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November 15, 2022

Via Online Portal

California Energy Commission
Docket No. 22-BUSMTG-01
715 P Street
Sacramento, CA 95814

**Re: Agenda Item 7 – Comments on Proposed Resolution Adopting
CEQA Findings and Approving Amendment 1 to Grant Agreement
EPC-19-018 with Hell's Kitchen Geothermal LLC**

Dear Chair Hochschild and Honorable Commissioners:

We are writing on behalf of Safe Fuel and Energy Resources California (“SAFER CA”) to comment on Agenda #7 of the November 16, 2022 California Energy Commission (“Commission”) Business Meeting, concerning the Proposed resolution adopting CEQA findings and approving Amendment 1 to grant Agreement EPC-19-018 (“Project”) with Hell's Kitchen Geothermal LLC (“Applicant”).

The Project’s proposed resolution for Amendment 1 approves Phase II of the Scope of Work (SOW), which authorizes the expenditure of funds for Phase II. Phase II of the Project includes procuring the required materials and equipment and constructing, commissioning, and operating the pre-treatment process at the pilot facility. Additionally, the Project will collect and evaluate data to determine the exact chemical composition of geothermal brine at the site, gather scaling factors to assist in the design of larger-scale plants, and provide techno-economic assessment for commercial-scale operations. This amendment includes minor changes to the SOW (not to the project’s purpose), reflecting the approval of this amendment.

As discussed below, the Commission’s proposed actions are premature, would support a project that is inconsistent with the draft findings and recommendations of the Lithium Valley Commission, and would violate CEQA. The Staff Report contains no evidence demonstrating that the Project is evaluating and mitigating the Project’s potentially significant environmental and public health impacts. There

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is also no evidence that the Project is providing High Road Jobs consistent with the revised draft findings and recommendations of the Lithium Valley Commission. The Project is therefore inconsistent with the direction provide by the Lithium Valley Commission.

With regard to CEQA, the Commission proposes to adopt a resolution finding that the proposed Project presents no new significant or substantially more severe environmental impacts beyond those already considered in previous environmental documents. These include 1) Imperial County's ("County") 2015 Final Programmatic Environmental Impact Report for the Renewable Energy & Transmission Element (SCH#2014071062) ("PEIR"); 2) Imperial County's 2017 Addendum to the Final Programmatic Environmental Impact Report (which focuses on the Hell's Kitchen Geothermal Exploratory Project) ("Addendum"); and 3) Imperial County's 2022 Notice of Exemption ("NOE") for research and development mineral extraction pilot work. The proposed CEQA findings are legally inadequate and cannot support approval of the Project because none of the County's prior CEQA documents analyzed the current Project, and the Project has potentially significant impacts which require analysis and mitigation in a project-level EIR.

The Commission cannot rely on the PEIR to approve this Project because the PEIR's broad, program-level coverage of all renewable energy development in Imperial County does not analyze the Project's issues, and explicitly calls for subsequent environmental review. The Commission also cannot rely on the 2017 Addendum because it only analyzes impacts relating to well exploration and drilling, and explicitly states that it does not analyze subsequent renewable energy facilities. The Commission cannot rely on the County's February 2022 NOE because the California Environmental Quality Act ("CEQA") prohibits tiering off of an NOE, and requires the finding that a project is exempt from CEQA to be included as an item of business on the Business Meeting agenda.

The Commission must prepare a project-level EIR to analyze and mitigate the Project's potentially significant impacts. SAFER CA respectfully requests that the Commission remand the Project to staff to prepare an EIR before the Project can be considered for future approval.

I. STATEMENT OF INTEREST

SAFER CA advocates for safe processes at California industrial facilities to protect the health, safety, standard of life and economic interests of its members. SAFER CA supports sustainable development in California that complies with environmental and public health laws. Its members have an interest in enforcing environmental and air quality protection laws which require the disclosure of potential environmental impacts of, and ensure safe operations and processes for, California's industrial, chemical, and mineral processing, storage, and extraction projects. Failure to adequately address the environmental impacts of industrial processes poses a substantial threat to the environment, worker health, surrounding communities and the local economy.

SAFER CA supports the sustainable development of mineral resources in California. However, poorly planned industrial projects can adversely impact the economic wellbeing of people who perform construction and maintenance work in mineral extraction and processing facilities, and the surrounding communities. Plant and facility shutdowns caused by accidental toxic releases and infrastructure breakdowns have caused prolonged work stoppages. Such nuisance conditions and catastrophic events impact local communities and the natural environment, and can jeopardize future jobs by making it more difficult and more expensive for businesses to locate and people to live in the area. The participants in SAFER CA are concerned about projects, like this one, that present serious environmental risks and public service infrastructure demands without providing countervailing employment and economic benefits to local workers and communities.

The members represented by the participants in SAFER CA live, work, recreate and raise their families in Imperial County. Accordingly, they would be directly affected by the Project's adverse environmental impacts. The members of SAFER CA's participating labor organizations may also work on the Project itself. They will, therefore, be first in line to be exposed to any hazardous materials, air contaminants, and other health and safety hazards, that exist onsite.

