

Case No. S189387

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

SIERRA CLUB,

Petitioner,

v.

**CALIFORNIA ENERGY RESOURCES CONSERVATION
AND DEVELOPMENT COMMISSION,**

Respondents,

**TESSERA SOLAR NORTH AMERICA, INC.; CALICO SOLAR,
LLC**

**Real Parties in
Interest**

After a Decision of the Energy Resources Conservation and
Development Commission of the State of California
Docket No. 08-AFC-13, Order No. 10-1028-03

**PRELIMINARY OPPOSITION TO PETITION FOR WRIT OF
MANDATE**

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APPELLANT/PETITIONER: SIERRA CLUB RESPONDENT/REAL PARTY IN INTEREST: CALIFORNIA ENERGY RESOURCES CONSERVATION AND DEVELOPMENT COMMISSION/CALICO SOLAR, LLC	
CERTIFICATE OF INTERESTED ENTITIES OR PERSONS (Check one): <input checked="" type="checkbox"/> INITIAL CERTIFICATE <input type="checkbox"/> SUPPLEMENTAL CERTIFICATE	
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1. This form is being submitted on behalf of the following party (name): Calico Solar, LLC

2. a. There are no interested entities or persons that must be listed in this certificate under rule 8.208.
 b. Interested entities or persons required to be listed under rule 8.208 are as follows:

Full name of interested entity or person	Nature of interest (Explain):
(1) K Road Sun LLC	K Road Sun, LLC owns more than 10% of Calico Solar, LLC
(2) K Road Power Holdings LLC	K Road Power Holdings, LLC owns more than 10% of K Road Sun LLC
(3) William Kriegel	William Kriegel owns more than 10% of K Road Power Holdings LLC
(4)	
(5)	

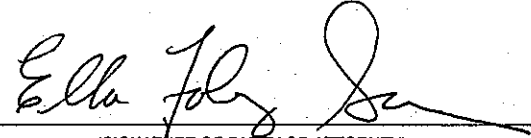
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The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: January 10, 2011

Ella Foley Gannon

 (TYPE OR PRINT NAME)



 (SIGNATURE OF PARTY OR ATTORNEY)

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I. INTRODUCTION

The Warren-Alquist Act establishes a comprehensive fact finding process that the California Energy Resources Conservation and Development Commission follows to gather technical data, consult other agencies, conduct evidentiary hearings, weigh evidence, and reach a decision in light of the information before it and discretionary matters of public policy. Pub. Res. Code §§ 25000 *et seq.*

When it approved the Calico Solar Project, the Commission issued all required reports, admitted all relevant evidence, and conducted all required hearings. The Commission held six hearings to admit evidence through direct and cross examination and extensive written documents.¹ 1 SC App. 14-17 (Commission Decision (“Decision”)). In its Decision, the Commission resolved factual issues and required implementation of over 150 conditions of project approval. 1 SC App. 16-17, 1 SC App. 1-2 SC App. 734 (Decision). Moreover, due to concerns raised by agencies and intervenors, the Commission reduced the size of the Calico Solar Project from 8,230 acres to 4,613 acres, avoiding development of the most sensitive habitat for the desert tortoise. 1 SC App. 257 (Decision).

Sierra Club participated extensively in the Commission’s

¹ Calico cites Sierra Club’s Appendix as [volume] SC App. [pages] (abbreviated document title)]” and its own Appendix as “[volume] RP

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proceedings. Yet, in its petition, Sierra Club details early testimony criticizing the Calico Solar Project studies and mitigation, and wholly ignores competing evidence and later testimony. This type of briefing is improper and forfeits Sierra Club's claims. *See Foreman & Clark Corp. v. Fallon*, 3 Cal.3d 875, 881 (1971); *Defend the Bay v. City of Irvine*, 119 Cal.App.4th 1261, 1266 (2004).

In any event, even the most cursory review of the record will reveal that the Commission heard and received extensive testimony on the impacts to desert tortoise, Mojave fringe-toed lizards, white-margined beardtongue, golden eagles and bighorn sheep, as well as the measures to reduce those impacts. Sierra Club's arguments boil down to nothing more than a complaint that, after hearing evidence on all sides, and weighing that evidence, the Commission reached decisions that Sierra Club does not like. Such complaints do not provide grounds for judicial review, much less issuance of a petition for writ of mandate by this Court. Therefore, Real Party Calico Solar, LLC, asks that the Court summarily deny the petition.

II. BRIEF RESPONSES TO ISSUES PRESENTED

Sierra Club poses two questions in its statement of issues presented. To the extent Sierra Club raises arguments, they are addressed in detail in

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[pages] [abbreviated document title)].”

the following points and authorities. This section presents a brief summary.

1. Does the State of California's goal to quickly develop utility-scale solar energy projects exempt the California Energy Commission from complying with California's fundamental environmental laws?

Brief response: There is no legal dispute. The Commission has not claimed such an exemption. Sierra Club argues this Court should accept its petition for review to provide judicial guidance regarding implementation of the Commission's procedures and their conformity with the requirements of CEQA. SC Petition at 6. Yet Sierra Club has not alleged a single procedural defect. Sierra Club presents no facts or arguments relating to its first stated issue.

2. Did the California Energy Commission violate the Warren-Alquist Act and the California Environmental Quality Act when it approved the Application for Certification of the Calico Solar Power Project?

Brief Response: Again, there is no legal dispute. The legal principles applicable to review of environmental findings have been well-established by this Court. *See Laurel Heights Improvement Ass'n v. Regents of Univ. of Cal.*, 47 Cal.3d 376, 393, 407, 409 (1988); *Western States Petroleum Ass'n v. Superior Court*, 9 Cal.4th 559, 572 (1995). The Commission heard testimony, weighed the evidence, and reached determinations based on that evidence. Sierra Club simply disagrees with the following Commission decisions:

Desert Tortoise. The desert tortoise is the only species listed under the federal or state Endangered Species Acts that lives or forages on the Calico Solar Project site. Transect surveys performed by qualified biologists under United States Fish & Wildlife Service (USFWS) protocol revealed *ten* desert tortoises within the 4,613-acre Calico Solar Project site. Application of the USFWS statistical formula bumps that number up to 22 to 59 tortoises, depending upon whether the median or high end of the 95% confidence interval is used. 3 SC App. 1251 (Supplemental Staff Assessment Addendum (“SSA Addendum”)); 3 SC App. 1450-1451 (USFWS Biological Opinion (“Biological Opinion”)). This is compared to a population of at least 182,000 desert tortoises in the Western Mojave Recovery Unit, where the Calico Solar Project is located. 3 SC App. 1473 (Biological Opinion). The Commission found, based upon the USFWS Biological Opinion and other expert testimony, that acquisition of 10,302 acres of desert tortoise habitat, and preservation and enhancement of that habitat for the benefit of the species, would effectively mitigate the Calico Solar Project’s impacts to the desert tortoise. 1 SC App. 281 (Decision). The Commission also found that additional measures to protect tortoises during construction, translocate individual tortoises, and fence the site to preclude entry by new tortoises would further minimize impacts. 1 SC App. 278-80 (Decision). Given that the USFWS reached the same conclusions in its Biological Opinion (3 SC App. 1474-1475 (Biological

Opinion)), it is impossible for Sierra Club to demonstrate that substantial evidence does not support the Commission's decision.

Mojave fringe-toed lizard. Mojave fringe-toed lizards, a sensitive but not endangered species, breed on 21 acres of the 4,613-acre Calico Solar Project site, and forage on another 143 acres. 1 SC App. 339 (Decision). The Commission determined that acquisition, improvement and long-term management of 207.5 acres of suitable offsite habitat, would reduce impacts to a less than significant level. 1 SC App. 274-275, 292 (Decision). Initially, staff also opined that the Calico Solar Project would obstruct a movement corridor used by the lizard. 2 SC App. 845, 917 (SSA). However, the Commission later required a 223 foot setback from the BNSF railroad tracks, which, according to the Commission's expert, would be sufficient to allow gene flow between populations on the east and west of the Project site. 5 SC App. 2694, 2724-2725 (Oct. 22 Transcript). Accordingly, the Commission found the impact to the movement corridor would be less than significant. 1 SC App. 283 (Decision). Sierra Club may disagree, but such a factual dispute is not grounds for judicial review.

White-margined beardtongue. One CNPS List 1 species of plants has been confirmed on the 4,613-acre Calico Project site. 1 SC App. 241-242 (Decision). The Commission determined that a 250-foot no-build buffer around the plants and monitoring would reduce impacts to a less than significant level. 1 SC App. 292, 316-320. Sierra Club fails to recognize

expert testimony supporting the Commission's decision. 4 SC App. 1911 (Aug. 5 Transcript).

Golden eagle. Golden eagles do not live on the Calico Solar Project site, but they fly over it. 1 SC App. 250 (Decision). The Commission determined that acquisition, preservation and enhancement of offsite habitat for the desert tortoise would also offset the loss of foraging habitat for the golden eagle. 1 SC App. 282 (Decision). To further minimize impacts to individual eagles, the Commission required adaptive management strategies including aerial markers or diverters. 1 SC App. 268, 282, 368-369, 378-379 (Decision). Sierra Club quibbles with the adaptive management strategies, but presents no grounds for review.

Nelson's bighorn sheep. Nelson's bighorn sheep are protected by the Bureau of Land Management. No bighorn sheep live on the Calico Solar Project site, but bighorn sheep have been observed nearby. 2 SC App. 868 (SSA). The Commission determined that monitoring for bighorn sheep during construction, and ceasing activity if sheep approach within 500 feet of the site, would mitigate impacts to less than significant levels. 1 SC App. 268, 292 (Decision). The Sierra Club now argues that this mitigation is harmful because the sheep prefer continuous noise rather than intermittent noise. However, during the evidentiary hearing in which this measure was addressed, Sierra Club's attorney asked that the condition *not* be deleted and reserved the right to comment on it later. 4 SC App. 1931

(Aug. 5 Transcript). Sierra Club submitted no further comments.

