is legally deficient.

With regard to the FTHL, the SA/DEIS contains no conclusion regarding the Project's impacts. "[S]taff is in the process of evaluating if the use of compensation funds is sufficient for CEQA mitigation." SA/DEIS, p. C.2-61. As discussed above, the DEIS *itself* is required to include this information. There is a "possibility that *thousands* of FTHL will die as a result of the Project"; a population of this size is "roughly half the size of the population within the entire West Mesa MA." Exhibit 429 to opening testimony for CURE, pp. 8-9. Additionally, "the loss of 6.063 acres of habitat" that would accompany the Project "represents a tremendous impact" on the FTHL, which "is proposed for listing due to habitat loss." These impacts must be mitigated *before* the Project is approved, not after.

The Project also "would cause considerable fragmentation to the remaining FTHL habitat." *Id.* at 9. Nonetheless, "[t]he SA/DEIS proposed no mitigation for impacts to FTHL movement between MAs." *Id.* at 11. The SA/DEIS' conclusion that such mitigation is infeasible is unsupported by the record. *Id.* There is no basis to assume that a corridor underneath I-8 would be impractical. *Id.* Additionally, the SA/DEIS contemplates that the FTHL "would be moved out of harm's way," SA/DEIS at C.2-55, but this strategy "only partially addresses the[FTHL's] survivorship" and, accordingly, only partially mitigates this impact. Exhibit 429 to opening testimony for CURE, p. 12. CEQA requires these potentially significant impacts to be mitigated and the SA/DEIS' failure to do so is unlawful.

Finally, the compensatory mitigation measure, BIO-10, also fails to fully mitigate habitat loss. This measure would allow current habitat to be replaced by "poor quality habitat." SA/DEIS, p. C.2-85. As such, the SA/DEIS fails to "prevent[] a net loss of FTHL habitat," as claimed. Exhibit 429 to opening testimony for CURE, p. 14.

D. *Hydrology and Soils Impacts*

The SA/DEIS' assessment of impacts to soil and water resources is likewise deficient, for three reasons. First, it is inaccurate. The SA/DEIS states that "[n]o groundwater would be used by the

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7 For example, staff working on the Calico Solar Project, which would use the same technology, "concluded a 250-foot buffer would be needed for on-site plan protection. *Id.* at 2 (*citing* Calico Solar Project SA/DEIS, p. C.2-175). Yet this SA/DEIS provides for only a "50 feet" or even "smaller buffer." SA/DEIS, p. C.2-98. "[T]he discrepancy highlights the fact that the SA/DEIS's approach to establishing adequate buffers is largely guesswork." Exhibit 429 to opening testimony for CURE, p. 3.

project." SA/DEIS, p. C.7-3. Yet the Project applicant has recently modified the Project so as to satisfy its water needs with groundwater. This substantial change must be recognized in the DEIS.

The DEIS' failure to acknowledge that the Project will use groundwater leads to the second inadequacy: the availability of this water, and the impacts of its use, are unknown because neither has been studied. As a result, it is impossible for members of the public to determine whether the Project's water needs can actually be satisfied in this manner. The environmental impacts of such use also have yet to be ascertained. CEC staff has noted that "the amount of water identified for project use . . . exceeds the permitted amount of groundwater extraction for the well." Staff Comments on Schedule Impacts of AFC Supplement, received May 17, 2010, p. 1. Furthermore, it is unknown how long groundwater will be used. The DEIS must be revised to include this critical information.

Third, the impacts that the Project will have on waters of the United States is unknown. The Project has the potential to cause massive amounts of runoff and erosion. Whether or not these impacts will be significant has yet to be determined because the Project applicant failed to include sufficient information in its application "to resolve uncertainties regarding the ability of the applicant-proposed measures to reduce sedimentation and stream morphology impacts to less than significant." The Project's consistency with section 404 of the Clean Water Act "cannot [be] determine[d] at this time." SA/DEIS, p. C.7-66.[8] This information must also be included in the SA/DEIS.

E. *Land Use and Recreational Impacts*

The discussion of land use impacts is inadequate because (1) the Project has numerous undisclosed inconsistencies with the Imperial County General Plan; and (2) because the SA/DEIS contains conflicting information regarding whether or not land use impacts will in fact be significant.

