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STATE OF CALIFORNIA

Energy Resources Conservation and Development Commission

In the Matter of: APPLICATION FOR CERTIFICATION FOR THE PALEN SOLAR POWER PROJECT	DOCKET NO. 09-AFC-7C

OPENING BRIEF OF INTERVENOR CENTER FOR BIOLOGICAL DIVERSITY

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Center Response at Page 11-12.

#2. Based on evidence in the record, what should the Committee conclude about the likely or potential magnitude of the impact of this project on avian mortality? What metrics should the Committee consider applying to weigh this impact as called for in Public Resources Code §§ 21081 and 25525?

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#3. Should the Energy Commission require the project to take additional steps to avoid avian mortality, including possible curtailment, if project operations were to result in excessive avian mortality? If so, what metric should be used to establish a maximum limit that would trigger a curtailment recommendation?

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#4. Regarding the Technical Advisory Committee (TAC), what modifications to Condition of Certification BIO-16b would best facilitate public transparency?

Center Opposes Deferring Mitigation to a TAC, But Provides Some Information in Appendix A regarding needed changes to the COCs.

#5. If the Riverside County LORS are preempted by federal law in Land Use, why are they not preempted in Visual Resources?

The Center has not addressed this question.

INTRODUCTION

The Center for Biological Diversity intervened in the original proceeding and this amendment proceeding in order to ensure the conservation of rare and imperiled species and related resources that may be affected by the original project, and now, the major proposed amendment including, but not limited to: the threatened desert tortoise and its habitat; Mojave fringe-toed lizard and sand habitats, other rare and imperiled wildlife species found in this area including resident and migratory birds, golden eagles, and desert kit fox; native plants; soils and water resources.[1] The proposed amendment would reconfigure the project footprint and add two 750-foot solar thermal power towers and fields of mirrors.

Even based on the inadequate data collected relevant to the amendment, it is clear that the power towers proposed in the amendment are particularly ill suited to the site and will cause significantly greater impacts than the original project. For example, it would likely result in significant mortality of many avian species in the area including eagles, Yuma clapper rail, willow flycatchers, and many other migratory and resident birds; none of these impacts were anticipated for the original project. In addition, the amended site layout significantly increases impacts to rare sand habitat and the Mojave fringe-toed lizard due to changes including removing private lands (that the applicant controls) from the project footprint and dropping the re-location of at 160 KV line; the amendment pushes further into rare sand habitats on the north east and wastefully including nearly 200 acres of "unused" lands within the project footprint in the south west that would be fenced off and unavailable to wildlife. For these resources, and others, approval of the proposed amendment would result in significant direct, indirect and cumulative impacts to resources far beyond those contemplated in the original proceeding.

The amended environmental review also looked only at a very narrow range of alternatives to avoid impacts and provided no on-site alternatives that would truly minimize impacts identified in the FSA to avian species, sand habitats and MFTL, or wildlife connectivity. Because there are feasible alternatives to the proposed amendment, including, but not limited to, the original project as approved,

[1] At the time this opening brief is due the FSA still remains incomplete as to air quality analysis. Therefore, the Center reserves the right to provide additional briefing on air quality issues and related issues including, but not limited to soils.

solar PV technology at this site, and other project layouts at this site that could substantially avoid many of the significant impacts of the amendment to species, habitats, and other resources, the proposed amendment must be denied in order to comply with the most fundamental substantive requirements of the California Environmental Quality Act ("CEQA"). (Public Resources Code §§ 21002, 21002.1(b).) Moreover, rather than fully address needed mitigation, the Commission appears intent on deferring both development and approval of critical minimizations and mitigation measures in violation of the most basic tenets of CEQA.

As intervenors in the original permitting process the Center is particularly concerned that the Commission is now intent on rushing this amendment process through without sufficient identification and analysis of impacts, particularly to avian species. Ironically, the earlier environmental review was rushed to a decision in December 2010 in order to facilitate the now-bankrupt company (STA) in meeting deadlines for public ARRA funding; now, even though there is no "fast track" excuse for rushing the process, the applicant still insists that funding deadlines for the production tax credit should define the schedule and is pressing for a decision based on deadlines in its private contracts with a utility company and for interconnection with the grid– PPAs and LGIAs-- although those deadlines can be changed by the parties to the agreements. The Commission should not undermine needed environmental review in its rush to accommodate applicants.

The environmental review had not met the most basic requirements of CEQA: for identification and analysis of impacts; consideration of alternatives to avoid impacts and mitigation measures to minimize or reduce impacts to resources; and to provide full and fair *public* review before any decision is made. Nonethless, even the inadequate environmental review provided in the FSA, exhibits and testimony provided at the evidentiary hearings, taken together are more than sufficient to show that, pursuant to CEQA and the Warren-Alquist Act, the Commission cannot fairly make override findings and should not approve the proposed project amendment. In addition, approval of the proposed amendment would violate other laws, ordinances, regulations, and statutes (LORS); and on this basis as well the proposed amendment must be denied.

STANDARD OF REVIEW AND BURDEN OF PROOF, THRESHOLDS OF SIGNIFICANCE, SOME APPLICABLE LORS, RESPONSE TO COMMITTEE QUESTIONS #1 & #3.

I. Standard of Review and Burden of Proof

The Commission has exclusive power to certify sites and related facilities for thermal power plants in California. (Public Resources Code[2] § 25500.) A certificate issued by the Commission may operate in lieu of other permits and supersede most otherwise applicable ordinances, statutes, and regulations. (*Id.*) Accordingly, the Commission itself must determine whether the proposed project complies "other applicable local, regional, and state, . . . standards, ordinances, or laws," such that the Commission decision can properly substitute for the issuance "of any permit, certificate, or similar document required by any state, local or regional agency" and whether the Commission believes the proposed project is consistent with Federal standards, ordinances, or laws. (§§ 25523(d), 25500; *see also* Siting Regs. § 1752(a).) The Commission may not certify any project that does not comply with applicable LORS unless the Commission finds both (1) that the project "is required for public convenience and necessity" and (2) that "there are not more prudent and feasible means of achieving public convenience and necessity." (§ 25525; Siting Regs. § 1752(k).)

The Commission also serves as lead agency for purposes of CEQA. (§ 25519(c).) Under CEQA, the Commission may not certify the Project unless it specifically finds either (1) that changes or alterations have been incorporated into the Project that "mitigate or avoid" any significant effect on the environment, or (2) that mitigation measures or alternatives to lessen these impacts are infeasible, and specific overriding benefits of the Project outweigh its significant environmental effects. (§ 21081; Siting Regs. § 1755.) These findings must be supported by substantial evidence in the record. (§ 21081.5; CEQA Guidelines § 15091(b), 15093; *Sierra Club v. Contra Costa County* (1992) 10 Cal.App.4th 1212, 1222-23.) The Commission must expressly ensure that any approvals it is issuing "in lieu" of another California agency or commission meets the required standards. In this instance, for example, the Commission must ensure that all California laws regarding wildlife are complied with

[2] All statutory references herein are to the Public Resources Code unless otherwise specified. Citations herein to "Siting Regs." refer to the Commission's Power Plant Site Certification Regulations, codified in Title 20 of the California Code of Regulations. Citations herein to "CEQA Guidelines" refer to regulations codified in Title 14 of the California Code of Regulations.

including California Endangered Species Act and the Fish and Game Code sections regarding fully protected species and protected fur bearing animals such as the desert kit fox. As detailed below, because this proposed amendment will cause take of fully protected species and the exceptions to that statute have not been met, it is not possible for the Commission to find that the proposed amendment complies with the law.

The Applicant (petitioner here) bears the burden of providing sufficient substantial evidence to support each of the findings and conclusions required for certification of the amendment including any evidence needed for override findings. (Siting Regs. § 1748(d); see also TR 10/28 at pdf 22) The Commission must determine whether sufficient substantial evidence is in the record to support its findings and conclusions. In this instance there is insufficient substantial evidence to support the required findings and conclusions in many areas (as detailed below) and there is insufficient evidence to support an override in any area, therefore, the Commission cannot certify the Project amendment or any overrides.

II. Thresholds of significance and Committee Question #3.

A significant environmental effect is "a substantial, or potentially substantial, adverse change in the environment." (Pub. Resources Code, § 21068.) The CEQA Guidelines encourage public agencies to adopt their own standards as meaningful thresholds of significance. (14 C.C.R. §15064.7.) In the absence of adopted standards, an agency must make its own thorough investigation of the environmental impacts and consider both quantitative and qualitative factors in determining a "site-sensitive threshold of significance." (*Berkeley Keep Jets Over the Bay Committee v. Board* (2001) 91 Cal. App. 4th 1344, 1380.) As the CEQA Guidelines explain: "The determination of whether a project may have a significant effect on the environment calls for careful judgment on the part of the public agency involved, based to the extent possible on scientific and factual data. An ironclad definition of significant effect is not always possible because the significance of an activity may vary with the setting. For example, an activity which may not be significant in an urban area may be significant in a rural area." (CEQA Guidelines §15064(b).) Similarly, the significance of the effect may depend on the nature of the resources affected. (*See, e.g.,* CEQA Guidelines § 15065(a)(1) [mandatory finding of significance requiring preparation of an EIR where a project will cause certain impacts to wildlife populations or listed species].) The Commission has not adopted specific thresholds of significance.

Where a project's impacts will violate LORS, the impacts should be presumed to be significant. However, mere consistency with a LORS or regulatory standard does not relieve the agency of its duty to determine whether or not impacts are significant. (See, e.g., *Communities for a Better Environment v. California Resources Agency* (2002) 103 Cal. App. 4th 98, 113-14 [holding that the trial court properly invalidated certain amendments to the CEQA Guidelines because mere application of significance threshold based on project's consistency with regulatory standard cannot supersede CEQA's fair argument standard].)

Guidance regarding impacts to wildlife that may be considered significant and thus trigger the need for a full environmental review in an EIR are found in the CEQA guidelines and may also be relied on as a metric for determining significance once the environmental review has been performed. (*See* CEQA Guidelines § 15065(a)(1) ["A lead agency shall find that a project may have a significant effect on the environment and thereby require an EIR to be prepared for the project where there is substantial evidence, in light of the whole record, that any of the following conditions may occur: . . . The project has the potential to . . . substantially reduce the habitat of a fish or wildlife species; . . . substantially reduce the number or restrict the range of an endangered, rare or threatened species; . . ."] .) Where, as here, the proposed amendment will result in significantly increased impacts to rare sand habitat, result in significant direct, indirect, and cumulative impacts to migratory and resident birds including many special status avian species (including direct impacts from collisions with mirrors and avian flux, loss of foraging habitat, and unknown but potentially significant impacts to migration, breeding success, and/or long term population trends), the elimination of approximately 3,897.5 acres of habitat in a designated WHMAs (including blocking a connectivity WHMA and potentially restricting the range of the desert tortoise), the impacts to biological resources are significant. While we agree with staff that impacts to avian species including eagles, Yuma clapper rail, willow flycatcher, burrowing owl, sensitive bat species and migratory birds protected under the MBTA are significant and unmitigable (FSA at 4.2-6 through 8), the evidence also shows that impacts to the desert tortoise connectivity, sand habitat and Mojave fringe-toed lizard are also significant and likely unmitigable.

Committee Question #3 clearly relates to thresholds of significance both to determine what is "excessive avian mortality" and a "trigger" for curtailment. Because take of any fully protected species is prohibited, the take of even one golden eagle or Yuma clapper rail would be significant and

excessive as would take of any birds protected under the MBTA—therefore, the threshold to trigger curtailment and other mitigation measures should be take of even one fully protected species or one MBTA protected species.

III. Some Applicable LORS Protecting Wildlife and Response to Committee Question #1

A. Some of the LORS Protecting Wildlife

1. Public Trust In Wildlife

The FSA fails to note that the Commission must consider impacts to public trust resources. Pursuant to statute (as well as common law) the waters and wildlife resources of the State of California are held in trust for the people of the State. Cal. Fish & Game Code §711.7(a); *see also* Fish & Game Code § 1801 (it is "the policy of the state to encourage the preservation, conservation, and maintenance of wildlife resources under the jurisdiction and influence of the state"). The public trust doctrine "places on the state the responsibility to enforce the trust." (*Center for Biological Diversity, et al., v. FPL Group, Inc*. (2008) 166 Cal App. 4th 1349, 1368, 1361 ["[I]t is clear that the public trust doctrine encompasses the protection of undomesticated birds and wildlife. They are natural resources of inestimable value to the community as a whole. Their protection and preservation is a public interest."].) The Supreme Court has identified this substantive duty "to protect the people's common heritage," holding that an agency may surrender "that right of protection only in rare cases when the abandonment of that right is consistent with the purposes of the trust." (*Nat'l Audubon Soc'y v. Superior Court* (1983) 33 Cal.3d 419, 441.)

As a result the Department, or the Commission if properly acting in its place, must fulfill its trust duties in considering the amendment here, including maintaining healthy populations of wildlife species and habitats, providing for the beneficial use and enjoyment of wildlife by all citizens of the State, and perpetuation of wildlife species for their intrinsic and ecological values. To the extent the Commission's permitting may affect public trust resources it must uphold the trust and protect public trust resources. In this capacity, the Commission must act as a trustee for the people of California. Further, the Commission's consideration of impacts to trust resources must be informed by the Department of Fish and Wildlife which is the trustee for fish and wildlife resources. (California Fish

and Game Code § 1802.)[3] In the CEQA review process, the Department discharges its public trust obligations through its role as a CEQA "trustee agency." During CEQA review, the Department is required to "consult with lead and responsible agencies and shall provide, as available, the requisite biological expertise to review and comment upon environmental documents and impacts arising from project activities, as those terms are used in [CEQA]." (Fish and Game Code, § 1802.) During the CEQA process the Department is charged with using its biological expertise to "focus on any shortcomings" in the environmental review. (14 Cal. Code Regs § 780). Thus, pursuant to statute, the Department is obligated to provide its requisite biological expertise to review and comment upon environmental documents and the significance of any impacts to state protected species and other wildlife resources arising from proposed project activities. The Commission must consider and should defer to the Department's expertise regarding impacts to special status species and trust resources. This record does not include any specific written recommendations from the Department regarding wildlife or show that Staff conferred with the Department in writing and relied on its expertise regarding trust resources. Staff must come forward with additional evidence showing that the Department provided its expertise in writing and Staff considered it or the process must be reopened and the FSA revised and recirculated.