III. STATEMENT OF THE CASE

A. The Calico Solar Project

The Calico Solar Project is a solar power facility to be constructed on approximately 4,613 acres of federal lands in San Bernardino County. The Project is proposed for development in two phases, with Phase 1 located on approximately 1,876 acres and Phase 2 on the remaining 2,737 acres. 1 SC App. 18 (Decision).

The Calico Solar Project is expected to produce 663.5 megawatts of renewable electricity that does not depend on foreign sources and would advance the state-mandated Renewable Energy Portfolio. The Project will contribute to the decommissioning of dirtier coal-burning power plants as well as aging coastal power plants that use ocean water for cooling and cause significant harm to marine life. 1 SC App. 139 (Decision). It also will help to implement California's legislative imperative – established by AB 32 – to substantially reduce greenhouse gas emissions. 1 SC App. 141-144 (Decision).

B. The Commission's Proceedings

The Calico Solar Project and its related facilities are subject to the exclusive permitting jurisdiction of the California Energy Commission. Pub. Res. Code §§ 25500 *et seq.* In December 2008, a predecessor-in-interest to Calico submitted an application with the Commission for site

certification. The original Project would have generated 850 MW on 8,230 acres. 1 SC App. 18, 234 (Decision).

The Commission acted as the state lead agency for studying environmental impacts of the Calico Solar Project. Under its certified regulatory program, the Commission prepares a set of environmental documents and conducts evidentiary hearings that the Secretary of Resources has determined are equivalent to compliance with the California Environmental Quality Act's requirements for environmental review. *See* Commission Regulations² §§ 1741 *et seq.*; Pub. Res. Code § 21080.5.

The Commission commenced review by first obtaining environmental data and studies submitted by Calico in the Application for Certification. 1 SC App. 14; 2 SC App. 716-717 (Decision). *See* Commission Regulations § 1742(a) (information about environmental effects and mitigation measures shall be provided in the application). Staff also collected other sources of information through a series of workshops. *See* 1 SC App. 16 (Decision). Next the Commission's staff prepared a Staff Assessment, which is a written report to review the information provided by the applicant and other sources, and assess the environmental impacts of the Project, the completeness of proposed mitigation, and the need for, and

² The Commission's regulations are found at Title 20 of the California Code of Regulations.

feasibility of, additional mitigation. *See* Commission Regulations § 1742.5. On March 30, 2010, the Commission distributed the Staff Assessment for the Calico Solar Project, along with reports on safety and reliability, and compliance with local regulations.³ 1 SC App. 16 (Decision).

Following publication of the Staff Assessment and based on recommendations from various agencies, Calico reduced the size of the Calico Solar Project from 8,230 acres to 6,215 acres to avoid the most sensitive environmental resources. 2 SC App. 739 (SSA). A Supplemental Staff Assessment was prepared to address this size reduction, and distributed on July 21, 2010. 2 SC App. 736 *et seq.* (SSA); 1 CSP App. 39 *et seq.* (SSA Part II).

Early in the permitting process, the Commission appointed a committee consisting of two Commission members to conduct its proceedings. On June 22, 2009, the Committee conducted a site visit to tour the Calico Solar Project site and held a public informational meeting. 1 SC App. 15 (Decision). The Commission and BLM held joint workshops to resolve technical issues, identify alternatives, and respond to data on September 16, 2009 and April 16, 2010 in Barstow; on December 22, 2009, August 24, 2010, and September 9, 2010 in Sacramento; and on August 12,

³ The Staff Assessment and the Bureau of Land Management's draft Environmental Impact Study were published jointly. 1 SC App. 16

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2010 via the web. 1 SC App. 16 (Decision). The Committee conducted a prehearing conference on July 30, 2010 and held formal evidentiary hearings on the Calico Solar Project and its environmental effects and mitigation on August 4, 5, 6, 18 and 25, 2010. 1 SC App. 16 (Decision).

As evidence and testimony were submitted during the hearings, Commission staff prepared a series of documents to respond to comments and to track the information: Staff Rebuttal Testimony and Errata dated July 29; Staff Errata to SSA dated August 4; SSA Part 2 dated August 9; and Staff's Second Errata to SSA dated August 17. 1 SC App. 16, 726-727. (Decision); 2 SC App. 1060 (Second Errata to SSA); 3 SC App. 1225 (SSA Addendum); 3 SC App. 1572 (Aug. 4 Transcript).

On September 3, 2010, the Committee directed Calico and other interested parties to explore a further size reduction. 1 SC App. 16 (Decision). In response, Calico presented six alternatives. Following a staff-conducted workshop and an additional evidentiary hearing, one of these reduced-size alternatives – Scenario 5.5 – emerged as the preferred alternative of both Calico and Commission staff. 1 SC App. 16 (Decision). Scenario 5.5 shrank the Calico Solar Project to 4,613 acres, just over half the originally proposed size. The smaller project is expected to produce

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(Decision).

663.5 MW of electricity. 1 SC App. 18 (Decision).

The Committee published a Presiding Member's Proposed Decision (PMPD) on September 25, 2010 recommending approval of the twice-reduced 4,613 acre Calico Solar Project. 1 SC App. 16 (Decision); *see* Commission Regulations § 1749. The PMPD included over 150 Conditions of Certification, which are designed to ensure that all the Project's environmental impacts are mitigated to the extent feasible. The Committee held a conference on the PMPD on October 22, 2010, which it continued to October 26, 2010 to receive further comments from the public and intervenors in response to a staff workshop held on October 25th. *Id.*

The full Commission held a hearing on October 28, 2010 to consider the PMPD and the recommendations of the Committee and the various commenting parties. 1 SC App. 16-17 (Decision); *see* Commission Regulations § 1754. Following six lengthy hearings featuring extensive public comment and deliberation, the Commission issued its final Decision certifying the Calico Solar Project. 1 SC App. 16 (Decision); *see* Commission Regulations § 1755.

IV. ARGUMENT

A. Standard of Review

Sierra Club ignores the standard of review applicable to this petition. It asks this Court to step into the shoes of the Commission, re-weigh evidence, and decide factual questions. The law is to the contrary.

The Legislature expressly limited judicial review of the Commission's site certification decisions. Section 25531 of the Warren-Alquist Act⁴ decrees that review be available only in this Court, and that the scope of review be limited:

The review shall not be extended further than to determine whether the commission has regularly pursued its authority, including a determination of whether the order or decision under review violates any right of the petitioner under the United States Constitution or the California Constitution.

Pub. Res. Code § 25531(b).

Sierra Club's petition raises no constitutional question.

Accordingly, judicial review is limited to whether the Commission has regularly pursued its authority.

Deference to the Commission's fact finding is based upon Legislative policy direction that, to the fullest extent permitted by the Constitution, all decisions regarding power plant siting be vested in the Commission as the agency with the expertise and resources appropriate to the task. *See* Pub. Res. Code §§ 25500 (vesting exclusive jurisdiction in the Commission, whose approval "shall be in lieu of any permit, certificate, or similar document required by any state, local or regional agency, or federal agency to the extent permitted by federal law"), 25201 (requiring specific

⁴ The Warren-Alquist Act is the CEC's enabling statute. *See* Pub. Res.

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technical (including environmental) expertise of Commission members). The Legislature recognized the importance power plants have in California, and the Commission's expertise in evaluating complex technical factors relevant to site certification. *E.g.*, Pub. Res. Code §§ 25001 (Legislative declaration that electrical energy is essential, and that the State has a responsibility to ensure a reliable supply), 25005 (Legislative recognition that expanded state authority and technical capability are required to address delays and interruptions in the orderly provision of electrical energy, protection of environmental values, and conservation of energy resources), 25009 (recognizing in part the need to "ensure the timely construction of new electricity generation capacity").

The presence of CEQA claims in this proceeding does not negate the judicial deference due to Commission decisions. CEQA does not envision a judicial reweighing of evidence or de novo review of factual or scientific questions. *Laurel Heights Improvement Ass'n v. Regents of Univ. of Cal.*, 47 Cal.3d 376, 393, 407, 409 (1988); *Western States Petroleum Ass'n v. Superior Court*, 9 Cal.4th 559, 573-574 (1995). A reviewing court does not perform its own scientific critique of the technical studies, or pass judgment on the validity or correctness of the agency's factual environmental

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Code §§ 25000 *et seq.*

findings, even if other experts might disagree with the underlying data, analysis, or conclusions. *Laurel Heights*, 47 Cal.3d at 392-393, 409; see also CEQA Guidelines § 15151.⁵ Instead, as this Court explained in *Western States Petroleum Association v. Superior Court*, judicial deference to the agency is required both to adhere to constitutional principles invoking the separation of powers doctrine, and to recognize the expertise of the reviewing agency:

Agencies must weigh the evidence and determine which way the scales tip, while courts conducting substantial evidence review generally do not. If courts were to independently weigh conflicting evidence in order to determine which side had a preponderance of the evidence, this would indeed usurp the agency's authority and violate the doctrine of separation of powers.

9 Cal.4th at 576 (quoting party's brief with approval; quotations and ellipsis omitted).

This judicial deference extends not only to the evidence upon which the agency relied, but also to the agency's inferences and conclusions.

"When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the [agency]." *Id.* at 571 (quotations omitted).

Moreover, the agency's decision is presumed correct, and it is the

⁵ The CEQA Guidelines are found at Title 14 of the California Code of Regulations.

challenger's burden to demonstrate otherwise.

Even when the challenge presents a question regarding appropriate procedures, judicial review is not unbounded. The question whether an agency conformed to procedures required by law entails a de novo determination whether the agency has employed the correct procedures. *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova*, 40 Cal.4th 412, 435 (2007). However, the decision is still presumed correct, and it is the petitioners' burden to prove otherwise. *Sierra Club v. City of Orange*, 163 Cal.App.4th 523, 530 (2008); see Evid. Code § 664 (presumption that official duties regularly performed). Moreover, petitioners must also establish that any error was prejudicial, and not just a technical defect. See *Ebbetts Pass Forest Watch v. Cal. Dep't of Forestry & Fire Prot.*, 43 Cal.4th 936, 944, 948-949 (2008) (noting that agency implementing certified regulatory program technically failed to follow certain procedure, but holding that even if question were treated as one of procedure rather than a question of fact, decision would be upheld since record as a whole demonstrated compliance with substance of the requirement); see also Pub. Res. Code § 21005 (noting that an error *may* constitute a prejudicial abuse of discretion).