CEQA requires EIRs to "discuss any inconsistencies between the proposed project and applicable general plans and regional plans." Guidelines § 15125(d). In conflict with this requirement, the SA/DEIS fails to disclose two such inconsistencies. First, the Project is inconsistent with General Plan Objective 2.6, which requires "alternative resource production to be in energy zoned areas to minimize off-site impacts and lessen need for more transmission corridors." SA/DEIS, p. C.8-23. The Project is inconsistent with this requirement because it "would not be [located] in an energy zoned area." *Id.* The SA/DEIS' conclusion that the Project *is* consistent because the project site "consists of undeveloped desert land" is unreasonable; the "off-site impacts" required to be "minimize[d]" under this Objective are likely to be *more*, not *less*, serious in pristine "undeveloped" areas.

Second, the Project is inconsistent with the Ocotillo/Nomiragee Community Area Plan, which directs that "most private enterprises or land uses are not allowed in" areas under the Open Space designation, such as the Project site. The SA/DEIS concludes that "[a]lthough the proposed project

8 The SA/DEIS refers readers to "Section C.7.8.4 of this report" for more information as to why the Project will affect "waters of the United States," but the SA/DEIS contains no such section. It proceeds straight from section C.7.8 to section C.7.9. This information should not have been omitted.

would not be allowed under this area plan's open space classification," the Project is nonetheless consistent with this plan because "BLM jurisdiction . . . supersedes Imperial County's area plans. . . ." SA/DEIS, p. C.8-27. In essence, the SA/DEIS claims that the Project is consistent with the Area Plan because it will lead to the abolishment of it. Such a finding is contrary to the purposes of disclosing these inconsistencies, in conflict with Guidelines section 15125(d), and contrary to both CEQA and NEPA.

The SA/DEIS is also inadequate because it contains conflicting statements regarding whether or not there will be a significant Land Use impact. The Project does not comply with the site's zoning designation. The Executive Summary states that, even though the Project fails to comply with all applicable laws, ordinances, regulations, and statutes ("LORS"), nonetheless all land use impacts are less than significant under CEQA after mitigation. SA/DEIS, p. ES-17. Yet the Land Use discussion itself states that such impacts "would be significant and unavoidable." SA/DEIS, p. C.8-30; *see also* SA/DEIS, p. C.8-49 ("the inconsistency with the S-2 zoning designation is a significant and unavoidable impact under CEQA." These conflicting statements within the SA/DEIS must be resolved.

F. *Cumulative Impacts*

Both NEPA and CEQA require agencies to consider the cumulative impacts of their actions. The Guidelines state that "[a]n EIR shall discuss cumulative impacts of a project when the project's incremental effect is cumulatively considerable." Guidelines § 15130(a). NEPA similarly requires this discussion. 40 C.F.R. §§ 1508.7, 1508.27(b)(7). The Project will have numerous cumulative impacts that were not disclosed.

First, the Project will have cumulative impacts on the PBHS, but the EIR fails to identify these impacts, perhaps due to a mistaken belief that the Project will have *no* significant impacts on the PBHS. Exhibit 400 to CURE opening testimony, p. 9; SA/DEIS, p. C.2-70 through 73 (cumulative impacts section solely analyzing impacts on FTHL and ignoring impacts on PBHS). The Project's impacts on the FTHL cannot be mitigated, as detailed above, and, accordingly, the SA/DEIS' conclusion based on this premise – that impacts to the FTHL are not cumulatively "considerable" or "significant" – is unfounded.

Second, the Project will have cumulative growth inducing impacts. The SA/DEIS concludes that no significant growth-inducing impacts will occur because the size of the Project's workforce is modest. SA/DEIS, p. C.10-8. It then concludes that there will be no cumulative impacts because again the workforce is modest and the cumulative projects will "have beneficial public impacts" such as higher taxes and lower unemployment. SA/DEIS, p. C.10-20. This conclusion is in direct conflict with CEQA, which directs that "**it must not be assumed that growth in any area is necessarily beneficial . . . or of little significance to the environment.**" Guidelines § 15126.2(d). This conclusion also violates CEQA because it fails to consider the totality of the Project's cumulative growth-inducing impacts. The SA/DEIS only considers the growth-inducing impacts of other *solar projects* being considered in the area. SA/DEIS, p. C.10-20. Yet, as the SA/DEIS admits elsewhere, Project approval "could have the

indirect effect of encouraging additional subsequent development. . . [b]ecause the relatively intact existing landscape would appear highly compromised after introduction" of the Project. SA/DEIS, p. C.13-22. The SA/DEIS must attempt to quantify the growth inducing impacts of all other types of projects that are likely to spring up in the Yuha Desert after Project approval, because these impacts are "reasonably foreseeable." Guidelines § 15355.

The Project will also have cumulatively significant biological and cultural impacts.

