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Re: Comments of Backcountry Against Dumps, *et al.*, on Supplemental Staff
Assessment for Imperial Valley Solar Project

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 Supplemental Staff Assessment (“SSA”) for the Imperial Valley Solar Project (formerly the SES Solar Two Project) (“Project”). Although slight progress has been made in a few areas – for example, the planned section 7 consultation – for the most part the SSA remains an inadequate informational document. We incorporate by reference our previous comments on the SA/DEIS.

INTRODUCTION

The Yuha Desert, where the Project is to be located, is a pristine but extraordinarily sensitive landscape. Damage to it from this Project is likely to be irreversible. “Implementation of this [P]roject will forever change the landscape of this area,”¹ and also lead to “the permanent destruction of hundreds of cultural resources. . . .”² The environmental devastation that this Project will cause is permanent, but the Project’s benefits are only temporary.³ The California Energy Commission (“CEC”) 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

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

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

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

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.”⁴ The CEC must not allow itself to miss the forest for the trees. The CEC’s primary responsibility is to produce a legally adequate environmental document, not to process the Project’s application within a specified period of time. CEQA does not allow agencies to exempt certain projects from CEQA’s requirements due to a project applicant’s needs or desires.⁵ 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.

The SSA is deficient in four main areas. First, the public comment process itself is flawed. The idea that meaningful public comment on a highly technical document exceeding 1,400 pages can be obtained in less than three weeks is untenable. Second, the SSA continues to unlawfully defer the formulation of mitigation measures by invoking “performance standards.”⁶ Third, the impact analysis remains inadequate. Significant impacts are deemed insignificant, and avoidable impacts are deemed unavoidable with little or no documentation. Moreover, the SSA fails to provide an analysis of the impacts of the project on cultural resources. Finally, due to all of these deficiencies, the environmental document *must* be recirculated and an additional noticed public comment period provided.

I. THE PUBLIC COMMENT PROCESS IS FLAWED

The Conservation Groups object to the cavalier manner in which public comment has been handled in this proceeding. CEQA is intended to “inform . . . decision makers *and the public* about the . . . environmental effects of proposed activities,” and, indeed, one of an EIR’s most important purposes is to “demonstrate to an apprehensive citizenry that the agency has, in fact, analyzed and considered the ecological impacts of its action.” CEQA Guidelines [14 C.C.R.; “Guidelines”] § 15002(a)(1), 15003(d). Here, the CEC has treated public comment not as central to the CEQA process but as an unanticipated afterthought.

The SSA *must* be re-released for additional *noticed* public comment because only 20, not 30, days were provided for the public to review this document. The 20-day public comment

⁴ 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, at 10.

⁵ 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>.

⁶ *See, e.g.*, SSA at p. C.2-115.

period provided for public review of the 1,410 page SSA is legally insufficient, for two reasons.

First, Public Resources Code⁷ section 21080.5 *specifically requires* that environmental documents prepared under a certified regulatory program (“CRP”) be “available for a reasonable time for review and comment by other public agencies and the general public.” Twenty days is *not* a reasonable time in which to expect members of the public, who unlike the CEC and Applicant, cannot devote all of their time to review of this document, to be able to meaningfully comment on the SSA.

Second, and additionally, CEQA requires a *bare minimum* of 30 – not 20 – days of public review. *Ultramar, Inc., v. South Coast Unified Air Quality Management Dist.* (1993) 17 Cal.App.4th 689 is instructive. In *Ultramar*, the agency, which also operated pursuant to a CRP, inadvertently omitted *one chapter* of its environment document when it distributed the document to the public. As a result, the public was given only 24 days to comment on that chapter. CEQA, however, requires a 30-day public review period, and this requirement is *not* contained within either of the two CEQA chapters from which agencies with CRPs are exempt. *Id.* at 699. (The 30-day requirement is found in section 21091(a), which is contained within Chapter 2.5, but agencies with CRPs are only exempt, under section 21080.5, from requirements in Chapters 3 and 4.) The court “c[ould] not overemphasize the importance of compliance with all notice provisions . . . so that there will be maximum public comment and involvement.” *Id.* The court found it irrelevant that, by its terms, section 21091(a) applies only to “draft environmental impact reports.”⁸ *Id.* at 699.