2. California Endangered Species Act

The desert tortoise, Yuma clapper rail, and willow flycatchers, are just a few of the species protected under the California Endangered Species Act ("CESA") that could be harmed or killed by the proposed amendment. The purpose of CESA is "to conserve, protect, restore, and enhance any endangered species or threatened species and its habitat." (Fish & Game Code § 2052; see also *Department of Fish & Game v. Anderson-Cottonwood Irrigation Dist.* (1992) 8 Cal. App. 4th 1554, 1563.) CESA broadly prohibits the "take" of species designated as endangered, threatened, or candidate species. (Fish & Game Code §§ 2080.) "Take" is defined to prohibit killing, or attempting to kill, such endangered, threatened or candidate species. (Fish & Game Code § 86.) Under limited

[3] The Department is the consulting agency under CEQA for any project that impacts fish and wildlife, (Cal. Code Regs., tit. 14, § 15086), because, as the trustee agency for fish and wildlife of the state, (Cal. Code Regs., tit. 14, § 15386), "Fish and Game has legal jurisdiction with respect to a project as it affects natural resources which are held in trust for the people of the State of California." (Cal. Code Regs., tit. 14, § 778.)

circumstances, the Department of Fish and Game may authorize take of species by issuance of an "incidental take permit." (Fish & Game Code §2081(b).) To do so, all of the following conditions must be met:

> (1) The take is incidental to an otherwise lawful activity.
> (2) 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. Where various measures are available to meet this obligation, the measures required shall maintain the applicant's objectives to the greatest extent possible. All required measures shall be capable of successful implementation. For purposes of this section only, impacts of taking include all impacts on the species that result from any act that would cause the proposed taking.
> (3) The permit is consistent with any regulations adopted pursuant to Sections 2112 and 2114.
> (4) *The applicant shall ensure adequate funding to implement the measures required by paragraph (2), and for monitoring compliance with, and effectiveness of, those measures.*

(Fish & Game Code § 2081(b) [emphasis added].) "Fully mitigate" is construed so as to remedy the evils of "extinction as a consequence of man's activities" and of "destruction of habitat" expressly recognized by the Legislature. (Fish & Game Code § 2051.) In addition, the Department must make a determination based on that the issuance of the permit will not "jeopardize the continued existence of the species." (Fish & Game Code § 2081(c).) "The department shall make this determination based on the best scientific and other information that is reasonably available, and shall include consideration of the species' capability to survive and reproduce, and any adverse impacts of the taking on those abilities in light of (1) known population trends; (2) known threats to the species; and (3) reasonably foreseeable impacts on the species from other related projects and activities." (*Id*.)

CESA requires that "that *reasonable and prudent alternatives* shall be developed by the Department, together with the project proponent and the state lead agency, consistent with conserving the species, while at the same time maintaining the project purpose to the greatest extent possible." (Fish & Game Code § 2053 [Emphasis added].) Moreover, nothing in the CESA abrogates the need to fully comply with CEQA's requirement that no project may be approved if feasible alternatives or mitigation measures are available to avoid or lessen the impacts of the proposed project. (Public Res. Code § 21002.) As a result, to comply with CESA, the Commission (or more properly the Department) must first develop alternatives to the project that could avoid impacts to covered species

and still maintain the project objectives to the extent possible, and only after consideration of those alternatives, ensure that all remaining impacts are also minimized and fully mitigated. (Fish & Game Code §2081(b)(2).)

The Commission has failed to comply with CESA in its review of this project. The Commission failed to develop any alternatives that would conserve the desert tortoise connectivity, Yuma clapper rail, willow flycatchers or other CESA listed species, and failed to provide the needed information to show that impacts to the species will be fully mitigated; rather, the Commission has indicated that for avian species in particular it will defer development of mitigation until after a decision is made and there is no provision in the COCs to "ensure adequate funding to implement" mitigation measures which have yet to be developed. At minimum, to "ensure adequate funding" for mitigation measures the COCs must also include a commitment to curtail project operations if needed to protect species regardless of any alleged "loss" of income.

3. Fully Protected Species

While the FSA mentions the fully protected species statutes, it fails to fully address this LORS. Because the proposed amendment is likely to take several fully protected species including the golden eagle and Yuma clapper rail (Exh. 3001; 3019), the Commission must determine that the amendment is consistent with that law, and on this record must conclude that it is *not*.

The golden eagle is a fully protected species under California law, Cal. Fish & Game Code § 3511.[4] Any take of a golden eagle, which is a fully protected species, is prohibited by California law unless it falls within the narrow exception allowing such take under an approved Natural Communities Conservation Plan ("NCCP") (Cal. Fish & Game Code § 2835). Because no NCCP has been approved for this project or in this area and the Commission cannot itself adopt an NCCP,[5] the Commission

[4] Golden eagles and other raptors are also protected under California law as Birds of Prey (Fish & Game Code § 3503.5), and eagles and other migratory birds are also protected under California law as Migratory Birds (Fish & Game Code § 3513).

[5] An NCCP is a comprehensive plan that requires specific data and information, analysis and findings *by the Department of Fish and Wildlife*. "'Natural community conservation plan' . . . means the plan prepared pursuant to a planning agreement entered into in accordance with Section 2810. The plan shall identify and provide for those measures necessary to conserve and manage natural biological diversity within the plan area while allowing compatible and appropriate economic development, growth, and other human uses," (Fish & Game Code § 2805); an NCCP is not a "permit, certificate, or similar document" as contemplated under Public Resources Code § 25500. Even assuming for the

cannot lawfully approve the amendment that will take golden eagles, and Yuma clapper rail among other protected avian species.[6]

Golden eagles and bald eagles are also protected under the federal Bald and Golden Eagle Protection Act ("BGEPA") 16 U.S.C. § 668 *et seq*. Take of any eagle without a permit is prohibited under Federal law and would violate LORS. (16 U.S.C. § 668 *et seq.*; *see also* FWS comments on FSA, TN201199 at PDF 8, enclosure 1, page 3 ["Without an eagle take permit, take of eagles would be a violation of the Eagle Act."].) Here, the Commission cannot make a finding that the project complies with the LORS of the federal BGEPA; while a permit *may* be issued for the take of golden eagle under BGEPA, there is no evidence in the record that any such permit has been applied for or issued in relation to this project amendment.

Similarly, the Commission cannot find that the project complies with the federal Migratory Bird Treaty Act ("MBTA") which was enacted to fulfill the United States' treaty obligations to protect migratory birds and provides that "[u]nless and except as permitted by regulations made as hereinafter provided in this subchapter, it shall be unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, kill, attempt to take, capture, or kill . . . any migratory bird." 16 U.S.C. § 703(a); *see also Missouri v. Holland*, 252 U.S. 416, 434-35 (1920) (describing the "national interest of very nearly the first magnitude" in protecting migratory birds "that yesterday had not arrived, tomorrow may be in another State and in a week a thousand miles away").

The MBTA authorizes the Secretary of the Interior to promulgate regulations allowing the take of birds otherwise protected by the MBTA when doing so would be compatible with migratory bird conventions. 16 U.S.C. § 704(a). The Secretary has delegated this authority to FWS, which has promulgated regulations allowing the take of migratory birds after the issuance of a permit, under specified circumstances. *See* 50 C.F.R. §§ 21.11, 21.27, 21.42. FWS's regulations underscore the

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sake of argument alone, that the Commission could approve an NCCP "in lieu" of the Department of Fish and Wildlife as part of the project amendment process for this project, which the Center does not believe would be lawful, because the Commission has not gathered all of the information or considered all of the factors required for such a plan here, no NCCP could be issued and therefore, no take of fully protected species may be authorized. *See* Public Resources Code § 2820 (detailing needed findings, etc. for approval of an NCCP).

[6] Notably, the Commission has not considered any of the factors needed for an NCCP that could allow take of a fully protected species including the golden eagle or other fully protected species.

statute's categorical prohibition on taking migratory birds "except as may be permitted under the terms of a valid permit issued pursuant to the provisions of [the agency's MBTA regulations]." 50 C.F.R. § 21.11. In comments on the FSA, FWS states that:

> The unauthorized take of migratory birds is illegal under the Migratory Bird Treaty Act (MBTA) and currently, there are no mechanisms for the issuance of an incidental take permit for migratory birds for a project such as this. . . . the proposed mitigation does not alleviate the responsibility of PSH to avoid impacts to migratory birds under the MBTA. Furthermore, without a clear assessment of bird use of the site and the level of harm the project may cause from direct and indirect take of migratory birds, we do not have any basis to evaluate whether total impacts from the project could be adequately offset through other conservation measures.
>
> . . .
>
> The BBCS is not a surrogate for a take permit under the MBTA; therefore it does not limit or preclude the Service from exercising its authority under any law, statute, or regulation, nor does it release any individual, company, or agency of its obligations to comply with Federal State, or local laws, statutes, or regulations.

(TN201199 at pdf 9 & 10, enclosure 1, page 4 & 5.) Even if it is accurate that no take permit can be obtained for this amended proposal under the current mechanisms, the FWS makes it clear that the project remains liable for any take of MBTA covered species and that the FSA for the amended project proposal has not done enough to analyze impacts, consider avoidance or off-sets—the Center agrees.

FWS's list of species protected by the MBTA includes many birds that may be taken by the project, including bald and golden eagle, Yuma clapper rail, willow flycatchers and common species many of which have been observed near very near the site at Lake Tamarisk. (*See* 50 C.F.R. § 10.13 [list of migratory birds]; Exhs. 3001, 3019 [bird list from Lake Tamarisk].) Because many migratory birds that may be killed by the amendment are protected under the MBTA, and the project would violate the MBTA, it will also violate LORS.

B. Response to Committee Question #1

The Committee question #1 states: "1. Regarding the Federal Migratory Bird Act, the Bald and Golden Eagle Protection Act, and the Fully Protected Species Act, please brief whether incidental take permits are available, necessary, and at what point permits would be required for a project's take of species covered under the above-mentioned laws."

As explained above, the proposed project does not conform to state or federal LORS relating to avian species because it would allow unpermitted violations of the California Fully Protected Species

Act, and the federal Migratory Bird Treaty Act and Bald and Golden Eagle Protection Act.

Incidental take permits for fully protected species are available through development of an NCCP. Because no NCCP has yet been developed that includes this project area, the Commission cannot issue an approval "in lieu" of a permit for take of any fully protected species and the project amendment does not comply with LORS. Programmatic permits for take of golden eagles are available under the BGEPA. Here, there is no evidence that the applicant has applied for or intends to apply for such a permit; therefore the Commission cannot find that the project complies with this LORS. Although take permits may not be available under the MBTA (as distinct from a collection permit to collect carcasses of dead birds killed by the project), clearly the applicant and staff have not yet done enough to consider ways to avoid or minimize impacts to MBTA covered species from the proposed amended project. Nonetheless, alternatives evaluated in the FSA could avoid many such impacts—both the PV alternative and the no project alternative would have far lower impacts to avian species-- therefore the Commission cannot find that the project complies with this LORS.

Because the proposed project amendment may result in the direct take of golden eagles and other protected birds as well as indirect take through loss of foraging habitat, the impacts are significant, as amended the project may also have significant impacts on breeding populations and breeding success in the area for fully protected species, eagles, and migratory birds. The proposal to defer consideration and development of avoidance and mitigation measures is also if great concern as many of the potential methods to dissuade birds from flying through the power tower area because some of those actions would need *additional permitting* under the LORS for harassing or harming special status avian species. Further, if these activities do cause individual birds to fly elsewhere to avoid the project site, they may cause other impacts to the species or other birds. For example, by forcing eagles to abandon an area now occupied it could push them into other already occupied home ranges resulting in additional competition and potential for additional cumulative lethal "take" for the species. The proposals are also flawed for several reasons (as detailed below in section I(B)1.b) including that none of these proposals has yet been analyzed in the CEQA review by the Commission in a public process. Thus even if the proper permits had been applied for or could otherwise be issued, there is insufficient identification and analysis of impacts to fully protected species, eagles, or migratory birds here for any agency to lawfully issue permits or a decision "in lieu" of such permits.

ARGUMENT

I. APPROVAL OF THE AMENDMENT WOULD VIOLATE CEQA

The Commission's power plant siting process is a certified regulatory program for purposes of CEQA. (*See* § 21080.5; CEQA Guidelines § 15251(j).) Although certification exempts the Commission from CEQA's environmental impact report requirement, the Commission still must comply with CEQA's substantive and procedural mandates. (Public Resources Code §§ 21000, 21002, 21080.5; *Sierra Club v. Bd. of Forestry* (1994) 7 Cal.4th 1215, 1236; *Joy Road Area Forest and Watershed Association v. Cal. Dept. of Forestry and Fire Protection* (2006) 142 Cal.App.4th 656, 667-68.) The Commission must ensure adequate environmental information is gathered and that the environmental impacts of a proposed project are fully identified and analyzed before it is approved. "To conclude otherwise would place the burden of producing relevant environmental data on the public rather than the agency and would allow the agency to avoid an attack on the adequacy of the information contained in the report simply by excluding such information." (*Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal. App. 3d 692, 724.) Environmental review documentation

> is more than a set of technical hurdles for agencies and developers to overcome. [Its] function is to ensure that government officials who decide to build or approve a project do so with a full understanding of the environmental consequences and, equally important, that the public is assured those consequences have been taken into account." (*Laurel Heights I, supra*, 47 Cal.3d at pp. 391-392.) For the [environmental review documentation] to serve these goals it must present information in such a manner that the foreseeable impacts of pursuing the project can actually be understood and weighed, and the public must be given an adequate opportunity to comment on that presentation before the decision to go forward is made.

