

### 3.0 COMMENTS AND RESPONSE TO COMMENTS

LETTER 8

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**Re: Comments of Backcountry Against Dumps, Donna Tisdale, Carolyn Allen,  
Danny Robinson and Robco Farms, Inc. on the Draft Environmental Impact  
Report for the Wistaria Ranch Solar Energy Center Project, SCH No.  
2013091084**

Pursuant to the California Environmental Quality Act (“CEQA”), Public Resources Code section 21000 *et seq.*, Imperial County’s (the “County’s”) August 22, 2014 Notice of Availability, and the instructions on page 1.0-17 of the County’s Draft Environmental Impact Report (“DEIR”) for the Wistaria Ranch Solar Energy Center (“Project”), Backcountry Against Dumps, Donna Tisdale, Carolyn Allen, Danny Robinson and Robco Farms, Inc. (collectively, “Backcountry”) submit the following comments on the Project and the DEIR.

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The Project would involve the construction and operation of an approximately 250-megawatt (“MW”) solar photovoltaic (“PV”) or concentrated photovoltaic (“CPV”) electrical generation facility, along with associated transmission interconnection lines and facilities, on nearly 2,800 acres of *highly productive* farmland, including “394.8 acres of Prime Farmland, 2,188 acres of Farmland of Statewide Importance[,] 5.5 acres of Unique Farmland,” and at least 436 acres of farmland that are protected by Williamson Act contracts. DEIR 4.9-43 (quote), 2.0-1, 2.0-68, 4.9-23 to 4.9-38. The “majority” – if not the entirety – of this farmland is “currently in production.” DEIR 4.9-23 (quote), 43. This fertile farmland is irreplaceable, and the food and fiber it produces year in and year out for Americans throughout our country are of inestimable value to present and future generations. Yet the Project would “preclude agricultural crop production [on the Project sites] for up to the 30 year maximum life of the [conditional use permits (“CUPs”)],” if not permanently. DEIR 2.0-67. Indeed, it “would contribute approximately 10.7 percent of the total . . . agricultural land conversion associated with

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cumulative solar projects on a County-wide basis,” more than any other planned or existing project. DEIR 4.9-61 (emphasis added). Furthermore, the Project would likely cause significant additional impacts to agriculture and the agricultural economy countywide by reducing demand for agriculture-serving businesses and interfering with one of the only airports servicing agricultural spraying operations in the County.

8-3 cont.

8-4

Backcountry opposes this Project as an unnecessary industrialization of some of the most productive farmland in the Imperial Valley. Not only would the Project have significant environmental, agricultural and economic impacts, the proposed industrial scale energy generation and transmission uses are forbidden by the Imperial County General Plan (and hence the Planning and Zoning Law, Government Code section 65000 *et seq.*). Backcountry therefore encourages Imperial County to adopt as an alternative to the proposed Project programs to develop or incentivize the development of distributed PV generation projects *near energy demand centers in already-disturbed areas*. Yet instead of even fully analyzing this feasible and environmentally preferable alternative as required by CEQA, the DEIR’s cursorily dismisses it.

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The DEIR also fails to fully analyze the Project’s significant impacts on water resources, greenhouse gas (“GHG”) emissions, biological resources, agriculture and aviation safety. In further expression of these major concerns and others, Backcountry offers the following comments on the Project and the County’s DEIR.

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**I. THE PROPOSED SOLAR ENERGY GENERATION USES ARE FORBIDDEN BY THE IMPERIAL COUNTY GENERAL PLAN LAND USE ELEMENT.**

**A. The Board May Not Approve a Conditional Use that Is Forbidden by the County General Plan.**

The Project is inconsistent with the County General Plan, and thus its approval would violate the Planning and Zoning Law. As acknowledged in *Neighborhood Action Group v. County of Calaveras* (“*Neighborhood*”) (1984) 156 Cal.App.3d 1176, 1184, the requirement that use permits be consistent with the county general plan

is necessarily to be implied from the hierarchical relationship of the land use laws. To view them in order: a use permit is struck from the mold of the zoning law ([Government Code section] 65901); the zoning law must comply with the adopted general plan (§ 65860); the adopted general plan must conform with state law (§§ 65300, 65302). The validity of the permit process derives from compliance with this hierarchy of planning laws. *These laws delimit the authority of the permit issuing agency to act and establish the measure of a valid permit. . . . A permit action taken without compliance with the hierarchy of land use laws is ultra vires as to any defect implicated by the uses sought by the permit.*

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*Id.* (emphasis added); *Endangered Habitats League, Inc. v. County of Orange* (“*Endangered Habitats League*”) (2005) 131 Cal.App.4th 777, 782 (“A project is inconsistent if it conflicts with a general plan policy that is fundamental, mandatory, and clear”).