The *Ultramar* court *enjoined the project and required that the agency re-release the entire document* for additional noticed comment because a single chapter was available for only 24, not 30 days. *Id.* at 705 & n. 6. Here, as in *Ultramar*, less than 30 days were provided for public comment. Here, as in *Ultramar*, the entire document must be re-released for additional noticed public comment.

Furthermore, the Conservation Groups object to the manner in which public comments were responded. The CEC has an obligation to prepare “written responses . . . to significant environmental points raised during the evaluation process.” § 21080.5(d)(2)(D). The Commission apparently somehow divided up the comments instead of responding to all comments serially in a single location. As a result, comments were overlooked. For example, the Conservation Groups previously noted that the Project “will have cumulative growth-inducing impacts” and that the SA’s conclusions that these impacts would “have beneficial

⁷ Undesignated references are to the Public Resources Code.

⁸ Nor is it relevant that this is a *supplemental* (rather than draft) Staff Assessment. A variety of new significant impacts not mentioned in the SA were identified in the SSA. Recirculation was accordingly required pursuant to Guidelines section 15088.5(a), and pursuant to CEQA Guidelines section 15088.5(d), the public review provisions applicable to draft EIRs are also applicable to recirculated EIRs.

public impacts” such as higher taxes directly conflicts with CEQA’s express requirement that “it must not be assumed that growth in any area is necessarily beneficial . . . or of little significance to the environment.” Conservation Groups’ comment letter dated May 27, 2010 at 10-11; Guidelines § 15126.2(d). The Conservation Groups pointed out that the SA’s conclusions were unfounded because (1) the “modest” size of the workforce does not *per se* mean that growth-inducing impacts will be insignificant, and (2) the SA acknowledges that the Project may have the effect of drawing *non-renewable energy* projects to the area, yet this potential environmental impact was ignored. Conservation Groups’ comment letter dated May 27, 2010, at 10-11. The CEC did not respond to this comment. One might expect to find a response in the Land Use, Recreation and Wilderness, or the Socioeconomics and Environmental Justice sections of the SSA, but no such response exists. The CEC should revise its public comment response procedures to avoid such mistakes in the future. Additionally, the CEC *must* respond to *all* public comments before a final decision is reached.

II. THE SSA IMPROPERLY DEFERS THE FORMULATION OF MITIGATION MEASURES

As discussed in our prior letter, CEQA prohibits the deferred formulation of mitigation measures. “[R]equir[ing 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* (1988) 202 Cal.App.3d 296, 306.

It is true that an agency may properly condition project approval on, for example, an applicant’s compliance with air and water quality, or other environmental, standards. *Id.* at 308. This is because compliance with such standards is based on “specific performance criteria articulated at the time of project approval.” *Sacramento Old City Ass’n v. City Council* (1991), 229 Cal.App.3d 1011, 1028. However, such a situation only arises where an agency “[1] recognize[s] the significance of the potential environmental effects, [2] commit[s] itself to mitigating their impact, and [3] articulate[s] specific performance criteria.” *Gentry v. City of Murrieta* (1995) 36 Cal.App.4th, 1359, 1395. When dealing with deferred mitigation measures, the agency must either “treat the impacts in question as being significant” or demonstrate that the deferred mitigation “is known to be feasible.” *Sacramento, supra*, 229 Cal.App.3d at 1028-29.

For example, in *Sacramento*, the court upheld an environmental document that mitigated potential future parking problems by relying on any of seven *specific* potential mitigation measures. *Id.* at 1025. This was permissible because “the city . . . set forth a list of alternative[.]” mitigation measures that could be deployed, and public comment on these mitigation measures was thus not precluded (and in fact was considered). *Id.* at 1022, 1028.