(*Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 449-450.) The environmental review documents must "contain facts and analysis, not just the agency's bare conclusions or opinions." (*Laurel Heights Improvement Assn. v. Regents* (1989) 47 Cal. 3d 376, 404 [and cases cited therein].) The environmental review documents "must include detail sufficient to enable those who did not participate in its preparation to understand and to consider meaningfully the issues raised by the proposed project." (*Id.*)

Unfortunately the FSA, while an improvement over the environmental review of many of the earlier solar projects, still has many shortcomings particularly as an informational document and fails to fully comply with the requirements of CEQA. (*Kings County Farm Bureau v. City of Hanford*

(1990) 221 Cal.App.3d 692, 717-718 [holding that a misleading impact analysis based on erroneous information rendered an EIR insufficient as an informational document]; *Environmental Planning & Information Council v. County of El Dorado* (1982) 131 Cal.App.3d 350, 357-58 [where baseline was inaccurate "comparisons utilized in the EIRs can only mislead the public as to the reality of the impacts and subvert full consideration of the actual environmental impacts which would result."].)

A. The Project Objectives and Environmental Setting

CEQA requires a statement of the objectives and a description in sufficient detail so that the impacts of the project can be assessed. (CEQA Guidelines §15124.)

> [A]n accurate, stable and finite project description is the *sine qua non* of an informative and legally sufficient EIR." (*County of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185, 199.) However, "[a] curtailed, enigmatic or unstable project description draws a red herring across the path of public input." (Id. at p. 198.) "[O]nly through an accurate view of the project may the public and interested parties and public agencies balance the proposed project's benefits against its environmental cost, consider appropriate mitigation measures, assess the advantages of terminating the proposal and properly weigh other alternatives … ." (*City of Santee v. County of San Diego* (1989) 214 Cal.App.3d 1438, 1454.)

(*San Joaquin Raptor Rescue Center v. County of Merced* (2007) 149 Cal.App.4th 645, 655; *see also Sacramento Old City Assn. v. City Council* (1991) 229 Cal. App. 3d 1011, 1023 [same]; *Stanislaus Natural Heritage Project v. County of Stanislaus* (1996) 48 Cal. App. 4th 182, 201 [same]; *Berkeley Keep Jets Over the Bay Com. v. Board of Port Comrs.* (2001) 91 Cal.App.4th 1344, 1358.)

The project objectives frame the alternatives analysis, the purpose of which is to enable the agency or commission to fulfill the statutory requirement that feasible alternatives that avoid significant impacts of a project *must be implemented*.

> [I]t is the policy of the state that public agencies should not approve projects as proposed if there are feasible alternatives or feasible mitigation measures available which would substantially lessen the significant environmental effects of such projects, and that the procedures required by this division are intended to assist public agencies in systematically identifying both the significant effects of proposed projects and the feasible alternatives or feasible mitigation measures which will avoid or substantially lessen such significant effects.

(Public Res. Code § 21002.) The statutory language and caselaw make it quite clear that the Legislature intended public agencies to utilize CEQA's environmental review process and procedures

to make determinations regarding feasible alternatives and mitigation measures based on a robust analysis.

Nothing in CEQA states that the project objectives utilized by the agency must meet all of the applicant's proffered objectives. The statutory definition of "feasible" does not even mention the applicant's objectives. (Pub. Res. Code § 21061.1.) Similarly, nothing in CEQA states that an alternative may be found infeasible solely due to a conflict with one of the applicant's objectives. In fact, the CEQA Guidelines expressly provide that a feasible alternative may *impede* achievement of the project objectives to some degree. (*See* 14 C.C.R (CEQA Guidelines) § 15126.6(a), (b).) For example, as discussed in detail below in the alternatives section, even if a photovoltaic solar (PV) project on this site does not completely satisfy all of the applicant's stated objectives, that does not render it an infeasible alternative. Indeed, if applicants could thwart consideration of all potentially feasible alternatives simply by adopting overly narrow objectives, CEQA would be rendered meaningless. (*See Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 736-37 (holding that applicant's prior commitments could not foreclose analysis of alternatives). As the Commission has stated:

> A reasonable, feasible alternative must be one that meets most basic project objectives while avoiding or substantially lessening any of the significant effects of the project. [CEQA Guidelines, § 15126.6(a).] Stating project objectives too narrowly or too specifically could artificially limit the range of reasonable, feasible alternatives to be considered.
> . . .
> The evidence leads us to conclude that the Applicant defined its objectives so narrowly as to preclude a reasonable range of alternatives. While it is true that a project's objectives should guide the selection of alternative sites for analysis, when objectives are defined too narrowly, the analysis of alternative sites may be inadequate. (*City of Santee v. County of San Diego* (1989) 214 Cal. App. 3d 1438, 1455.)

Final Commission Decision, Chula Vista Energy Upgrade Project, June 2009 (07-AFC-4) CEC-800-2009-001-CMF ("Chula Vista") at 26 (finding that applicant had not met its duty to analyze a reasonable range of alternatives). The Commission *could not* lawfully rely on the applicant's overly narrow objectives for the amendment such that no meaningful alternatives could be considered before undertaking environmental review. Here, the FSA looked at the applicant's stated objectives for the amendment and also took into account the Commission's policies and goals for renewable energy

production in formulating a set of project objectives to form the basis for CEQA review in this matter to allow for some meaningful range of alternatives to the project that may avoid and/or minimize significant impacts to resources. Nonetheless, as discussed below regarding alternatives, the objectives remain too narrow such that they preclude inclusion of distributed solar power, efficiency measures, and conservation, to achieve the Commission's and the State's goals regarding renewable energy development while avoiding even more of the significant impacts of the proposed project. In addition, the FSA improperly includes economic and timing considerations as part of the analysis without providing full public disclosure relevant to these issues.

1. Project Objectives Relied on in the FSA Are Too Narrow

The Staff relied on the following project objectives in the FSA

> • Safely and economically construct and operate a utility-scale solar energy project of up to 500 megawatts.
>
> • Develop a renewable energy facility that will supply clean, renewable electricity, and assist Southern California Edison in satisfying its California Renewables Portfolio Standard program goals.
>
> • Ensure construction and operation of a renewable electrical generation facility that will meet permitting requirements and comply with applicable laws, ordinances, regulations, and standards.
>
> • Develop a renewable energy facility in a timely manner that will avoid or minimize significant environmental impacts to the greatest extent feasible.
>
> • Develop a renewable energy facility in an area with high solar value and minimal slope.

(Exh. 2000, FSA part A, at 6.1-5.) These project objectives are unclear in several regards and unduly narrow although they do allow for some range of alternatives. Unfortunately, the range is then is undermined by the statements in the section entitled "Potential Feasibility Issues" where Staff appears to be attempting to backdoor many limitations on the alternatives based solely on the project applicant's statements regarding its contractual obligations under PPAs and LGIAs that are not fully disclosed in the record.

The first objective states that the objective is to "safely and economically construct and operate a utility-scale solar energy project of up to 500 megawatts" There is no evidence in this record

regarding economics of the amendment-- Staff did not provide any detailed analysis of cost in this case and petitioner has not revealed the cost of the energy that will be produced. Nothing in this record shows that this amendment would result in "economical" solar power for the California rate payers. (See Exh.1077 at pdf 86 [applicant states terms of PPA are confidential].) Petitioner, in an attempt to undermine any of the feasible alternatives, both the initial approved project (the no project alternative) or the PV alternative, provides no evidence, just conclusory statements regarding economics and the timing issues regarding obtaining government subsidies. (*Id.* ["Therefore amendment to either the PPA's or the LGIA would essentially make the project infeasible because it would no longer be able to be constructed in sufficient time to qualify for the Investment Tax Credit."].) Thus, according to petitioner, unless the proposed amendment is approved as it wishes and within the time frame it desires, the project will be economically infeasible. Relying solely on petitioner's unsupported statements regarding the economics and timing to reject feasible alternatives such as PV and the no project alternative would make a mockery of the CEQA process and the Commission must reject it.

In addition, even if some of the pricing were know, it would nonetheless be impossible to calculate economic "feasibility" in terms of the full costs of the project as compared with income, because mitigation requirements have not yet been formulated—particularly critical mitigation for avian species that may include curtailment of operations to protect avian species. If, for example, radar and other observation methods are included in the COCs (to provide notice to the operator when eagles or other large birds are in the vicinity and when migratory birds are moving through the area) and curtailment of operations is *required* at those times, then actual operations and energy production may be far less than currently estimated. (*See, e.g.,* Exh. 2013 FSA part C, GHG table 3 [estimated yearly gross MWh].) Because initial avian surveys are insufficient to estimate the amount of time such curtailment may be required, there is no rational way to calculate the "cost" of such curtailment to the project owner and therefore no way to calculate whether or not this project can fairly be said to be "economical."

Moreover, in the past, the Commission has stated that ratepayer costs is an issue for the CPUC not the Commission, for this reason as well, economics is not properly used as a project objective. Even so, undisputed evidence in this record shows that this project will most likely not be competitively priced or "economical" for the ratepayers. This project is not even mentioned in any

existing PPA, rather, petitioner appears to be relying on one or more PPAs that were approved by the CPUC more than 4 years ago for a location "to be determined" (Advice Letter 3459-E[7] and CPUC Resolution E-4269, Issued 9/29/09, Dated September 24, 2009[8] at 2 [listing 2- 200 MW projects in Nevada and 3-200 MW projects at locations "to be determined" with on-line dates of July, 2016, December, 2016, and July, 2017]). First, even if the amendment is adopted by the Commission in early 2014, there is no evidence the project could be on-line by July, 2016 and; therefore, these PPAs will need to be revised and re-submitted to the CPUC. When and if revisions are submitted to the CPUC, it is most likely that the PPAs will be rejected as it did for 3 similar PPAs last year. In that instance, the CPUC reluctantly approved only one unit *of this same design as an experiment* at the Rio Mesa site[9] (and that project application has since been withdrawn from the Energy Commission). (CPUC Resolution E-4522, Issued October 29, 2012, Dated October 24, 2012[10].) As the CPUC stated:

> The Rio Mesa 1 project *compares poorly on price and value relative to other solar thermal projects* offered to SCE at the time the amended and restated PPAs were being negotiated and executed, and it compares poorly to other recently approved contracts.
> . . .
> Although the Rio Mesa 2 project provides a value that is very similar to Rio Mesa 1, this resolution approves the Rio Mesa 2 PPA, with modifications, because it comprises a necessary step in the evolution of BrightSource's technology development to build and finance the third generation power towers with molten salt storage that provide much greater value for California ratepayers."

(CPUC Resolution E-4522 at 2-3.) In sum, the CPUC approved a PPA for *one* power tower unit at the Rio Mesa site, *although it was found not to be cost competitive*, but rather an experiment on the way to a better future technology which might later provide better value. Here, petitioner seeks to build *two*

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[7] Available at http://www.pge.com/nots/rates/tariffs/tm2/pdf/ELEC_3459-E.pdf ; this document is referenced in the record, officially noticeable and relevant.
[8] Available at http://docs.cpuc.ca.gov/PublishedDocs/WORD_PDF/FINAL_RESOLUTION/107761.PDF ; this document is officially noticeable and relevant.
[9] The Rio Mesa application was withdrawn at the request of the applicant which also has now withdrawn its interconnection request from California ISO (Applicant's status report #1 dated 4/1/13).
[10] Available at http://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M032/K198/32198829.PDF ; this document is referenced in the record (*See, e.g.,* Tr. 3/18/13 at 134-135), officially noticeable, and relevant.

power towers of this same untested design which are not cost competitive-- the only difference being that the bill will be footed by PG&E rate payers instead of SCE rate payers.

The FSA is both confusing and inaccurate in its discussion of the PPAs, appearing to assume that the PPA in question was one for the original solar trough project—but no such PPA is in evidence. Rather, the facts show that the CPUC has never addressed any PPA that specifically included this technology at this project site. (*See* Exh. 2000, FSA part A at 6.1-28 to 29. ["Potential Feasibility Issues **. . . .** Approval of the PPAs by CPUC demonstrates that CPUC deems *the PSEGS* appropriate for helping to meet the state's RPS program goals. . . . . It is unknown whether *changing the technology of the PSEGS back to a parabolic trough project* would require amending the PPAs. It is also unknown whether CPUC would approve amendments to the PPAs allowing the change, if such approvals would be necessary." Emphasis added.])

The project objective regarding timing is also unclear. "Develop a renewable energy facility in a timely manner that will avoid or minimize significant environmental impacts to the greatest extent feasible." (Exh. 2000, FSA part A, at 6.1-5.) FSA's section on Potential Feasibility Issues also discusses timing as a feasibility issue for the alternatives analysis with regard to the Large Generator Interconnection Agreement (LGIA) – which is not in evidence here. The FSA appears to assume that the timing in the LGIA, and thus timeliness overall, is based on the amendment being approved, thus turning the amendment process on its head. "A schedule delay could result in a project's failure to meet its milestones and a breach of the LGIA. *Changing the project technology back to* a parabolic trough technology could at least cause a project schedule delay, *and it is not known at what point a project schedule delay would affect project viability*." (Exh. 2000 at 6.1-29; *see also* Exh.1077 at pdf 86 [applicant also assumes that solar trough would be a *reversal*, and not the *current status quo*, "if the PSEGS were *to revert back to* a solar trough project"].) Staff cannot backdoor the petitioner's desire to build a power tower rather than a trough as a limit to the alternatives analysis by flipping the facts on their head and labeling it a "feasibility" issue.

Despite the fact that the FSA's project objectives remain unduly narrow and unfairly include both economic factors and timing issue based on information that has not been fully disclosed to the

public, the applicant complains that they are not narrow enough – insisting that any alternative to the project—or even keeping the current approval as a solar trough is unacceptable because it could require changes to the timing of the PPAs and LGIA. (*See* Exh. 1077 at pdf 86.) Although there is no supporting evidence in this record, the applicant states that "any request to amend the LGIA would likely result in reduction in the project output by the California Independent System Operator (CAISO) *due to the difference in power quality and reliability* from a large injection of PV electricity." (*Id*., emphasis added) However, there was no evidence regarding either "power quality" or "reliability" presented. What is clear, is that this project is not designed, and cannot be designed, to include significant storage and that the no project alternative (solar trough) would have more thermal "momentum" than the proposed amended project. (10/28 Tr. at 85-88 questions from Commissioner Hochschild to applicant). In fact, the proposed solar power tower amended project, without storage, does not provide significantly more reliability than a tracking PV project at this site would or than a distributed PV alternative could and is more costly and less economical. Even using these overly narrow objectives, staff correctly found, the PV alternative with single-axis tracking would avoid or reduce impacts of the project in many categories as would the no-project alternative (solar trough). Exh. 2000 at 1-20, 6.1-2 to 3, 6.1-51 to 75. And a PV alternative is environmentally superior because it could avoid many of the significant impacts of the proposed amended project and minimize other impacts. In addition, a PV alternative is highly likely to be both less costly for the rate payers. (*See* Exh 669, 670 [articles explaining that after a solar thermal project in Texas was cancelled a mid-sized PV projects were substituted at a lower price].) Nevertheless, because the inclusion of economics and timing of project objectives rely on unsupported assumptions as do the "feasibility issues" relied on to undermine full and fair review of alternatives, the project objectives must be revised and the CEQA analysis should be revised and recirculated for public review and comment.