IV. THE SA/DEIS MUST BE RECIRCULATED WHEN THE MISSING INFORMATION IS ADDED.

As discussed above, huge amounts of crucial information were omitted from the SA/DEIS. Moreover, the applicant's decision to modify the Project's water source would, as also discussed above, at the very least create a possibility of new significant environmental impacts. The public was significantly hindered in commenting on the Project by the absence of all of this information. In these situations, both NEPA and CEQA require recirculation of the environmental document. *See, e.g.,* Pub. Res. Code § 21092.1 (renotification required where significant new information is added to EIR prior to certification); Guidelines § 15088.5 (new information is significant, and recirculation accordingly required, where the EIR "deprives the public of a meaningful opportunity to comment upon" the project's significant impacts or mitigation measures); 40 C.F.R. § 1502.9(c)(1) (agencies "shall prepare supplements to . . . draft . . . environmental impact statements" where "substantial changes" are made to the Project or "significant new circumstances or information" was added to the document). Because NEPA and CEQA are intended to provide the public with access to high-quality information, it is unlawful to release the DEIS and then attempt to fix its problems out of the public eye. If significant new information is added to the SA/DEIS, it must be recirculated.

V. BLM UNLAWFULLY REJECTED SITE ALTERNATIVES ON THE BASIS OF INCONSISTENCY WITH THE *APPLICANT'S* PURPOSE AND NEED.

A. *BLM's Statement of Purpose and Need Reflects the Applicant's Needs, and Is Too Narrowly Drawn.*

BLM failed to consider the three site alternatives under NEPA because "none would accomplish the purpose and need for the proposed action." SA/DEIS p. B.2-2. However, BLM's statement of purpose and need for the SA/DEIS is too narrowly drawn. As the Ninth Circuit has held, although an agency has discretion to define the purpose and need of a project, it cannot use "unreasonably narrow" terms to define a project's objective. *City of Carmel-By-The-Sea v. United States Dep't. of Transp.,* 123 F.3d 1142, 1155 (9th Cir.1997). Otherwise, "the EIS would become a foreordained formality." *Friends of Southeast's Future v. Morrison,* 153 F.3d 1059, 1066 (9th Cir.1998), (quoting *Citizens Against Burlington, Inc. v. Busey,* 938 F.2d 190, 196 (D.C.Cir.1991), *cert. denied,* 502 U.S. 994, 112 S.Ct. 616, 116 L.Ed.2d 638 (1991)).

"[T]he Department of Interior has promulgated no regulations emphasizing the primacy of private interests. The DOI . . . regulation, 40 C.F.R. § 1502.13, merely requires that an EIS "briefly specify the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action." *National Parks & Conservation Ass'n v. Bureau of Land Management* 587 F.3d 735, (2009) *as modified by* 2010 Daily Journal D.A.R. 7271, at 7277. As the Ninth Circuit noted:

> DOI's NEPA handbook explains that the "purpose and need statement for an externally generated action must describe the BLM purpose and need, *not an applicant's or external proponent's purpose and need.* " Department of Interior, Bureau of Land Management, National Environmental Policy Act Handbook 35, (citing 40 C.F.R. § 1502.13) (emphasis added), *available at* http://www.blm.gov/pgdata/etc/medialib/blm/wo/Information_Resources_Management/policy/blm_handbook.Par.24487.File.dat/h1790-1-2008-1.pdf (citing 40 C.F.R. § 1502.13) (emphasis added). "The applicant's purpose and need may provide useful background information, but this description must not be confused with the BLM purpose and need for action.... It is the BLM purpose and need for action that will dictate the range of alternatives...." *Id.*

National Parks & Conservation Ass'n v. Bureau of Land Management, supra, 2010 D.J. at p. 7280 n. 9.

Instead, however, the SA/DEIS statement of BLM's purpose and need is "to respond to the SES application under Title V of FLMPA for a ROW grant to construct, operate and decommission a solar thermal facility and associated infrastructure in compliance with FLPMA, BLM ROW regulations, and other applicable federal laws." SA/DEIS p. B.2-11. For this reason, BLM has declined to examine any off-site alternatives, despite its duty to comply with NEPA. SA/DEIS p. B.2-2. As the Energy Policy Act, and related Secretarial and Executive Orders direct BLM to "encourage the development of environmentally responsible renewable energy" while complying with existing environmental laws, its purpose and need statement need not be so narrowly drawn as to preclude the consideration of alternative locations. To do so reflects the needs of the Project applicant, not the needs of BLM, in violation of NEPA.