Requiring applicants to *commission future studies* and comply with the mitigation measures *recommended in them*, on the other hand, has been repeatedly held to violate CEQA. For example, in *Sundstrom*, a developer was planning to construct a hotel and restaurant. After potential impacts to hydrology and soils became apparent, the County required the applicant to “have a study prepared by a civil engineer which evaluates potential effects of the proposed

development upon soil stability, erosion, sediment transport, and the flooding of downslope properties and contains recommended mitigation measures to minimize such impacts.” *Sundstrom, supra*, 202 Cal.App.3d at 306. The County also required review and approval of the plan by planning and building services, after which the mitigation measures would be incorporated into the use permit. *Id.* The court held that this condition constituted a “post hoc rationalization of agency actions” that would “inevitably have a diminished influence on decisionmaking”; this violated CEQA. *Id.* at 307. Moreover, such deferral of mitigation measures subverts one of the key purposes of CEQA: to ensure the adequacy of environmental review by exposing it to the public and interested agencies. *Id.* at 307-08. “By merely requiring administrative approval of the hydrological studies, the use permit provides no . . . guarantee of an adequate inquiry into environmental effects.” *Id.* at 307. The public was prevented from commenting upon, or assessing the adequacy of, these deferred mitigation measures.

Similarly, in *Gentry, supra*, 36 Cal.App.4th at 1396, the court also found an environmental document to violate CEQA because it contained a deferred mitigation condition. There, the project approval permitted the City to require the applicant to submit a biological report regarding the Stephens’ kangaroo rat; if such a report were to be required, the applicant would have to comply with “any recommendations” in it. *Id.* This condition was “on all fours with the condition in *Sundstrom*” and therefore also constituted an improper deferral of mitigation. *Id.* Because there was evidence “that the Project, even as mitigated . . . would have a significant effect on the Stephens’ kangaroo rat . . . any proposed mitigation for impacts on the . . . rat had to be made available for public review” and not deferred for future formulation. *Id.* at 1397.

Here, formulation of mitigation measures is unlawfully deferred. As discussed in our prior letter, the SSA is replete with mitigation measures whose content will not be determined until a later date. 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.” SSA at C.7-79. 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.” Exhibit 499-I to rebuttal testimony for CURE, at p. 7. The Stormwater Pollution Prevention Plan apparently “has been developed” but “is in the process of being updated,” so its contents are not disclosed. SSA at C.7-18. “[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” Exhibit 499-I to testimony for CURE, at p. 8. 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.” Applicant’s Draft Noxious Weed Management Plan, at 6-5. How this will be accomplished is not specified. The public must be given the opportunity to comment on the final versions of these, and similar plans so as to ensure that they actually mitigate impacts, to the extent claimed by the applicant and the CEC.

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

The CEC may not “approve[] or adopt[]” the Project “if there are feasible alternatives or feasible mitigation measures available that would substantially lessen a significant adverse effect that the [Project] may have on the environment.” Again the SSA (1) fails to identify certain impacts altogether; (2) mislabels other significant impacts as insignificant; and (3) fails to adopt mitigation measures for those impacts found to be significant, as discussed thoroughly below.

A. *Biological Resources*

The Conservation Groups appreciate that the SSA now provides for formal section 7 consultation with USFWS regarding the Project's impacts on Peninsular Bighorn Sheep (“PBHS”), although public comment must be provided regarding the outcome of this consultation.⁹ Nonetheless, the SSA fails to adequately identify and mitigate the Project's impacts on biological resources, in the following areas:

1. Flat-Tailed Horned Lizard (“FTHL”)

There are at least seven deficiencies in the SSA's assessment of the Project's impacts on the FTHL.

First, as testified by expert biologist Scott Cashen, the proposed Raven Management Plan (BIO-12) fails to minimize the effects of predation on the FTHL to less than significant levels, as the SSA claims on page C.2-81. Exhibit 499-K to rebuttal testimony for CURE, at 2-4. Mr. Cashen's testimony speaks for itself and need not be repeated at length here, but, briefly, the Raven Management Plan, among other deficiencies: (1) fails to reduce, and does not purport to reduce, the impacts of FTHL predation from *non-raven* predators; (2) contains a timeline too hurried to ensure that the plan will mitigate raven predation, as ravens are highly adaptable and require adaptive management; (3) proposes inadequate monitoring methods; and (4) contains a success criterion (the Raven Management Plan will be discontinued if “ravens are not adversely affecting the local [FTHL] population”) that, scientifically, cannot be determined. Moreover, because the ravens are highly adaptable, it is possible that the ravens could be successfully managed for the two-year period provided for in the success criterion (leading to the discontinuance of the Raven Management Plan), but could later impact the FTHL when adaptive management techniques are withdrawn.