The Commission's Chula Vista Decision is instructive because the applicant objected to the Staff considering a PV alternative to a gas fired power plant. "The Applicant effectively eliminated photovoltaic (PV) generation from its alternatives analysis when it stated that it did 'not meet the project objective of utilizing natural gas available from the existing transmission system.' [] This is

another example of a too-narrow project objective artificially limiting the range of potential alternatives. Requiring the use of natural gas as a project objective eliminates consideration of alternative fuel sources." Chula Vista at 29. The Commission found that PV could be a feasible alternative technologically as well as financially where testimony showed that "there was little or no difference between the cost of energy provided" from the gas proposal or PV. Chula Vista at 30. Here, petitioner's conclusory statements regarding the infeasibility of a PV alternative and Staff's equally conclusory statements about economics, timing and feasibility of all alternatives undermine full and fair CEQA review of the amendment and cannot be relied on by the Commission to reject the PV alternative or the no project alternative.

2. The Environmental Setting or "Baseline" Information is Inaccurate and Incomplete for Biological Resources and Land Use Plans

The baseline or environmental setting is critical to identification and analysis of impacts. In order to assess the impacts of a project the agency must have detailed and specific information regarding the resources of the project site and the baseline should reflect the project's real-world physical setting—"real conditions on the ground"—rather than "hypothetical situations." (*Save Our Peninsula Committee v. Monterey County Board of Supervisors* (2001) 87 Cal.App.4th 99, 121, 125; see also *Woodward Park Homeowner's Association v. City of Fresno* (2007) 150 Cal.App.4th 683, 708-09.) The environmental setting or baseline information must be fair and accurate and cannot understate the value of the environmental resources so as minimize the significance of the impacts of the proposed project. (*San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal. App. 4th 713, 725 [finding that failure to adequately describe adjacent riparian habitat and potential for wetlands on the project site "understates the significance of" the river adjacent to the site and avoiding discussion of those resources "precluded serious inquiry into or consideration of wetland areas adjacent to the site or whether the site contained wetland areas."].)

In several regards the FSA and information provided at the hearing falls short of these basic requirements – particularly for avian species. The baseline against which impacts are measured must also be adequately described but was not for avian species utilizing the project sites and the region.

In addition to the Center's expert, the US FWS also raised similar concerns. For example, the US FWS stated:

> In addition, risks to bald eagles (*Haliaeetus leucocephalus*) have not been considered thus far. Bald eagles were observed at Lake Tamarisk on October 5, 2013, about 5 miles from the project location and in January 2013 near Blythe at the Cibola National Wildlife Refuge to the southeast (reports available on www.eBird.org). Bald eagles do not nest at Lake Tamarisk, but this species is known to migrate across the desert from the coast and Imperial Valley to the Colorado River corridor; therefore, a similar effects analysis should be conducted for bald eagles as part of the proceedings.
>
> . . .
>
> Surveys were conducted on the project site to assess use by migratory birds; however, *the data submitted by PSH to date are inadequate to characterize migratory bird use of the habitat, and the non-breeding occurrence of bald and golden eagles and other raptors.* Surveys using protocols recommended by the interagency Renewable Energy Action Team (REAT) were only conducted during April 2013. This short timeframe is not adequate to provide a baseline of avian use of the site prior to construction. An adequate baseline of avian use of the project site is necessary to evaluate changes to the bird community resulting from plant operations and to design meaningful adaptive management measures should impacts be observed.

(TN201199, Encl. 1 at 3 & 4 [emphasis added].) The FSA also both understated the value of the existing resources and overstated the existing development in the area. The FSA does not provide a clear overall description of the environmental setting or baseline but rather discusses environmental setting separately in each section leaving the public and decisionmakers with no clear sense of the environmental setting. (*See* Exh. 300, FSA at 1.1-12.) The FSA focuses largely on the existing development and disturbance in the area and fails to properly address the largely undisturbed quality of area with sweeping vistas, spectacular night skies, vibrant resident wildlife and migratory birds throughout the year, surrounded by thousands of acres of largely undisturbed public lands and the proximity to Joshua Tree National Park and three wilderness areas. The proposed amended project is now sited *entirely* on federal public lands managed by the BLM within the CDCA, and will directly, indirectly and cumulatively impact lands within two designated Wildlife Habitat Management Areas ("WHMAs"); the Palen-Ford WHMA and the Desert Wildlife Management Area (DWMA) Connectivity WHMA. The project is inconsistent with the WHMA land use designations. Although the Center raised these issues in the initial proceeding Exh. 640 and the Committee then stated "…the proposed Project and Reconfigured Alternatives 2 and 3 could impede wildlife movement in these corridors and obstruct connectivity for wide ranging wildlife such as burro deer, kit fox, coyotes, and

badgers, and on a population level could impede gene flow for desert tortoises" (Commission Decision 12/22/2010), the FSA for the amendment still failed to adequately address these issues.

The management emphasis for the Palen-Ford WHMA is on the management of the dunes and playas within the Palen-Ford dune system. Management emphasis for the DWMA Connectivity WHMA is on the geographic connectivity for the desert tortoise for the conservation areas east and south of Desert Center (i.e., connectivity between the Chuckwalla DWMA and the wilderness area north of I-10). (SDEIS at 3.23-2.) These two areas, which are contiguous on and adjacent to the site, were adopted as part of a "Multi-species Conservation Zone." NECO Plan at 2-2. The NECO Plan goals and objectives for "Other Special Status Animal and Plant Species, Natural Communities, and Ecological Processes" are very specific and focus on conservation:

> Goals for special status animal and plant species, natural communities, and ecological processes are as follows:
>
> • Plants and Animals. Maintain the naturally occurring distribution of 28 special status animal species and 30 special status plant species in the planning area. For bats, the term "naturally occurring" includes those populations that might occupy man-made mine shafts and adits.
> • Natural Communities. Maintain proper functioning condition in all natural communities with special emphasis on communities that a) are present in small quantity, b) have a high species richness, and c) support many special status species.
> • Ecological Processes. Maintain naturally occurring interrelationships among various biotic and abiotic elements of the environment.
>
> The objectives are to
>
> a. protect and enhance habitat
> b. protect connectivity between protected communities

(NECO Plan at 2-52.) Further, the NECO Plan adopted action items to promote the objectives to "Protect and enhance habitat" (NECO Plan at 2-55), and "Protect connectivity between protected communities" (NECO Plan at 2-58). *See also* NECO Plan ROD at D-1, D-3.

For the first objective, to protect and enhance habitat, the first "action" is to

> Designate seventeen multi-species WHMAs (totaling 555,523 acres) such that approximately 80 percent of the distribution of all special status species and all natural community types would be included in the Multi-species Conservation Zone (Map 2-21 Appendix A). See Appendix H for a description of the process used to define the WHMA and the concept of conservation zones.

(NECO Plan at 2-55.) For the second objective, to protect connectivity, one of the actions states that: "The fragmenting affects of projects should be considered in the placement, design, and permitting of new projects." (NECO Plan at 2-58.) Other relevant "actions" include:

> Require mitigation of impacts of proposed projects in suitable habitat within the range of a special status species and within natural community types using commonly applied mitigation measures and conduct surveys in the proposed project area for special status species as follows (also see range maps 3-6a-f and 3-7a-f Appendix A):

(NECO Plan at 2-55.) For sand dune and playa communities that were closed to vehicle use, which includes this area of the Palen-Ford WHMA (NECO Plan at 2-57),

> Action in sand dune and playa communities (Map 3-3 Appendix A) that are closed to vehicle use, ***compensation for surface disturbance would be required at 3 acres for each acre disturbed.*** . . .

(NECO Plan at 2-57 [Emphasis added].)

Further, although Staff acknowledges the impacts to connectivity and to sand and playa areas and MFTL habitat, no alternatives that would avoid this impact are fully analyzed, no site design changes are suggested to reduce impacts to this important connectivity, no minimization measures are suggested. The MFTL alternative presented by the Center was flatly rejected. Staff needed to fully consider impacts to the WHMAs, habitat and connectivity, alternative placement and design for to protect connectivity, and impose 3:1 mitigation for all impacts to sand dune and playa areas within the Palen-Ford WHMA. Unfortunately, the FSA fails on all counts—it fails to provide the required analysis, to consider alternative placement or design, or to impose the proper mitigation ratio. As a result the amendment does not comply with FLPMA and is inconsistent with this LORS.

The project site is within the boundaries of the Riverside-East Solar Energy Zone ("SEZ") identified in the Final Solar Programmatic Environmental Impact Statement (SPEIS), however the Right of Way (ROW) also overlaps part of the exclusion areas identified in the SPEIS for the SEZ. The FSA is unclear in its treatment of the SEZ; on the one hand stating that because the project is in an SEZ it is compatible with the land use requirements, and on the other stating that the requirements for the SEZ (including avoiding the sand habitats and ensuring north-south connectivity) do not apply to this project because it was approved by the Commission before the SEZ was adopted. (Exh. 2000 at 4.5-3 [setting is in a SEZ], 6.1-16 ["appears to be in an area delineated as 'developable'"], 4.2-199

[noting need for desert tortoise connectivity in the SEZ], 4.2-224 [response to comment ignoring the need for wildlife corridors *to be developed* and the exclusion zone in the PEIS].) The SPEIS treats active sand areas as avoidance areas

> Disturbance of sand dune habitats and sand transport systems on the SEZ shall be avoided or minimized to the extent practicable. Substantial sand dune habitat has now been eliminated from the developable area within the SEZ. . . . development within these habitats shall be avoided or minimized to the extent practicable. Adverse impacts on the following species could be reduced with the avoidance of sand dune habitats and sand transport systems: . . . .Mojave fringe toed lizard.

(Final SPEIS at 9.4-88), and also requires that

> "Within the [Riverside-East] SEZ, two north–south wildlife corridors of sufficient width (a minimum width of 1.3 mi [2 km], but wider if determined to be necessary through future site-specific studies) should be identified by the BLM in coordination with the USFWS and CDFG. These corridors should be identified as non-development areas within the SEZ on the basis of modeling data (Penrod et al. 2012) and subsequent field verification of permeability for wildlife."

(Final SPEIS at 9.4-50.) Clearly the DWMA Connectivity WHMA is an existing and extant north-south wildlife corridor put in place to allow for connectivity of desert tortoise that meets the needs identified in the PEIS for a north-south connectivity corridor but this is ignored by Staff in the FSA although the proposed amended project will *even further impede the connectivity though this WHMA* for wildlife as compared with the original project (Exh. 3065; Tr. 10/29 at 45-46, 49-50) and render this WHMA virtually useless for desert tortoise genetic connectivity.

B. The FSA Failed to Properly Analyze All of the Project's Significant Impacts

The Commission can require the petitioner to submit any "data and information" that may be necessary to determine whether the amendment may have significant effects on the environment:

> Whenever any person applies to any public agency for a lease, permit, license, certificate, or other entitlement for use, the public agency may require that person to submit data and information which may be necessary to enable the public agency to determine whether the proposed project may have a significant effect on the environment . . . .

(Pub. Resources Code, § 21160; see also, *Sierra Club, supra*, 7 Cal.4th at p. 1220 (holding that section 21160 vests agency operating under a certified regulatory program with authority to require applicant to submit of information, if such information is necessary to enable the agency to determine whether a

proposed project will have significant adverse impacts on the environment].) In this matter, the Commission failed to obtain much of the information needed for a full and fair analysis of the impacts of the proposed project.

Unfortunately, for some of significant impacts of the proposed project the FSA failed to provide adequate identification regarding foreseeable impacts and environmental setting, and/or provided limited analysis of the impacts, particularly for cumulative and growth inducing impacts.

1. Environmental Review of Impacts to Biological Resources is Incomplete and Inadequate

The proposed project will be detrimental to several rare species. In some instances in the FSA and subsequent staff testimony, adequate information on which to base an impact analysis is lacking. In other instances, and impacts are inadequately analyzed and therefore the analysis of alternatives to avoid the impacts, and measures to minimize or mitigate impacts are also flawed. Unfortunately, the FSA fails to adequately identify and analyze impacts to biological resources or avoid, minimize and mitigate the direct, indirect, and cumulative impacts to these rare species as required under CEQA.

a. Impacts to Desert Tortoise Connectivity are significant

The impacts to desert tortoise connectivity is significant for the original project layout which is in the connectivity WHMA and impacts from the amendment will be *greater* than because the fenceline in the southwestern portion of the project has been moved closer to the I-10 freeway (to what was previously the edge of disturbance but south of the original fencing). (Exh. 3065 [identifying changes in the fenceline]; 10/29 Tr. at 51 [I. Anderson testimony].) As a result, tortoise and other wildlife that do manage to cross the I-10 using underpass #11 Exh. 2000 pdf 501, figure 10), will be forced into an even narrower corridor – or a trap-- which can only be escaped to the west through a new underpass under the access road. (10/29 Tr. at 45-46, 49-50.)

In addition to the loss of habitat, fragmentation, and edge effects degrading the remaining habitat, the direct, indirect and cumulative impacts of this amendment with other projects in the area (including additional projects since the original approval) will also increase other threats to the tortoise from traffic and subsidized predators. These impacts were not adequately addressed in the FSA or at the hearing. The Commission should find that impacts to tortoise connectivity and tortoise movement and

gene flow are significant and unmitigable. In addition, these significant impacts were not adequately addressed in the alternatives. Indeed, no desert tortoise connectivity alternative was included in the FSA and the one reduced footprint alternative that was included did nothing to avoid impacts to connectivity in the south west because it includes the same common area as the proposed amendment (with nearly 200 acres of unused habitat fenced off) and did not look at reconfiguring that area or retaining the approved move of the 160 KV line and actually utilizing that area. (Exh. 2000 at pdf 1464-65 [figure 5a and 5b].)

b. Impacts to Avian Species and Invertebrates Have Not Been Adequately Addressed and Formulation of Mitigation Has Been Improperly Deferred.