I. THE PROJECT IS INCONSISTENT WITH THE DRAFT FINDINGS OF THE LITHIUM VALLEY COMMISSION

The proposed grant amendment would support development and operation of a project that is inconsistent with the draft findings and recommendations of the Lithium Valley Commission.

The Lithium Valley Commission was convened by the Commission pursuant to Assembly Bill 1657, and is charged with reviewing, investigating, and analyzing the impacts of lithium extraction and use in California.¹ State law required the Lithium Valley Commission to submit, on or before October 1, 2022, a report to the Legislature documenting its findings and recommendations.² The Lithium Valley Commission's Revised Draft Report on Lithium Extraction in California explains that there remains "outstanding questions and public concern about potential for adverse impacts, environmental or otherwise, on the existing overburdened communities in the region that suffer from poor air quality and a lack of infrastructure."³ With respect to economic impacts, "[a]t Commission meetings, residents from communities in the Salton Sea region have expressed concern that they will be left behind or excluded from participating in educational and employment opportunities and economic growth that results from lithium development. Community representatives also shared interest in ensuring concerns that training programs result in real jobs for local residents."⁴

During the Blue Ribbon Commission meetings, the developers committed to adequate review of public health and environmental impacts and "all conveyed their commitment to supporting development of a local workforce and emphasized that the success of their facilities depends on building and maintaining a local workforce."⁵ The Revised Draft Report also states that the project developers: "[a]re working with labor unions to establish project labor agreements and apprenticeship programs." Unfortunately, there is no evidence of such collaboration on the workforce and economic impacts and, as explained herein, the County did not adequately review the Project's potentially significant environmental and public health impacts.

In January 2022, Governor Newsom's proposed 2022–2023 state budget, the California Blueprint, explained that the state plans to develop lithium "to improve the state's ability to store renewable energy while creating high-paying jobs and

¹ See <https://www.energy.ca.gov/data-reports/california-power-generation-and-power-sources/geothermal-energy/lithium-valley>.

² *Id.*

³ Lithium Valley Commission, Revised Draft Report for Consideration by the Blue Ribbon Commission on Lithium Extraction in California, October 28, 2022 (TN# 247103), Docket 20-LITHIUM-01, p. 14.

⁴ *Id.*, pg. 67.

⁵ *Id.*, pg. 66.

generating benefits for surrounding communities and all Californians.”⁶ The Lithium Valley Commission’s Revised Draft Report on Lithium Extraction in California explains that, “while there is potential for an economic transformation of the Salton Sea region, the experiences of the residents and Tribes in these communities make some of them skeptical about Lithium Valley development efforts and whether and how such development will benefit them instead of worsening existing conditions or creating new harms.”⁷

The Lithium Valley Commission’s Revised Draft Report on Lithium Extraction in California explained:

“The record of Commission proceedings underscores that while the development of a geothermal and lithium based economic hub can lead to new industry and businesses, and individual projects may be subject to the rigorous requirements of the California Environmental Quality Act, there remains outstanding questions and public concern about potential for adverse impacts, environmental or otherwise, on the existing overburdened communities in the region that suffer from poor air quality and a lack of infrastructure.”⁸

“The Blue Ribbon Commission learned a great deal about ways that the local communities wish to be meaningfully included in the permitting and consideration of geothermal power plants, lithium recovery projects, and the development of related manufacturing projects in the region. The Commission also heard consistent requests that state and local government agencies acknowledge historic, systemic, and disproportionate environmental harms -- in forms of structural, procedural, distributional, and generational inequity -- caused to and experienced by low-income communities and communities of color. It also heard requests to go beyond standard procedures and instead proactively work to increase community voice and address and decrease potential negative impacts to the communities and region.”⁹

⁶ Lithium Valley Commission, Revised Draft Report for Consideration by the Blue Ribbon Commission on Lithium Extraction in California, October 28, 2022 (TN# 247103), Docket 20-LITHIUM-01, p. 14, citing State of California. 2022. 2022–2023 state budget. <https://www.ebudget.ca.gov/2022-23/pdf/Enacted/BudgetSummary/FullBudgetSummary.pdf>, p. 5, 72.

⁷ Id., p. 16.

⁸ Lithium Valley Commission, Revised Draft Report for Consideration by the Blue Ribbon Commission on Lithium Extraction in California, October 28, 2022 (TN# 247103), Docket 20-LITHIUM-01, pp. 4-5.

⁹ Id., p. 37.