Second, the SSA fails to detail the process which will be used to “move[]” the FTHLs encountered during construction “out of harm's way,” yet the outcome of this relocation depends entirely on the process used to handle and transport lizards, and the release sites selected. SSA at

⁹ This consultation also must address outstanding issues regarding PBHS, as detailed in the testimony of Dr. Vernon Bleich (Exhibit 499-F to Rebuttal Testimony for CURE).

C.2-74; Exhibit 499-K to rebuttal testimony for CURE, at 12. It is thus unknown whether this relocation will be successful; if not, unaddressed impacts will result.

Third, while clearance surveys would occur prior to *decommissioning* to relocate FTHLs to other suitable habitat, no clearance surveys prior to *commissioning* are provided. Exhibit 499-K to rebuttal testimony for CURE, at 12. The SSA fails to explain the justification for this distinction.

Fourth, the selection criteria that will be used to select FTHL compensation lands are inadequate. SSA at C.2-169 through 170. The selection criteria are vague and lacking in specificity and certainty. *See* Exhibit 499-K to rebuttal testimony for CURE, at 13. For this reason, mitigation of impacts is not assured.

Fifth, the SSA fails to explain how the amount of the in-lieu fee, which allows the applicant to satisfy its mitigation obligations with a cash payment, would be calculated. *See* SSA at C.2-176; Exhibit 499-K to rebuttal testimony for CURE, at 14. The fee's adequacy is simply to be determined by the CEC at a later date. *Id.* (in-lieu fee may only be used "to the extent" it "is found by the [CEC] to be in compliance with CEQA and CESA requirements"). The public cannot comment on the sufficiency of the cash payment. Without such detail, it is impossible for the public to ascertain whether or not impacts on FTHL will in fact be mitigated.

Sixth, the Applicant has been given 24 months to acquire, and prepare a management plan for, compensation lands. The mitigation proposed by the SSA ignores the effect of this two year delay on the FTHL. It is likely that mitigation in excess of the 1:1 ratio compensated would be required to actually offset impacts to the FTHL.

Finally, the applicant's Least Environmentally Damaging Preferred Alternative ("LEDPA") is deficient. It proposes nearly 220 wash crossings by road *daily* (6,602 monthly) yet claims that these "roads . . . would be used minimally. . . ." Moreover, while the LEDPA does contain additional movement corridors for the FTHL, it is unlikely that the provided corridors would be used because they would be located adjacent to the Project site yet "[r]esearch has shown FTHL are absent along human-induced edges. . . ." Exhibit 499-K to rebuttal testimony for CURE, at 15. This absence can be attributed to increased noise and predation near human activity. *Id.*

For these reasons, the SSA fails to mitigate impacts to the FTHL to the maximum extent feasible.

2. Special-Status Plants

The SSA's proposed methods of mitigating impacts to special status plants are inadequate. As mentioned in our previous comment letter, and as testified by Mr. Cashen, but

unaddressed in the SSA, the size of the proposed buffer (now down to 10 to 20 feet, from a previous size of 50 feet in the SA (SA at C.2-98)) is inadequate. Mr. Cashen could not imagine *any* scenario in which a buffer of such a size would be adequate. Exhibit 499-K to rebuttal testimony for CURE, at 10. No explanation is given as to why, when comments were received that the prior 50 foot buffer was too small, *the buffer was reduced to 10 to 20 feet*. Moreover, the Special-Status Plant Mitigation Plan (BIO-19) is another example of an unlawful deferral of mitigation.

B. *Hydrology and Soils (Groundwater) Impacts*

Although previously it was stated that “[n]o groundwater would be used by the project,” SA/DEIS, p. C.7-3, the Project now proposes to satisfy its “construction and possibly operation[al]” water needs through the use of groundwater from the Dan Boyer Water Company Well, which draws water from a Sole-Source Aquifer. The rushed assessment of impacts from groundwater use is inadequate in no less than eleven ways.