As discussed above regarding the Committee Questions and various LORS, the amendment would impact many special status avian species. Staff acknowledges the impacts are significant and unmitigable (Exh. 2000 at 4.2-7 [special status birds], 4.2-163 [effects of flux on birds]), but still fails to adequately address alternatives, minimization, or mitigation measures—instead proposing to defer development of mitigation measures until after approval and outside of the public process in violation of CEQA. (*See* Exh. 3001 at 3-4 [many plans are not provided to the public even in draft form including ECP and BBCA].) As the Center and FWS have both emphasized, even though we agree with Staff's conclusions that the impacts are significant and unmitigable, the identification and analysis of impacts to avian species and invertebrates from the amendment to date is inadequate and much more is needed to address avoidance, minimization and mitigation of these impacts. (Exh. 3001; TN201199 [FWS comments], Encl. 1 at 1-5 [avian species], 5-6 [pollinating insects].) For example, FWS noted that the evaporation ponds and the potential "lake effect" could attract avian species including the endangered Yuma Clapper rail and "recommend[ed] the evaporation ponds are removed (or effectively covered) from the proposed project in an effort to reduce the number of potential attractants" (id., Encl. 1 at 6). Although Staff was well aware of this issue from the earlier McCrary observations which noted that the presence of birds at the site was due in part to the adjacent agricultural ponds which attracted birds, Staff has not responded to the FWS recommendation or evaluated other needed alternatives, minimization and mitigation measures.

As noted above the Center is still concerned that there is not adequate baseline information regarding birds that reside in or use the proposed project area. Nonetheless, the FSA acknowledges one of the most significant and disturbing impacts of the proposed project is its potential to kill large numbers of birds by singeing or burning or collisions with mirrors. The Staff properly relied on the peer-reviewed published study from McCrary (1986) to estimate the number of birds that are at risk. The McCrary study found the "most frequent form of avian mortality was from collisions . . . most (>75%) died from colliding with the mirrored heliostats. . . . Thirteen (19%) birds (7 species) died from burning . . ." (Exh. 3026.) Extrapolating these numbers to the amendment—which is almost fifty times larger in area than the project studied by McCrary, it is likely that the project will kill many thousands of birds from collisions, burning and singing.

In addition, new information suggests that power towers may actually attract insects which in turn may attract even more avian species to the site and to their deaths. (*See* Exh. 3067 [I. Anderson testimony, "invertebrates and birds may actually be *attracted to* the power tower projects which create an 'environmental trap.'"); Exh. 3088 [article, "A Service staff member made a personal observation of a large number of insects attracted to the power towers at Ivanpah on a recent visit to the site. We're going to be paying close attention to this"]; 3090 [article].) This is another reason that the Commission should suspend this proceeding until new information is collected on this critical issue.

c. Impacts to Sand Habitat and Mojave Fringe-toed Lizard

The Center provided expert testimony that supports the Staff's analysis of the number of acres of dune habitat affected by the amendment. (Exh. 2000 [1,160 acres directly and indirectly affected]; Exh. 3050; 10/29 Tr. at 124 [staff "We believe the areas will either deflate or have the potential to deflate, or have the potential to degrade or become stabilized."], at 149 [staff, "We believe that decay of habitat will not be beneficial to fringe-toed lizards, and that while fringe-toed lizards may occupy portions of those areas after development of the project, we're uncertain if the habitat quality will shift to a point where they no longer occupy it, if it becomes [hardened]."], at 152-53 [Dr. Lancaster "a project of this size is likely to have some significant effect on the whole region of local wind field downwind of the project and adjacent to it. So there certainly will be effects on sand transport."], at 153 [Dr. Muth: "deflation leads to stabilization. Deflation means that you're changing the particle size

distribution by blowing the smaller particles off or averting them off by water, wind or whatever. Stabilization refers to that process whereby the surface undergoes a change to coarser materials, bigger particle size, and it tends to form a crust, which you can essentially pick up small pieces of that stays together, and biological crusts will eventually form in some areas over the long period."].) The petitioner's claim that the sand habitat in the area will not be significantly affected because of sediment transport across the site is wrong. (*See, e.g.,* 10/29 Tr. at 135 ["Fringe-toed lizards occur in a very specific range of sand size, where the average sand grain size for fringe-toed lizards is a tenth of a millimeter to a millimeter in grain size. Below that or above that, they either don't occur there or it alters their behavior. So when you get a sediment transport across the site, it's transporting particle sizes of all ranges from silt, you know, less than half a millimeter on up to small gravel, pebbles, whatever. That doesn't do anything any good in an aeolian sand system. The wind has to come in and sort those grains down wind."].)

However, Center does not support Staff's calculation of mitigation requirements based on the amount of reduction of sand transport however; *all* impacted downwind sand habitat areas that will be affected should be fully mitigated at minimum at a 3:1 ratio. (Exh. 3050 at 3-4 [staff identifies short term impacts to MFTL but its assumptions that the area continue to provide suitable habitat in the long term are unsupported]; 10/29 Tr. at 128 [Dr. Muth "assignment of a 25 percent trigger as being non-significant, that's totally arbitrary, as are -- as is 50 percent. Those percentages are not correlated in any way with fringe-toed lizard habitat quality or the ability of lizards to occupy that habitat over the long-term."].) Further, undisputed testimony shows that sand habitat on the private land that the project footprint excludes in the north east will also be significantly impacted as it is surrounded on more than 3 sides by project fencing and features (10/29 Tr. At 153-154 [Dr. Muth, "Because the area is completely surrounded by the project . . . [it] will be deprived of sand, no question about that, and it will change over time."], see Exh. 3091 [map of parcels owned or controlled by the petitioner]); if the amendment is approved, which the Center does not support, the Decision must expressly state that those private lands *cannot* be used for mitigation.

Staff amended the original COC regarding MFTL and the use of motorized vehicles in their rebuttal testimony. (Exh. 2003 at 4-5 [reducing speed to 15 mph on roads in MFTL habitat but eliminating 10 mph limit off of roads].) However, the Center's expert and the most recent report from

the CPUC, both recommend a limit of 10 mph. (Exh. 3061 [Muth rebuttal testimony], Exh. 3062 [report to CPUC]; 10/29 Tr. at 156-57 [Dr. Muth, "they're hard -- very hard to see. They don't move very fast. A lot of times they'll just freeze in place. They also bury in the sand . . . . the slower you go, the more focused you can be on what's coming up in the road, the more likely you are to see [MFTL] to stop or avoid them. So the slower the better"].)

d. Impacts to Desert Kit Fox, American Badger, and Burrowing Owls

As stated the Center's testimony, impacts to the desert kit fox and badger and new data and information are not adequately analyzed or addressed by Staff and the proposed mitigation measures are not adequate. (Exh. 3001 at 7-9; 10/29 Tr. at 50, 197-99 [impacts and new information], 200-205 [need for monitoring and fees for a future program]; Exh. 2005 [DFW outline re kit fox monitoring and mitigation].) Similarly, Staff has not accurately addressed burrowing owl impacts and the need to fully mitigate for lost territories for this species. (Exh.3001.)

e. Soil Crusts, Soil Stability, and Surface Hydrology

Cryptobiotic soil crusts are an essential ecological component in arid lands and increase soil stability. They are the "glue" that holds surface soil particles together precluding erosion, provide "safe sites" for seed germination, trap and slowly release soil moisture, and provide CO2 uptake through photosynthesis. (Exh. 3001; 10/29 Tr. at 211-12.) The proposed project will disturb an unidentified amount of these soil crusts and cause them to lose their capacity to stabilize soils and trap soil moisture thereby increasing erosion and PM10 and PM2.5 impacts to air quality and the loss of those stabilizing soils on this site area could be significant. Because no surveys were done regarding cryptobiotic soils or biological soil crusts in the original proceeding or this one, and the impacts of the loss of these soils has not been fully evaluated, the Commission has not met its duties under CEQA.

f. Air Quality [Reserved]

2. Cumulative Impacts are Significant and Unmitigated

Cumulative impacts analysis is a critical part of any CEQA analysis.

> [t]he cumulative impact analysis must be substantively meaningful. "'A cumulative impact analysis which understates information concerning the severity and significance

> of cumulative impacts impedes meaningful public discussion and skews the decisionmaker's perspective concerning the environmental consequences of the project, the necessity for mitigation measures, and the appropriateness of project approval.

(*Joy Road Area Forest and Watershed Assoc. v. Cal. Dept. of Forestry* (2006) 142 Cal. App. 4th 656, 676.) Where, as here, the impacts of a project are "cumulatively considerable" the agency must also examine alternatives that would avoid those impacts and mitigation measures for those impacts. (CEQA Guidelines §15130(b)(3).) In some cases the potential cumulative impacts will be best addressed by compliance with existing regulations (such as land use plans, conservation plans, or clean air act standards), in other cases avoidance and mitigation measures will be site specific, and in some cases new regulations or ordinances may be needed to address cumulative concerns.

Here, as detailed above, impacts to avian species, sand dunes and MFTL habitat, desert tortoise connectivity habitat, kit fox, and visual resources are cumulatively considerable and likely unmitigable. None of the mitigation measures provided to date are designed to actually minimize or mitigate impacts to these resources although such mitigation is required. (CEQA Guidelines § 15130(b)(3).). Therefore, the conclusion that those impacts are mitigated to below a level of significance is entirely unsupported.

The cumulative impacts to wildlife in the area from the proposed project and other projects will be significant and devastating—converting a largely open and wild landscape to an industrial zone not only destroying thousands of acres of intact habitat but also blocking aeolian transport, severely reducing connectivity, and fragmenting habitat.

C. The Alternatives Analysis in the FSA Fails to Meet CEQA's Requirements

An EIR "must consider a reasonable range of potentially feasible alternatives that will foster informed decisionmaking and public participation." (14 C.C.R. § 15126.6(a).) The Supreme Court has underscored the importance of the analysis of alternatives and mitigation: "The core of an EIR is the alternatives and mitigation sections" and the alternatives should "offer substantial environmental advantages over the proposed project." (*Goleta II,* 52 Cal.3d at 564, 566.) "One of an EIR's major functions . . . is to ensure that all reasonable alternatives to proposed projects are thoroughly assessed by the responsible official." (*Wildlife Alive v. Chickering* (1976) 18 Cal.3d 190, 197.)

Under CEQA, a lead agency may not approve a project if there are feasible alternatives that would avoid or lessen its significant environmental effects. (Public Resources Code §§ 21002, 21002.1(b).) To this end, the alternatives discussion "shall focus on alternatives to the project . . . which are capable of avoiding or substantially lessening any significant effects of the project, even if these alternatives would impede to some degree attainment of the project objectives, or would be more costly." (14 C.C.R. § 15126.6(b).) The agency is required to consider a range of potentially feasible alternatives to a project, or to the location of a project, that would feasibly attain most of the basic objectives while avoiding or substantially lessening any of the significant environmental impacts. (*Save Round Valley Alliance v. County of Inyo* (2007) 157 Cal.App.4th 1437, 1456.)

Environmental review documents must provide "sufficient information about each alternative to allow meaningful evaluation, analysis and comparison with the proposed project." (CEQA Guidelines § 15126.6(d); *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564-65 [italics in original].) It is the Commission's duty to consider alternatives and make findings regarding feasibility. As one court put it, "

> Since CEQA charges the agency, not the applicant, with the task of determining whether alternatives are feasible, *the circumstances that led the applicant in the planning stage to select the project for which approval is sought and to reject alternatives cannot be determinative of their feasibility.* The lead agency must independently participate, review, analyze and discuss the alternatives in good faith.

(*Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 736 [emphasis added].) Thus, the petitioner's narrow interest in constructing only one type of solar project using only one specific technology and in private contracts it has entered into for PPAs or LGIAs cannot be the primary determinant of the feasibility of alternatives. Because there is more than one feasible alternative that meets most objectives and avoids significant impacts to the environment, ***the Commission cannot approve the amendment and it must be denied.***

Environmental review documents must also contain sufficient detail to help "insure the integrity of the process of decisionmaking by precluding stubborn problems or serious criticism from being swept under the rug." (*Concerned Citizens of Costa Mesa, Inc. v. 32nd Dist. Agricultural Assn.* (1986) 42 Cal.3d 929, 935 [citations omitted].) The discussion of alternatives must be sufficiently

detailed to foster informed decision-making and public participation, not simply vague and conclusory. (*Save Round Valley Alliance v. County of Inyo* (2007) 157 Cal.App.4th at pp. 1456, 1460.) "Conclusory comments in support of environmental conclusions are generally inappropriate.[]" (*Laurel Heights Improvement Assn. v. Regents* (1989) 47 Cal. 3d 376, 404 [citations omitted].) "An EIR which does not produce adequate information regarding alternatives cannot achieve the dual purpose served by the EIR, which is to enable the reviewing agency to make an informed decision and to make the decisionmaker's reasoning accessible to the public, thereby protecting informed self-government." (*Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal. App. 3d 692, 733 citing *Laurel Heights Improvement Assn. v. Regents of University of California, supra*, 47 Cal.3d at p. 392.)

The same requirements apply to an environmental document, like an FSA, prepared as part of a certified regulatory program. (See *Sierra Club v. State Bd. of Forestry* (1994) 7 Cal. 4th 1215, 1228-29.) Alternatives must be analyzed in such a document even if measures intended to mitigate a project's significant impacts also are proposed. (See *Friends of the Old Trees v. Dept. of Forestry & Fire Protection* (1997) 52 Cal.App.4th 1383, 1393-94.) Overall, the FSA fails to address the most important criteria for a feasible alternative – that it avoids significant impacts on the environment of the proposed project. The question for the Commission in this matter is whether the impacts of *this* amendment could be avoided by a feasible alternative. Unfortunately the environmental review failed to address this critical question.