Further, and of critical importance to review of Sierra Club's petition, when an appellant challenges an administrative decision as unsupported by substantial evidence in light of the record as a whole, it is

the appellant's burden to demonstrate that the record does not contain sufficient evidence to support the agency's decision. *Int'l Brotherhood of Elec. Workers, Local 889 v. Aubry*, 42 Cal.App.4th 861, 870 (1996). A petitioner cannot prevail when it fails to present all of the material evidence in the record, and instead presents only the evidence supporting its position. *Foreman & Clark Corp. v. Fallon*, 3 Cal.3d 875, 881 (1971). Unless this is done, the error is forfeited. *Id.* CEQA provides no exception to this rule:

As with all substantial evidence challenges, an appellant challenging an EIR for insufficient evidence must lay out the evidence favorable to the other side and show why it is lacking. Failure to do so is fatal. A reviewing court will not independently review the record to make up for appellant's failure to carry his burden.

Defend the Bay v. City of Irvine, 119 Cal.App.4th 1261, 1266 (2004)

(citing *Markley v. City Council*, 131 Cal.App.3d 656, 673 (1982)).

B. The Commission Regularly Pursued its Authority in Adopting Desert Tortoise Mitigation Measures

The Calico Solar Project's potential impact to desert tortoise was the single most debated and analyzed issue in the Commission's licensing proceedings. The issues related to this impact as well as potential mitigation measures were the subject of hundreds of pages of written analysis and testimony and nearly countless hours of oral testimony. 1 SC App. 15 (Decision). A dozen biological experts from federal and state

agencies as well as experts hired by Calico and the various intervenors opined extensively on these issues⁶ and each party had the opportunity to cross-examine these witnesses. Based on this evidence, the Commission ultimately approved a project that was reduced in size by nearly 50%.⁷ After thoroughly reviewing and weighing all the evidence, the Commission determined that the Project would have a potentially significant impact to desert tortoise and that this impact could be mitigated to a less than significant level by implementing extensive mitigation measures that are estimated to cost more than \$31 million. Sierra Club's bald assertion that the record does not contain ANY evidence to support these conclusions is belied by even a cursory review of the extensive record. Further, it is fatal to Sierra Club's claims. *Foreman*, 3 Cal.3d at 881.

⁶ The following biological experts appeared at the evidentiary hearings: Ashleigh Blackford (U.S. Fish and Wildlife Service), Chris Oxahal (BLM), Larry LaPre (BLM), Dr. Christine Berry (federal employee at the request of the Commission), Becky Jones (CDFG), Tonya Moore (CDFG), Chris Huntley (Commission), Scott White (Commission), Dr. Patrick Mock (Applicant), Theresa Miller (Applicant), Scott Cashen (California Unions for Reliable Energy and Sierra Club), and Jeff Aardahl (Defenders of Wildlife).

⁷ In the summer of 2010, the Project site was reduced from 8,230 acres to 6,215 acres in response to feedback from the Renewable Energy Action Team agencies and the USFWS Desert Recovery Office. 2 SC App. 739, 762 (SSA). In September, at the Commission's direction, the Project site was again reduced, resulting in the approved Project footprint of 4,613 acres.

1. Substantial evidence supports the desert tortoise mitigation adopted by the Commission.

The Commission determined that the impacts to desert tortoise could be mitigated to a less than significant level and that the impact of authorized take could be fully mitigated by implementing a comprehensive and clearly identified mitigation package. 1 SC App. 280 (Decision). The central provision of this package is the requirement that Calico Solar acquire and provide for the enhancement of more than 10,000 acres of desert tortoise habitat that meets specific criteria. 1 SC App. 281, 354-355 (Decision). The Commission further required that Calico Solar undertake a series of actions designed to minimize the level of potential impacts to individual desert tortoise, including the installation of exclusionary fencing to keep desert tortoise out of the site and a measure to translocate desert tortoises found on the site. 1 SC App. 349-357 (Decision). Substantial evidence in the record supports the Commission's factual determination that these measures will be effective in mitigating the Project's impacts and that they are feasible. 1 SC App. 280-281 (Decision).

a. The Calico Solar Project's impact to desert tortoise

The desert tortoise is a species listed as threatened under the federal and California Endangered Species Acts. 1 SC App. 242 (Decision). Its range includes the Mojave Desert region of Nevada, southern California, and the southwest corner of Utah, and the Sonoran Desert region of

Arizona and northern Mexico. 1 SC App. 256 (Decision). As required under the federal Endangered Species Act, USFWS has designated critical habitat for the desert tortoise.⁸ 3 SC App. 1436 (Biological Opinion). The Calico Solar Project site is not designated critical habitat and the nearest critical habitat is approximately 0.5 mile south, within the Ord-Rodman Desert Wildlife Management Area (DWMA). 1 SC App. 257 (Decision).⁹

The Calico Solar Project site does, however, support desert tortoise habitat. Desert tortoise surveys conducted according to stringent USFWS protocols discovered 10 tortoises on the 4,613-acre Project site. 3 SC App. 1450 (Biological Opinion). It is recognized, however, that the true number of tortoises on the site was likely to be somewhat higher. Tortoises move and not all desert tortoises – particularly small and furtive juveniles – are likely to be found in a survey. 3 SC App. 1451 (Biological Opinion). Accordingly, USFWS uses a formula that generates 95 percent confidence interval ranges for desert tortoises on a site. 3 SC App. 1251-1252 (SSA Addendum). Using the median values of these ranges for adult/subadult

⁸ Under the federal Endangered Species Act, the USFWS is required to designate as critical habitat the areas “on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection.” 16 U.S.C. §§ 1532(5), 1533(b)(2).

⁹ Sierra Club’s description of the Project site as being “particularly critical desert tortoise habitat” (SC Petition at 10) is misleading in this regard.

and juvenile tortoises, the Commission's experts estimated that 22 desert tortoises would be on the Project site. *Id.*¹⁰

The Commission estimated the number of individual desert tortoises that it concluded were likely to die as a result of implementation of the Calico Solar Project. Taking its estimate of 22 desert tortoises on the Project site, assuming that 13 of those could be found and translocated but that 50% of the 13 would not survive, and assuming that 5% of the other tortoises handled at translocation and control sites would not survive, the Commission estimated that 29 tortoises would die as a result of the Project. *Id.*

USFWS's experts arrived at a similar conclusion, estimating mortality of up to 30 juvenile desert tortoises, but their reasoning was somewhat different from the Commission's. USFWS anticipated that none of the juvenile tortoises on the Project site would be successfully translocated because they would not likely be found during clearance surveys, and if found, were unlikely to survive translocation. USFWS noted, however, that because "juvenile desert tortoises experience high

¹⁰ The USFWS uses a slightly different approach in estimating the number of desert tortoise likely to be found on the site. USFWS generated the same 95 percent confidence interval as those used by the Commission, but the USFWS selected the high end of the range rather than the median value. This deliberately conservative approach resulted in an estimate of 59 adult/subadult and juvenile desert tortoise on the Calico Solar Project site.

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mortality rates under natural circumstances, many of these individuals would likely not survive to reproductive age in the absence of project-related effects.” *Id.* With respect to the adult/subadult tortoises being translocated and the off-site tortoises being handled for disease testing and tracking, USFWS explained its confidence in the ability of professional biologists to successfully conduct that operation. 3 SC App. 1453-1461. USFWS anticipated no mortality to on-site or off-site adult/subadult tortoises and concluded that “the mortality of translocated and resident desert tortoises is not likely to differ materially from that of control animals.” 3 SC App. 1462 (Biological Opinion).

USFWS also compared the numbers of desert tortoises estimated to be lost as a result of the project to its estimates of desert tortoises in the Western Mojave Recovery Unit where the project site is located – 182,399 to 256,847 tortoises. 3 SC App. 1473 (Biological Opinion). In an impressive understatement, USFWS concluded that the project-related loss of up to 30 tortoises would “comprise a relatively small portion of the overall population in the Western Mojave Recovery Unit.” *Id.*

b. Desert tortoise compensatory mitigation

The centerpiece of mitigation for impacts to the desert tortoise is

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3 SC App. 1450-1451.

habitat acquisition, improvement, and long-term management.¹¹ 1 SC App. 281, 354-365. The mitigation includes acquisition of off-site habitat at the new, increased ratios announced by CDFG in August 2010. See 4 SC App. 2205, 2209, 2214 (Aug. 18 Transcript). Thus, the Project is required to mitigate the 370 acres of high-quality habitat at 5:1, the 2,104 acres of good quality habitat at 3:1, and the 2,140 acres of lower quality habitat at 1:1. 1 SC 277, 354-359 (Decision); 5 SC App. 2695 (Sept. 20 Transcript). The result is a total of 10,302 acres of compensatory desert tortoise habitat acquisition. 1 SC App. 354-359 (Decision). Calico must fund initial improvements to the acquired lands as well as long-term management of the lands. 1 SC App. 359-361. The estimated cost of the Commission's compensatory mitigation measure for the tortoise exceeds \$31 million. 1 SC App. 354-356.

