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Re: Comments of Backcountry Against Dumps, the Protect Our Communities Foundation, the East County Community Action Coalition, and the Desert Protective Council, on the Presiding Member's Proposed Decision for the Imperial Valley Solar Energy Project, Docket No. 08-AFC-5

Dear Mr. Meyer:

On behalf of Backcountry Against Dumps, the Protect Our Communities Foundation, the East County Community Action Coalition, and the Desert Protective Council (collectively, the "Conservation Groups"), we respectfully submit the following comments regarding the Presiding Member's Proposed Decision ("PMPD") for the Imperial Valley Solar Project (formerly the SES Solar Two Project) ("Project") proposed by Imperial Valley Solar, LLC (formerly Stirling Energy Systems Solar Two, LLC) ("Applicant"). Although slight progress was made between the Staff Assessment/Draft Environmental Impact Statement ("SA/DEIS") and the Supplemental Staff Assessment ("SSA"), the PMPD does little to improve the Commission's environmental review of the Project. Not only does the PMPD fail to address numerous deficiencies in the SA and SSA, it presents new problems of its own. Thus, at the very least, the Commission must augment its environmental review of the Project and modify its certification conditions before it can legally certify it. We incorporate by reference our previous comments on the SA/DEIS and the SSA.

## INTRODUCTION

The Yuha Desert, where the Project is to be located, is a pristine but extraordinarily sensitive landscape. Damage to it from this Project is likely to be irreversible. "Implementation

of this [P]roject will forever change the landscape of this area,”<sup>1</sup> and also lead to “the permanent destruction of hundreds of cultural resources. . . .”<sup>2</sup> The environmental devastation that this Project will cause is permanent, but the Project’s benefits are only temporary. SA/DEIS at ES-7 (“The planned life of the SES Solar Two Project is 40 years”). The California Energy Commission (“CEC” or “Commission”) continues to rush through critical environmental reviews and refuses to extend any deadlines, no matter how unreasonable, because the Project “must meet extraordinarily tight time-lines with respect to state and federal agency permitting decisions to qualify for funding from the U.S. Department of Energy under the American Recovery and Reinvestment Act [“ARRA”]. . . . Even a slight delay could cause projects to miss critical deadlines in the permitting process, and therefore lose access to recovery act funding.”<sup>3</sup> The Commission must not allow itself to miss the forest for the trees. The Commission’s primary responsibility is to produce a legally adequate environmental document, not to process the Project’s application within a specified period of time. The California Environmental Quality Act (“CEQA”) does not allow agencies to exempt certain projects from CEQA’s requirements due to a project applicant’s needs or desires.<sup>4</sup> Producing a legally inadequate environmental document will cause the Project to be delayed for far longer than the time it would take to compile a proper report in the first instance.

## I. THE COMMISSION’S STATUTORY DUTIES

Before certifying any energy project, such as the IV Solar Project, the Commission must comply with the requirements of both the Warren-Alquist Act, Pub. Res. Code §§ 25500 et seq., and CEQA, Pub. Res. Code §§ 21000 et seq.

First, as the lead CEQA agency for the Project, the Commission has the responsibility to make sure its decision on the Project, and the environmental review process and documents leading up to it, comply with CEQA. *See* Pub. Res. Code § 25519(c).<sup>5</sup> To wit, the

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<sup>1</sup> National Park Service, Comments on the Imperial Valley Solar Project Draft EIS, received May 4, 2010, p. 1.

<sup>2</sup> Quechan Indian Tribe, Comments on the SA/DEIS, received May 19, 2010, p. 7.

<sup>3</sup> California Energy Commission, Decision re: Data Concerning Cultural Resources on BLM Land, *available at* [http://www.energy.ca.gov/2010-CRD-1/documents/2010-07-14\\_Commission\\_Decision\\_Cultural\\_Resources\\_on\\_BLM\\_Land.pdf](http://www.energy.ca.gov/2010-CRD-1/documents/2010-07-14_Commission_Decision_Cultural_Resources_on_BLM_Land.pdf), at 10.

<sup>4</sup> The Conservation Groups note that the impact of the “safe harbor” provision of the ARRA, added March 2010, on these timetables has apparently not been considered. More information can be found at <http://www.treas.gov/recovery/docs/guidance.pdf>.

<sup>5</sup> Even though the Commission has a certified regulatory program under CEQA, it is still bound by requirements substantially similar to those of the statutory environmental impact report (“EIR”) process. *See* Pub. Res. Code § 21080.5; 20 Cal. Code Regs. §§ 1741 et seq.

environmental review process must “inform [the Commission, other] governmental decision makers, and the public about the . . . environmental effects of proposed activities,” 14 Cal. Code Regs (“CEQA Guidelines” or “Guidelines”) § 15002(a)(1), and “demonstrate to an apprehensive citizenry that the agency has, in fact, analyzed and considered the ecological impacts of its action.” *Id.* § 15003. And if the Commission omits essential environmental review, this informational void is a prejudicial abuse of discretion. *Sierra Club v. State Board of Forestry* (1994) 7 Cal.4th 1215, 1237.

In addition, under CEQA, the Commission may not certify the Project unless it finds that either (1) changes have been incorporated into the Project that “mitigate or avoid” any significant environmental impact, or (2) mitigation measures or less harmful alternatives are infeasible, and the Project has specific overriding benefits that outweigh its significant impacts. Pub. Res. Code §§ 21080.5(d)(2)(A), 21081; CEQA Guidelines §§ 15250, 15251; 20 Cal. Code Regs. § 1755. Furthermore, the Commission’s findings and conclusions must be supported by substantial evidence in the record, Pub. Res. Code. §§ 21080, 21081.5, i.e. “fact, a reasonable assumption predicated upon fact, or expert opinion supported by fact.” *Id.* § 21080(e).

Second, under the Warren-Alquist Act, before it can certify the Project the Commission must determine whether the Project complies with all “other applicable local, regional, and state . . . standards, ordinances, or laws,” and “federal standards, ordinances, or laws” (collectively, “LORS”). Pub. Res. Code § 25523(d); 20 Cal. Code Regs. § 1752(a). The Commission may not certify any project that does not comply with the applicable LORS unless it finds both that (1) the project “is required for public convenience and necessity” and (2) “there are not more prudent and feasible means of achieving public convenience and necessity.” Pub. Res. Code § 25525; 20 Cal. Code Regs. § 1752(k).

Additionally, before certification the Commission must determine whether the Project site is one of the areas in which the Warren-Alquist Act prohibits siting of power plant facilities, including “wilderness, scenic or natural reserves, [and] areas for wildlife protection, recreation [and/or] historic preservation.” Pub. Res. Code § 25527. If the Project site is within one of the

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Furthermore, the Commission must still comply “with all of CEQA’s other requirements” not directly pertaining to the EIR process, i.e. all requirements except those in CEQA chapters 3 and 4. 14 Cal. Code Regs (“CEQA Guidelines” or “Guidelines”) §§ 15250 (“A certified program remains subject to other provisions in CEQA such as the policy of avoiding significant adverse effects on the environment where feasible.”), 15252; *Mountain Lion Foundation v. Fish and Game Commission* (1997) 16 Cal.4th 105, 113-114. This includes such substantive obligations as providing a project description, analyzing alternatives to the proposed action and developing mitigation measures (i.e. “conditions of certification”) to minimize significant environmental impacts. See *Schoen v. California Department of Forestry & Fire Protection* (1997) 58 Cal.App.4th 556, 567, 572.

prohibited areas, then the Commission may not certify the Project unless it (1) determines that the Project is not inconsistent with the primary land use of the area in which it is to be sited, (2) determines that it will have no "substantial adverse environmental effects," and (3) ensures that it receives approval by the public agency "having ownership or control of such lands." Pub. Res. Code § 25527; 20 Cal. Code Regs. §§ 1752(f), 1755(k).