The Blue Ribbon Commission noted that several issues raised by community members included (but were not limited to):

- Pathways for community influence in project approval, specific to new DLE facilities and broader investment and development in the region.
- Consideration of the existing public health issues for residents and workers.
- Consideration of existing environmental issues, such as the shrinking of the Salton Sea and reductions in the water supply, as identified by IID, when evaluating the impacts of new development.
- Consideration of the communities' existing workforce and skills, and appropriate training opportunity to ensure that anticipated jobs benefit residents.
- Lack of information and skepticism of the oversight of potential impacts to public health, water, air, and land (including potential earthquakes).
- Lack of existing infrastructure in the region (roads, sidewalks, broadband, housing), and the need for local infrastructure investment to happen in advance of, or concurrent with, industrial and economic development in the region.
- Requests for information on potential worst-case scenarios (such as a burst geothermal brine pipe) and emergency response plans to limit negative impacts.
- Concerns about access to education, workforce training, and career opportunities.
- Need for community cobenefit agreements to ensure the community rises along with the industry, as well as oversight and accountability to ensure funding is allocated to local priorities for community-grounded projects...¹⁰

As explained in the Revised Draft Report, “[t]he Blue Ribbon Commission heard from workforce development, labor, and academic professionals that

¹⁰ Id., pp. 37-38.

coordination, commitment, and investment are needed to support development of a "High Road Jobs and Careers." As Carol Zabin, Ph.D., Director of the Green Economy Program at the Center for Labor Research and Education at UC Berkeley explained, "a High Road Job" is "one that provides job quality, wages sufficient to support a family, high health and safety standards, career pathways, and worker protections. Also, the Blue Ribbon Commission heard that creating High Road Jobs for local residents will require sustained communication with local community organizations, labor groups, academic institutions, and public agencies."¹¹

Based on this evidence, "[t]he Blue Ribbon Commission finds it is imperative that new geothermal lithium recovery and related projects prioritize development and hiring of a local workforce, provide resources to support development of necessary training and educational opportunities, and commit to requirements for strong workforce and labor standards that produce high-quality jobs and careers."¹² Accordingly, the Blue Ribbon Commission proposed the following recommendation regarding the potential economic and community impacts from construction and operation of lithium facilities:

"Require or establish incentives for developers to enter into, and continue entering into, project labor agreements, implement High Road principles, and prioritize local hiring."¹³

Here, there is no evidence that the Project is evaluating and mitigating the potentially significant environmental and public health impacts. There is also no evidence that the Project is providing High Road Jobs consistent with the revised draft findings and recommendations of the Lithium Valley Commission. The Commission must continue its consideration of the Project and require staff to implement changes to the Project to make it consistent with the Lithium Valley Commission's findings and recommendations.

II. CEQA LEGAL STANDARD

In an effort to ensure the long-term protection of the environment of the state, CEQA requires governmental agencies at all levels to develop standards and

¹¹ Id., p. 67.

¹² Id., p. 68.

¹³ Lithium Valley Commission, Draft of Condensed Recommendations for Consideration by the Blue Ribbon Commission on Lithium Extraction in California, October 28, 2022 (TN# 247104), Docket 20-LITHIUM-01, p. 4.

procedures necessary to protect environmental quality. To this end, CEQA requires preparation of an EIR whenever a public agency proposes to approve or to carry out a project that may have a significant effect on the environment.¹⁴ In this way, CEQA is designed to inform decision makers and the public about the potentially significant environmental impacts of a project before it is approved and implemented.¹⁵

Described as “an environmental ‘alarm bell’ whose purpose it is to alert the public and its responsible officials to environmental changes before they have reached ecological points of no return,”¹⁶ an EIR’s purpose is to “inform the public and its responsible officials of the environmental consequences of their decisions *before* they are made. Thus, the EIR protects not only the environment, but also informed self-government.”¹⁷ To fulfill this purpose, the discussion of impacts in an EIR must be detailed, complete, and “reflect a good faith effort at full disclosure.”¹⁸ Furthermore, CEQA imposes an affirmative obligation on agencies to avoid or reduce environmental harm by adopting feasible project alternatives or mitigation measures to address all potentially significant impacts identified in the agency’s CEQA analysis.¹⁹ An adequate EIR must contain facts and analysis, not just an agency’s conclusions.²⁰

CEQA “projects” include activities undertaken by public agencies that cause direct physical changes to the environment.²¹ Following preliminary review of a project to determine whether an activity is subject to CEQA, a lead agency is required to prepare an initial study to identify several key objectives, including whether to prepare an EIR or negative declaration, as well as the appropriate process to be used for analysis of the project’s environmental effects and potential

¹⁴ *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 390.

¹⁵ Cal. Code Regs., tit. 14, § 15002, subd. (a)(1) (“CEQA Guidelines”); *Berkeley Keep Jets Over the Bay v. Bd. of Port Comm’rs.* (2001) 91 Cal.App.4th 1344, 1354 (“*Berkeley Jets*”); *County of Inyo v. Yorty* (1973) 32 Cal.App.3d 795, 810.

¹⁶ *County of Inyo v. Yorty* (1973) 32 Cal.App.3d 795, 810.

¹⁷ *Citizens of Goleta Valley v. Bd. of Supervisors* (1990) 52 Cal.3d 553, 564 (internal citations omitted).

¹⁸ CEQA Guidelines, § 15151; *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 721-722.

¹⁹ Pub. Resources Code, §§ 21002-21002.1.

²⁰ *See Citizens of Goleta Valley v. Bd. of Supervisors* (1990) 52 Cal.3d 553, 568.