The Commission concluded, as did its staff, that these "habitat

¹¹ In addition to habitat compensation measures (BIO-17), the Commission's desert tortoise mitigation requirements include a Worker Environmental Awareness Program (BIO-6); a Biological Resources Mitigation Implementation and Monitoring Plan (BIO-7); monitoring during construction to avoid vehicle impacts and entrapment of desert tortoise (BIO-8); desert tortoise clearance surveys and exclusion fences (BIO-15); a Desert Tortoise Translocation Plan (BIO-16); a Raven Monitoring, Management, and Control Plan (BIO-18); a potential in-lieu fee option pursuant to Fish and Game Code sections 2069 and 2099 (BIO-30); and detailed measures to ensure that mitigation, including that for desert tortoise, is professionally executed and reported (BIO-1 through -5, BIO-9). 1 SC App. 293-310, 349-367, 391 (Decision).

enhancement measures, in combination with habitat acquisition, would feasibly and effectively mitigate the project's impacts to desert tortoises." 1 SC App. 281 (Decision).

c. The Biological Opinion

It is important to note up front that Sierra Club's assertion that the Commission disregarded the opinion of its sister agencies when it found that the Project's impacts to desert tortoise would be sufficiently mitigated is based on a gross distortion of the record. Sierra Club ignores the fact that other agencies ultimately came to the same conclusion as the Commission and that the Commission relied in part on these views in making its findings. The conclusions and findings included in the Biological Opinion issued by the USFWS on October 15, 2010 are a good example. Sierra Club cites fragments of the Biological Opinion in an attempt to argue that USFWS, the agency with the greatest expertise and the leadership role in addressing desert tortoise recovery, agrees with Sierra Club's oft-repeated assertion that the Calico project will be "devastating" to the desert tortoise. SC Petition at 26. In fact, the Biological Opinion states the opposite. The Biological Opinion is, in and of itself, substantial evidence supporting the Commission's conclusion that the Project's impacts to desert tortoise will, with the mitigation required, be less than significant.

The Biological Opinion identifies measures to minimize adverse effects to the desert tortoise. Like the Commission, USFWS requires

general protective measures, including exclusion fencing; management of common ravens; weed management; tortoise translocation and monitoring in accordance with detailed rules and a Desert Tortoise Translocation Plan; and habitat compensation at 5:1, 3:1 and 1:1 ratios. 3 SC App. 1420-1431 (Biological Opinion).

USFWS does not anticipate that the Project “will result in effects that appreciably reduce the current distribution, numbers, or reproduction of the overall population within the Western Mojave Recovery Unit or range wide.” 3 SC App. 1474 (Biological Opinion). Instead, USFWS anticipates that the compensation programs “will result in an increase in the amount of habitat that is managed for the conservation of this species and will result in many advances in the implementation of recovery actions.”

Id.

USFWS concludes: “[I]t is our biological opinion that the proposed action is not likely to jeopardize the continued existence of the desert tortoise. 3 SC App. 1474-1475 (Biological Opinion).

The Biological Opinion belies Sierra Club’s claims that USFWS supports the club’s view of the Calico Solar Project’s effects on the desert tortoise. More importantly, the Biological Opinion represents substantial evidence supporting the Commission’s decision. *Id.*

2. Substantial evidence supported the Commission's adoption of desert tortoise translocation mitigation.

Sierra Club asserts that translocation "does not constitute a viable take minimization strategy" for desert tortoise and, therefore, should not have been approved. SC Petition at 28. This appears to be an argument that the Commission should not have approved the Calico Solar Project at all, since Sierra Club does not identify any alternative take minimization strategy, and continues to consider the Project's impacts – even at the reduced number of 10, rather than 104, surveyed tortoises – "devastating" and "catastrophic."

Sierra Club's argument is not well taken. The Commission heard, reviewed and weighed extensive evidence – far more extensive than in a typical CEQA process – regarding desert tortoise translocation, resolved disputes among experts, and explained why, on balance, it believed desert tortoise translocation was worthwhile. Accordingly, Sierra Club's claims present no issue for Court review.

Sierra Club begins by attacking a translocation plan of its own invention. Sierra Club asserts that every tortoise found on the Project site will be disease-tested, removed from its home range, and moved to a receptor location "several miles away." SC Petition at 28. The record shows, however, that most of the 13 (Commission estimate) to 29 (USFWS estimate) tortoises that are anticipated to be moved will travel fewer than

500 meters, into the area north of the Calico project boundary, and will not require disease testing because they will remain within their home ranges. 3 SC App. 1453-1454 (Biological Opinion). Because most desert tortoises are in the north, USFWS anticipates that Calico will move most desert tortoises less than 500 meters into the Linkage translocation area. *Id.*

Sierra Club next argues that the entire concept of translocation has been discredited because of high mortality at the Fort Irwin translocation project in which Dr. Kristin Berry participated. SC Petition at 28-29, 31-36. But as the Commission observed a potential reason for high mortality at Fort Irwin was the high density of desert tortoises already occupying the translocation receptor sites. 1 SC App. 280 (Decision). The translocation plan for the Calico Solar Project restricts receptor site density to a much lower level. 5 SC App. 2963 (Translocation Plan).

Sierra Club states that Dr. Berry criticized the translocation plan, but that is irrelevant given the substantial evidence supporting the plan. Moreover, the plan Dr. Berry criticized was the original draft of July 28, 2010, and was based on a 6,215 acre project with 57 identified tortoises. 4 SC App. 2304, 2340 (Aug. 25 Transcript). Dr. Berry did not comment on the "Final Plan Corrected Version" of October 14, 2010, which was revised to reflect the 4,613-acre Project with 10 identified tortoises and to provide additional information, partly in response to comments received on the July 28, 2010 draft. 5 SC App. 2946-2988 (Translocation Plan).

In an effort to convert its opposition to the Calico Solar Project and its disagreement with the Commission's factual determinations into a CEQA claim, Sierra Club next argues that CEQA required the Commission to approve the final Desert Tortoise Translocation Plan before approving the Project and that Condition BIO-16, Desert Tortoise Translocation Plan, was inadequate. Prior approval of the Desert Tortoise Translocation Plan was not necessary to the validity of the Commission's desert tortoise mitigation package. A mitigation plan need not be fully detailed before it is approved. "Deferral of the specifics of mitigation is permissible where the [lead agency] commits itself to mitigation and lists the alternatives to be considered, analyzed and possibly incorporated in the mitigation plan On the other hand, an agency goes too far when it simply requires a project applicant to obtain a biological report and then comply with any recommendation that may be made in the report." *Defend the Bay v. City of Irvine*, 119 Cal.App.4th 1261, 1275 (2004) (citing *Sacramento Old City Ass'n v. City Council*, 229 Cal.App.3d 1011, 1028-1030 (1991) and *Gentry v. City of Murrieta*, 36 Cal.App.4th 1359, 1396-1397 (1995)).

First, this is not a case in which a lead agency failed to analyze an environmental impact, then papered over the defect with a "mitigation" plan consisting of future preparation of a report and implementation of the report's recommendations. Here, the Commission intensively analyzed the Calico Solar Project's impacts on desert tortoise and Sierra Club makes no

claim to the contrary. But Sierra Club's petition relies on cases that hinged on lead agencies' failures of analysis. For example, in *Communities for a Better Environment v. City of Richmond*, 184 Cal.App.4th 70 (2010), a city did not acknowledge significant greenhouse gas impacts until *after* it had issued a final EIR, then set a no-net-increase standard for mitigation and gave the applicant a year to devise a plan to achieve that target, listing "a handful" of measures to be "considered." *Id.* at 91-92. This was the entire mitigation plan, and the court held that it was unduly deferred. In *San Joaquin Raptor Rescue Center v. County of Merced*, 149 Cal.App.4th 645, 668-672 (2007), the lead agency did not require protocol-level surveys for vernal pool species or burrowing owls prior to project approval; its mitigation measures required the applicant to conduct those surveys and, if the species were found, then to develop mitigation measures. The court held that this was impermissible.

Second, the translocation plan was only one element of the desert tortoise mitigation, and the Commission determined that translocation was not essential to the determination that the Calico Solar Project's impacts would be mitigated: "Staff believes that habitat enhancement measures, in combination with habitat acquisition, would feasibly and effectively mitigate the project's impacts to desert tortoises. . . . We agree." 1 SC App. 281 (Decision) (internal cites omitted). Sierra Club insists that the translocation plan would not "fully mitigate" the Project's impacts to desert

tortoise; the answer to that argument is that the translocation plan was not intended to carry that burden.¹² Translocation is, as Sierra Club asserts, a “salvage” operation, but it is one both the Commission and USFWS have weighed and concluded is worthwhile.

Third, Condition BIO-16 is far more detailed than other mitigation measures the courts have upheld in the face of undue-deferral claims.

Condition BIO-16 requires the finalization of a Desert Tortoise

Translocation Plan:

in conformance with standards and guidelines described in *Translocation of Desert Tortoises (Mojave Population) From Project Sites: Plan Development Guidance* (USFWS 2010), any more current guidance or recommendations as available from CDFG or UWFWS, and meet[ing] the approval of USFWS, CDFG, BLM’s Wildlife Biologist and the CPM [CEC’s Compliance Project Manager]. The goal of the Plan shall be to safely exclude desert tortoise from within the fenced project area and translocate them to suitable habitat capable of

¹² To the extent Sierra Club’s argument reflects the view that take of *any* desert tortoise represents a significant impact in and of itself, that view is incorrect under CEQA. Section 15065(a)(1) of the CEQA Guidelines provides that a project has a significant impact if it has the potential to “substantially reduce the habitat of a fish or wildlife species; cause a fish or wildlife population to drop below self-sustaining levels; threaten to eliminate a plant or animal community; [or] *substantially* reduce the number or restrict the range of an endangered, rare or threatened species” CEQA Guidelines § 15065(a)(1) (emphasis added). In mid-2004, the word “substantially” was added before “reduce the number” in this Guideline; expressly to clarify that loss of a single individual of a species did not *per se* constitute a significant environmental impact.

supporting them, while minimizing stress and potential for disease transmission. Tortoises to be moved farther than 500 meters shall be tested for disease prior to translocation. . . . The Plan shall include but not be limited to, a list of the authorized handlers, protocols for disease testing and assessing tortoise health, proposed translocation locations and procedures, schedule of translocations, a habitat assessment of translocation lands, monitoring and reporting, and contingency planning (e.g., handling an injured or diseased desert tortoise.) 1 SC App. 353-354. (Decision).