1. Construction Water Use

The SSA states that “[p]lumping for construction of the . . . Project will average 51.1 acre-feet per year” (“AFY”) of water “for slightly more than three years.” SSA at C.7-44. The SSA, however, “limits water purchases from the Dan Boyer Water Company to 34” AFY. *Id.* at C.7-80. The SSA does not specify where the other 17.1 AFY will come from. “There is currently no backup water supply for the project.” *Id.* at C.7-51. “[T]here appear to be no feasible water conservation options available for this project.” *Id.* The SSA does not specify how water use will be curtailed during *construction* if demand exceeds permitted use. *See* Exhibit 499-I to rebuttal testimony for CURE, p. 4 (mitigation if demand exceeds permitted use is to suspend washing of mirrors, but this does not address construction impacts). Moreover, the numbers provided for the construction water use are contradictory and it is possible that the Project will require 228 AF of water in its first year of construction. Exhibit 499-I to rebuttal testimony for CURE, pp. 2-3. This fundamental deficiency calls into question the entirety of the groundwater analysis, as impacts may be drastically understated.

2. Operational Groundwater Use

The SSA’s statements regarding operational water use are also dubious. It is unclear how many mirror washings will be conducted annually; on the one hand, the SSA states that “[e]ach mirror would be washed . . . once per month, with *another* wash of approximately 42 gallons every 3 months”¹⁰ but on the other hand, the SSA bases its water use assumptions on “every SunCatcher having approximately 8 normal washer per year with one additional scrub wash.” SSA at C.7-17, Table 3 n. 3. As a result, water use for mirror washing may actually amount to

¹⁰ SSA at C.7-16 (emphasis added); *see also id.* at C.1-17 (“[m]irror washing would be required approximately once every month”).

25.8 AFY, not 14.2 AFY, as claimed. Exhibit 499-I to rebuttal testimony for CURE, p. 3. Moreover, the Project may require an additional 2.2 AFY to satisfy workers' demands for potable water. See Exhibit 499-I to rebuttal testimony for CURE, p. 4. The projected operational water use calculations also ignore that "enhanced" dust control, which uses twice the water of standard dust control, may be required on occasion by mitigation measure WorkerSafety-8. As a result, total operational water use could amount to a total of 47.6 AFY, which is 13.6 AFY above the permitted use. Exhibit 499-I to rebuttal testimony for CURE, p. 4. Again, it is unknown how the Project's water use would be accommodated if the Dan Boyer source is insufficient. This fundamental deficiency calls into question the entirety of the groundwater analysis, as impacts may be drastically understated.

3. The Possibility of Simultaneous Construction and Operation Was Ignored.

The soil and water resources section of the SSA ignores the fact that the Project may simultaneously be under construction and operating. Compare SSA at C.1-20 ("applicant plans to start operation of SunCatchers as soon as they are ready; therefore it is anticipated that starting at Month 8 in the construction schedule, the first SunCatchers would be ready to operate and produce electricity"). The effects of such simultaneous operation was not considered when calculating the Project's water use. Simultaneous operation would exacerbate already-devastating groundwater impacts and must not be allowed.

4. The SSA's Conclusion That "Projected Well Interferences From Project Pumping Will Be Less Than 8 Feet and Therefore Considered Less Than Significant"¹¹ is Unfounded.

The SSA concludes that the Project will not significantly interfere with nearby residential water users' wells or significantly affect the yield of these wells. SSA at C.7-48 through 50. This conclusion is unfounded, for two reasons.

First, staff improperly utilized *average* well characteristics. Staff assumed an average "depth to water of 125 feet" in nearby residential wells, but many nearby wells contain water between 20 and 50 feet from the surface. Testimony of Edie Harmon, Exhibit 591 to rebuttal testimony of Tom Budlong, p. 8. Moreover, two of the ten neighboring wells "only have 5 feet of water above the well screens," but staff assumed an average depth of 15 feet to well screens. Exhibit 499-I to rebuttal testimony for CURE, p. 5. If the aquifer continues its "average observed decline of 0.21 feet per year," SSA at C.7-42, the water level at these two wells will drop below the well screen, and *any* additional decline attributable to the project could "exacerbate yield conditions at those 2 wells." Exhibit 499-I to rebuttal testimony for CURE, p. 5. The SSA acknowledges that "drawdown among two or more wells is . . . 'well interference.'" SSA at C.7-44. Here, two wells will be drawn down by the project's water use. As such, this

¹¹ SSA at C.7-49 (capitalization added).

significant impact must be analyzed and disclosed. Staff should also re-do the groundwater assessment using observed measurements, not averages.