²¹ *County of Ventura v. City of Moorpark* (2018) 24 Cal.App.5th 377, 385.

mitigation.²² CEQA requires an agency to analyze the potential environmental impacts of its proposed actions in an EIR except in certain limited circumstances.²³

A. Tiering

In preparing an initial study, a lead agency is required to identify the appropriate level of environmental review and must determine whether a previously prepared EIR could be used with the project.²⁴ Tiering, in which the analysis of general matters contained in a broader EIR, such as one prepared for a general plan, is used to frame the general discussion of a later, narrower project and its specific issues and impacts, can be appropriate when considering large-scale planning approval or separate but related projects. A later EIR shall be required when the initial study or other analysis finds that the later project may cause significant effects on the environment that were not adequately addressed in the prior EIR.²⁵

Where a program EIR has been prepared that could apply to a later project, CEQA requires the lead agency to conduct a two-step process to examine the later project to determine whether additional environmental review is required.²⁶ First, the agency must consider whether the project will result in environmental effects that were not examined in the program EIR.²⁷ Whether a later activity is within the scope of a program EIR is a factual question that the lead agency determines based on substantial evidence in the record.²⁸ If the agency finds the activity would have environmental effects that were not examined in the program EIR, it must then prepare an initial study to determine whether to prepare an EIR or negative declaration to address those effects.²⁹

Second, if the agency determines the project is covered by the program EIR, it must then consider whether any new or more significant environmental effects could occur due to changes in circumstances or project scope, or new information

²² CEQA Guidelines, §§ 15060, 15063, subd. (c).

²³ See, e.g., Pub. Resources Code, § 21100.

²⁴ CEQA Guidelines, §§ 15060, 15063, subd. (c).

²⁵ 14 C.C.R. § 15152(f).

²⁶ See CEQA Guidelines, 15168, subd. (c); S. Kostka & M. Zischke, Practice Under the California Environmental Quality Act 2d, § 10.16 (Mar. 2018).

²⁷ CEQA Guidelines, § 15168, subd. (c)(1).

²⁸ *Id.* at (c)(2).

²⁹ CEQA Guidelines, § 15168, subd. (c)(1).

that could not have been considered in the program EIR.³⁰ More specifically, pursuant CEQA Guidelines section 15162, subsequent or supplemental environmental review is required when one or more of the following events occur:

- (1) Substantial changes are proposed in the project which will require major revisions of the previous EIR due to the involvement of new significant effects or a substantial increase in the severity of previously identified effects;
- (2) Substantial changes occur with respect to the circumstances under which the project is undertaken which will require major revisions of the previous EIR due to the involvement of new significant environmental effects or a substantial increase in the severity of previously identified significant effects; or
- (3) New information of substantial importance, which was not known and could not have been known with the exercise of reasonable diligence at the time the previous EIR was certified as complete or the negative declaration was adopted, shows any of the following:
 - (A) The project will have one or more significant effects not discussed in the previous EIR or negative declaration;
 - (B) Significant effects previously examined will be substantially more severe than shown in the previous EIR;
 - (C) Mitigation measures or alternatives previously found not to be feasible would in fact be feasible, and would substantially reduce one or more significant effects of the project, but the project proponents decline to adopt the mitigation measure or alternative; or
 - (D) Mitigation measures or alternatives which are considerably different from those analyzed in the previous EIR would substantially reduce one or more significant

³⁰ CEQA Guidelines, § 15168, subd. (c)(2).

effects on the environment, but the project proponents decline to adopt the mitigation measure or alternative.³¹

The terms “supplement” and “subsequent” are not interchangeable. “A supplement to an EIR is a document that contains additions or changes needed to make the previous EIR adequate ... In contrast ... a subsequent EIR revises the previous EIR, rather than simply supplements it.”³² With subsequent review the “revised EIR must receive the same circulation and review as the original EIR.”³³

B. Categorical Exemptions

CEQA identifies certain classes of projects which are exempt from the provisions of CEQA, called categorical exemptions.³⁴ Categorical exemptions apply to certain narrow classes of activities that generally do not have a significant effect on the environment.³⁵ Public agencies utilizing such exemptions must support their determination with substantial evidence.³⁶

CEQA exemptions are narrowly construed and “[e]xemption categories are not to be expanded beyond the reasonable scope of their statutory language.”³⁷ Erroneous reliance by a lead or responsible agency on a categorical exemption constitutes a prejudicial abuse of discretion and a violation of CEQA.³⁸ “[I]f the court perceives there was substantial evidence that the project might have an adverse impact, but the agency failed to secure preparation of an EIR, the agency’s action must be set aside because the agency abused its discretion by failing to follow the law.”³⁹ Courts have held that if “no EIR has been prepared for a nonexempt project, but substantial evidence in the record supports a fair argument that the

³¹ CEQA Guidelines, § 15162, subd. (a)(1)-(3); see also Pub. Resources Code, § 21166.

³² S. Koskte & M. Zischke, *Practice Under the Environmental Quality Act 2d.*, § 19.4, p. 19-8 (Mar. 2018).

³³ S. Koskte & M. Zischke, *Practice Under the Environmental Quality Act 2d.*, § 19.4, p. 19-8, (Mar. 2018), emphasis added; see also CEQA Guidelines, §§ 15162, 15163.