Contrary to Sierra Club's assertion, this condition sets forth clear performance standards that the plan must meet and provides guidance as to how the goal of the plan will be met. The condition requires conformance with published USFWS Desert Tortoise Recovery Office guidelines. As Sierra Club itself insists, tortoise mitigation is evolving. Accordingly, the condition requires the plan to keep up with the most current guidance and recommendations from the expert agencies, and to be approved by them. *See National Parks & Conservation Ass'n v. County of Riverside*, 71 Cal.App.4th 1341, 1366 (1999). It specifies elements that not only may, but shall, be included in the plan. Further, by the time the Commission approved the Calico project, the details of the translocation plan had progressed to the point that USFWS relied on the plan in its Biological Opinion. 3 SC App. 1416, 1427 (Biological Opinion).

Sierra Club asserts that the Commission somehow violated CEQA by releasing its first draft of the Translocation Plan just prior to "the

commencement of the evidentiary hearings” (SC Petition at 29), but as *Defend the Bay* demonstrates, there was no requirement that the plan be circulated at all, and under CEQA — unlike the Warren-Alquist Act under which the Commission operates — there is no requirement at all for evidentiary hearings. Sierra Club cites *Mountain Lion Coal. v. Fish & Game Comm’n*, 214 Cal.App.3d 1043 (1989), for the proposition that CEQA sets an early deadline for an agency to air “critical issues,” but that case turned on the agency’s failure to issue a draft environmental impact document that complied with an existing court order. Here, of course, as Sierra Club itself asserts, the Commission heard evidence on the perceived merit and demerits of desert tortoise translocation over a period of months.

Next Sierra Club argues that the Commission did not acknowledge the potential negative effects of translocation on tortoises in the translocation and control areas. SC Petition at 36-39. This is simply inaccurate as the record is replete with evidence that the Commission, its experts, the USFWS and other experts all recognized that translocation itself can cause harm to individual desert tortoises. Translocated desert tortoises may not survive; “resident” tortoises already living at the translocation destination may be adversely affected by competition or disease from the translocated tortoises; even tortoises monitored at control locations may suffer simply from being handled and tagged. 1 SC App. 278-280 (Decision); 3 SC App. 1453-1463 (Biological); 2 SC App. 848-

850 (SSA). After evaluating this evidence, the Commission determined, consistent with its experts' and the USFWS' opinions, that translocation was worthwhile and would minimize harm to individual desert tortoises. 1 SC App. 278-280 (Decision); 3 SC App. 1474-1475 (Biological Opinion). Sierra Club may disagree with the Commission's factual determination, but this disagreement does not constitute a basis for judicial review or reversal of the Commission's decision.

3. Substantial evidence supported the Commission's approval of Condition BIO-17, Desert Tortoise Compensatory Mitigation.

Condition BIO-17 requires the Calico to provide compensatory mitigation acreage of 10,302 acres of desert tortoise habitat lands, as well as funding for initial improvement and long-term maintenance, enhancement and management of the acquired lands.¹³ 1 SC App. 355-356 (Decision). Sierra Club argues that Condition BIO-17, Desert Tortoise Compensatory Mitigation, is invalid on the grounds that CEQA required the Commission to identify habitat lands available for acquisition and there was no evidence such lands were in fact available. Sierra Club is wrong on both counts.

¹³ As with other mitigation measures, the Sierra Club Petition mischaracterizes BIO-17. Sierra Club asserts that 15,000 acres are required and that they must be contiguous (SC Petition at 40); both assertions are incorrect. *Id.*

Sierra Club argues that it is not feasible to acquire this acreage in the Western Mojave Recovery Unit. The Decision draws the contrary conclusion, citing the testimony of BLM expert Amy Fesnock, who agreed that at \$1,000 per acre, there was “mitigation land to be bought in the desert in the kind of quantity” the CEC was requiring. 1 SC App. 281 (Decision); 3 SC App. 1800 (Aug. 5 Transcript). Sierra Club simply ignores this testimony and quotes the next sentence of the transcript – and then asserts that Ms. Fesnock testified only about land cost, not land availability. The quoted testimony indicates that the price of mitigation land could rise; it does not suggest that such land would be unavailable. *Id.* (Aug. 5 Transcript).

Sierra Club also claims that San Bernardino County “raised concerns regarding the availability of compensatory mitigation lands within its jurisdiction.” SC Petition at 41. This is the opposite of what the County said. The County raised no concerns about the “availability” of compensatory mitigation lands within its jurisdiction for the Calico Solar Project. In fact, the County was concerned that under CDFG’s newly increased mitigation demands for desert tortoise habitat, “vast tracts” of County land *would* be acquired for habitat. 6 SC App. 3278 (County Response (“County Response”) (section headed “Acquisition of Vast Tracts of Mitigation Land Should Be Minimized”). As Sierra Club’s own petition admits, the County stated that there were “140,000 acres of potential desert

tortoise habitat held in private unincorporated lands under County jurisdiction.” SC Petition at 41; 6 SC App. 3280 (County Response). This alone represents additional evidence that sufficient mitigation land is available for the Calico Solar Project.

Finally, Commission staff also concluded that adequate mitigation land was available. In the Supplemental Staff Assessment, staff states that there is sufficient land available for Project owner to purchase as compensatory mitigation. Given the Calico Solar Project’s “location in the central Mojave Desert, and the widespread distribution of suitable habitat for Mojave fringe-toed lizard and desert tortoises in the region,” staff concluded that suitable private lands do exist and could be available for purchase. 2 SC App. 940 (SSA).

Sierra Club further argues that CEQA requires a lead agency to identify specific compensatory mitigation sites before approving a project that requires such mitigation land. The law is squarely to the contrary. *Cal. Native Plant Soc’y v. City of Rancho Cordova*, 172 Cal.App.4th 603, 622 (2009); *Endangered Habitats League, Inc. v. County of Orange*, 131 Cal.App.4th 777, 794-795 (2005). In *CNPS*, the court held that the lead agency’s habitat mitigation met all CEQA requirements although no specific mitigation site was identified. *CNPS* is directly on point and contradicts Sierra Club’s claim. *See also Endangered Habitats League*, 131 Cal.App.4th at 794.

Based on the evidence presented, the Commission determined that it was feasible for Calico to acquire the necessary mitigation lands to offset impacts to the desert tortoise. Sierra Club may disagree that there is adequate land available in the Project area, but this factual dispute does not constitute a reason for judicial review or reversal of the Commission's decision.

4. Substantial evidence supported the Commission's approval of enhancement measures for compensatory mitigation lands.

The Commission required, as part of Condition BIO-17, that Calico provide both initial improvement and long-term management of desert tortoise habitat acquired as mitigation. 1 SC App. 359-360. The Commission found the effectiveness of this mitigation measure comes about by improving the carrying capacity of the acquired property so that more desert tortoises will survive and reproduce on these lands, thus offsetting over time the decrease in numbers of tortoises resulting from the habitat loss and other Project impacts. *Id.*

Sierra Club argues that these habitat enhancement measures are not adequate, citing two sentences of the USFWS Biological Opinion stating that the Service cannot conclude that enhancement measures "would completely offset the adverse effects of the solar facility." SC Petition at

43; 3 SC App. 1473 (Biological Opinion). There is no requirement that the Project's impacts be "completely offset"¹⁴ and USFWS expressly concluded: "Compensation requirements through the Bureau and CDFG will result in an increase in the amount of existing habitat that is managed for the conservation of the desert tortoise and will likely lead to restoration of lost or degraded habitat within these areas." 3 SC App. 1475 (Biological Opinion).

Sierra Club criticizes the Commission's statement that enhancement measures "will vary depending on the condition and location of land acquired." SC Petition at 44. This statement is, however, inescapably true, and Sierra Club's critique is simply a reiteration of its meritless challenge to the Commission's authority under CEQA to select compensatory mitigation lands in the future. The enhancement measures appropriate for any particular parcel of compensation land are highly site-specific. CEQA required the Commission to establish an approach for compensatory mitigation, which the Commission did; nothing in CEQA required the Commission to speculate regarding the selection of specific enhancement

¹⁴ As is discussed in Section IV.C below, the Commission determined that the mitigation measures included as conditions of certification would fully mitigate the potential take of desert tortoise associated with the Project and that the Project would be in compliance with the requirements of the California Endangered Species Act. There is no support for the proposition that fully mitigating the impact of authorized take is equivalent with fully

(Footnote Continued on Next Page.)

measures to be implemented on to-be-identified compensation lands.

5. Substantial evidence supported the Commission's approval of condition of certification BIO-30.

Finally, Sierra Club challenges Condition of Certification BIO-30, which allows the Project owner to satisfy certain compensatory mitigation obligations through payment of an in-lieu fee to the Department of Fish and Game, if the Commission finds at that time that the in-lieu fee would meet CEQA and CEQA requirements. SC Petition at 45; 1 SC App. 391 (Decision). Sierra Club's argument is based on the faulty premise, refuted above, that no evidence supports the Commission's conclusion that land acquisition is infeasible. Moreover, CEQA permits a "menu" approach. *See Sacramento Old City Ass'n v. City Council*, 229 Cal.App.3d 1011, 1029-1030 (1991); *Defend the Bay*, 119 Cal.App.4th at 1276; *see also San Joaquin Raptor Rescue Center v. County of Merced*, 149 Cal.App.4th 645, 671-672 (2007).

C. The Commission made the findings required by CESA based upon substantial evidence.

Sierra Club contests the Commission's factual finding that impacts to species listed under the California Endangered Species Act will be fully mitigated. Apart from an unsupported assertion that the plain meaning of

(Footnote Continued from Previous Page.)

offsetting the impacts of the Project.

the “fully mitigate” standard included in Fish and Game Code section 2081 automatically requires a “higher standard of mitigation,” the Sierra Club does not explain why the Commission’s determination was unlawful.