B. *BLM Unlawfully Rejected Site Alternatives.*

BLM additionally failed to consider the three site alternatives under NEPA on the grounds such alternatives were "unreasonable" because they did not fall within the BLM's jurisdiction. SA/DEIS p. B.2-19. However, NEPA itself does not declare such alternatives unreasonable.

Indeed, "[a]n agency may not reject a reasonable alternative because it is 'not within the jurisdiction of the lead agency.' 40 C.F.R. § 1502.14(c); *see also Muckleshoot Indian Tribe,* 177 F.3d at 814. An agency's refusal to consider an alternative that would require some action beyond that of its congressional authorization is counter to NEPA's intent to provide options for both agencies and

Congress." *National Wildlife Federation v. National Marine Fisheries Service*, 235 F.Supp.2d 1143, 1154 (W.D. Wash. 2002).

BLM's determination to narrow its purpose and need to preclude the analysis of alternative sites, and to avoid analysis of offsite alternatives because they are outside of its jurisdiction, renders the SA/DEIS deficient.

C. *Relocation to an Alternative Site Would Reduce the Project's Impacts.*

Both the Agricultural Lands Alternative and the Mesquite Lake Alternative are environmentally superior to the proposed Project's environmentally sensitive location within the undisturbed desert environment, amid washes and habitat for protected species. BLM and the Energy Commission should adopt either of these alternatives in lieu of the Project alternative, to avoid the Project's significant impacts, including its degradation of visual resources, cultural resources and artifacts, and habitat for bighorn sheep.

The Mesquite Lake Alternative site is an environmentally superior location to the proposed Project. Selecting the Mesquite Lake Alternative would reduce the Project's impacts on visual resources (SA/DEIS p. B.2-43) and on Native American cultural resources. SA/DEIS p. B.2-31. Likewise, selecting the Agricultural Lands Alternative would reduce the project's impact on Native American cultural resources. SA/DEIS p. B.2-58. Accordingly, one of these two alternatives should be adopted.

VI. THE SA/DEIS UNLAWFULLY SEGMENTS THIS PROJECT BY IGNORING ITS RELIANCE ON THE SUNRISE POWERLINK PROJECT.

CEQA requires agencies to consider the environmental impacts of "the whole of [their] action" so as to ensure "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." Guidelines § 15378(a); *Bozung v. Local Agency Formation Com.* (1975) 13 Cal.3d 283-84; *see also Plan for Arcadia, Inc. v. City Council of Arcadia* (1974) 42 Cal.App.3d 712, 726 (CEQA's requirements "cannot be avoided by chopping up proposed projects into bite-size pieces which, individually considered, might be found to have no significant effect on the environment or to be only ministerial").

NEPA also requires that connected actions be considered together in the same EIS. *See* 40 C.F.R. § 1508.25; *Thomas v. Peterson*, 753 F.2d 754, 758-759 (9th Cir. 1985) ("*Thomas*"). Connected actions are those that (1) "[a]utomatically trigger" other actions potentially requiring EISs; (2) "cannot or will not proceed unless other actions are taken previously or simultaneously;" or (3) are "interdependent parts of a larger action and depend on the larger action for their justification." 40 C.F.R. § 1508.25. Courts commonly apply an "independent utility" test to "determine whether multiple actions are so connected as to mandate consideration in a single EIS." *Great Basin Mine Watch v. Hankins*, 456 F.3d 955, 969 (9th Cir. 2006). In applying this test, courts have consistently "held that approval of access

roads across federal lands requires federal agencies to analyze impacts of the road as well as the activities for which the road is being constructed." *Sierra Club v. U.S. Department of Energy*, 255 F. Supp. 2d 1177, 1184 (D. Colo. 2002) (*Sierra Club v. DOE*) (holding that a road easement granted by the Department of Energy was connected for NEPA purposes to the mining activities it enabled); *see also Thomas*, 753 F.2d at 758-59 (holding that a road approved for construction by the Forest Service was connected to the timber sales that could not proceed without it).

Here, phase II of the Project is dependant on construction of the Sunrise Powerlink Project. SA/DEIS, p. B.1-19. The Sunrise Powerlink Project is currently under challenge in both state and federal court. Until Sunrise Powerlink is completed, this entire Project cannot proceed. Accordingly, "whole . . . action" would include both of these "connected" Projects; their environmental impacts should be considered in the same document. Guidelines § 15378(a); 40 C.F.R. § 1508.25. Here, however, staff simple declined to "independently review th[e] related [Sunrise Powerlink] project." SA/DEIS, p. B.1-19. Because the SA/DEIS fails to include an assessment of the environmental impacts of the entirety of the Project, it violates both CEQA and NEPA.