³⁴ PRC § 21084(a); 14 CCR §§ 15300, 15354.

³⁵ PRC § 21084(a); 14 CCR §§ 15300, 15354.

³⁶ PRC § 21168.5.

³⁷ *Mountain Lion Found. v. Fish & Game Com.* (1997) 16 Cal.4th 105, 125; *McQueen*, 2 Cal.App.3d at 1148.

³⁸ *Azusa*, 52 Cal.App.4th at 1192.

³⁹ *Dunn-Edwards Corp. v. Bay Area Air Quality Mgmt. Dist.* (1992) 9 Cal.App.4th 644, 656).

project may result in significant adverse impacts, the proper remedy is to order preparation of an EIR.”⁴⁰ An agency’s decision not to require an EIR can be upheld only when there is no credible evidence to the contrary.⁴¹

CEQA also contains several exceptions to categorical exemptions. In particular, a categorical exemption shall not be used for an activity where there is a reasonable possibility that the activity will have a significant effect on the environment, including (1) when “the cumulative impact of successive projects of the same type in the same place, over time is significant.”⁴² An agency may not rely on a categorical exemption if to do so would require the imposition of mitigation measures to reduce potentially significant effects.⁴³

Finally, agencies cannot tier from previous categorical exemptions.⁴⁴ Neither CEQA nor the CEQA Guidelines apply the subsequent review standards to situations in which the lead agency has approved a project on the basis that it is exempt from CEQA.⁴⁵ This construction equally applies to responsible agencies. Whereas a responsible agency may be bound by an EIR or a negative declaration prepared by the lead agency if it adequately analyzed a project,⁴⁶ CEQA and the Guidelines do not authorize responsible agencies to accept the lead agency’s determination that a project is exempt.⁴⁷

III. THE COMMISSION MUST PREPARE A NEW CEQA DOCUMENT FOR THE GRANT AMENDMENT PROJECT BECAUSE IT WAS NOT ANALYZED IN THE PRIOR COUNTY CEQA DOCUMENTS

The Commission proposes to adopt a finding that no CEQA review is required for the Project based on three prior CEQA documents prepared by Imperial County -

⁴⁰ See, e.g., *Communities for a Better Environment v. South Coast Air Quality Management Dist.* (2010) 48 Cal.4th 310, 319-320.

⁴¹ *Sierra Club v. County of Sonoma* (1992) 6 Cal.App.4th, 1307, 1318; see also *Friends of B Street v. City of Hayward* (1980) 106 Cal.App.3d 988, 1002 (“If there was substantial evidence that the proposed project might have a significant environmental impact, evidence to the contrary is not sufficient to support a decision to dispense with preparation of an EIR and adopt a negative declaration, because it could be ‘fairly argued’ that the project might have a significant environmental impact”).

⁴² 14 CCR § 15300.2(b).

⁴³ *Salmon Pro. & Watershed Network v. County of Marin* (“SPAWN”) (2004) 125 Cal.App.4th 1098, 1198-1201.

⁴⁴ *Apartment Ass’n of Greater Los Angeles v City of Los Angeles* (2001) 90 CA4th 1162, 1172.

⁴⁵ *Id.*

⁴⁶ Pub Res C §21080.1; 14 Cal Code Regs § 15231.

⁴⁷ See 14 Cal Code Regs §§ 15096, 15231.

1) Imperial County’s 2015 Final Programmatic Environmental Impact Report (“PEIR”) for the Renewable Energy & Transmission Element (“RETE”); 2) Imperial County’s 2017 Addendum to the PEIR (which focuses on the Hell’s Kitchen Geothermal Exploratory Project); and 3) Imperial County’s 2022 Notice of Exemption (“NOE”) under CEQA Guidelines Section 15306 for research and development mineral extraction pilot work.⁴⁸

As discussed below, none of these prior CEQA documents analyzed the specific Project activities proposed for Commission approval, which would authorize funding for “procuring the required materials and equipment and constructing, commissioning, and operating the pilot facility” for pre-treatment of geothermal brine to prepare the brine for lithium extraction.⁴⁹ And even if the County’s NOE may have addressed some Project-related activities, the Commission cannot rely on it to approve the Grant Amendment because responsible agencies are not authorized to tier from a lead agency’s prior CEQA exemption.⁵⁰ Nor can the Commission adopt a new CEQA exemption or any other new CEQA determination at the November 16 hearing based on the Staff Report’s CEQA analysis because the Agenda does not provide public notice of a new CEQA exemption.

CEQA “projects” include actions funded or authorized by a public agency.⁵¹ The Grant Amendment is a new project which is independently subject to CEQA. The Commission must continue this meeting to prepare a legally adequate CEQA document which analyzes and mitigates the potentially significant impacts of funding and constructing a lithium pilot plant.