Because Imperial County is a general law county, the foregoing settled law is dispositive. Indeed, the County’s own “administrative process” for approving CUPs – such as the 17 that the applicant seeks for the Project – “requires [that] [f]indings can be made that the proposed project is consistent with the General Plan.” DEIR 4.9-53 (quote); *id.* (“The authority may approve or conditionally approve an application *only* if it finds . . . [that] [t]he proposed use is consistent with the goals and policies of the adopted County General Plan” and “complies with all applicable laws, ordinances and regulations of the County of Imperial and the State of California”). Since, as shown below, the proposed solar energy generation and transmission uses are specifically forbidden under the Imperial County General Plan, the County lacks authority to approve those uses in contravention of the General Plan. Any “permit action taken without compliance with the hierarchy of land use laws is *ultra vires*.” *Neighborhood*, 156 Cal.App.3d at 1184.

8-8 cont.

#### **B. The Imperial County General Plan Forbids the Proposed Solar Energy Generation and Transmission Uses.**

The Imperial County General Plan’s Land Use Element specifically *forbids* the proposed solar uses within the “Agriculture” plan designation that applies to the entire Project site. DEIR 4.9-54 (“The General Plan designates the [entire] Project site as ‘Agriculture’”). The Land Use Element directs that lands designated as “Agriculture” may not be developed with uses that do not preserve and protect agricultural production and related activities. It states in pertinent part as follows:

##### **1. Agriculture.**

This category is intended to preserve lands for agricultural production and related industries including aquaculture (fish farms), ranging from light to heavy agriculture. Packing and processing of agricultural products may also be allowed in certain areas, and other uses necessary or supportive of agriculture. . . .

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*Where this designation is applied, agriculture shall be promoted as the principal and dominant use to which all other uses shall be subordinate. Where questions of land use compatibility arise, the burden of proof shall be on the non-agricultural use to clearly demonstrate that an existing or proposed use does not conflict with agricultural operations and will not result in the premature elimination of such agricultural operations. No use should be permitted that would have a significant adverse effect on agricultural production, including food and fiber production, horticulture, floraculture, or animal husbandry. . . .*

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Imperial County General Plan, Land Use Element (Revised 2008), page 48 (emphasis added).

It is clear from the foregoing language that lands designated as “Agriculture in the General Plan must be used *only* for agriculture and related industries that support agricultural production. “Where questions of land use compatibility arise, the burden of proof shall be on the non-agricultural use to *clearly demonstrate* that an existing or proposed use does not conflict with agricultural operations and will not result in the premature elimination of such agricultural operations.” *Id.* (emphasis added).

8-9 cont.

Here, it is undisputed that the proposed industrial-scale solar facility uses will terminate and prevent all agricultural use on the nearly 2,800 acres of farmland on the Project sites for up to 30 years. DEIR 2.0-67 (the Project would “preclude agricultural crop production [on the Project sites] for up to the 30 year maximum life of the CUP[s]”). As the California Department of Conservation (“DOC”) has determined in both the Williamson Act and CEQA contexts, and reiterated in its November 1, 2011, and July 16, 2010 letters (attached hereto as Exhibits 1 and 2) to the Imperial County Planning and Development Services Department regarding other solar projects proposed for lands designated for Agriculture, commercial solar uses are *completely incompatible* with agricultural uses. *See also* DEIR 4.9-2 (“The DOC ‘considers the construction of a solar facility that removes and replaces agriculture on agricultural lands to have a significant impact on those agricultural lands’” (quoting a 2010 letter from DOC)).

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Furthermore, the Project would impede agricultural operations on *surrounding* lands, which is demonstrated by the increasingly rapid conversion of farmland to non-agricultural uses in the Project area as more and more industrial-scale electrical generation projects are proposed and built there. *See* DEIR 2.0-8 (figure showing projects in the area). This is more than concerning to many local farmers. Michael Abatti, whose “farming operation” is “directly” north of the Project, explains that the Project “will cause the air to be warmer than normal creating heat dams,” which in conjunction with “the Valley’s south and southwest winds . . . would have a huge effect on the crops in [his] fields.” Michael Abatti, October 28, 2013, Letter to David Black re: Wistaria Ranch Solar (included in DEIR Appendix A). Mr. Abatti concludes that his “aerial and ground applications will be [made] more difficult by the proximity of this project.” *Id.* Ben Abatti, who has been a “farmer in the Imperial Valley for over 60 years,” agrees. Ben Abatti, October 25, 2013, Letter to Armando Villa re: Wistaria Ranch Solar (included in DEIR Appendix A). He states that “[a]ll Solar Projects present and future [have] and will [hurt] and will be hurting the Imperial Valley. The Solar Projects create[] hotter temperatures, which hurt our commodities and create more dust with the increasing loss of farm land.” *Id.*

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The Project could also reduce employment, income, sales and tax revenue in the County.<sup>1</sup>

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<sup>1</sup> The DEIR states that the Project would benefit the County economically, but it fails to provide to the public the study on which it relies: Development Management Group, March 11, 2014,

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As Imperial County Agricultural Commissioner Valenzuela noted in her February 25, 2011 comments (attached hereto as Exhibit 3) on the DEIR for a similar solar project, “removal of any farmland out of production would have a *direct negative impact on employment, income, sales and tax revenue.*” As these projects convert more and more agricultural land to non-agricultural uses, more and more agriculture-serving businesses will be forced to close, due to both declining revenues and logistical problems.<sup>2</sup> And as the quantity and quality of agriculture-serving businesses decrease in the County, more and more farmers will find it uneconomical or impractical to keep farming and be forced to sell, lease or use their lands for non-agriculture purposes.