VII. THE PROJECT VIOLATES THE FEDERAL SAFE DRINKING WATER ACT BECAUSE IT WILL LEAD TO THE CONTAMINATION OF A SOLE-SOURCE AQUIFER.

The DEIS for the Project claimed that wastewater from the Seeley Wastewater Reclamation Facility (SWWRF) would be used to clean the solar panels. This decision, however, was based on a mitigated negative declaration for the SWWRF. The Seeley County Water District (SCWD) decided not to adopt the mitigated negative declaration, but instead to prepare an Environmental Impact Report for the SWWRF. Because of this change, the Project now intends to rely on a sole-source aquifer to provide the wash-water for the panels. The impacts of the groundwater pumping that would be required by the Project are completely unknown, and present many risks.

The aquifer from which the wash-water for the Project will be pumped, the Ocotillo-Coyote Wells Aquifer, has been deemed the "sole or principal source of drinking water for Ocotillo, Nomirage, Yuha Estates, and Coyote Wells." 61 Fed. Reg. 47752 (Sept. 10, 1996). If this aquifer is contaminated it "would create a significant hazard to public health." *Id.* It is irresponsible for the Project to use four cities' sole-source of drinking water as wash-water, especially in the desert. This impact is not recognized, analyzed or mitigated in the DEIS.

As was admitted in the "Staff Comments on Schedule Impacts of AFC Supplement," dated May 17, 2010, the amount of water needed for the Project "exceeds the permitted amount of groundwater extraction for the well." The risk of groundwater depletion from the Ocotillo-Coyote Wells Aquifer is not recognized, analyzed or mitigated in the DEIS.

Further, the Public Health and Welfare Code forbids projects that receive federal monies that "may contaminate" a sole-source aquifer. 42 U.S.C.A. § 300h-3(e). "Contaminant" is defined as "any

physical, chemical, biological, or radiological substance or matter in water." 42 U.S.C.A. § 300f(6). By drastically increasing the rate of groundwater pumping from the Ocotillo-Coyote Wells Aquifer, the Project may contaminate this sole-source aquifer by creating a cone of depression in the area of the aquifer, allowing physical, chemical, biological or radiological substances present elsewhere in other groundwater aquifers to leach into the Ocotillo-Coyote Wells Aquifer. If such contamination were to occur, a "significant hazard to public health" would result, in violation of the Public Health and Welfare Code. 42 U.S.C. § 300h-3(e). Because the DEIS did not analyze the possible impacts of pumping groundwater from the Ocotillo-Coyote Wells Aquifer, the risk of contamination from pumping is unknown. The Project's impacts on groundwater pumping must therefore be fully acknowledged, analyzed and mitigated to protect the sole-source of water for Ocotillo, Nomirage, Yuha Estates and Coyote Wells.

VIII. IF AN ACTION IS TAKEN, BLM SHOULD ADOPT THE NO ACTION ALTERNATIVE WHICH WOULD MAKE THE AREA UNAVAILABLE FOR FUTURE SOLAR DEVELOPMENT.

The SA/DEIS studies three No Action Alternatives under NEPA, each of which would result in a different CDCA Plan: (1) the No Action/No CDCA Plan Amendment Alternative; (2) the No Action/Amend the CDCA to make the area *available* for future solar development Alternative; and (3) the No Action/Amend the CDCA to make the area *unavailable* for future solar development Alternative ("Unavailable Alternative") (emphasis added). We support the third alternative because it will provide the greatest protection to this immaculate landscape and will ensure that the character of the area is preserved for future generations.

The SA/DEIS recognizes that adoption of this alternative would prevent future environmental impacts from other renewable energy projects. Unless this alternative is adopted, "other renewable energy projects" with "similar[ly]" devastating cultural impacts could be approved. SA/DEIS, p. C.2-142. Adoption of the Unavailable Alternative would also prevent future impacts to the PBHS, FTHL, and special-status plant species. SA/DEIS, p. C.2-70. Visual resources would be similarly protected. SA/DEIS, p. C.13-33.[9] BLM should demonstrate its commitment to the preservation of our nation's rapidly disappearing desert lands by adopting the Unavailable Alternative.

9 This portion of the SA/DEIS appears to be incomplete; it ends mid-sentence.

CONCLUSION

For these reasons, the SA/DEIS violates both NEPA and CEQA. Accordingly, it should be revised and re-released. With regard to the various CDCA Amendment alternatives, the No Action/Amend the CDCA to make the area unavailable for future solar development Alternative should be adopted.

Thank you for considering our views on this important matter.

Very truly yours,

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