A. The Project Was Not Analyzed in the 2015 Final PEIR for The RETE Update

In 2015, the County updated the 2006 Geothermal/Alternative Energy and Transmission Element and associated implementing ordinances. While the 2006 Element primarily focused on geothermal renewable energy resources, the Element update presented a broader focus that took into account additional forms of renewable energy, including wind, solar, deep solar ponds, biofuel, bio-mass, algae

⁴⁸ Staff Report, pp. 1-2.

⁴⁹ *Id.*

⁵⁰ *Apartment Ass 'n*, 90 CA4th at 1172; 14 Cal Code Regs §§ 15096, 15231.

⁵¹ 14 Cal Code Regs §15352(a).

production, concentrated solar-thermal power, and concentrated photovoltaics.⁵² In accordance with CEQA Guidelines Section 15168, the County prepared the PEIR to analyze the “general matters and environmental effects” of the Element Update, to be “followed by narrower or site-specific” analyses.⁵³ The PEIR did not analyze the lithium pilot plant Project that is being considered for grant funding by the Commission.

CEQA Guidelines Section 15168’s two-step inquiry of a program EIR’s applicability to later activities holds that “if a later activity would have effects that were not examined in the program EIR, a new initial study would need to be prepared leading to either an EIR or a negative declaration.”⁵⁴

Here, the PEIR provided a general, program-level analysis of development in Imperial County – a broad analysis that was intended to cover a wide range of renewable projects, “including wind, solar, deep solar ponds, biofuel, bio-mass, algae production, concentrated solar-thermal power, and concentrated photovoltaics.⁵⁵ No specific lithium pilot projects were before the County for approval as part of the RETE Update. As a result, the PEIR did not analyze the potential impacts of this specific Project, such as air quality, health risk, greenhouse gases, noise, transportation, hazards, and other potentially significant impacts.

For example, the PEIR did not analyze air quality impacts related to the construction of a brine pre-treatment project, let alone this Project. The PEIR’s construction air quality analysis states that air quality emissions from construction of renewable energy facilities would vary depending on the project: “[t]he concentrations of these pollutants would vary based on the level of intensity of each component of construction.”⁵⁶ The PEIR further acknowledges that it did not even attempt to characterize the construction emissions of future projects: “[t]he level of emissions would vary on a ‘project-by-project’ basis based on the characteristics of individual projects...Consequently, estimates of future pollutant concentrations emitted during construction cannot be calculated at this time.” Therefore, the

⁵² Final Programmatic Environmental Impact Report Renewable Energy & Transmission Element Update (July 2015), pg. 1-1.

⁵³ *Id.* at 1-2.

⁵⁴ 14 C.C.R. § 15168(c)(1).

⁵⁵ Final Programmatic Environmental Impact Report Renewable Energy & Transmission Element Update (July 2015), pg. 1-1.

⁵⁶ PEIR, pg. 4.3-12.

construction emissions of this Project are not considered in the PEIR, and are thus “new effects that were not examined in the program EIR.”⁵⁷

Similarly, regarding operational air quality impacts, the PEIR states: [a]s described under the analysis for construction impacts, the proposed Project would be implemented on a ‘project-by-project’ basis based on County approval of individual renewable energy projects... Consequently, estimates of future pollutant concentrations emitted during operation cannot be calculated at this time.”⁵⁸ The PEIR’s analysis therefore did not address the operational air impacts of brine treatment facilities, let alone this particular Project’s impacts. Thus, the Project’s operational emissions are new effects that require a project-level EIR to be prepared under Section 15168(c).

Regarding hazards, the PEIR did not address the Project’s potential generation of hazardous materials. The Project involves the removal of silica and heavy metals from geothermal fluid and precondition the brine for subsequent extraction of lithium. Heavy metals are highly toxic, and human exposure results from anthropogenic activities such as mining and industrial operations.⁵⁹ These potential hazardous materials impacts are not addressed in the PEIR, which states: “the proposed Project would be implemented on a “project-by-project” basis; and operational impacts regarding the release of hazardous materials into the environment cannot be estimated at this time.”⁶⁰ The Project’s processing of hazardous materials is a new effect that is not evaluated in the PEIR.

Regarding water quality and hydrology, the Project proposes to pretreat geothermal brine, and reinject the resultant lithium-depleted brine to the main brine stream for re-injection into a second well. This process was not discussed in the PEIR, nor its impacts on water quality and hydrology. As a result, any impacts to water quality and hydrology from reinjecting lithium-depleted brine are new project-level effects not evaluated in the PEIR.

Regarding water supply impacts, the PEIR states: “[t]he proposed Project would be implemented on a ‘project-by-project’ basis based on County approval of individual renewable energy projects... Consequently, estimates of water supply

⁵⁷ 14 C.C.R. § 15168(c)(1).

⁵⁸ PEIR, pg. 4.3-13.

⁵⁹ Tchounwou, Yedjou, Patlolla, and Sutton, Heavy Metals Toxicity and the Environment (2012) <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4144270/>.

⁶⁰ PEIR, pg. 4.8-8.

and wastewater treatment capacity are not known at this time.”⁶¹ Thus, any impacts on the water supply are new project-level impacts not analyzed in the PEIR.