Second, staff failed to assess the cumulative impacts of the Project's groundwater use combined with groundwater use by US Gypsum and other nearby projects such as the Wind Zero project. Exhibit 499-I to rebuttal testimony for CURE, p. 5; Exhibit 591 to rebuttal testimony of Tom Budlong, pp. 8-9. These cumulative impacts must be acknowledged and, if feasible, mitigated.

5. The Project's Impacts On Water Quality Were Not Disclosed.

The Project may increase concentrations in the Sole-Source Aquifer of Total Dissolved Solids by almost 5%. Exhibit 499-I to rebuttal testimony for CURE, p. 5. This impact was ignored in the SSA. Nor does the SSA consider the Project's cumulative impacts on water quality if other industrial or commercial uses draw water simultaneously with the project. *Id.* Moreover, as discussed below, it appears that, in fact, the vast majority of the Project's water use will be exported from the Sole-Source Aquifer; this reduction will also increase the remaining concentration of groundwater contaminants. Because the Project may contaminate a sole-source aquifer, it is prohibited from receiving federal monies. 42 U.S.C. § 300h-3(e).

6. The Project Has No Long-Term Water Supply.

No long-term water supply has been identified for the project. The Dan Boyer Water Company has only stated that it "will serve" the Project's water needs for 6 to 11 months. SSA at C.7-52. No backup water supply exists. *Id.* at C.7-54. "[W]ater supplies are not sufficient to satisfy the water demands of the project. . . ." *Id.* at C.7-53. It is unknown when, if ever, the SWWTF upgrades will be completed. *Id.* at C.7-52. Nobody knows how the Project's water needs will be met after 11 months. Staff cannot simply throw up their hands at this deficiency. As detailed below, potentially feasible alternative water supplies exist and have not been studied.

7. A New Method of Groundwater Modeling Should be Used.

As testified by two experts on groundwater, the SSA's chosen model used to determine groundwater impacts is insufficient. Exhibit 499-I to rebuttal testimony for CURE, p. 6; Exhibit 591 to rebuttal testimony of Tom Budlong, p. 10. The specific deficiencies with the chosen model are discussed by those experts and need not be replicated here. In sum, a "[f]ailure to use the best available information and science can lead to a . . . misrepresentation of potential project impacts. . . ." Exhibit 499-I to rebuttal testimony for CURE, p. 6. Use of the best available science is particularly important where, as here, potential impacts on groundwater are hugely controversial and where, as here, even small differences in data can lead to substantial environmental impacts.

8. Potentially Feasible Alternative Sources of Water Exist and Should be Studied.

The SSA fails to study alternative potential sources of groundwater other than the Dan Boyer well. At least three potentially feasible sources have been identified. As noted by Ms. Harmon, it may be feasible to obtain reclaimed water from the Centinela State Prison. Exhibit 591 to rebuttal testimony of Tom Budlong, p. 3. Further, it may be feasible – with congressional action – to obtain water from the Imperial Irrigation District. The fact that congressional action would be required does not automatically render this alternative infeasible.¹² The feasibility of this alternative is further underscored by the fact that such Congressional approval has been obtained in the past. Exhibit 591 to rebuttal testimony of Tom Budlong, p. 3. Finally, it is unclear why the Project’s water needs cannot be met through the importation of water. Indeed, the Executive Summary contemplates “[p]otable water . . . deliver[y] . . . by truck.” SSA at ES-6. If it is too expensive or too many other environmental impacts would result from such delivery, this should be clearly stated in the SSA.

9. Because None of the Project Site Actually Overlies the Sole Source Aquifer, All Water Used by the Project Will Be Exported From that Aquifer.

As discussed extensively by Ms. Harmon, the Project site is actually to the east of the Ocotillo-Coyote Wells Sole Source Aquifer. Exhibit 591 to rebuttal testimony of Tom Budlong, pp. 4-5. The SSA’s statement that the Project “site lies primarily over the Ocotillo-Coyote Wells aquifer” is incorrect. SSA at C.7-11. 0%, not 96%, of the Project site overlies this Sole Source Aquifer. *Compare. id.* at ES-36 with Exhibit 591 to rebuttal testimony of Tom Budlong, pp. 4-5, and exhibits referenced therein. Because none of the Project site overlies the Sole Source Aquifer, any water from the Dan Boyer well that is used on the Project site will be exported from the aquifer. This would be in violation of mitigation measure Soil&Water-1, as well as Imperial County Land Use Ordinance 9. Nothing explanation is given in mitigation measure Soil&Water-1 as to how such exporting would be avoided. As such, it must be assumed that all of the Project’s water will be exported from the Sole-Source Aquifer. The attendant impacts must be studied.