As detailed below, however, the Commission has thus far failed to fulfill its statutory duties under CEQA and the Warren-Alquist Act with respect to the IV Solar Project. The environmental review process and the documents produced along the way, culminating in the PMPD, are far from adequate.

## II. CEQA VIOLATIONS

### A. *The Project Description is Inadequate*

The project description is the essential starting point of an adequate environmental analysis under CEQA. Among other things, the EIR - or equivalent document prepared under a certified regulatory program - must contain the "precise location and boundaries of the proposed project" and a "description of the project's technical, economic, and environmental characteristics." CEQA Guidelines §§ 15124, 15252(a)(1); *see also* Pub. Res. Code § 21080.5(d)(3)(A). Additionally, the document "must include a description of the physical environmental conditions in the vicinity of the project." *Id.* § 15125.

Here, the Commission has failed to meet this basic requirement. Most prominently, nowhere in the SA/DEIS, SSA or PMPD is there an adequate description of the 709 MW selected alternative. The selected proposal was not even *mentioned* as a possible option in the SA/DEIS and SSA, and the PMPD does little to explain the differences between the 709 MW facility and the previously preferred 750 MW design. Instead of describing in detail the engineering and locational differences between the two designs and presenting the Commission staff's analysis of the 709 MW facility, the PMPD merely notes that the 709 MW alternative would, logically, have fewer SunCatchers and produce less electricity. PMPD at 1, 2, I-1, I-7. Indeed, the PMPD allocates more space to explaining why the 709 MW alternative need not be fully described and analyzed than to actually describing and analyzing it. PMPD at II-20 to II-23. This is unacceptable for an environmental review document.

In addition, the description of area surrounding the Project remains inaccurate in the PMPD and must be clarified. For instance, in describing the Project and its location the PMPD, like the SA/DEIS and SSA before it, makes no mention of the close proximity of Centinela State Prison, situated approximately five miles to the northeast of the Project site. Indeed, the prison is barely mentioned at all in the PMPD, with the only references coming in the sections on the impacts to soil and water, and cultural resources. The lack of any discussion or analysis of the

prison - and the Project's impacts on it - in the project environment, public health and other sections is especially glaring since it is the closest sizeable population center to the Project, with approximately 4,345 inmates and over 1,000 employees.<sup>6</sup>

Furthermore, the PMPD still contains many of the locational mistakes made in the SA/DEIS and SSA. For example, the SA/DEIS and SSA frequently misrepresent that the Project would be located about four miles east of Ocotillo Wells (SSA at ES-2, C.4-6, C.11-4), a mistake that is replicated in the PMPD. PMPD at VII.B-1. Ocotillo Wells is located more than 20 miles to the northwest of the Project site. Rather, it is the communities of Ocotillo and Coyote Wells that are located nearby the Project, approximately five miles to the west. These types of mistakes not only confuse the public and decisionmakers, they reveal a disturbing lack of concern for the Project area and the people who live there.

The end result of the shortcomings discussed above, among others, has been to stymie the realization of CEQA's goals of informed decisionmaking and constructive public participation and cooperation. The reaction of Edie Harmon - a committed participant in both the Commission certification and BLM decisionmaking processes - is an apt example. In response to, among other things, BLM's continued reference in its Final Environmental Impact Statement: Imperial Valley Solar Project ("BLM FEIS") to Ocotillo Wells instead of Ocotillo being near the IV Solar Project site, Mrs. Harmon voiced her frustrations thusly: "Please note that I gave up because it seems so obvious that no one involved in decision-making seems to care, so why finish reviewing and commenting on the inadequacies of the FEIS for the IVS project."<sup>7</sup>

To rectify these problems, and before the Commission can certify the Project, the public must be given ample opportunity to study and comment on the Project's *actual* design, i.e. the 709 MW alternative. This necessitates providing the public with a full and accurate description of the Project and its surroundings.

*B. The Analysis of the Project's Environmental Impacts is Inadequate*

As was bluntly stated by the Commission staff, "the direct project impacts to biological resources, and soil and water resources, and visual resources, and the cumulative impacts associated with biological resources, land use, soil and water resources, and visual resources for

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<sup>6</sup> California Department of Corrections and Rehabilitation, Institution Statistics for California State Prison at Centinela, *available at* [http://www.cdcr.ca.gov/Facilities\\_Locator/CEN-Institution\\_Stats.html](http://www.cdcr.ca.gov/Facilities_Locator/CEN-Institution_Stats.html).

<sup>7</sup> Eddie Harmon, Comments to BLM on its Proposed Resource Management Plan Amendment PRMP-A/FEIS for the CDCA Plan and Imperial Valley Solar Project (IVS), August 26, 2010, p. 10.

the Imperial Valley Solar (IVS) Project *will be significant*" (emphasis added).<sup>8</sup> While it is true that the Commission may certify a project with significant environmental impacts if it finds that mitigation of the impacts is infeasible and substantial benefits override the negative impacts, it is nonetheless not absolved from fully analyzing the project, its impacts, any potential mitigation measures and a reasonable range of alternatives, and providing for public review and comment. See Pub. Res. Code § 21080.5(d); 20 Cal. Code Regs. §§ 1742, 1742.5; see also Pub. Res. Code §§ 21002.1, 21091, 21092; CEQA Guidelines §§ 15126, 15126.2, 15126.4, 15126.6, 15250, 15252. The Commission has not met its duties in this case.

1. The Commission Has Not Provided Any Analysis of the Impacts of the 709 MW Facility Selected in the PMPD

The Commission has shirked its duty under CEQA to describe and analyze the specific impacts of the 709 MW alternative selected by the Imperial Valley Solar AFC Committee ("Committee") in the PMPD. As has been made clear by the Commission staff, intervenor California Unions for Reliable Energy ("CURE") and others, the impacts of the 709 MW alternative will not just be a reduced version of the impacts from the 750 MW alternative that was analyzed more thoroughly in the SA/DEIS and SSA.<sup>9</sup> To the contrary, they will be fundamentally different in numerous respects.

For example, the 709 MW alternative changes the number of roads and method of travel by which the SunCatcher units would be accessed for maintenance. The new plan calls for removal of numerous east-west roads and all stabilized spur access roads, which presumably means maintenance workers would have to access many of the SunCatcher units by *off-road* driving.<sup>10</sup> This would not only change the location of the biological, air quality, hydrological and other environmental impacts, it would likely increase some of the negative effects. For instance, the off-road driving would likely increase erosion and sediment transport into nearby washes. In addition, it would reduce air quality and exacerbate public health risks by increasing the amount of dust - and thus particulate matter and the Valley Fever-inducing *coccidioides immitis* fungus - in the air.<sup>11</sup>

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<sup>8</sup> Terry O'Brien, CEC Deputy Director, "Staff's Comments Regarding a Possible Energy Commission Finding of Overriding Considerations - Imperial Valley Solar Project (08-AFC-5)," July 27, 2010.

<sup>9</sup>See California Energy Commission, "Staff's Comments on the Presiding Members Proposed Decision," Docket No. 08-AFC-5, September 16, 2010; see also CURE, Reply Brief re: Imperial Valley Solar Project (08-AFC-5), August 18, 2010, pp. 1-2.

<sup>10</sup>See U.S. Army Corps of Engineers, "Draft 404(b)(1) Alternatives Analysis For the Imperial Valley Solar Project (aka Solar II)," July 16, 2010, p. 24.

<sup>11</sup>See, e.g., Edward L. Arsura *et al.*, "Coccidioidomycosis (Infectious Diseases)," December 21, 2009, available at <http://emedicine.medscape.com/article/215978-overview>.