1. A PV Alternative is Environmentally Superior and Feasible.

Under CEQA, the lead agency is may need to consider at alternatives even if they are outside of the agency's jurisdiction. (See *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 575.) And the CEQA Guidelines expressly provide that a feasible alternative may impede achievement of those objectives to some degree. (*See* CEQA Guidelines § 15126.6(a), (b).) The Commission is required to comply with its independent duty under CEQA to analyze a reasonable range of feasible alternatives in the FSA and made some attempt to do so. The PV alternative, utilizing any one of a number of potential panels and layouts, would avoid many of the significant impacts of

the proposed project while still fulfilling the project objectives. A PV alternative is clearly feasible as well and this conclusion is supported by specific facts and analysis in the FSA. (Exh. 2000; *see Preservation Action Council v. City of San Jose* (2006) 141 Cal. App. 4th 1336, 1356-57.)

An applicant's mere assertion of a conflict with its own project objectives does not render an alternative economically infeasible. On the contrary, recent decisions have clarified that a finding of economic infeasibility must be based upon *quantitative, comparative evidence* showing that the alternative would render the project economically impractical. (See, e.g., *Save Round Valley Alliance v. County of Inyo* (2007) 157 Cal.App.4th 1437, 1461-62 [holding that applicant's inability to achieve "the same economic objectives" under a proposed alternative does not render the alternative economically infeasible]; *Uphold Our Heritage v. Town of Woodside* (2007) 147 Cal.App.4th 587, 600 [requiring evidence that comparative marginal costs would be so great that a "reasonably prudent property owner" would not proceed with the project]; *Preservation Action Council v. City of San Jose* (2006) 141 Cal.App.4th 1336, 1356-57 [holding that evidence of economic infeasibility must consist of facts, independent analysis, and meaningful detail, not just the assertions of an interested party].) The Commission cannot reject this alternative solely based on the applicant's statements that it does not wish to build such a project or that the timing is not optimal to meet its private contractual obligations.

As to economic feasibility, the only economic issues that are discussed are the applicant's concern about project delay and their inability to fulfill PPA or LGIA deadlines (Exh. 2000 and 1077). Nothing has been disclosed as to the actual cost to the consumer of the energy that may ultimately be generated from the proposed amendment. As a result no meaningful economic comparison could be or was made between the proposed project and the PV alternative, the distributed PV alternative or other alternatives such as conservation measures on their ability to meet the RPS standard. To the extent that the petitioner has stated that the proposed project is dependent on meeting deadlines for federal Investment Tax Credits (Tr. 3/18/13 at 84 ["We're facing the Investment Tax Credit which is due to expire at the end of 2016. This project proposes to be in service prior to that date."]), there is no showing in this record that a PV alternative could not be completed in that time; petitioner cannot use the funding deadline as an end-run around CEQA's requirement that significant impacts be avoided.

In order to fairly compare economic feasibility of alternatives, the Staff should have provided *some* economic metric that would put the proposed project on a level playing field with other alternatives rather than only discussing cost and funding sources in the context of the applicant's proposal.

2. The FSA Improperly Failed to Consider Any On-Site Design Alternatives

Staff failed to consider any on-site design alternatives to reduce the impacts of the amendment footprint on sand habitats or connectivity. Staff admits they did not look at utilizing the private lands controlled by the applicant that were included in the original decision and did not consider any design alternatives with the 160 KV line re-located, as approved in the original decision (10/29 Tr. at 77.). As a result, there is no evidence in this record of any analysis of minimization measures and, instead, the amendment design is highly irregular, increases impacts to sand habitats, and includes nearly 200 acres of "unused" lands within the fence—Staff was required look at redesigning the footprint to minimize the impacts—not merely to accept the initial layout proffered by the petitioner. On this basis as well, the review violates CEQA.

3. The FSA Unfairly Rejected Consideration of A Distributed PV Alternative

The FSA rejected analyzing a distributed renewable alternative in the FSA. In the original proceeding the Center sponsored testimony from Bill Powers on the treatment of the distributed energy alternative and reincorporated this testimony in the amendment proceeding (Exh. 3000), showing that the discussion by Staff rejecting this alternative was inaccurate and inadequate and that these alternative energy sources provide a feasible alternative to the proposed project. (Exh. 600-639, 669-670 [Testimony of Bill Powers and exhibits].) Notably, the FSA for the amendment did not find that this alternative was infeasible – as it could not—but rather rejected it as an "alternative" based on three flawed reasons (Exh. 2000 at 6.1-20 to 21): 1) that the public had not identified defined projects with sites – staff could have evaluated a hypothetical project at a defined site, but chose not to do so; 2) DG programs are voluntary – program structure is irrelevant to an environmental analysis of a similar sized DG project; and 3) that DG projects to not meet RPS program goals – however, the failure to fairly count DG in the RPS is a policy issue -- DG *in fact* does help meet the RPS goals with the least impact to the environment by providing renewable energy on existing structures, parking lots and disturbed

sites at or very near the point of use. Therefore, this Staff's decision to eliminate DG from the alternatives analysis was wrong.

D. Mitigation Measures Were Not Fully Considered In the Environmental Review

Under CEQA, an agency must "mitigate or avoid" the significant environmental impacts of the "projects it carries out or approves whenever it is feasible to do so." (Cal. Pub. Res. Code §§ 21002, 21002.1(b); 14 Cal. Code Regs. § 15065(c)(3).) To satisfy this requirement, an EIR "shall describe feasible mitigation measures which could minimize significant adverse impacts" for "each significant effect identified in the EIR." (14 Cal. Code Regs. § 15126.4(a).) Before approving a project where the EIR identifies one or more significant effects from the proposed project, the agency must make a finding that (1) the project incorporates alterations that mitigate or avoid such impacts, (2) such alterations have been or can and should be adopted by another agency, or (3) the identified mitigation measures and alternatives are infeasible and the benefits of the project outweigh its significant effect on the environment. (Cal. Pub. Res. Code § 21081; 14 Cal. Code Regs. § 15091(b).) When making such a finding, the agency shall (1) adopt a monitoring or reporting program designed to ensure compliance with measures adopted to mitigate or avoid impacts during project implementation, and (2) provide that such measures are fully enforceable through permit conditions, agreements, or similar measures. (Cal. Pub. Res. Code § 21081.6(a)-(b).)

1. Mitigation Measures Must Be Formulated Before Approval of the Amendment

"An EIR is inadequate if '[t]he success or failure of mitigation efforts . . . may largely depend on management plans that have not yet been formulated, and have not been subject to analysis and review with the EIR.'" (*Communities for a Better Environment v. Richmond* (2010) 184 Cal.App.4th 70, 92 (*citing San Joaquin Raptor Rescue Center v. County of Merced* (2007) 149 Cal.App.4th 645, 670).) To satisfy CEQA's requirement for meaningful evaluation and disclosure of measures necessary to mitigate adverse impacts, "[f]ormulation of mitigation measures should not be deferred until some future time." (14 C.C.R. § 15126.4(a).) Rather, an agency must scrutinize all potential mitigation actions in the EIR for a project. (*San Joaquin Raptor*, 149 Cal.App.4th at 670 (internal quotes omitted).) It cannot "leave[] the reader in the dark about what land management steps will be taken, or what specific criteria or performance standard will be met." (*Ibid*.) The reason for this prohibition is also self-evident:

> A study conducted after approval of a project will inevitably have a diminished influence on decisionmaking. Even if the study is subject to administrative approval, it is analogous to the sort of post hoc rationalization of agency actions that has been repeatedly condemned in decisions construing CEQA.

(*Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 307.)

While an EIR may, in certain narrow circumstances, defer selection from among several different identified mitigation options, it cannot delay the formulation of those mitigation options to some future, post-EIR process. (14 Cal. Code Regs. § 15126.4(a)(1)(B) (explaining that the formulation of mitigation may not be deferred, but that "measures may specify performance standards which would mitigate the significant effect of the project and which may be accomplished in more than one specified way").) The courts have been clear that an agency may defer mitigation *only where* the agency "(1) undertook a complete analysis of the significance of the environmental impact, (2) proposed potential mitigation measures early in the planning process, and (3) articulated specific performance criteria that would ensure that adequate mitigation measures were eventually implemented." (*Richmond*, 184 Cal.App.4th at 95.)

In *San Joaquin Raptor*, the court found inadequate two mitigation measures because they did not set forth specific plans where the measures required the project applicant to consult wildlife experts to develop plans and to receive State approval before breaking ground. (149 Cal.App.4th at 670-671.) In rejecting the measures, the court explained that the EIR failed to explain why mitigation plans were deferred and also failed to impose "any criteria or standards of performance." (*Id.* at 670-671.)[11] So too here, the Commission has failed to provide the needed criteria or standards of performance to lawfully defer development of specific mitigation measures.

2. Mitigation Measures Must Be Feasible, Enforceable, and Funded

To be legally adequate, mitigation measures must be "feasible and enforceable." (*Lincoln Place Tenants Ass'n*, 155 Cal.App.4th at 445.) CEQA requires that mitigation measures are fully enforceable through permit conditions, agreements, or similar measures. (Cal. Pub. Res. Code § 21081.6(a)-(b).) To be feasible, a measure must be "capable of being accomplished in a successful

[11] In contrast, the court upheld a mitigation measure that included specific criteria requiring that the applicant choose one of two options to replace vernal pool areas: either by "creating vernal pools or swales within the conservation area on site, or by off-site purchase of wetland banking credits." (Ibid.)

manner within a reasonable period of time, taking into account economic, environmental, social, and technological factors." (*Ibid*. (quoting Cal. Pub. Res. Code § 21061.1).) Where, as here, there is no showing in the record that funding exists to carry out the many as yet unidentified mitigation measures, the proposed mitigation is neither feasible nor enforceable. (*Gray v. County of Madera* (2008) 167 Cal.App.4th 1099, 1122 (finding inadequate mitigation fee measures where the "EIR fails to include any discussion of how or when the possible mitigation fees would be collected or spent" and where the lead agency "made no finding regarding the limitation or the feasibility of the County guaranteeing funding for roadway improvement").) [12]

Even where the identified mitigation measures are under the jurisdiction of another agency, such as where a public agency other than the lead agency has "jurisdiction over natural resources affected by the project," the lead agency must obtain from that other agency complete and detailed performance objectives for the identified mitigation measures. (Cal. Pub. Res. Code § 21081.6(c).) "The purpose of these requirements is to ensure that feasible mitigation measures will actually be implemented as a condition of development, and not merely adopted and then neglected or disregarded. (*Federation of Hillside & Canyon Ass'ns v. City of Los Angeles* (2000) 83 Cal.App.4th 1252, 1261; *see also Lincoln Place Tenants Ass'n v. City of Los Angeles* (2007) 155 Cal.App.4th 425, 443-444 (noting that "[t]he fundamental goals of environmental review under CEQA are information, participation, mitigation, and accountability").)

3. Significant Adverse Impacts that Have Not Been Avoided or Minimized or Mitigated.

The amendment will have significant impacts that have not been mitigated including impacts to biological resources, visual resources, and significant cumulative impacts. Because identification and analysis of many impacts of the proposed project is incomplete (particularly with regards to avian species) many of the proffered mitigation measures do not fully address the impacts and mitigate for them. Moreover, even though significant impacts are identified to avian species, no meaningful

[12] While CEQA does not require that an EIR discuss mitigation funding in every instance, an agency cannot ignore legitimate funding concerns. (*Federation of Hillside*, 83 Cal.App.4th at 1260.) In *Federation of Hillside*, the court struck down an EIR which failed to rebut concerns that the cost of mitigation "far exceed[ed]" the city's ability to pay, required the cooperation of multiple agencies, and did not make development contingent upon the implementation of the mitigation measures. (*Id*. at 1256, 1261.)

mitigation measures have been provided and there is no showing that the mitigation measures that have been deferred to a future time for development will be effective, fully funded, or enforceable. Accordingly, the Commission cannot find that these measures have mitigated the proposed project's impacts to a less than significant level. Conclusions regarding the effectiveness of mitigation measures must be supported by substantial evidence. (See, e.g., *Gray v. County of Madera* (2008) 167 Cal. App. 4th 1099 at p. 1116-119.) Significant impacts that were identified have not been avoided, minimized and mitigated below a level of significance and many impacts were not adequately identified and analyzed such that a finding of significance could be made, as a result, the environmental review for the proposed project fails to comply with CEQA's substantive requirements. As a result, on this record, the Commission cannot lawfully approve the amendment or make the findings needed to override.

Here, Staff has recommended deferring the development of needed mitigation with no performance objectives and no provision to ensure that mitigation is feasible, enforceable or fully funded. This completely undermines CEQA's focus on accountability and implementation of mitigation measures. The Commission cannot rely on undefined future mitigation which the petitioner has not agreed to fund (or to provide curtailment for). Instead, the Commission should suspend these proceedings until proposed mitigation is developed and can be evaluated by the public and decision makers before any decision is made on the amendment.

Committee Question #3 assumes many facts not in evidence. The Center is particularly concerned with the lack of critical minimization and mitigation measures and the reliance on many plans which have not yet been provided to the public and parties in this matter which fails to comply with the requirements of CEQA. As the Committee is well aware, CEQA requires that environmental review must also analyze the effects of any proposed mitigation measures and their likely efficacy. CEQA Guidelines § 15126.4(a)(1)(D) ("If a mitigation measure would cause one or more significant effects in addition to those that would be caused by the project as proposed, the effects of the mitigation measures *shall* be discussed . . ." emphasis added); *Save Our Peninsula Comm. v. Monterey Board of Supervisors* (2001) 87 Cal.App.4th 99, 130 ("An EIR is required to discuss the impacts of mitigation measures."). Here, the FSA provides no avoidance or minimization measures for impacts to avian species, the Commission has not complied with CEQA and it must "require the project to take

additional steps to avoid avian mortality, including possible curtailment, if the project were to result in excessive avian mortality," and in order to comply with the law, the Commission must develop those measures ***before*** the amendment is approved. Moreover, more needs to be done to identify and analyze the likely mortality and the status of various avian species in the project area in order to even begin to define "excessive avian mortality" to define triggers for curtailment.