The gist of Sierra Club’s argument appears to be that the fully mitigate standard cannot be met because some individual desert tortoises will be harmed by the Calico Solar Project. This argument is baseless. It is important to note that “fully mitigate” cannot mean full avoidance of take of a species because this provision of the Fish and Game Code is specifically addressing when and how take of a listed species can be authorized.¹⁵ Second, it should be noted that it is only the authorized “take” which must be fully mitigated, not all impacts to the listed species. Fish & Game Code § 2081(b)(2). As this Court has recently explained, the CESA statute addresses what “fully mitigate” means. *Envtl. Prot. Info. Ctr. v. Cal. Dep’t of Forestry & Fire Prot.*, 44 Cal.4th 459, 511 (2008). Fish and Game Code section 2081(b)(2) states: “The impacts of the authorized take shall be minimized and fully mitigated. The measures required to meet this obligation shall be roughly proportional in extent to the impact of the authorized taking on the species.” Therefore, contrary to Sierra Club’s

¹⁵ Under CESA certain species, designated as fully protected species, are given heightened protection and the take of such species is categorically precluded. See Fish & Game Code § 5050. The desert tortoise is not one of these species.

suggestion, CESA does not require an unidentified “higher standard” of mitigation, but rather roughly proportional mitigation for the take of a desert tortoise. *See* Fish & Game Code § 2081(b)(2); *Envtl. Prot. Info. Ctr.*, 44 Cal.4th at 511. Evaluating whether there is “rough proportionality” in mitigation requires an agency to exercise its judgment and make a factual determination based on substantial evidence. *See Env'tl. Council of Sacramento v. City of Sacramento*, 142 Cal.App.4th 1018, 1029 (2006). As the court of appeal pointed out in *Environmental Council of Sacramento*, where mitigation occurs “in a variety of ways,” it is improper to “parse but one component from [an] integrated [CESA] mitigation program, ignoring the broader context, the broader findings, and the broader evidence relied on by the agencies.” *Id.* at 1039.

The Commission made a factual determination regarding the combined mitigation based on substantial evidence, and thus complied with CESA. 1 SC App. 280-281 (Decision). Sierra Club’s disagreement with these factual findings does not present an issue for judicial review.

D. The Commission Regularly Pursued its Authority in Analyzing Cumulative Impacts.

1. The Commission analyzed cumulative impacts of the Calico Solar Project combined with other past, present and future projects.

The Commission addressed the cumulative impacts of the Calico Solar Project combined with other past, present and future projects,

including large-scale solar projects in the Mojave Desert. *See* 1 SC App. 114, 116, 127, 141, 153-156, 175-176, 178, 185-194, 209-210, 226-228, 281-284, 293, 421-428, 434, 471, 530-532, 534, 557-559, 577-581, 597-599; 2 SC App. 613, 615, 620-621, 624, 652-654, 656 (Decision). The Commission then made the factual determination that the Calico Solar Project would make a cumulatively considerable contribution to significant cumulative impacts to cultural, recreation and wilderness, and visual resources. 2 SC App. 660-665 (Decision).

2. The Commission did not need to wait until future studies were completed.

Sierra Club claims that the Commission's analysis of cumulative impacts was inadequate because the Commission approved the Calico Solar Project before "regional, coordinated efforts" to study cumulative effects on desert tortoise habitat and connectivity were completed. SC Petition at 46-48. The Commission was aware of such studies, but decided to analyze and approve the Calico Solar Project without waiting until all studies were completed. *See, e.g.*, 2 SC App. 787-788 (SSA); 3 SC App. 1587, 1609-1610 (Aug. 4 Transcript). The Supplemental Staff Assessment even notes that the planning agreement guiding preparation of one of these studies, the Desert Renewable Energy Conservation Plan, explicitly provides that agencies "will work to ensure that permitting for interim projects . . . not be unduly delayed during preparation of the DRECP." 2 SC App. 788 (SSA).

By making a prompt decision on the Calico Solar Project application, therefore, the Commission acted in accordance with the intent of the DRECP.

CEQA empowers lead agencies to decide to approve a project, rather than wait until further studies are completed. "Adoption of an EIR need not be interminably delayed to include results of works in progress which might shed some additional light on the subject." *Towards Responsibility in Planning v. City Council*, 200 Cal.App.3d 671, 681 (1988) (rejecting argument that a public agency should have waited to adopt an EIR until a five-year water quality study, then in its third year, was complete); *see also San Francisco Ecology Ctr. v. City & County of San Francisco*, 48 Cal.App.3d 584, 594 n.8 (1975) ("Preparation of an EIR need not be interminably delayed to include all potential comments or results of works in progress which might shed some additional light on the subject of the impact statement. . . . The courts should look for adequacy and completeness in an impact statement, not perfection." (internal quotation marks omitted)).

The Calico Solar Project's environmental documents provided information on cumulative impacts "to the extent it was available at the time," and "CEQA requires nothing more." *Towards Responsibility in Planning*, 200 Cal.App.3d at 681. Sierra Club asks for detailed consideration of several unrelated projects and their impacts on the tortoise,

but fails to acknowledge that “the sufficiency of an EIR is to be reviewed in the light of what is reasonably feasible.” CEQA Guidelines § 15151. An exhaustive analysis of unrelated projects is neither feasible nor mandated by CEQA.

3. CEQA imposes no requirement to treat all large-scale projects in the Mojave Desert as one “project” or to complete the equivalent of a program EIR for such projects.

Sierra Club is mistaken to the extent it implies, without so stating, that the Commission was required either to consider unrelated projects in the region as one “project” for CEQA purposes or to complete the equivalent of a program EIR before approving the Calico Solar Project. Only under limited circumstances must separate activities be considered as one “project” and reviewed together under CEQA. *See Sierra Club v. West Side Irrigation Dist.*, 128 Cal.App.4th 690, 698 (2005) (identifying these situations). A single environmental review is not required for “two separate projects independent of each other.” *Id.* at 699 (“[W]here the second activity is independent of, and not a contemplated future part of, the first activity, the two activities may be reviewed separately, even though they may be similar in nature.”). This is well-settled law. In *Christward Ministry v. County of San Diego*, 13 Cal.App.4th 31 (1993), for instance, the court considered whether an EIR for a proposed expansion of a public landfill should have included in its project description other proposed solid

waste landfills and projects in the region. The court rejected this contention, concluding that the other projects were independent of the main proposed landfill, were not a reasonably foreseeable consequence of the main project, and did not combine with the proposed landfill to form a contemplated larger project within the area. *Id.* at 41-46. As the Commission recognized here, the Calico Solar Project is entirely independent of other large-scale solar projects and therefore does not demand joint environmental review.

Similarly, the Commission did not need to complete its equivalent of a program EIR before approving the Calico Solar Project. The CEQA Guidelines provide that a program EIR is not required “[w]here one project is one of several similar projects of a public agency, but is not deemed a part of a larger undertaking or a larger project.” CEQA Guidelines § 15165; *see also* 1 Kostka & Zischke, Practice Under the California Environmental Quality Act § 10.20 (2d ed. 2010) (same). So long as the Commission properly analyzed cumulative impacts, as it did here, it was entitled to complete a free-standing environmental review for the Calico Solar Project.

E. The Commission Regularly Pursued its Authority in Adopting Mojave Fringe-Toed Lizard Mitigation Measures.

The Mojave fringe-toed lizard is found primarily in San Bernardino and Riverside Counties, but is also found to the north in Inyo County and

historically to the west in eastern Los Angeles County. 1 SC App. 258 (Decision). Although not listed under either the federal ESA or CESA, it is a BLM sensitive species and a California Species of Special Concern. *Id.* at 242.

Surveys of the Calico Solar Project site showed that the lizard was present on approximately 16.9 acres of the site comprising a partially stabilized dune complex. But Commission staff did not merely rely on this evidence of the lizard's presence. Rather, it conducted its own independent, expert analysis of the Calico Solar Project site, which resulted in detection of four Mojave fringe-toed lizards over a greater area. *Id.* at 810-11. On the basis of this additional evidence, Commission staff concluded that there are 21.4 acres of breeding habitat and another 143.3 acres of foraging and cover habitat surrounding the breeding area. *Id.* at 978. Accordingly, Commission staff concluded that 164.7 acres of suitable lizard habitat on the 4,613-acre Project site that would be impacted by the Project. *Id.*

- 1. There is substantial evidence to support the Commission's conclusion that compensatory mitigation for lizard impacts is feasible and effective.**

Commission staff proposed Condition of Certification BIO-13, "which requires the acquisition of suitable dune/sand habitat at a 3:1 ratio to mitigate loss of suitable breeding habitat and at a 1:1 ratio for

surrounding habitat suitable for foraging and cover.” 2 SC App. 779 (SSA). Application of these ratios results in a requirement that 207.5 acres of suitable off-site habitat be acquired, protected, and maintained. 1 SC App. 275 (Decision). Commission staff consulted with CDFG, BLM, and USFWS regarding the compensatory mitigation plan and all agencies agreed that preservation of appropriate mitigation lands off-site would provide a viable approach to mitigating lizard impacts. 2 SC App. 843-845 (SSA).

For all of the same reasons set forth in Section IV.B.1 above, substantial evidence supports the Commission’s determination the compensatory mitigation strategy for the lizard would be appropriate. *See also* 2 SC App. 940 (SSA) (Commission staff addressing availability of suitable compensatory habitat); 4 SC App. 1865-1866 (Aug. 5 Transcript) (“certainly there is suitable habitat for Mojave fringe-toed lizards east and west of the site . . .”).

2. **There is substantial evidence to support the Commission’s factual determination that the cumulative impact to east-west migration of lizards would be mitigated to a less than significant level by a new movement corridor.**

Sierra Club again selectively ignores important portions of the record when it asserts that there is no evidence to support the Commission’s conclusion that cumulative impacts to the Mojave fringe-toed lizard would be reduced to less than significant levels through mitigation.