Furthermore, as compared to the 750 MW facility, the 709 MW alternative would impact seven *more* main stem washes, even though the total acreage of impacted U.S. waters would be less.<sup>12</sup> Moreover, as acknowledged by the Commission staff, “[a]lthough the alternatives analyzed by staff and the [709 MW alternative] are within the same outer boundaries, the relative impacts can *differ significantly* based on type and location of impacts within that are due to the uneven distribution of environmental resources” (emphasis added).<sup>13</sup>

However, despite these and other significant changes in the Project design, the environmental impacts of the 709 MW alternative have not been properly analyzed or disclosed. As the Commission staff admits in its review of the PMPD, its “ability to provide detailed technical comments on the PMPD is limited due to the adoption of an alternative *not analyzed* in Staff’s Supplemental Staff Assessment.”<sup>14</sup> The public should not have to ferret out the details of the selected facility and develop its own environmental analysis of the project; this should be provided through the Commission’s environmental review process.

By failing to study the differences in impacts between the two alternatives - indeed, by even failing to fully describe the 709 MW alternative in the PMPD - the Commission has thus violated its statutory duty to inform the public about the Project and its impacts and allow for public review and comment. Pub. Res. Code § 21080.5(d)(3); 20 Cal. Code Regs. §§ 1742, 1742.5, 1747, 1749. Moreover, without a full description and analysis of the 709 MW alternative anywhere in the record - indeed, without even an assurance that the selected design for the Project will not change again post certification<sup>15</sup> - the Commission lacks the requisite substantial evidence upon which to approve the Project. Pub. Res. Code §§ 21080(d)-(e), 21081, 21081.5; CEQA Guidelines §§ 15250, 15252; 20 Cal. Code Regs. §§ 1751, 1752, 1755. Accordingly, the Commission should suspend the certification proceeding until a revised staff assessment of the Project’s new design is completed and circulated for review by the parties and the public.

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<sup>12</sup>See California Energy Commission, “Staff’s Comments on the Presiding Members Proposed Decision,” Docket No. 08-AFC-5, September 16, 2010; *see also* CURE, Reply Brief re: Imperial Valley Solar Project (08-AFC-5), August 18, 2010, pp. 1-2.

<sup>13</sup>California Energy Commission, “Staff’s Comments on the Presiding Members Proposed Decision,” Docket No. 08-AFC-5, September 16, 2010, p. 3.

<sup>14</sup> *Id.* at p. 1.

<sup>15</sup> The 709 MW alternative recommended in the PMPD is based on and identical to the United States Army Corps of Engineers’ (“ACOE’s”) preliminary Least Environmentally Damaging Practicable Alternative (“LEDPA”), developed pursuant to ACOE’s authority under section 404 of the federal Clean Water Act. However, as the Commission staff itself has been quick to note, “the final LEDPA could be different depending on how [ACOE] addresse[s] public and agency comments on the preliminary LEDPA” and “[s]taff cannot comment on the actual impacts of the final LEDPA until it has been developed and adopted.” *Id.* at pp. 3-4.

2. The Applicant Has Failed to Identify - and the Commission Has Failed to Analyze - an Adequate and Reliable Water Supply for the Project

Water supply has long been a pivotal issue in California land use, and is becoming more and more critical with time. With this premise in mind, the California courts have long held that EIRs - and their counterparts in certified regulatory programs - must analyze the effects of providing water to projects. See *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Ranch Cordova* (2007) 40 Cal. 4th 412, 428-32. According to the California Supreme Court in *Vineyard*, "CEQA's informational purposes are not satisfied by an EIR that simply ignores or assumes a solution to the problem of supplying water to a proposed land use project." *Id.* at 430-31. Further, the environmental review document "for a land use project must address the impacts of *likely* future water sources, and the [document's] discussion must include a reasoned analysis of the circumstances affecting the likelihood of the water's availability." *Id.* at 432. And, "where, despite a full discussion, it is impossible to confidently determine that anticipated future water sources will be available, CEQA requires" identification of reasonably foreseeable alternative sources, analysis of the environmental impacts of utilizing those sources and development of mitigation measures to minimize those effects. *Id.*<sup>16</sup> Finally, CEQA requires a showing that there is "a *likelihood* water would be available, over the long term, for this project." 40 Cal.4th at 441, emphasis in original.

Nonetheless, as described in detail in our July 27, 2010 comment letter on the SSA, the Applicant had not then identified, and the Commission had not yet described and analyzed, an adequate and reliable water supply for either the construction or operational phases of the Project. Furthermore, they put forth *conflicting* estimates of exactly how much water the Project would require. And despite our and others' attempts to flag the problem and encourage the Applicant and the Commission to rectify it before issuing the PMPD, these deficiencies still remain, as detailed below.

a. *There Is Insufficient Water Available to Meet the Project's Construction Phase Needs*

The estimates for water use during the Project's 39-month construction period are the same in the PMPD as they are in the SSA. Specifically, the Project will average 51.1 acre-feet per year ("AFY") of water for dust control and other construction activities. PMPD at VI.B-13. In addition, the construction workers will require approximately 0.23 additional AFY of potable water. *Id.* Thus, during the construction phase, the Project will require at least 51.3 AFY of water, a substantial amount in such an arid environment. Indeed, given the contradictory

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<sup>16</sup> For a fuller discussion of the *Vineyard* case and CEQA's water supply requirements, see Jamey Volker, 2008, "Water Supplies Finally Take Center Stage in the Land Use Planning Arena," 35 Ecology L. Q. 573.

numbers provided for water use, it is possible that the Project will require 228 acre-feet of water in the first year of construction.<sup>17</sup>

However, the Applicant has only identified one source of water for construction activities, the Dan Boyer Water Company's well (State Well No. 16S/9E-36G4), which pumps from the Ocotillo-Coyote Sole Source Aquifer. PMPD at VI.B-24 to 26. There is one other potential source of water for the Project, the Seeley Waste Water Treatment Facility ("SWWTF"), but the necessary upgrading of the facility is currently undergoing environmental review and will likely not be ready for service until after the Project has been constructed, if ever.<sup>18</sup> As such, the Applicant proposes to rely solely on the Boyer well for up to three years. BLM FEIS at Appendix B, p. B-16. The trouble with the Applicant's plan, though, is that the Dan Boyer well cannot supply nearly enough water to meet the Project's needs.

The first problem is that the Dan Boyer Water Company's "Will Serve Letter" only discusses providing water to the Project for a six-to-eleven month period, far less time than the estimated three years during which the Project will have no other water source besides the Boyer well.<sup>19</sup> More importantly, though, is the fact that the Dan Boyer Water Company is prohibited from pumping more than 40 AFY of water out of its well. PMPD at VI.B-25.<sup>20</sup> In addition, according to the Commission staff, approximately 6 AFY of water is already being drawn from the Boyer well by the company's current clients, leaving only 34 AFY for the Project. SSA at C.7-52. The Committee disputes the staff's findings, concluding in the PMPD that the Project could use up to 39 AFY of water from the Boyer well, but its decision amounts to a distinction without much of a difference. PMPD at VI.B.-26 to 27. Even if the well could provide the Project with 39 AFY of water, and the Dan Boyer Water Company was willing to continue providing that much for the three years (or more) the Project will need it, it still would not come close to meeting the Project's construction period water needs of at least 51.3 AFY.

Moreover, the 12.3 AFY gap between available water supplies and Project demands during construction does not even account for the additional water that will be needed to operate each group of Stirling Engine modules as they are completed, as the Applicant plans to do. PMPD at I.2. And while the certification conditions for the Project would require suspension of mirror washing in such cases where water demand exceeds supply, there are no provisions for

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<sup>17</sup> Exhibit 499-I to Rebuttal Testimony for CURE, p. 4

<sup>18</sup> See, e.g., U.S. Environmental Protection Agency, Detailed Comments on the Bureau of Land Management FEIS for the Imperial Valley Solar Project, August 30, 2010, p. 3.