Indeed, the "additional steps to avoid avian mortality", such as those presented in the applicant's rebuttal testimony (Exh. 1080), provide an excellent example of why the CEQA rule requiring analysis of mitigation measures as part of the project CEQA analysis is so important. Many of the mitigation measures proposed by the applicant (but not analyzed in the FSA) could significantly increase the impacts of the project on the environment including, but not limited to: increasing CO2 emissions (from airplanes, helicopters and propane cannons suggested to be used for deterring avian use of the area), increasing noise (from the airplanes, helicopters, propane cannons, pyrotechinics, blank shells, wailers broadcasting "dog barking, siren, gunfire, music, human screams or other deterrent sounds"); increasing impacts to wildlife (risks to kit fox from the proposed use of dogs which could further spread distemper in this already impacted population; risks to MFTL and other small wildlife from falcons used for deterrence; risks to these same species from "implementation of avian prey reduction measures within the fence-line"; risks to many species from Mylar balloons which pose a hazard to wildlife if they come lose and land in desert areas); increased impacts to water resources (from use of water cannons or mist to deter birds); increased impacts to soils and air quality (increased ATV use in avian areas); additional direct and indirect impacts to birds (netting and monofilament lines that may not just deter birds from the site but also trap or kill birds); increased impacts to native vegetation and soils (from proposal to significantly reduce onsite vegetation with more frequent and aggressive mowing). The FSA evaluated *none* of these impacts from proposed mitigation and defers consideration and approval of such plans until after the public review process in violation of CEQA.

The FWS suggests that additional adaptive management measures may be developed *in the future* which "could include developing advanced conservation practices that modify operations to reduce mortality by reducing or diffusing the concentrated solar flux when eagles or other bird species are detected as at risk using radar or other technologies. Other spatial and temporal curtailments of operations could be used to respond to specific issues, such as active breeding attempts or migratory

events." (TN201199 at pdf 14 & 15, enclosure 2, page 1 & 2.) While the Center concurs that these should be considered, because none of these has yet been evaluated under CEQA and the company has not committed to sufficient funding for mitigation measures including radar and significant curtailment measures (including reducing or diffusing flux) such that an open ended future adaptive management strategy could be fully funded and potentially workable, the Commission cannot simply defer the development of mitigation measures. If the Commission intends to use new monitoring measures and an adaptive management framework now being developed by FWS and other agencies at the Ivanpah project as a model for the amendment, then the Commission should suspend the procedure for this amendment at least one year until those measures and frameworks are developed and put in place and can be evaluated by the all parties. To continue to rush forward with the amendment for power towers when so little information is available is completely irresponsible.

Given the lack of any CEQA analysis to date by the Commission, and the lack of adequate avian baseline information as detailed above, it is impossible for the Commission at this time to rationally address the question of avoidance and curtailment—additional CEQA review is needed. In contrast, the Commission does have sufficient information in the FSA *to deny the proposed amendment* because there are alternatives analyzed in the FSA that would avoid many impacts to avian species such as the PV alternative or the no project alternative.

E. The Commission Cannot Make the Findings Necessary to "Override" the Project's Significant Impacts Under CEQA, And Response to Committee Question #2; Part 2: "What metrics should the Committee consider applying to weigh this impact as called for in Public Resources Code § 21081 . . .?"

In order to approve the amendment despite its significant environmental impacts, the Commission must find (1) that mitigation measures or alternatives to lessen these impacts are infeasible, and (2) specific overriding benefits of the Project outweigh its significant environmental effects. (§ 21081; Siting Regs. § 1755.) Here the Commission's objectives can be met without the proposed project in several ways—most obviously with a PV alternative. Even assuming for the sake of argument alone, that the identification and analysis of environmental impacts were adequate, which they are not, as explained above, the alternatives analysis in the FSA shows that a PV project on this site is feasible and could avoid many of the significant impacts of the project.

Moreover, there is no showing in this record that the alleged benefits of the project outweigh the significant harm the amendment will surely cause. Indeed, many of the alleged benefits are exceedingly speculative because this tower technology has never been operated at this scale. As explained above, this same design of a solar power tower project with two 750 foot towers *without storage* has already been rejected by the CPUC as adding no significant benefit and uneconomic. (CPUC Resolution E-4522, [grudgingly approving one power tower of this design as based on the applicant's allegations that it was necessary step before it could build a power tower with storage].) Thus, the alleged benefits of the proposed amendment as compared to a PV project or the already permitted solar trough project on this site do not outweigh the significant environmental effects.

In contrast, its impacts—to the birds, desert tortoise, sand habitat and Mojave fringe-toed lizards, visual resources and other resources—are more than considerable. On this record, therefore, the Commission cannot make the findings necessary to "override" the Project's significant environmental impacts under CEQA.

Because the PV alternative and the no project alternative are both feasible, the Commission cannot make the findings required to "override" the amendment's significant impacts. As a result, the record does not contain substantial evidence to support either of the findings necessary to "override" a significant impact under CEQA or the Warren-Alquist Act.

II. THE AMENDMENT IS INCONSISTENT WITH FEDERAL AND STATE LORS.

A. State LORS

1. Approval of the Amendment Would Violate CEQA

As detailed above, the CEQA review for the proposed project to date is inadequate and therefore the Commission's approval of this project would violate CEQA.

2. Approval Would Violate CESA and the Fully Protected Species Act

As discussed above, the Commission has not adequately identified impacts to special status species or evaluated alternatives to avoid impacts to CESA listed species including willow flycatchers and therefore, cannot find that the amendment complies with CESA.

In addition, the project will take eagles and Yuma clapper rail in violation of the fully protected species law, (Cal. Fish & Game Code § 3511). As discussed above, any take of a golden eagle, which is a fully protected species, is prohibited by California law and the project does not fall within the

narrow exception allowing such take under an approved NCCP (Cal. Fish & Game Code § 2835), as no such plan has been approved for this project or in this area. Golden eagles and other raptors are also protected under California law as Birds of Prey (Fish & Game Code § 3503.5), and eagles and other migratory birds are also protected under California law as Migratory Birds (Fish & Game Code § 3513). All of these LORS would likely be violated by approval the amendment. or operation of power towers. Therefore, the Commission should not approve this project which violates state LORS.

B. Approval of the Project Would Violate Federal LORS

The proposed project would have unmitigated impacts to avian species that will also violate the Migratory Bird Treaty Act (16 U.S.C. § 701 *et seq*.), the Bald and Golden Eagle Protection Act (16 U.S.C. § 668 et seq.), and likely other federal laws, ordinances, regulations and standards.

As discussed above, the environmental review shows that the proposed project will have significant impacts to birds, including migratory birds and golden eagles. Therefore, it is impossible for the Commission to find that the project is consistent with the Migratory Bird Treaty Act or the Bald and Golden Eagle Protection Act both of which prohibit take.

C. The Commission Cannot "Override" the Project's Noncompliance with State and Federal LORS, And Response to Committee Question #2; Part 3:

"[T]he Commission has consistently regarded a LORS override [as] an extraordinary measure which . . . must be done in as limited a manner as possible." (*Eastshore Energy Center, Final Commission Decision, October 2008 (06-AFC-6) CEC-800-2008-004-CMF*, at p. 453 [quotation omitted].) In order to approve a project that conflicts with LORS, the Commission must make two independent findings: (1) that public convenience and necessity require the project, and (2) that there are not more prudent and feasible means of achieving public convenience and necessity. (§ 25525; Siting Regs. §§ 1752(k), 1755(b).) Neither finding can be made on the record here because the amended power tower proposal is not necessary to meet any public convenience or necessity, including the RPS goals which can be met in other ways, and because a PV alternative on this site, the original solar trough project, or a distributed PV alternative would all be more prudent and feasible means of achieving the RPS goals and achieving public convenience and necessity.

1. Public Convenience and Necessity Do Not Require the Project.

The Applicant has not met its burden of presenting substantial evidence to support a finding

that public convenience and necessity require this project. (*See* Siting Regs. § 1748(d).) The phrase "public convenience and necessity," depending on the facts presented, can mean anything from "indispensable" to "highly important" to "needful, requisite, or conducive." (*San Diego & Coronado Ferry Co. v. Railroad Com. of California* (1930) 210 Cal. 504, 511-12.) A more recent decision defines the phrase as meaning "a public matter, without which the public is inconvenienced to the extent of being handicapped in the practice of business or wholesome pleasure or both, and without which the people of the community are denied, to their detriment, that which is enjoyed by others similarly situated." (*Luxor Cab Co. v. Cahill* (1971) 21 Cal.App.3d 551, 557-58.) In *Eastshore*, the Commission stated that its practice is to balance the benefits of each project against the public purposes of the LORS with which it conflicts. (See *Eastshore* at p. 455.) Under any of these tests, public convenience and necessity do not require the amendment, and as a result it cannot be certified.

2. There are more prudent and feasible means of achieving the Commission's goals

While it is undoubtedly true that California must move forward with the development of new sources of clean, renewable energy, there is no reason, and no showing on this record, that this amendment to allow two- 750-foot power towers and the associated mirror fields is needed at this time as many other solar and wind energy projects are being constructed and together with distributed PV programs will easily meet or exceed current RPS requirements. Moreover, there are other proposals proceeding through the Commission's approval process and other federal, state and local approval processes that provide feasible alternatives of achieving the Commission's goals without conflict with LORS particularly regarding impacts to avian species and rare sand habitats, violations of CESA, the fully protected species act, CEQA, and many federal laws.

Alternative renewable energy projects are being proposed, built, and brought on line in many areas of California. While some solar development may be appropriate in this area, the amendment would have significant direct, indirect, and cumulative impacts on the resources of the Chuckwalla Valley and nearby Joshua Tree National Park that are avoidable with feasible alternatives. The Commission cannot rationally approve this highly impactful amendment when other feasible alternatives exist, including the already approved project and a PV alternative on site, that would provide renewable energy at a far lower cost to the environment.

CONCLUSION

In light of the above, the testimony, exhibits and public comment submitted in this matter, the Center urges the Commission to deny the amendment application.

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Respectfully submitted,

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Appendix A: THE CENTER'S PROPOSED CHANGES TO CONDITIONS OF CERTIFICATION

Appendix A

Center For Biological Diversity's Required Changes to Palen COC's

Because so many of the plans (at a minimum, sixteen plans for biology alone) are required to be developed and implemented in the future as part of the avoidance, minimization and mitigation strategy in the COC, the CEC must make those plans available to the public for input before finalizing. Therefore we suggest the following **"overarching" Condition of Certification** for all plans ultimately required in the Final Decision.

All plans required as a Condition Of Certification (COC) will be posted on the CEC's Compliance Proceeding Webpage for public review and notification sent to Palen Solar Listserv. Public comment will be taken for thirty days on the plans. Public comments will be reviewed and incorporated into the final plan prior to adoption by the CPM. The final plans will then also be posted on the Compliance Proceeding Webpage for public review and notification sent to Palen Solar Listserv.

BIO-8 (3)

While the revised **Bio-8(3) (**filed with Staff's Rebuttal) lowers the speed limit to 15 mph, it also eliminated the speed limit for vehicles traveling off of roads during construction and operations. Based on the documented mortalities at the Colorado River Substation lizard mortality is likely to be significant, therefore the following changes to the language in **Bio-8(3)** need to be included:

> 3. No vehicle speed shall exceed ~~15~~ 10 miles per hour on roads within areas where Mojave fringe toed lizard are known to occur or have the potential to occur on site. No vehicle speed shall exceed 10 miles per hour when traveling off of roads on the site during construction or operations.
>
> "Excessive road mortality" is defined as 5 percent of the local population, with local population being the number of Mojave fringe-toed lizards found on the project site.

- Biological monitors will be present on site in areas where Mojave fringe-toed lizards are present during activity periods to remove the lizards from the road and out of harm's way.
- During construction and maintenance, escorts will be used for all vehicles to avoid impacting Mojave fringe-toed lizards when lizards are present and active.
- BRIMMP will address avoidance of Mojave fringe-toed lizards.

- If excessive road mortality of lizards is documented, all site activity and access will be re-routed out of Mojave fringe-toed lizard habitat when lizards are present and active.

While we agree with the installation of the box culvert in **Bio-8 (11)** to aid in connectivity in a very constrained wildlife connectivity area, a key component needs to be added as follows:

- The box culvert should be maintained regularly to secure unimpeded passage for a variety of wildlife.

BIO-10

While translocation efforts allow for survival of some desert tortoise, in the case of the proposed project, moving the tortoise out of immediate harms way by moving them nearby (and even perhaps within part of their historic "home range"), will likely still result in long-term demise of the animals because of the industrialization of the site. Therefore, to actually determine the outcome of the translocation over time, **BIO-10** needs to include the following as part of the requirement for the Desert Tortoise Translocation Plan:

- Monitoring of all of the translocated tortoises or desert tortoise moved as part of this project will continue annually throughout the life of the Palen Solar Energy Power System.

If the translocation site is not conserved in perpetuity, moving animals out of harm's way for one project does not preclude the eventuality of having to move them for a second time when another project is proposed in the area where the translocated animal has eventually settled. Indeed, this situation is occurring for desert tortoise that were moved off-site of the Ivanpah Solar Electric Generating System site, and may now need to be moved a second time if the Stateline Solar project is permitted as currently proposed[1]. Because the project is within the BLM's Solar Energy Zone, which was subsequently zoned after the original project was permitted, it is very likely that any tortoises (or other animals) moved off of the proposed project site may need to be moved a second time if additional projects move forward in the area. The more times animals are moved out of their existing home ranges, the less likely they are to survive. Therefore, the translocation areas, or areas where relocated or translocated plant/animals reside should be put off limits to all future development. Therefore, **BIO-10** needs to have the following language added to it:

- Areas where relocated or translocated desert tortoise reside will be conserved in perpetuity to provide a safe refugia for tortoise moved from the project site.

[1] Figure 8 Tortoise Records ISEGS Monitoring Project and Perimeter Recipient Sites.

BIO- 12

This COC still significantly underestimates the value of the project area for wildlife as identified by the BLM in the Northern and Eastern Colorado Plan, where it is identified as not one, but two overlying Wildlife Habitat Management Areas (WHMAs) - The Palen-Ford WHMA, established for the conservation of special status desert species and the Desert Tortoise Connectivity WHMA, established specifically for desert tortoise connectivity. Because mitigation for impacts to other desert species that currently occupy the project site will be "nested" within the desert tortoise mitigation, these significant wildlife conservation designations and the species that they were proposed to protect need to more accurately align with the impact from the project. Therefore the following changes to the language in **Bio-12** needs to be included:

> …To satisfy this condition, the Project owner shall acquire, protect and transfer 5 acres of desert tortoise habitat for every acre of habitat within critical habitat and within the final Project footprint, and 3~~1~~ acres of desert tortoise habitat for every acre of habitat outside of critical habitat but within the final Project footprint, and provide associated funding for the acquired lands, as specified below….