In summary, Section 15168’s two-step inquiry of a program EIR’s applicability to later activities holds that “if a later activity would have effects that were not examined in the program EIR, a new initial study would need to be prepared leading to either an EIR or a negative declaration.”⁶² Here, the Project’s construction and operation have effects that the PEIR explicitly acknowledges it does not examine. Thus, these effects must be analyzed in a project-level EIR.

B. The Project Was Not Analyzed in The 2017 Addendum

Similarly to the 2015 PEIR, the Project cannot rely on the 2017 Addendum to the PEIR for CEQA compliance. In 2017, Imperial County prepared an Addendum to the 2015 Final PEIR to analyze the project-specific impacts of Controlled Thermal Resources’ Geothermal Permit #16-001 Exploratory Well Project Conditional Use Permit. The activities and impacts analyzed in the Addendum are different than the instant Project. The Commission cannot rely on an Addendum prepared for a different project.

First, the activities described in the Addendum are facially distinct from the proposed Project. The project analyzed in the Addendum is the exploration of geothermal resources and the subsequent construction of well pads.⁶³ Gravel access roads would also be constructed to provide access to the wells. Following the drilling of the exploratory wells, the wells would be evaluated using wireline logs. Then, a production test would be conducted.⁶⁴ Finally, the unsuccessful wells would be decommissioned.⁶⁵ Here, the Project proposes to construct and operate a brine pre-treatment unit to enable removal of silica and heavy metals from geothermal fluid and precondition the brine for subsequent extraction of lithium. The project analyzed in the Addendum is an exploratory drilling project, whereas the instant Project is a treatment plan project.

⁶¹ PEIR, pg. 4.17-8.

⁶² 14 C.C.R. § 15168(c)(1).

⁶³ Addendum, pg. 3.

⁶⁴ *Id.* at 3.

⁶⁵ *Id.* at 2-3.

The Addendum explicitly states that beyond exploratory drilling, “future development of a geothermal production project, power plant, and associated facilities at the project site is beyond the scope of this analysis.”⁶⁶ The Addendum further explains that “[a] geothermal exploratory project is considered to be a separate project from any subsequent geothermal field development.” Since this Project proposes the construction of a subsequent geothermal facility, it is, by definition, a different project – one explicitly not analyzed in the Addendum.

Not only is the Addendum – by its own terms – inapplicable to the Project, the Project cannot attempt to “tier off” from the Addendum. The standards for subsequent environmental review under Public Resources Code Section 21166 and CEQA Guidelines Section 15162 apply only when an EIR or a negative declaration was previously prepared for a project.⁶⁷ Since the 2017 Addendum is neither an EIR or negative declaration, the Project cannot tier from the Addendum.

Due to the inapplicability of the Addendum, a subsequent EIR must be prepared to evaluate the Project’s impacts.

C. The Commission Cannot Rely on the County’s Categorical CEQA Exemption

In February 2022, Imperial County adopted an NOE for mineral extraction R&D pilot work at Well Pad #1 pursuant to CEQA Guidelines Section 15306 (Information Collection). The Commission’s proposed resolution approving the Project states that it is relying, in part, on the NOE for the Project’s CEQA compliance.⁶⁸ The Commission states, “the proposed project presents no new significant or substantially more severe environmental impacts beyond those already considered.”⁶⁹ But the Commission’s reliance on the County’s NOE is erroneous because the Project cannot attempt to “tier off” from the NOE. The standards for subsequent environmental review under Public Resources Code §21166 and CEQA Guidelines section 15162 apply only when an EIR or a negative declaration was previously prepared for a project.⁷⁰ Since the NOE is neither an EIR or negative declaration, the Project cannot tier from it.

⁶⁶ Addendum pg. 4.

⁶⁷ *Apartment Ass 'n of Greater Los Angeles v City of Los Angeles* (2001) 90 CA4th 1162, 1172.

⁶⁸ State Energy Resources Conservation And Development Commission Resolution Re: Hell's Kitchen Geothermal LLC, Resolution No: 22-1116-07

⁶⁹ *Id.*

⁷⁰ *Apartment Ass 'n of Greater Los Angeles v City of Los Angeles* (2001) 90 CA4th 1162, 1172.

1. The Class 6 Exemption Does Not Apply to the Grant Amendment Project

The County's 2022 NOE relied on the Class 6 exemption from CEQA for "Information Collection" to exempt "R&D mineral extraction pilot work" on the Well Pad #1 site. It did not address the construction and operation of a lithium plant, as proposed here. The County's exemption therefore did not analyze the current Project, nor do the actions subject to a Class 6 exemption include the proposed Project.

Class 6 projects consist of "basic data collection, research, experimental management, and resource evaluation activities which do not result in a serious or major disturbance to an environmental resource."⁷¹ The Guidelines further explain that Class 6 exemptions are "strictly for information gathering purposes, or as part of a study leading to an action which a public agency has not yet approved, adopted, or funded."⁷² The exemption therefore does not apply to the Project, which would authorize funding for the physical construction and operation of a new facility which has potentially significant impacts.