10. Contrary to the SSA’s Statements, Phreatophytic Vegetation Does Exist in the Area.

¹² For example, courts have repeatedly held that the federal statute on which CEQA was patterned, NEPA, is intended to “inform [all] three branches of government.” *Rhode Island Committee on Energy v. Gen. Svcs. Admin.*, 397 F.Supp. 2d 41, 56 n.19 (D.C.R.I. 1975). Accordingly, “even if an alternative requires ‘legislative action’, this fact ‘does not automatically justify excluding it from an EIS.’” *Methow Valley Citizens Council v. Regional Forester*, 833 F.2d 810, 815 (9th Cir. 1987) (quoting *City of Angoon v. Hodel*, 803 F.2d 1016, 1021 (9th Cir. 1986)). *Methow Valley* was “reversed only in part” by the Supreme Court at 490 U.S. 332. *Methow Valley Citizens Council v. Regional Forester*, 879 F.2d 705, 706 (9th Cir. 1989). “The Supreme Court . . . did not address the portion of the Ninth Circuit decision dealing with alternatives; thus, that aspect of the Circuit court’s decision remains good law.” Remy, *et al.*, *Guide to CEQA*, p. 1028 n. 78 (11th ed. 2007).

The SSA claims that no phreatophytic¹³ vegetation exists in the Project area because the “water table is too deep to support” such “vegetation (average depth to water is about 125 feet).” SSA at C.7-45. This statement is incorrect. As noted by Ms. Harmon, there are a number of mesquite hummocks and tamarisks in the general Project vicinity. Exhibit 591 to rebuttal testimony of Tom Budlong, p. 6-7. This error also arose because of an improper use of averages. The fact that the *average* depth to water is 125 feet does *not* mean that there are not *areas* that can support phreatophytic vegetation. These observed species could *not* survive if their roots did *not* reach the groundwater table. Exhibit 591 to rebuttal testimony of Tom Budlong, pp. 6-7. The Project’s impacts on such vegetation must be assessed.

11. The SSA’s reliance on Drainage Avoidance Alternative # 1 is Improper.

The SSA bases the bulk of its analysis of impacts to water of the United States upon the staff’s preferred alternative of Drainage Avoidance Alternative #1. This alternative was rejected by the USEPA. SSA at C.2-5. It is unreasonable to base the SSA’s assessment of impacts upon an alternative is *clearly not* going to be adopted. The SSA must be recirculated when the final format of the Project is determined by the Army Corps of Engineers to allow members of the public to actually comment on the Project that will be constructed.

C. *Worker Safety and Fire Protection*

The SSA acknowledges that the Project site is “bisect[ed]” by the Sunrise Powerlink project. However, staff’s assessment of the Project’s fire risks only examines the impacts of a fire upon I-8 and ignores the impacts that a fire may have on the Sunrise Powerlink project.¹⁴ This impact should be studied and acknowledged. Furthermore, apparently construction of a new firehouse is going to be necessary in order for the Imperial County Fire Department to be able to adequately respond to these fire risks. *Id.* The environmental impacts of this construction, which will involve land disturbance, water use, and attendant injury to the environment, must be disclosed in the SSA.

IV. THE SSA MUST BE RECIRCULATED AND A PERIOD FOR ADDITIONAL NOTICED PUBLIC COMMENT PROVIDED

As discussed above, the SSA is inadequate as an informational document. The public was significantly hindered in commenting on the Project by the absence of detailed information. Indeed, the discussion of the Project’s impacts to Cultural Resources, an significant consequence of this project, was simply omitted. In this situation, CEQA requires recirculation of the environmental document. *See* Pub. Res. Code § 21092.1 (renotification required where

¹³ Phreatophytic vegetation is defined as vegetation whose roots reach the groundwater table.

¹⁴http://www.energy.ca.gov/sitingcases/solartwo/documents/2010-07-21_Staff_Rebuttal_Testimony.pdf