<sup>19</sup> See *id.*

<sup>20</sup> See also Imperial County Planning and Development Commission, Letter to Dan Boyer re: Westwind Water Company, APN 033-564-002-000, November 12, 2008.

curtailing other operational water uses or *any* construction activities.<sup>21</sup>

Thus, not only are the estimates of water use during the construction phase inconsistent, the Applicant has yet to identify a reliable source of water that could meet even the lowest use estimates, regardless of whether the Committee-recommended certification conditions are followed to reduce water demand. As such, contrary to the Commission staff's contention in their August 19, 2010 Reply Brief, the Commission cannot comply with CEQA's demand for a water supply analysis by relying solely on the Boyer well. Where uncertainty remains as to whether the identified water source for a project will meet the project's water needs, as is the case with the Boyer well with respect to the Project's water needs for the first three years, CEQA requires identification of reasonably foreseeable alternative sources, analysis of the environmental impacts of utilizing those sources and development of mitigation measures to minimize those effects. *Vineyard*, 40 Cal. 4th at 432. This has not been done here, and therefore the Commission cannot certify the Project without violating CEQA.

b. *There Is Significant Uncertainty as to Whether There Will Be Sufficient Water Available to Meet the Project's Operational Needs*

Like the estimates for construction water use, the estimates for operational water use during the Project's expected 40-year life, with all their attendant discrepancies, are the same in the PMPD as they are in the SSA. The PMPD states that operational water needs will be 37.6 AFY of water. However, as explained in our July 27, 2010 comment letter on the SSA, total operational water use could amount to a total of 47.6 AFY given the seeming underestimates in the SSA and PMPD of the volume of water needed to wash the SunCatcher mirrors, satisfy workers' demands for potable water and control dust.<sup>22</sup> In any case, regardless of whether the Project's operational water needs are 37.6 AFY, 47.6 AFY or somewhere in between, it is highly uncertain that sufficient water supplies will be available to the Project. This uncertainty violates CEQA's command that the agency must "show a *likelihood* water would be available, over the long term, for this project." *Vineyard*, 40 Cal.4th at 441, emphasis in original.

As aforementioned, the Dan Boyer Water Company has only committed to serving the Project for the first six-to-eleven months, before most operational activities will have

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<sup>21</sup> See Exhibit 499-I to Rebuttal Testimony for CURE, p. 4. Furthermore, even if there was a certification condition that required Project construction and operation to halt if sufficient water supplies were not available, that still would not meet CEQA's requirements. For when named water supplies are uncertain, CEQA's "informational demands may not be met . . . simply by providing that development will not proceed if the anticipated water supply fails to materialize." *Vineyard*, 40 Cal. 4th at 432.

<sup>22</sup> See Exhibit 499-I to Rebuttal Testimony for CURE, pp. 3-4; see also Backcountry Against Dumps, *et al.*, Comments on SSA, July 27, 2010, pp. 8-9.

commenced. Furthermore, the PMPD's condition of certification Soil&Water-2 expressly prohibits the Project from relying on groundwater for more than three years unless the owner seeks a Project Amendment. PMPD at VI.B-41. Moreover, extraction from the Boyer well is capped at 40 AFY of water in any case, some of which has already been allocated to existing residential users. PMPD at VI.B-26 to 27. Thus, the Boyer well will not be sufficient to meet the Project's operational water needs over the course of its planned 40-year life.

Not surprisingly, however, given the extremely arid climate around the Project site, the Applicant has only been able to identify one additional potential water source besides the Boyer well. That source is the Seeley Waste Water Treatment Facility, and its ability to provide water to the Project is still highly uncertain. Before the SWWTF can supply water to the Project it has to be upgraded and a 12-mile pipeline from the facility to the Imperial Valley Solar water treatment plant built. SSA at C.7-50. However, those proposed projects are still undergoing environmental review. And despite the Committee's conclusion on page VI.B-29 of the PMPD that "it is more likely than not that this treated effluent will become available in less than three years," even the U.S. Environmental Protection Agency recognizes that "[u]nanticipated delays in the upgrade of the SWWTF could occur."<sup>23</sup> Furthermore, environmental review is not a rubber-stamp process and there is no guarantee that the upgrade will ever be approved.

As such, there remains substantial uncertainty regarding the operational water supplies for the Project. And as discussed above in relation to the Project's water supplies for construction, when such uncertainty arises CEQA requires identification of reasonably foreseeable alternative sources, analysis of the environmental impacts of utilizing those sources and development of mitigation measures to minimize those effects. *Vineyard*, 40 Cal. 4th at 432. This has not been done here; no other alternatives beyond the SWWTF have been discussed. The only measure taken to protect the Project from running out of water is the inclusion of a requirement that mirror washing would be suspended if demand outpaced supply.<sup>24</sup> Yet according to the California Supreme Court, CEQA's "informational demands may not be met . . . simply by providing that future development will not proceed if the anticipated water supply fails to materialize." *Vineyard*, 40 Cal.4th at 432. Therefore, the Commission cannot certify the Project without violating CEQA.

3. The Commission's Analysis of the Impacts of Pumping from the Ocotillo-Coyote Wells Sole Source Aquifer Remains Inadequate

Not only has the Applicant failed to identify adequate water supplies for the Project, the Commission has failed to properly analyze the impacts of using the Project's most assured water

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<sup>23</sup> U.S. Environmental Protection Agency, Detailed Comments on the Bureau of Land Management FEIS for the Imperial Valley Solar Project, August 30, 2010, p. 3.

<sup>24</sup> See Exhibit 499-I to Rebuttal Testimony for CURE, p. 4.

supply, the Boyer well, which draws from the Ocotillo-Coyote Wells Sole Source Aquifer.

- a. *The PMPD's Conclusion That Pumping from the Boyer Well Will Not Significantly Impact Nearby Residential Water Wells Is Unfounded*

In the PMPD, the Committee concludes "that the project's proposed use of groundwater from the Boyer well during the period of time water from the SWWTF is unavailable will not have a significant direct or cumulative impact on the Ocotillo/Coyote Basin." PMPD at VI.B-29. The Committee bases its conclusion on the Applicant's "Groundwater Evaluation Report," which found the Boyer well to have a limited zone of influence, i.e. not great enough to reach any of the surrounding private wells, for up to three years of 40 AFY pumping. PMPD at VI.B-28 to 29. The Committee's analysis, however, is incomplete and its conclusion unfounded.

The most notable problem is that the Committee does not account for the possibility of the Project using Boyer well water for more than just three years. As noted, the SWWTF upgrade project is still undergoing environmental review and there is no guarantee it will be completed and able to meet the Project's operational water needs within three years, or potentially ever. Furthermore, the Applicant has identified no alternative backup sources of water for its operational needs. Accordingly, it is possible the Project would seek to rely on Boyer well water for greater than three years. There is no evidence that the Dan Boyer Water Company and Imperial County would allow that to occur. In any event, the Committee failed to analyze the possibility of extended reliance on the Boyer well.

The Commission staff, on the other hand, recognized that possibility in the SSA and analyzed the drawdown impacts of pumping 40 AFY of water out of the Boyer well for the entire 40-year life of the Project. SSA at C.7-41 to 50. According to the Commission staff, the nearest residential well would experience a drawdown of between 1.4 feet (if the Boyer well were just used during Project construction) and 5.6 feet (if the Boyer well were used for the entire period of Project operation and the storage coefficient were 0.02 instead of 0.10). SSA at C.7-49. And while the Commission staff concluded this would not constitute a significant impact, they failed to account for the average ongoing 0.21 feet/year decline in the groundwater level and the fact that at least two of the ten closest private wells have only five feet of water above their well screens.<sup>25</sup> When taking these factors into account, the Project's pumping, combined with the annual decline in groundwater level, would cause the water level in at least two nearby wells to drop below the top of the well screen, creating a significant hardship for those well owners. This is a significant impact that the Commission failed to acknowledge and analyze.