CEQA exemptions are narrowly construed and "[e]xemption categories are not to be expanded beyond the reasonable scope of their statutory language."⁷³ Erroneous reliance by a lead agency on a categorical exemption constitutes a prejudicial abuse of discretion and a violation of CEQA.⁷⁴ The Commission therefore cannot rely on the County's Class 6 exemption determination to approve the Project.

2. The Project is Not Exempt from CEQA

The Staff Report and proposed resolution explain that the Project is not exempt from CEQA. Indeed, the Grant Request Form checks a box stating: "Agreement IS NOT exempt."⁷⁵ The proposed CEQA Findings also contain a lengthy discussion of the County's prior findings that the Project and related geothermal exploratory well would have potentially significant impacts on "Aesthetics, Air Quality, Biological Resources, Cultural Resources, Tribal Cultural Resources,

⁷¹ CEQA Guidelines 15306.

⁷² *Id.*

⁷³ *Mountain Lion Found. v. Fish & Game Com.* (1997) 16 Cal.4th 105, 125; *McQueen*, 2 Cal.App.3d at 1148.

⁷⁴ *Azusa*, 52 Cal.App.4th at 1192.

⁷⁵ Grant Request Form, EPC-19-018 Amendment # 1, pg. 2.

Geology and Soils, Hazards and Hazardous Materials, Hydrology and Water Quality, Noise and Vibration, Transportation/Traffic, Utilities and Service Systems.”⁷⁶ The Findings go on to explain that various mitigation measures adopted in the PEIR and Addendum would reduce those impacts to less than significant levels, with some exceptions.⁷⁷

Only those projects having no significant effect on the environment are categorically exempt from CEQA review.⁷⁸ A lead agency must provide “substantial evidence to support [their] finding that the Project will not have a significant effect.”⁷⁹ Whether a fair argument can be made that the project may have a significant effect on the environment is to be determined by examining the whole record before the lead agency.⁸⁰ If an activity may have a significant effect on the environment, the activity is not categorically exempt from CEQA, CEQA review must occur, and only then are mitigation measures relevant.⁸¹ An agency may not rely on a categorical exemption if mitigation measures would be necessary to reduce potentially significant effects to less than significant levels.⁸²

The record before the Commission demonstrates that the Project has numerous potentially significant impacts which require mitigation, therefore rendering any CEQA exemption inapplicable. The Commission therefore lacks substantial evidence that the Project is exempt from CEQA, and demonstrates that the Project is likely to have significant impacts which require analysis and mitigation in an EIR.

D. The Commission Cannot Adopt a New CEQA Determination at the November 16 Meeting

The Commission must continue the November 16 meeting and re-agendize the Project for consideration at a future business meeting in order to adopt a new CEQA determination for the Project because the Agenda does not identify a legally adequate CEQA determination. This restriction applies whether the Commission

⁷⁶ Proposed CEQA Statement of Findings (“Findings”), pp. 1-2.

⁷⁷ *Id.* at pp. 3-25.

⁷⁸ Pub. Res. Code §§ 21080(b)(9); 21084(a).

⁷⁹ *Banker’s Hill, Hillcrest, Park West Community Preservation Group v. City of San Diego* (2006) 139 Cal.App.4th 249, 269.

⁸⁰ 14 C.C.R. § 15384.

⁸¹ *SPAWN*, 125 Cal.App.4th at 1107.

⁸² *SPAWN*, 125 Cal.App.4th at 1102; *Azusa Land Recl. Co.*, 52 Cal. App.4th at 1198-1201.

intends to adopt a CEQA exemption or any other CEQA determination that is not already listed on the November 16 agenda.

In a published opinion filed October 26, 2022, the Second District Court of Appeal held that a public agency must list its staff's determination that a project is exempt from CEQA as an item of business on the agenda for the meeting at which it considers the project approval.⁸³ The opinion extends the existing holding in *San Joaquin Raptor Rescue Center v. County of Merced* ("San Joaquin Raptor"),⁸⁴ which holds that a public agency's decision to adopt a CEQA document, such as an EIR or negative declaration, must be described as a distinct item of business under the Brown Act when it is to be considered at a public hearing, to the distinct context of CEQA-exempt projects.

In this case, the Agenda states that the Commission will consider adopting findings that no further CEQA review is required based on the County's 2015 PEIR, 2017 Addendum, and 2022 NOE. As explained above, these findings do not comply with CEQA, and cannot be used to approve the Project. Therefore, the Commission must continue its meeting on the Project to a later date and re-agendize it after the Commission has prepared a legally adequate CEQA document for the Project.

IV. CONCLUSION

For the reasons stated herein, SAFER CA respectfully requests that the Commission continue its consideration of the Project until a legally adequate CEQA document is prepared for the Project and the Project is made consistent with the findings of the Lithium Valley Commission. The Project should not be re-agendized for consideration until the Commission has fully complied with CEQA.

Sincerely,



Aidan P. Marshall

APM:acp

⁸³ *G.I. Industries v. City of Thousand Oaks, et al (Arakelian Enterprises, Inc., Real Party In Interest)* (2022) __ Cal.App.5th __.

⁸⁴ (2013) 216 Cal.App.4th 1167.