Calico originally sought to install solar facilities throughout the Calico Solar Project site, including near the BNSF railroad right-of-way. Consequently, the SSA stated that cumulative impacts to the existing wildlife transportation corridor between the Pisgah Crater ACEC in the east and the sandy washes and deposits in the upper Mojave River watershed to the west would be significant and unavoidable. 2 SC App. 845, 917 (SSA). The Commission's biological expert had been specifically concerned with preserving the Mojave fringe-toad lizards' ability to move west from the Pisgah ACEC to reproduce and disperse. 4 SC App. 1866 (Aug. 4 Transcript). Subsequently, in response to BNSF Railway and the Commission staff's comments, the Commission adopted a new mitigation measure, TRANS-7, which required the applicant to provide a 223 foot setback from the BNSF right-of-way or any public roadway. 2 CSP App. 250, 256, 261, 275, (Supplemental Staff Assessment, Part II (SSA Prt II)).

The Commission's biological expert stated that the setback on each side of the BNSF tracks would be enough habitat to allow gene flow to occur between the populations to the east and to the west. 5 SC App. 2694, 2724-2725 (Sept. 20 Transcript). While there was some discussion that detention basins could be placed in the BNSF right-of-way north of the tracks, this proposal was quickly dropped when Commission staff confirmed that the corridor plays an important role in mitigating cumulatively significant impacts. 5 SC App. 2805-2806, 2832 (Oct. 22

Transcript). Because the Commission retains authority over the size, location and design of the detention basins (1 SC App. 447-454 (Decision)), and has designated the corridor created by the setback as a mitigation area, detention basins could not be built in the setback area without the Calico Solar Project owner retuning to the Commission and the Commission considering the effect on the Mojave fringe-toed lizards. 5 SC App. 2832 (Oct. 22 Transcript).

As a result of the inclusion of a setback from the BNSF right-of-way, Commission staff concluded that the area both north and south of the railroad would provide a suitable movement corridor and that the impacts to Mojave fringe-toed lizard would therefore not be cumulatively considerable. 3 SC App. 1271-72 (SSA Addendum). The Commission considered this evidence and agreed. 1 SC App. 283 (Decision). The Commission's conclusion was supported by substantial evidence. *Id.*; 5 SC App. 2693-94 (Sept. 20 Transcript), 5 SC App. 2806 (Oct. 22 Transcript).

The Commission considered the evidence submitted by Sierra Club¹⁶ as well as the evidence submitted by California Unions (5 SC App. 2765 (Oct. 22 Transcript)) when it concluded that the Calico Solar Project would not cause cumulative impacts to the Mojave fringe-toed lizard. Sierra Club

¹⁶ Sierra Club's attorney cross-examination. 5 SC App. 2723-25 (Sept. 20 Transcript); 5 SC App. 2789, 2865 (Oct. 22 Transcript).

may disagree that a setback corridor is adequate to address the cumulative impact caused by loss of a wildlife transportation corridor, but such a factual dispute is not grounds for judicial review or reversal of the Commission's decision.

F. The Commission Regularly Pursued its Authority in Adopting White-Margined Beardtongue Mitigation Measures.

White-margined beardtongue is a perennial herb that flowers in the spring between March and May and dies back to the ground in the summer. 2 SC App. 805 (SSA). It is not listed as endangered, threatened or rare under the California Endangered Species Act, Fish & Game Code §§ 2050 *et. seq.*, nor is it listed under the federal Endangered Species Act, 16 U.S.C. §§ 1531-1544. Nonetheless, Commission staff concluded that white-margined beardtongue meets criteria for consideration as rare, threatened or endangered under CEQA. 2 SC App. 1248 (SSA).

Project impacts to white-margined beardtongue would consist of isolation of some plants and their habitat within the surrounding solar facility during Project development and operation. In addition, indirect project impacts to this species could result on-site or off-site from facility operations. 1 SC App. at 271 (Decision).

1. The Commission mitigated impacts to the white-margined beardtongue as required by CEQA.

- a. The commission weighed evidence and applied its expert judgment in devising**

mitigation to reduce impacts to white-margined beardtongue.

Commission staff evaluated several approaches to mitigating impacts to white-margined beardtongue and other special-status plants, including acquisition and protection of special-status plant populations on private lands, protection and enhancement of populations on public lands and seed collection, translocation or transplantation of special status plants. 2 SC App. 835 (SSA).

After weighing these alternatives, Commission staff recommended on-site protection for all occupied habitat of white-margined beardtongue as described in staff's proposed Condition of Certification BIO-12. 2 SC App. 837 (SSA); 3 SC App. 1789 (Aug. 5 Transcript). Condition BIO-12 requires the applicant to establish "Environmentally Sensitive Areas" of at least 250-feet in width surrounding all occurrences of the plant within which no construction or operational activities are allowed. 2 SC App. 961 (SSA).

Commission staff concluded that "configuration of the project footprint to avoid areas that support white-margined beardtongue, as analyzed in th[e] SSA, would minimize direct impacts to special-status plant species" and would reduce both direct and cumulative impacts to less than significant levels. 2 SC App. 837 (SSA). Staff concluded that this avoidance strategy "is feasible for white-margined beardtongue because

only a few plants are known within the project site and the proposed project design would provide the recommended avoidance areas.” *Id.*

- b. There is substantial evidence to support the Commission’s conclusion that on-site avoidance would mitigate impacts to the white-margined beardtongue to less than significant levels.**

As it does before this Court, Sierra Club questioned during the Commission proceedings both the effectiveness of the 250-foot buffer areas to mitigate impacts and the completeness of the SSA’s identification of beardtongue occurrences. Sierra Club Petition at 52-53; 4 SC App. 1908 (Aug. 5 Transcript); 6 SC App. 3238-3240 (Andre Testimony). There is substantial evidence in the record to support the Commission’s conclusions regarding mitigation and impacts.

Commission staff determined that the 250-foot buffer surrounding each occurrence of the white-margined beardtongue would give the plants the best opportunity to persist in the long term. 4 SC App. 1911 (Aug. 5 Transcript). Commission staff testified that the 250-foot buffer area was based on an analysis by a group called the Conservation Biology Institute, which was carried out for another rare plant elsewhere in Southern California but which represented the best and most thorough overall review of these kinds of effects. Staff also reviewed data relating to fragmentation to rare plants. *Id.* Staff concluded based on this careful review that its

recommended 250-foot buffer was the best estimate of the appropriate distance for the beardtongue. *Id.*

Condition BIO-12 also includes a host of continuous performance monitoring and adaptive management features to ensure effectiveness of the mitigation. 1 SC App. 315-320 (Decision). BIO-13 requires preparation of an avoidance and minimization plan that includes annual monitoring for the life of the Project of avoided occurrences of the beardtongue, propagation research, and development of remedial measures if specific success standards are not met. 1 SC App. 318 (Decision). The plan is also required to monitor weed abundance and Project effects upon occupied areas to the east of the Project site and to include adaptive management strategies and control methods to address the results of such monitoring. 1 SC App. 319-20 (Decision). Sierra Club fails to address these elements of beardtongue mitigation before asserting that mitigation is ineffective.

In support of its claim that the Commission did not identify all instances of the beardtongue, Sierra Club incorrectly states that the Commission based its beardtongue impact conclusions on a single survey. SC Petition at 52. In fact, Commission staff also relied upon rare plant information submitted by Calico and on staff's own reconnaissance level survey in May 2010. 1 SC App. 259 (Decision). The Commission's biological expert acknowledged the limitations of plant surveys, but concluded that because the "vast bulk of California occurrences are off-site

to the east and this project site doesn't . . . fall in the middle of that or interrupt the potential for pollen or seed to move among the bulk of these off-site areas," impacts would be less than significant following mitigation. 4 SC App. 1911 (Aug. 5 Transcript).

Based on its weighing of this evidence, the Commission relied on its expert judgment to conclude that mitigation would reduce impacts to the white-margined beardtongue to less than significant levels. Sierra Club may disagree that avoidance of white-margined beardtongue is adequate to address the potential impact to this plant species, but such a factual dispute is not grounds for judicial review or reversal of the Commission's decision. Pub. Res. Code § 25531(b); *Laurel Heights*, 47 Cal.3d at 393, 407, 409.

G. The Commission Regularly Pursued its Authority in Adopting Golden Eagle Mitigation Measures.

Golden eagles need open terrain for hunting, and their habitat typically includes rolling foothills, mountain areas, and deserts. 2 SC App. 813 (SSA). The eagles do not nest on the Calico Solar Project site, though helicopter surveys detected one active nest that contained an incubating adult golden eagle approximately 3.5 miles east of the Calico Solar Project area. 1 SC App. 250 (Decision). Golden eagles have been observed flying over the Calico Solar Project site. *Id.* The golden eagle is a BLM sensitive species, a state fully protected species, and a California Department of Fish and Game watch list species. *Id.* at 242.

1. The Commission described potential impacts of the Project on the golden eagle and found a cumulatively significant impact on habitat loss.

The Commission considered potential impacts of the Calico Solar Project on the golden eagle. The Commission heard testimony by the Fish and Wildlife Service and Commission staff on impacts to the golden eagle and determined that the overall loss of foraging habitat for golden eagles within the region would be a cumulatively significant impact before mitigation. 1 SC App. 282 (Decision); 2 SC App. 779-780, 862-864, 912-914 (SSA); 4 SC App. 1862-1863 (Aug. 5 Transcript). The Commission also weighed evidence on the possibility that golden eagles might collide with energy generation equipment on the Calico Solar Project site. *See* 2 SC App. 780, 863-864 (SSA); 4 SC App. 1868; 5 SC App. 2717. Accordingly, there is no merit to Sierra Club's argument that the Commission failed to investigate and disclose the Calico Solar Project's full impacts on the golden eagle. SC Petition at 54.

2. The Commission made a factual determination that the cumulative impact to golden eagle habitat loss would be mitigated to a less-than-significant level.

The Commission adopted three conditions of certification that specifically address golden eagle impacts. The Commission found that implementation of BIO-17, the compensatory mitigation plan for desert tortoise, would offset the loss of foraging habitat for golden eagles by preserving mitigation lands with similar habitat. 1 SC App. 282 (Decision).