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<sup>25</sup> See Exhibit 499-I to Rebuttal Testimony for CURE, p. 5.

Furthermore, the impacts on nearby private wells would be even greater when considered alongside the groundwater pumping of other current and reasonably foreseeable future projects overlying the aquifer. For example, the Wind Zero project, which is currently being considered by Imperial County for permitting, would likely use groundwater from the same aquifer.<sup>26</sup> In addition, the drawdown effects from the Project would likely be greater when pumping from the Boyer well occurred simultaneously with groundwater extraction by U.S. Gypsum and from other commercial wells. However, neither the Commission staff in the SA/DEIS or SSA, nor the Committee in the PMPD, mentions these cumulative projects. And in the PMPD, the Committee merely concludes without analysis of *any* cumulative projects that there would be no direct or cumulative impacts on surrounding wells. PMPD at VI.B-28 to 29. This constitutes a fatal lack of analysis and severely undermines the basis for the Committee's conclusions.

b. *The PMPD's Conclusion that Pumping from the Boyer Well Will Not Have a Significant Impact on Overdraft of the Ocotillo-Coyote Sole Source Aquifer Is Unfounded*

In addition to concluding that the Project's use of the Boyer well by itself would not have a significant drawdown impact on nearby private wells, the Committee also asserts in the PMPD that the pumping would not have a direct or cumulative impact on the Ocotillo-Coyote Sole Source Aquifer. PMPD at VI.B-29. Again, however, the Committee's analysis is incomplete and its conclusion unfounded.

It is uncontested by the parties, the Commission staff and the Committee that the Ocotillo-Coyote Sole Source Aquifer is in overdraft. PMPD at VI.B-27 to 28. Furthermore, as the Committee admits in the PMPD, water "[c]onservation is apparently not a viable option in this case," nor are other measures of mitigating the Applicant's extraction of groundwater from the Boyer well. PMPD at VI.B-28. Thus, as again admitted in the PMPD, the Project could permanently deplete the aquifer by 1,600 acre-feet, barring some large unforeseen increase in aquifer recharge. PMPD at VI.B-28.

Based on this information, at least two Commission staff groundwater experts, Christopher Dennis and John Fio, concluded the Project would cause an unmitigable significant impact to the aquifer and its users. PMPD at VI.B-27 to 28. Furthermore, their opinions do not even take into account the cumulative effects from other current and foreseeable future projects. When considering these projects, such as the proposed Wind Zero project discussed above, the groundwater impacts are even more significant.

Despite this evidence, however, and without even addressing the applicable cumulative projects, the Committee still concludes in the PMPD that there will be "no significant direct or

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<sup>26</sup> See *id.*

cumulative impact on the Ocotillo/Coyote Basin.” PMPD at VI.B-29. And the only evidence adduced in the PMPD to support that conclusion is the Applicant’s self-serving “Groundwater Evaluation Report,” which opined that other wells near the Boyer well would not be impacted in the *short* term (up to three years) by the Project’s groundwater extraction. PMPD at VI.B-28 to 29. In view of this report’s lack of supporting data, misplaced assumptions and failure to address *long* term water supply shortfalls, there is no substantial evidence to support the PMPD’s conclusion. The Commission must not ignore the Project’s significant direct and cumulative impacts on overdraft of the Ocotillo-Coyote Sole Source Aquifer, and it must assess alternative potential sources of water to reduce those impacts, such as reclaiming water from the Centinela State Prison.<sup>27</sup>

c. *The Project’s Impacts on Water Quality Have Still Not Been Disclosed and Analyzed*

It is undisputed that pumping in the Holocene alluvium portion of the Ocotillo-Coyote Sole Source Aquifer causes upflux of lower-quality water from the underlying Palm Springs and Imperial formations. PMPD at VI.B-31. However, in addressing the impacts of the upflux that would be caused by the Project’s groundwater extraction, the PMPD, like the SSA before it, only discusses the upflux volume and not the concentration of contaminants therein. Thus, while the upflux volume may only be 0.4 percent of minimum affected aquifer volume, the “average percent change in quality or Total Dissolved Solids (TDS) concentration in the minimum affected aquifer volume is close to 4.5%” based on a weighted average.<sup>28</sup> This constitutes a potentially significant groundwater quality impact that the Commission must analyze. Its failure to address this impact violates CEQA.

d. *The Project’s Impacts on Phreatophytic Vegetation Have Still Not Been Disclosed and Analyzed*

Despite the expert evidence introduced by Tom Budlong showing that there are a number of mesquite hummocks and tamarisks in the Project vicinity, the Committee in the PMPD failed to correct the Commission staff’s error in the SSA and analyze the Project’s impacts on phreatophytic vegetation.<sup>29</sup> The observed mesquite hummocks and tamarisks could not survive if their roots did not reach the groundwater table, so it is imperative that the Commission analyze the Project’s impact on the groundwater level underlying the vegetation.

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<sup>27</sup> For a discussion of the possibility of using reclaimed water from the Centinela State Prison, see Exhibit 591 to Rebuttal Testimony of Tom Budlong, p. 3.

<sup>28</sup> Exhibit 499-I to Rebuttal Testimony for CURE, p. 5.

<sup>29</sup> Exhibit 591 to Rebuttal Testimony of Tom Budlong, pp. 6-7.

4. The Commission's Analysis of Biological Impacts Remains Inadequate

a. *The Commission's Analysis of the Impacts to the Peninsular Bighorn Sheep and the Associated Mitigation Measures Must Be Updated Once Section 7 Consultation Has Been Completed*

The Conservation Groups appreciate that the U.S. Fish and Wildlife Service ("FWS"), along with the California Department of Fish and Game, have decided to require section 7 consultation under the federal Endangered Species Act ("ESA") regarding the Project's impacts on the Peninsular bighorn sheep ("PBHS"). SSA at ES-27. Nonetheless, in order to satisfy CEQA and ensure compliance with the ESA, as required by the Warren-Alquist Act, the Commission must wait until consultation is complete before certifying the Project. *See* Pub. Res. Code §§ 21080.5(d)(2)(A) (requiring incorporation of mitigation measures), 25523(d) (requiring that the Commission make a determination of compliance with all LORS). Once consultation has been completed, the Commission must update its PBHS impact analysis to incorporate any new findings from the consultation and alter its mitigation plan to comport with the requirements of the biological opinion. In addition, a subsequent comment period on those changes, if any, should be provided.

b. *The Commission's Analysis of the Impacts on the Flat-Tailed Horned Lizard Remains Inadequate*

In the Conservation Groups' July 27, 2010 comment letter on the SSA, we identified seven concrete deficiencies in the Commission's assessment of the Project's impacts on the FTHL. The PMPD, however, does not correct them. Further, additional deficiencies also remain. These two other issues are discussed first, followed by a summary of the inadequacies noted in our July 27 comment letter.

First, the PMPD, just like the SA/DEIS and SSA, fails to account for and analyze the substantial edge effect that the Project will have. According to CURE's biology expert, Scott Cashen, the Project will have an edge effect of 450 meters, which translates into an increase in impacted FTHL habitat of 2,800 acres beyond the 6,063.1 acres affected by the Project site and 92.8 acres impacted by the off-site transmission line.<sup>30</sup> Not only has the Commission failed to analyze the impact on the FTHL of this edge effect, it has failed to account for it in the mitigation measures developed to offset FTHL impacts. For example, while condition of certification BIO-10 provides for acquisition of off-site habitat to compensate for the habitat loss on the Project site and around the transmission line, there is no proposed acquisition to offset the 2,800 acres of FTHL habitat impacted by edge effects. This omission violates CEQA.

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<sup>30</sup> Exhibit 499-K to Rebuttal Testimony for CURE, pp. 2-4.