The mitigation acquisition requirement for desert tortoise do not require that connectivity for desert tortoise be part of the mitigation, despite the project being located in the only desert tortoise WHMA established for connectivity. Therefore **BIO-12 (1)** a needs to include the following changes:

> a. be within the Colorado Desert Recovery Unit, and provide ~~with potential to contribute to~~ desert tortoise habitat connectivity and build linkages between desert tortoise designated critical habitat, known populations of desert tortoise, and/or other preserve lands. The mitigation lands will be acquired, designated and protected in perpetuity for desert tortoise connectivity;

BIO-16a

1) While we fully support eliminating electrocutions and cable avoidance of avian species from transmission lines, the offending lines/towers that are causing injury and mortality are the responsibility of the transmission line/tower company, not this project proponent. Therefore **BIO-16 a (1) should be deleted in whole.**

2) It is unclear how a one-time $1,500,000.00 was determined to be adequate to help offset impacts to Migratory Birds through implementation of conservation measures. Because of the on-going nature off the impacts to migratory birds through the life of the project, the $1,500.000.00 may be appropriate as base-line compensation with additional compensation being required based on monitoring results of migratory bird mortality through the life of the project. The following language needs to be added to **BIO-16a:**

> a. Initially, ~~P~~pay $1,500,000.00 to fund the activities of a CPM-approved third party ~~or CEC~~ that will perform additional migratory bird conservation measures.

Based on the outcome of avian mortality monitoring through the life of the project, additional compensation will be required if avian mortality continues.

Based on the current language, we are surprised that the COC includes language where the CEC (through the CPM) will give money to itself to fund bird conservation measures. To our knowledge, the CEC has not previously taken on direct mitigation obligations of any projects that they permit. Furthermore, it is unclear that the CEC has any expertise in migratory bird conservation measures, based on the lack of any clear measures presented herein, and no implementation experience. Indeed because activities include a management component, it appears this measure would be a direct payoff to CEC. Therefore we find the designation of the CEC itself as implementer of the bird conservation measures to be inappropriate and recommend that other entities such as Fish and Wildlife Service's Sonoran Joint Venture (http://sonoranjv.org/) or the National Fish and Wildlife Foundation (http://www.nfwf.org/Pages/default.aspx) or others to be more appropriate recipients of the conservation measure funding.

Numerous fully-protected and state-listed species are known from the project area, and therefore have potential to be impacted by the project. The following language needs to be added to **BIO-16a:**

- Because state fully-protected species are known from the project site, the project will initiate and finalize a Natural Communities Conservation Plan. In addition the project will provide additional safeguards through project operations to avoid and minimize future mortalities including curtailment of operations during times when fully-protected species are present.
- If a state-listed species mortality occurs on the site, the project will re-initiate consultation with the California Department of Fish and Wildlife in addition to providing safeguards through project operations to preclude future mortalities, including curtailment of operations during times when fully-protected species are present.

Of additional concern is the lack of specificity of the conservation measures to be implemented. Where will the conservation measures be implemented? In this case, the conservation measures should not be implemented nearby the project, as any enhancement of resources for migratory birds nearby could lure more birds into the area and putting them in harm's way. The following language needs to be added to **BIO-16a:**

- Conservation measures will be implemented in the same watershed as the project, but will occur well away from the project, so as to not lure migratory birds into harm's way of the project.

Because desert riparian areas, which are often key migratory bird habitat are often overrun by the introduced tamarisk (*Tamarix* sp.) plants and other non-native plants, a common "mitigation" measure is removal of tamarisk and other riparian non-native species. While we generally support this approach, great care and coordination with other agencies is required implement permanent removal of these non-native plant

species from migratory bird habitat. Anything less than permanent removal creates the "unending" mitigation opportunities that allows for on-going destruction of riparian habitat while repeatedly removing non-native plants from the same "enhancement" area. The following language needs to be added to **BIO-16a:**

- If the conservation measures include enhancements to migratory bird habitat by removal of non-native vegetation, the removal shall be closely coordinated with other agencies and landowners to insure removal is permanent.

BIO-16b

Bio-16b describes a new novel proposal involving a Technical Advisory Committee (TAC). While we generally are supportive of technical input into complex biological issues and TACs in particular, the make-up as described in (2) does not include any technical experts, but instead relies solely on the regulatory and land management agencies and the project owner. As proposed, TAC will basically be advising itself - a strange and perplexing dynamic. A functional TAC needs to include numerous actual experts. In this case, appropriate experts need to include experts on migratory birds, on specific avian species based on mortality monitoring, on eagles, on bats and on other species-specific or technology-specific issues as they arise. The following language need to be added to and **deleted BIO-16b(2):**

> 2. Formation of a technical advisory committee (TAC). The TAC will consist of ~~a single representative of the BLM, CEC, CDFW, USFWS, one representative of the Project Owner involved in operation of the project and one representative of the Project Owner with environmental compliance responsibilities.~~ experts on migratory birds, on specific avian species based on mortality monitoring, on eagles, on bats and on other species-specific or technology-specific issues that need to be addressed. Members of the TAC may include, but are not limited to, experts from BLM, CEC, CDFW, USFWS and academic institutions. Representatives of the Project Owner involved in operations of the project and/or environmental compliance may be invited to present to the TAC but shall not be included as TAC members.

Additionally, all TACs that the Center is aware of are publicly accessible meetings providing transparency to the public about the issues. The TAC for this matter should be no exception. The following language needs to be added to **BIO-16b (2):**

- All TAC meetings will be open to the public and noticed to the public through the CEC's Compliance Proceeding Web Page and E-notification System at least 5 days prior to the meeting along with agendas. Complete transcripts of all TAC meetings will be provided in the same manner as notice was given no more than 2 weeks after any meeting.

Because the project would be operational for 20-30 years and perhaps beyond, in order to evaluate the long-term impacts over time, monitoring of avian impacts should occur for

the life of the project. As monitoring techniques improve over time, we agree that changes should be able to be made as part of adaptive management strategy. The following language need to be added to and deleted **BIO-16b(6)**:

> 6. …All surveys and monitoring studies included in the BBCS shall be conducted ~~for at least three years following~~ throughout the commercial operation and approval of the BBCS by the CPM. At five year intervals ~~the end of the three-year period~~, the project owner~~, the TAC~~ and the CPM shall meet with the TAC and confer to determine whether the survey program is adequately capturing avian mortality and operational measures that need to be implemented to reduce mortality if it is occurring ~~shall be continued for subsequent periods~~. The monitoring program may be modified with the approval of the CPM based on input from the TAC in response to survey results, identified scavenging efficiency rates, or other factors to increase monitoring accuracy and reliability or in accordance with the adaptive management decision-making framework included in the BBCS which has been reviewed by and commented on by the TAC.

One viable avoidance and minimization strategy that the COCs fail to incorporate is the curtailment of the project operation during migration times of avian species. This operational adjustment needs to be included as part of the avoidance and minimization strategy for this project. Therefore **BIO16b** needs to include the following language:

- During spring and fall migratory periods, project operations will be curtailed during morning and evening hours to avoid and minimize avian mortality.

BIO-17

Because the project is in an area that is directly adjacent to the first documented outbreak of canine distemper in the desert kit fox, the requirements for the American Badger and Desert Kit Fox plan needs to include the recommendation from the California Department of Fish and Wildlife veterinarians:

- Baseline desert kit fox census and population health survey, by characterizing the demography (e.g., size, structure, and distribution) of the kit fox population on the site and receiving areas, and a testing component in which researchers trap and test a representative subsample of the population for canine distemper, and generally describe animal health on the site and receiving areas.
- incorporates baseline desert kit fox census and health survey findings into a cohesive management strategy that minimizes disease risk to kit fox populations;
- provides a program for tagging, radio-tracking and monitoring of a subset of displaced kit foxes during the construction phase to understand how displacement affects regional kit fox populations;
- specifically identifies preconstruction survey methods for kit foxes (and large carnivores e.g., badgers) in the Project area;
- describes preconstruction and construction-phase relocation methods from the site, including the possibility for passive and active relocation from the site (and outlines identified CDFW permit and MOU requirements for active relocation);

- coordinates survey findings prior to and during construction to meet the information needs of wildlife health officials in monitoring the health of kit fox populations;
- includes contingency measures that would be performed if canine distemper were documented in the Project area or in potential relocation areas, and measures to address potential kit fox reoccupancy of the site
- includes preconstruction surveys, avoidance of active den complexes and implementation of measures to monitor, minimize and contain any canine distemper outbreaks.

The following additional measures need to also be included:

- Monitoring should occur semi-annually for at least ten years after relocation to determine, in fact, relocation is not causing "take".

BIO-17(4) would benefit from having "project-related activities" clearly defined, because kit fox mortality has occurred at other solar project sites and was not considered part of or attributed to "project-related activities". For example, the desert kit fox distemper outbreak on the Genesis project site was not attributed to project related activities such as hazing the animals from the site, blocking their dens to prevent re-entry and deconstructing their dens. However, according to the State Department of Fish and Wildlife, these stressors to the animals made them more vulnerable to disease.[2] Therefore, the following definition should be included in **BIO-17**

- Project-related activities include all passive or active relocation activities, construction and operations activities.

BIO-18

As with desert kit fox, no scientific data is available to evaluate the effectiveness of passively relocating burrowing owls. Therefore the burrowing owl mitigation plan needs to include the following language in **BIO-18(2):**

- Long-term monitoring of relocated and adjacent burrowing owls will occur for the life of the project.

In addition, the mitigation and management requirements for desert burrowing owls are inadequate based on the best available science and CDFW guidance. **BIO-18(4)** needs to include the following language:

- For each pair of burrowing owls that will be affected by the project footprint, 242 hectares of compensatory mitigation lands will be acquired.
- Habitat should not be altered or destroyed, and burrowing owls should not be excluded from burrows, until mitigation lands have been legally secured, are

[2] L.A. Times Article 4-18-2012

managed for the benefit of burrowing owls according to Department-approved management, monitoring and reporting plans, and the endowment or other long-term funding mechanism is in place or security is provided until these measures are completed.

BIO-20

Because of the impacts to the sand transport corridor and Mojave fringe-toed lizard habitat both on the project site and downwind of it, the following changes to the language in **BIO-20** needs to be incorporated:

• 3:1 mitigation for direct impacts to stabilized and partially stabilized sand dunes, non-dune Mojave fringe-toed lizard habitat and indirect impacts to stabilized and partially stabilized sand dunes (per **BIO-29 – Table 2** or final acreage impacted by the Project footprint);
~~• 1:1 mitigation for direct impacts non-dune Mojave fringe-toed lizard habitat (per **BIO-29 – Table 2** or final acreage impacted by the Project footprint); and~~
~~• 0.5:1 mitigation for indirect impacts to stabilized and partially stabilized sand dunes (per **BIO-29 – Table 2** or final acreage impacted by the Project footprint).~~

Because the goals for mitigation compensation are to provide conservation lands in perpetuity for Mojave fringe-toed lizard, **BIO-20(1)i**. should be changed as follows:

i. Be on land for which ~~long-term~~ conservation management is feasible in perpetuity.

BIO-21

The acquisition of State Waters for mitigation as described in BIO-21 is unacceptably broad, and does little to protect the Chuckwalla Valley watershed and resources, which is where the impact occurs. Therefore the following language needs to be incorporated into **BIO-21(1)**

Mitigation for impacts to state waters shall occur within the Chuckwalla or ~~East Salton Sea, Hayfield,~~ Rice, ~~or portion of Whitewater within the NECO,~~ Hydrologic Units (HUs) or the Palo Verde Watershed and be prioritized within the Chuckwalla HU in the Palen or adjacent watersheds.

In order to assure that the diversion of waters around the proposed project site does not affect downstream resources (which also relates to soil and water issues) the following language needs to be added to **BIO-21(6):**

- i) Design all flows coming off the project site to spread out in a manner that mimics the existing downstream sheet flow conditions, which will maintain the natural surface drainage patterns and sediment transport critical to wash-dependent special-status species.

In addition several additional COCs need to be incorporated into the current COC in order to more comprehensively address impacts from the project as follows:

BIO-30 – Monitoring and Adaptive Management for Impacts to Invertebrates

A monitoring plan for the onsite aerial invertebrates will be developed and implemented to evaluate the impact of the operations of the project on the local invertebrate fauna, attraction of species to the Project, as well as the potential for aerial insects to attract avian species onto the project site. The plan shall include:

- baseline of the species located on the project site;
- estimation of the populations;
- species specific attraction of insects to the SRSG;
- attraction of birds to the onsite insects;

Verification: At least 30 days prior to the start of any site mobilization and construction -related ground disturbance activities and every year thereafter for the life of the project during the invertebrate flight seasons, the Project owner shall provide the CPM a letter-report describing the findings of the invertebrate surveys, including the time, date, and duration of the survey; identity and qualifications of the surveyor (s); and a list of species observed.

Subsequently, active flight swarms visually detected during surveys will be documented in a report that shall include a map or photo identifying the location of the flight swarm and shall depict the movement of the swarm and impact from operational activities.

Each year during flight season as part of the annual compliance report a follow-up report shall be provided to the CPM, BLM, CDFW, and USFWS describing the results of the flight swarm monitoring and will be used as a basis for adaptive management to implement operational avoidance during particularly active times of emergence and flight.

BIO-31 – Inventory of Cryptobiotic Soil Crusts and Desert Pavements

Prior to any site disturbance, the project owner will map all cryptobiotic soils and desert pavements on the project site.
Every five years thereafter, the project owner will map all cryptobiotic soils and desert pavements on the project site for the duration of the project and compare it to the existing conditions in order to evaluate the impact of the project on these fragile soils.

Verification: At least 30 days prior to the start of any site mobilization and construction -related ground disturbance activities and every five years thereafter for the life of the project, the Project owner shall provide the CPM a letter-report describing the findings of the location and extent (including maps) of the Cryptobiotic Soil Crusts and Desert Pavements, including the time, date, and duration of the survey; identity and

qualifications of the surveyor (s); and a list of the types of cryptobiotic soil crusts and desert pavements observed.