The Commission also adopted BIO-20, which requires focused golden eagle nest surveys within one mile of the Calico Solar Project boundaries during construction. If an occupied nest is detected, the Calico Solar Project owner must establish a disturbance-free, half-mile buffer around the nest. *Id.* at 282, 368-369. Finally, the Commission adopted BIO-22, a mitigation measure that requires the Project owner to prepare and implement an Avian and Bat Protection Plan to monitor bird and bat collisions with energy facility features. *Id.* at 378-379. Among other components, the Plan must feature adaptive management strategies, including the placement of bird flight diverters, aerial markers, or other strategies to minimize collisions. *Id.* at 378.¹⁷

Sierra Club dismisses these conditions of certification as deferred mitigation that merely requires a survey and preparation of “some type of a plan.” SC Petition at 54. This description fails to recognize just how specific BIO-20 and BIO-22 are. *See* 1 SC App. 368-369, 378-379 (Decision). BIO-20 requires that a golden eagle monitoring and management plan contain specified “adaptive management actions,” while

¹⁷ In addition to these focused mitigation measures, the Commission adopted numerous conditions of certification directed generally at protecting biological resources (BIO-1 through BIO-9). One of these conditions, BIO-6, establishes a Worker Environmental Awareness Program that places a special emphasis in trainings and printed materials on golden eagles, among other species. 1 SC App. 297-299 (Decision).

BIO-22 details certain “adaptive management strategies” that will minimize collisions with solar generation technology. 1 SC App. 369, 378 (Decision). As discussed previously, a mitigation measure need not be fully detailed before its approval. *See Defend the Bay v. City of Irvine*, 119 Cal.App.4th 1261, 1275 (2004). The Commission did not improperly defer mitigation for impacts to the golden eagle.

Rather, the Commission properly weighed evidence on the sufficiency of mitigation and made a factual determination that the robust mitigation it required would reduce impacts to golden eagles to a less than significant level. 1 SC App. 282 (Decision); *see also id.* at 268 (finding that Condition of Certification BIO-20 mitigates potential impacts to golden eagles to insignificant levels and that BIO-22 mitigates potential impacts to birds from collision with project equipment to insignificant levels). While Sierra Club may disagree that compensatory mitigation for loss of foraging habitat, protection of active nests, and preparation of an avian protection plan are adequate to address the potential impacts to golden eagles, such a factual dispute is not grounds for judicial review or reversal of the Commission’s decision.

H. The Commission Regularly Pursued its Authority in Adopting Bighorn Sheep Mitigation Measures.

Nelson's bighorn sheep are a BLM Sensitive Species.¹⁸ 1 SC App. 243 (Decision). Typically bighorn sheep forage within one mile of mountain foothills where adequate escape habitat occurs. 2 SC App. 868 (SSA). During the surveys of the Calico Solar Project site, no Nelson's bighorn sheep were observed. *Id.* Helicopter surveys observed 62 bighorn sheep within 10 miles of the Project site, and traces of bighorn sheep were found north of the Project site, closer to the Cady Mountains. *Id.*

1. The Commission described potential impacts of the Calico Solar Project upon Nelson's bighorn sheep.

The Commission recognized that bighorn sheep may use portions of the Calico Solar Project site for foraging and possibly inter-mountain movement to some degree. 1 SC App. 253 (Decision). The Commission found that noise and human presence are likely to adversely affect bighorn sheep and therefore, the sheep are expected to avoid the lower foothills during construction of the Project. *Id.* at 274.

Sierra Club claims the Commission's staff analysis omitted information on the regional movement of bighorn sheep along the base of

¹⁸ Limited sport hunting of Nelson's bighorn sheep is authorized by the Fish and Game Commission. Fish & Game Code § 4902; 5 SC App. 2871 (Oct. 22 Transcript).

the Cady Mountains, which prevented the Commission from making informed conclusions. SC Petition at 55. This is incorrect. Commission staff and others testified about the east-west and north-south movement of bighorn sheep. 3 SC 1789-91 (Aug. 5 Transcript); 4 SC App. 1847-48, 1888-89, 1900 (Aug. 5 Transcript).

Further, in September 2010, the Commission's staff expert testified that the staff took into consideration the testimony of Dr. Bleich, intervenor California Unions' expert witness, which included the testimony quoted in Sierra Club's petition, when staff prepared the SSA Addendum. 5 SC App. 2719 (Sept. 20 Transcript).

2. The Commission made a factual determination that reductions in the Project footprint reduced the impacts to the wildlife movement corridor to less than significant.

The 8,230 acre site originally proposed by Calico was reduced to 6,215 acres in early summer 2010, by pulling the northern boundary of the Calico Solar Project back from the foothills of the Cady Mountains. 1 SC App. 234, 257 (Decision). Commission staff determined that the reduction in the Project footprint would allow for the persistence of the large linkage area where passage to dwelling species could continue to occur post-development. 3 SC App. 1791 (Aug. 5 Transcript).

In September 2010, Calico again reduced the Project footprint and excluded an additional 1,601 acres north of the Calico Solar Project

boundary. 3 SC App. 1226 (SSA Addendum). BLM's witness testified that USFWS', CDFG's, the Commission's and BLM's main goal in reducing the Calico Solar Project to 4,614 acres was to address the impacts to bighorn sheep, as well as desert tortoise. 5 SC App. 2694 (Sept. 20 Transcript).

The Commission found that the reduced Calico Solar Project would not contribute significantly to the loss of bighorn sheep habitat, as most occupied habitat for Nelson's bighorn sheep within the Cady Mountains does not overlap the northern portion of the reduced Project's development area. 1 SC App. 283 (Decision). The Project footprint would avoid large open areas located on the bajada below the Cady Mountains that could provide connectivity to adjacent mountain ranges. *Id.* The Commission therefore concluded that impacts of the Project on bighorn sheep would not be cumulatively considerable. *Id.* Sierra Club cannot contend the Commission's record is devoid of evidence supporting these conclusions.

3. The Commission weighed factual evidence, applied its judgment and expertise and adopted mitigation to reduce impacts to bighorn sheep to less than significant levels.

Based upon its expertise, the Commission staff proposed monitoring, avoidance and minimization measures (BIO-1 through BIO-9) that include worker training, implementation of Best Management Practices and biological monitoring. 2 SC App. 820, 870 (SSA). BIO-23 requires daily

scans of the Calico Solar Project area and surrounding hills and bajadas to search for bighorn sheep. 2 SC App. 1006-07 (SSA). If bighorn sheep approach within 500 feet of an active construction site, all construction activity must cease until the sheep moves away. *Id.* If necessary, the CPM may modify this 500 foot buffer with the approval of BLM and CDFG. *Id.* The Commission agreed with staff's recommendations, found that these conditions mitigate potential impacts to sheep to insignificant levels and adopted them. 1 SC App. 268, 292 (Decision).

At the August 5th evidentiary hearing, Dr. Bleich (California Unions' witness) raised a concern that that cessation of construction, as required in BIO-23, could be worse than no mitigation from the standpoint that large mammals living in highly predictable environments adapt pretty well and the starting and cessation of construction activities may provide some measure of disturbance to bighorn sheep. 4 SC App. 1883-84 (Aug. 5 Transcript). Later at the same hearing, Hearing Officer Kramer asked the parties if anyone else had anything else to say about Dr. Bleich's suggestion. 4 SC App. 1931 (Aug. 5 Transcript). Calico stated it would not object to the removal of the condition. *Id.* (Aug. 5 Transcript). Sierra Club's attorney specifically asked that the condition *not* be deleted and reserved the right to comment later on removing the measure. *Id.* at 1932. After the hearing, Sierra Club said nothing more about deleting this condition. Accordingly, Sierra Club has waived its claims.

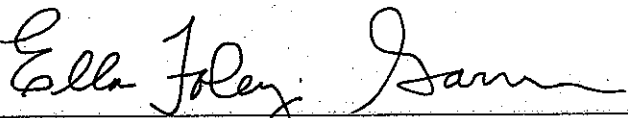
In any event, the Commission considered the evidence submitted by Sierra Club as well as the evidence submitted by others when it found that due to the reduction in the size of the Project footprint and adopted mitigation, the impacts to Nelson's bighorn sheep would be less than significant. Sierra Club may disagree that mitigation measures are adequate to address the potential impact to bighorn sheep, but such a factual dispute is not grounds for judicial review or reversal of the Commission's decision.

V. CONCLUSION

For the foregoing reasons, Sierra Club's Petition for Writ of Mandate should be denied.

DATED: January 10, 2011

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By: 

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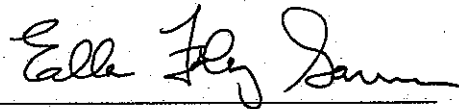
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Dated: January 10, 2011

Bingham McCutchen LLP

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PROOF OF SERVICE

I am over 18 years of age, not a party to this action and employed in the County of San Francisco, California at Three Embarcadero Center, San Francisco, California 94111-4067. I am readily familiar with the practice of this office for collection and processing of correspondence for next business day delivery by FedEx, and correspondence is deposited with FedEx that same day in the ordinary course of business.

Today I served the attached:

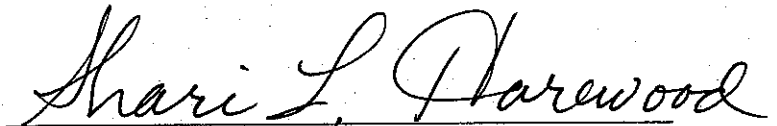
PRELIMINARY OPPOSITION TO PETITION FOR WRIT
OF MANDATE

REAL PARTY IN INTEREST'S APPENDIX VOL. 1 AND
2

by causing a true and correct copy of the above to be delivered by FedEx from San Francisco, California in sealed envelope(s) with all fees prepaid, addressed as follows:

Please see attached service list.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on January 10, 2011.



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