Second, the PMPD fails to rectify the inadequate analysis in the SA/DEIS and SSA of the Project's impacts on connectivity between the two FTHL management areas on either side of the Project, the Yuha Desert Management Area to the south and the West Mesa Management Area to the north. The Conservation Groups agree with the Commission staff that the loss of connectivity between the two management areas will lead to significant impacts on the FTHL; however, there are additional impacts that the Commission has not yet identified or analyzed. Of particular note is the fact that nowhere in the SA/DEIS, SSA or PMPD has the Commission discussed the increased predation on the FTHL - as well as other migratory animals - that occurs when their movement corridors are narrowed and/or reduced in number. As the lizards - like any prey animal - are forced to use fewer and narrower corridors, it will make it much easier for predators to find and kill them.

Third and finally, the problems with the FTHL impact analysis we noted in our July 27, 2010 comments remain. In summarized form, those seven issues are as follows:

- First, the proposed Raven Management Plan (condition of certification BIO-12) fails to mitigate the effects of predation on the FTHL to less than significant levels, as the Commission staff claims it would.<sup>31</sup>
- Second, the PMPD, like the SSA, fails to detail the process that will be used to move the FTHLs encountered during construction "out of harm's way," even though the outcome of the relocation depends entirely on the process used to effectuate it. PMPD at VI.A-31.
- Third, the Commission still has yet to explain why clearance surveys to confirm that relocation of TTHLs to other suitable habitat would occur prior to Project *decommissioning*, but not before Project *commissioning*.
- Fourth, the selection criteria that are to be used to select FTHL compensation lands are too vague.<sup>32</sup>
- Fifth, the Commission has still failed to explain how the in-lieu fee would be calculated. The fee's adequacy is slated to be determined by the Commission at a later date, but without more detail now it is impossible to ascertain whether or not impacts on the FTHL will in fact be mitigated.
- Sixth, the mitigation proposed by the Commission ignores the effects on the FTHL that will occur during the two years give to the Applicant to acquire, and prepare a

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<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 13.

management plan for, compensation habitat.

- Seventh and finally, the 709 MW alternative selected by the Committee in the PMPD (i.e. the LEDPA) is not likely to have a lesser impact on the FTHL than the original 750 MW alternative. While the chosen alternative does contain additional movement corridors for the FTHL, it is unlikely that they would be used because they would be located adjacent to the Project site. “Research has shown FTHL are absent along human-induced edges.”<sup>33</sup>

For the reasons discussed above, the PMPD fails to identify and properly analyze the significant impacts the Project would have on the FTHL, and fails to mitigate those impacts to the maximum extent feasible.

c. *The Mitigation Measures Proposed for Special Status Plants Are Inadequate*

As in the SSA, the PMPD uses an insufficiently sized buffer around “environmentally sensitive areas” to protect special-status plants. Condition of certification BIO-19 specifies the use of a buffer of 10 to 20 feet instead of the 50-foot buffer recommended in the SA/DEIS. Not only has the Commission given no explanation for the buffer size reduction, the 10 to 20 foot buffers are likely to be ineffectual. Mr. Cashen, CURE’s biology expert, could not imagine *any* scenario in which a buffer of such a small size would be adequate.<sup>34</sup> Thus, the reduction in buffer size vitiates that portion of certification condition BIO-19 and should be reversed.

d. *The Commission’s Analysis of the Impacts on the Western Burrowing Owl Must Be Updated to Account for the Owl’s Recent Precipitous Population Decline in the Imperial Valley*

In the SA, SSA and PMPD, the Commission has acknowledged that the Project would impact the western burrowing owl. PMPD at VI.A-24. However, significant new information has come to light since the PMPD was issued that bears on the Project’s effects on the owl. As a September 22, 2010 article in the *Los Angeles Times* explains, there has been an “alarming decline in the number of burrowing owls in the Imperial Valley,” including a 27 percent drop in the number of pairs between 2007 and 2008 (4,879 pairs to just 3,557).<sup>35</sup> Based on this information, the Project’s impacts on the owl, including the “permanent[] eliminat[ion] of a large expanse of

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<sup>33</sup> *Id.* at 15.

<sup>34</sup> *Id.* at 10.

<sup>35</sup> Louis Sahagun, September 22, 2010, “Number of Burrowing Owls in Imperial Valley Falls Sharply,” *Los Angeles Times*, Greenspace Blog, available at <http://latimesblogs.latimes.com/greenspace/2010/09/burrowing-owls-in-imperial-county.html>.

habitat on the plant site and along the linear facilities that is currently available for foraging and breeding,” become proportionally greater than they otherwise would be. PMPD at VI.A-40 to 41. The Commission must assess this new information and incorporate it into its western burrowing owl impact analysis.

e. *The Commission’s Biological Impacts Analysis Must Be Updated to Account for the Changes in the Project Design*

Despite the fact that changes in the Project from the 750 MW facility to the 709 MW alternative will likely have substantial changes on the Project’s biological impacts, the PMPD fails to update the biological resource impact analysis to account for the changes. For one, as compared to the 750 MW design, the 709 MW alternative calls for removal of numerous east-west roads and all stabilized spur access roads, which presumably means maintenance workers would have to access many of the SunCatcher units by off-road driving.<sup>36</sup> As noted above, this change is likely to cause much different – and likely greater – impacts to the flora and fauna on the Project site due to erosion, noise and dust. Therefore those impacts must be analyzed.

In addition, the removal of the spur roads “increases the temporary disturbance for the construction of the SunCatchers by the use of a temporary 50-foot road that includes the 2-foot wide trench for the installation of an underground utility line and hydrogen pipeline.”<sup>37</sup> While the U.S. Army Corps of Engineers (“ACOE”) failed to quantify or discuss this increased “temporary disturbance,” the Commission does not have that option; it must analyze and potentially develop mitigation measures for that impact. Furthermore, it should be noted that disturbances of the extremely fragile desert soils and desert pavement may themselves be “temporary,” but their impacts are all too often permanent in nature.

5. The Commission’s Air Quality Impacts Analysis Must Be Updated to Account for the Changes in the Project Design

As with the changes in biological impacts caused by the selection of the 709 MW facility over the 750 MW design, the PMPD also fails to update the air quality impact analysis to account for the changes in the Project. For example, the 709 MW alternative calls for removal of numerous east-west roads and all stabilized spur access roads, which presumably means maintenance workers would have to access many of the SunCatcher units by off-road driving. In turn, the road removal and increased off-road driving is likely to reduce air quality and exacerbate public health risks by increasing the amount of dust - and thus particulate matter and the Valley

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<sup>36</sup> See U.S. Army Corps of Engineers, “Draft 404(b)(1) Alternatives Analysis For the Imperial Valley Solar Project (aka Solar II),” July 16, 2010, p. 24.

<sup>37</sup> *Id.*

Fever-inducing *coccidioides immitis* fungus - in the air.<sup>38</sup> These impacts must be disclosed and analyzed.

6. The Commission's Analysis of Cultural Resources Impacts Remains Inadequate

While greater discussion of the Project's cultural resource impacts has occurred since the SSA, the Commission's analysis of those impacts remains wholly inadequate. Instead of fully investigating, analyzing and mitigating the Project's cultural resource impacts, the Commission has opted for a fast-track certification process that impermissibly defers impact analysis and mitigation measure formulation until after approval.

As a prime illustration of the Commission's delinquency, the PMPD's analysis of cultural resource impacts essentially begins with an attempted excuse for its inadequacy:

Given the American Recovery and Reinvestment Act (ARRA) deadlines, [the Commission and BLM] staff have not had time to provide a detailed evaluation of each resource potentially eligible for historic register nomination. Resources instead will be evaluated according to protocols established by the Conditions of Certification and Cultural Resources Programmatic Agreement. There likely are undiscovered resources on the site and they will be permanently changed and/or destroyed during construction.

PMPD at VI.C-3. The Commission's admitted dereliction of its CEQA duties is not excused by ARRA's funding deadlines.

CEQA does not allow agencies to ignore or defer their environmental review duties for purposes of obtaining federal grant money. The Commission's primary responsibility is to produce a legally adequate environmental document and ensure that the Project, if approved, will include all feasible mitigations. Instead, the Commission appears to be treating its primary responsibility as processing the Project's application within a specified period of time. This is impermissible. The Commission must identify, fully analyze, prepare mitigation measures for and allow public comment on the Project's cultural resources impacts *before*, not *after*, it considers certifying the Project. Were the Commission to certify the Project based on the current environmental record, its omission of essential environmental review would constitute a prejudicial abuse of discretion. *Sierra Club v. State Board of Forestry* (1994) 7 Cal.4th 1215, 1237.

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<sup>38</sup> See, e.g., Edward L. Arsura *et al.*, "Coccidioidomycosis (Infectious Diseases)," December 21, 2009, available at <http://emedicine.medscape.com/article/215978-overview>.

C. *Formulation of Mitigation Measures Cannot Be Deferred*

As discussed in our prior two letters, CEQA prohibits the deferred formulation of mitigation measures. Requiring an “applicant [to] adopt mitigation measures recommended in a future study is in direct conflict with the guidelines implementing CEQA.” *Sundstrom v. County of Mendocino* (1st Dist. 1998) 202 Cal. App. 3d 296, 306. Nonetheless, the PMPD follows in the footsteps of the SA/DEIS and SSA and, under the guise of certification conditions, unlawfully defers the formulation of essential mitigation measures.

For example (and for illustrative purposes only), the Drainage Erosion and Sediment Control Plan would require the implementation of Best Management Practices (“BMPs”) that are “designed to prevent wind and water erosion.” PMPD at VI.B-40. It is not specified what these BMPs will consist of, and, as testified by expert civil engineer Dr. Christopher Bowles, the “assumption” that the project will not increase erosion “has not been quantified by accurate calculations.”<sup>39</sup> The Stormwater Pollution Prevention Plan apparently “has been developed” but “is in the process of being updated,” so its contents are not disclosed. PMPD at VI.B-15. “[I]t is assumed by the Applicant that all soil erosion concerns will be adequately addressed in the DESCP and SWPPP. This assumption is unwarranted . . . .”<sup>40</sup>

Another example of an unlawfully deferred mitigation measure is the Weed Management Plan, which states, regarding post-closure revegetation, that “a site reclamation and revegetation plan should be drafted with the goal of reducing the extent of weeds that persist on the site following closure.”<sup>41</sup> How this will be accomplished is not specified.

Furthermore, formulation of most of the cultural resources mitigation measures has been impermissibly deferred. To wit, the PMPD states that “[i]mplementation of Conditions of Certification CUL-1 through CUL-12[, i.e. all the cultural resources mitigation measures, are] subject to the consultation process for the development of the Programmatic Agreement,” which is still in draft form. PMPD at VI.C-89. Thus, there is nothing concrete on which the public can comment; the actual content, implementation and success of the mitigation measures is wholly dependent on the Programmatic Agreement.

Similarly, the PMPD fails to specify how the Project will comply with the federal Endangered Species Act with respect to such species as the Peninsular bighorn sheep and the flat-tailed horned lizard. Both of these species are currently the subject of section 7 consultation between BLM and FWS, and the process is likely to result in an incidental take statement specifying additional mitigation measures the Project must take to comply with the ESA.

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<sup>39</sup> Exhibit 499-I to Rebuttal Testimony for CURE, p. 7.

<sup>40</sup> *Id.* at p. 8.

<sup>41</sup> Imperial Valley Solar, LLC, Draft Noxious Weed Management Plan, p. 6-5.

However, if the Commission certifies the Project before consultation is complete, neither it nor the public will have had the opportunity to analyze and comment on the full range of mitigation measures ultimately required for the Project. This too constitutes an impermissible deferral of mitigation measure formulation.

The public must be given the opportunity to comment on the final versions of the plans and mitigation measures of which the PMPD has deferred formulation, including those mentioned above and others, so as to ensure that they actually mitigate impacts to the extent claimed by the Applicant and the Commission.

*D. Selection of the Preliminary LEDPA/709 MW Alternative Violates CEQA*

The Commission must not approve any activity “if there are feasible alternatives . . . available that would substantially lessen a significant adverse effect that the activity may have on the environment.” Pub. Res. Code § 21080.5(d)(2)(A); CEQA Guidelines §§ 15250, 15252(a)(2). And a finding of infeasibility requires more than just conclusory statements. “The fact that an alternative may be more expensive or less profitable is not sufficient to show that the alternative is financially infeasible. What is required is evidence that the additional costs or lost profitability are sufficiently severe as to render it *impractical* to proceed with the project.” *Citizens of Goleta Valley v. Board of Supervisors* (2nd Dist. 1988) 197 Cal. App. 3d 1167, 1181 (emphasis added).

In contravention of CEQA’s mandate, however, the Committee’s selected alternative, the 709 MW facility, is not the least environmentally damaging feasible alternative. To wit, the single 300 MW plant alternative has been found by both the BLM and EPA to be feasible *and* capable of meeting the project’s purpose and need as set forth in the BLM FEIS: approval of non-hydropower renewable power on public lands. BLM FEIS at 1-2 to 1-4. And the purpose and need identified in the BLM FEIS is very similar to the purpose and need detailed in the PMPD. PMPD at II-2 to II-3.

Moreover, the Project Applicant itself has admitted the economic feasibility of a 300 MW facility through its contract with San Diego Gas and Electric (“SDG&E”) for 300 MW produced on the Project site.<sup>42</sup> Indeed, regardless of the Commission’s certification of the Project - or the approval of any of the other action agencies, such as BLM and ACOE - a 300 MW plant may be the *only* alternative that *is* feasible. That is because the second phase of the Project, which would add the additional 400 plus megawatts, is entirely “dependent on the approval and construction of additional transmission capacity, such as the proposed Sunrise Powerlink 500-kV transmission line.” PMPD at 2.

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<sup>42</sup> See Exhibit 499-M to Rebuttal Testimony for CURE; see also CURE, Reply Brief re: Imperial Valley Solar Project (08-AFC-5), August 18, 2010, p. 5..

In sum, the Commission cannot certify the 709 MW facility without violating CEQA because there is a feasible, yet less environmentally damaging, alternative. Pub. Res. Code § 21080.5(d)(2)(A); CEQA Guidelines §§ 15250, 15252(a)(2).

### III. WARREN-ALQUIST ACT VIOLATIONS

#### A. *Selection of the Preliminary LEDPA/709 MW Alternative Violates LORS*

Under the Warren-Alquist Act, the Commission cannot certify the Project unless and until it determines whether the Project complies with all “other applicable local, regional, and state . . . standards, ordinances, or laws,” and “federal standards, ordinances, or laws.” Pub. Res. Code § 25523(d); 20 Cal. Code Regs. § 1752(a). The Commission may not certify any project that does not comply with the applicable LORS unless it finds both that (1) the project “is required for public convenience and necessity” and (2) “there are not more prudent and feasible means of achieving public convenience and necessity.” Pub. Res. Code § 25525; 20 Cal. Code Regs. § 1752(k). Here, the Commission cannot certify the Project until it determines that it will comply with, among other laws, the federal Clean Water Act (“CWA”) and the ESA.

First, as to the CWA, because the Project would impact jurisdictional waters of the United States, it must obtain a CWA section 404(b) permit from ACOE. And before it will issue a permit, ACOE must first determine the Least Environmentally Damaging Practicable Alternative for the Project, so as to minimize and mitigate unavoidable impacts. Here, however, ACOE has only issued a *preliminary* LEDPA, not a *final* LEDPA.

Thus, until ACOE approves a final LEDPA, the Commission cannot be sure that the Project design it approves will comport with the LEDPA and comply with the Clean Water Act. Contrary to the Committee’s assertion in the PMPD, the mere fact that the 709 MW alternative selected by the Committee in the PMPD is the same as ACOE’s preliminary LEDPA is not enough compliance with the Clean Water Act. While there might be “nothing in the record that would lead [the Committee] to believe [the preliminary LEDPA] will not be adopted by the Corps as proposed,” there is nothing in the record to indicate that it *will* be adopted. PMPD at VI.B-35. By comparison, there was nothing in either the SA/DEIS or SSA to indicate that the Committee would select the 709 MW alternative instead of the 750 MW facility or any of the other designs that were described and analyzed in the record, yet the 709 MW facility is the one it approved. And in any case, an *absence* of information does not constitute the *substantial* evidence that CEQA and the Warren-Alquist Act require to be the basis of the Commission’s findings and conclusions. See Pub. Res. Code. §§ 21080, 21081.5, 25901; CEQA Guidelines § 15384.

Second, as to the Endangered Species Act, BLM and FWS are currently in section 7 consultation over the Project’s likely taking of Peninsular bighorn sheep, a federally listed endangered species, and the flat-tailed horned lizard, which is expected to be listed soon. PMPD

at VI.A-50. However, FWS has not yet issued a biological opinion, let alone an incidental take statement. Therefore, it is not yet clear whether the Project, as approved by the Committee, would comply with the conditions FWS will impose. As such, the Commission cannot determine whether Project will comply with the federal Endangered Species Act, and may not certify the Project, until after section 7 consultation has been completed.

Until the Commission determines that the Project will comply with the federal Clean Water Act and the Federal Endangered Species Act, which it cannot yet do, it must not certify the Project.

*B. The Commission Has Not Complied with Public Resources Code Section 25527*

The Warren-Alquist Act prohibits the siting of power plant facilities in certain areas of the state, including “wilderness, scenic or natural reserves, [and] areas for wildlife protection, recreation [and/or] historic preservation.” Pub. Res. Code § 25527. If the Project site is within one of the prohibited areas, then the Commission may not certify the Project unless it (1) determines that the Project is not inconsistent with the primary land use of the area in which it is to be sited, (2) determines that it will have no “substantial adverse environmental effects,” and (3) ensures that it gets approved by the public agency “having ownership or control of such lands.” Pub. Res. Code § 25527; 20 Cal. Code Regs. §§ 1752(f), 1755(k).

Here, the Project site is located primarily on BLM-managed land, with a small portion (about five percent of the total Project area) situated on private land. PMPD at I-1. The BLM land on which most of the Project would be located is managed pursuant to the California Desert Conservation Area Plan (“CDCAP”). And under the CDCAP, the Project area is designated as “Multiple-Use Class L,” which is designed to “protect[] sensitive, natural, scenic, ecological, and cultural resource values” and is the second most restrictive designation (out of five).<sup>43</sup> More specifically, lands “designated as Class L are managed to provide for generally lower-intensity, carefully controlled multiple use of resources, while ensuring that sensitive values are not significantly diminished.”<sup>44</sup> As such, the CDCAP prohibits the siting of nuclear and fossil fuel power plants on Class L lands, and only allows wind and solar projects “after NEPA requirements are met.”<sup>45</sup>

Thus, as illustrated by the Project area’s Class L designation, the site falls within the ambit

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<sup>43</sup> U.S. Bureau of Land Management, “California Desert Conservation Area Plan,” 1980 (as amended), p. 13, *available at* [http://www.blm.gov/pgdata/etc/medialib/blm/ca/pdf/cdd/cdcaplan.Par.15259.File.dat/CA\\_Desert.pdf](http://www.blm.gov/pgdata/etc/medialib/blm/ca/pdf/cdd/cdcaplan.Par.15259.File.dat/CA_Desert.pdf).

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at p. 14.

Christopher Meyer  
CEC Project Manager  
September 27, 2010  
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of Public Resources Code section 25527 as a “wilderness, scenic or natural reserve” and/or a place “for wildlife protection, recreation [or] historic preservation.” Indeed, the site’s inclusion in the California Desert Conservation Area alone should suffice to make section 25527 applicable. To date, however, the Commission has entirely failed to comply with this provision of the Warren-Alquist Act. Indeed, there isn’t even a single mention of the section 25517 siting restrictions anywhere in the SA/DEIS, SSA or PMPD.

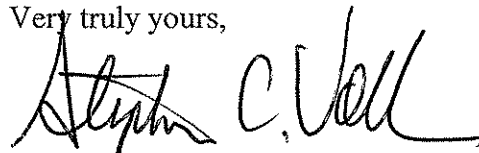
Therefore, the Commission is prohibited from certifying the Imperial Valley Solar Project in its current location unless and until it determines that the Project is not inconsistent with the primary land use of the surrounding area and will have no substantial adverse environmental impacts. Pub. Res. Code § 25527; 20 Cal. Code Regs §§ 1752(f), 1755(k). The Commission must also withhold certification until the Project is approved by the BLM. *Id.* However, given that the Project will have substantial adverse environmental impacts (as even the Committee admits in the PMPD) and still has not been approved by the BLM, the Commission may never be able to certify the Project.

#### IV. CONCLUSION

For these reasons, the PMPD violates, and the Commission has failed to comply with, CEQA and the Warren-Alquist Act. Before the Commission can even consider certifying the Project, it must revise and augment the environmental review done to date and recirculate it for public comment. And before reaching a final decision on this matter, the Commission must respond in writing to all “significant points raised during the” environmental “evaluation process.” Pub. Res. Code § 21080.5(d)(2)(E).

Thank you for considering our views on this important matter.

Very truly yours,



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Attorney for Conservation Groups

### LIST OF EXHIBITS

1. Backcountry Against Dumps, *et al.*, Comments on Staff Assessment/Draft Environmental Impact Statement and Draft California Desert Conservation Area Plan Amendment for Imperial Valley Solar Project, May 27, 2010.
2. Backcountry Against Dumps, *et al.*, Comments on Supplemental Staff Assessment for Imperial Valley Solar Project, July 27, 2010.
3. California Energy Commission, "Commission Decision re: Data Concerning Cultural Resources on BLM Land," July 14, 2010.
4. California Department of Corrections and Rehabilitation, Institution Statistics for California State Prison at Centinela, 2010.
5. Eddie Harmon, Comments to BLM on its Proposed Resource Management Plan Amendment PRMP-A/FEIS for the CDCA Plan and Imperial Valley Solar Project (IVS), August 26, 2010.
6. Terry O'Brien, CEC Deputy Director, "Staff's Comments Regarding a Possible Energy Commission Finding of Overriding Considerations - Imperial Valley Solar Project (08-AFC-5)," July 27, 2010.
7. Edward L. Arsura *et al.*, "Coccidioidomycosis (Infectious Diseases)," December 21, 2009.
8. "Additional Testimony of Dr. Christopher Bowles and Christopher Campbell . . . on Soil and Water Resources for the Imperial Valley Solar Project," CURE Exhibit 499-I, July 21, 2010.
9. Imperial County Planning and Development Commission, Letter to Dan Boyer re: Westwind Water Company, APN 033-564-002-000, November 12, 2008.
10. "Testimony on Alternative Water Supply of Witness Edie Harmon for Intervenor Tom Budlong," Exhibit 591, July 21, 2010.
11. "Additional Rebuttal Testimony of Scott Cashen . . . on Biological Resources for the Imperial Valley Solar Project," CURE Exhibit 499-K, July 21, 2010.
12. Louis Sahagun, "Number of Burrowing Owls in Imperial Valley Falls Sharply," Los Angeles Times, Greenspace Blog, September 22, 2010