8-12 cont.

Because the proposed solar energy generation and transmission uses at the Project sites would “conflict with agricultural operations,” result in the certain “elimination” of agricultural operations and “have a significant adverse effect on agricultural production,” both on the Project sites and elsewhere in the County, the Project is specifically forbidden by the General Plan.

**C. The Project’s Incompatibility with the General Plan Agricultural Use Provisions Is Not Cured by Other Conflicting General Plan Provisions or the County Land Use Ordinance.**

Despite the fact that the Project would “conflict with” and result in the certain “elimination” of “agricultural operations,” and “have a significant adverse effect on agricultural production,” the DEIR states that the “proposed solar energy generation use is consistent with [the ‘Agriculture’] land use designation and the zoning (A-2, A-2-R and A-3).” DEIR 4.9-54. The DEIR asserts that because solar energy generation “[p]rojects located on A-2, A-2-R, or A-3 zoned lands are permitted subject to approval of a CUP ([County Land Use Ordinance] Sections 90508.02 and 90509.02),” they “are considered consistent with corresponding land use designations of the General Plan.” DEIR 4.9-54 (first quote), 4.2-36 (second quote). The DEIR is mistaken. The existing A-2 (General Agriculture), A-2-R (General Agriculture, Rural Zone) and A-3 (Heavy Agriculture) zoning on the Project sites is *inconsistent* with the General Plan’s “Agriculture” designation.

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“Wistaria Ranch Solar, LLC, Imperial Valley, CA Project, Economic Impact Analysis, Employment (Jobs) Impact Analysis, Fiscal Impact Analysis, Statement of Potential for Urban Decay, Final Report of Findings.”

<sup>2</sup> For example, the Wistaria Solar Project could disrupt the functioning of the lone local airport servicing agricultural spraying operations by putting local pilots at significant risk due to the glint and glare from the Project’s solar panels. The airport – the Johnson Brothers Airstrip – is located just over a mile “east of the easternmost boundary (Ferrell Road) of CUP 13-0052) (APN 052-210-020).” DEIR 4.2-24. “Frontier Agricultural Services uses the facility for crop dusting services.” *Id.*

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As discussed, the Project is incompatible with the General Plan's explicit use standards for lands designated as "Agriculture." Not only will the proposed solar energy generation and transmission use conflict with existing (and future) agricultural operations and have a significant adverse effect on agricultural production on the Project sites by terminating and preventing all agricultural use on the sites for up to 30 years, it will impede agricultural operations elsewhere in the County as well. To the extent the County Land Use Ordinance – which by law is subordinate to the County General Plan – might be interpreted to allow uses such as the proposed solar facilities that are inconsistent with the General Plan's land use designations, that interpretation is invalid. Government Code § 65860(a); *Neighborhood*, 156 Cal.App.3d at 1184. And to the extent the Land Use Element's Compatibility Matrix, the Agricultural Resources Element, the Conservation and Open Space Element, the Geothermal/Alternative Energy and Transmission Element or any other part of the General Plan can be read to approve zoning regulations that conflict with the Land Use Element's textual land use standards, the General Plan is internally inconsistent and invalid. Government Code § 65300.5 ("the Legislature intends that the general plan and elements and parts thereof comprise an integrated, internally consistent and compatible statement of policies for the adopting agency"); *Concerned Citizens of Calaveras County v. Board of Supervisors* (1985) 166 Cal.App.3d 90, 97 ("a general plan must be reasonably consistent and integrated on its face"); *Sierra Club v. Kern County* (1981) 126 Cal.App.3d 698, 704 ("Since the general plan was internally inconsistent, the zoning ordinance under review . . . could not be consistent with such plan and was invalid when passed.").

8-13 cont.

The County may not approve a land use in reliance on an invalid zoning regulation or General Plan element. "Under state law, the propriety of virtually any local decision affecting land use and development depends upon consistency with the applicable general plan and its elements. . . . [Absence of a valid general plan, or valid relevant elements or components thereof, precludes enactment of zoning ordinances and the like." *Resource Defense Fund v. County of Santa Cruz* (1982) 133 Cal.App.3d 800, 806; *Neighborhood*, 156 Cal.App.3d at 1104; *Concerned Citizens of Calaveras County*, 166 Cal.App.3d at 97. And where there is a clear violation of a specific General Plan provision, mere compatibility with the overarching objectives of the Plan is not enough to make a project consistent and compliant with the Plan as a whole. *Neighborhood*, 156 Cal.App.3d at 1184; *FUTURE v. Board of Supervisors* (1998) 62 Cal.App.4th 1332, 1342.

## **II. THE FAILS TO PROVIDE A COMPLETE AND ROBUST ANALYSIS OF PROJECT ALTERNATIVES AND IMPACTS.**

Despite the fact that the proposed Project's solar uses are prohibited by the County General Plan, the County has developed a DEIR for the Project. While Backcountry maintains that the County may not approve the Project under the current General Plan, it nonetheless offers the following comments on the DEIR's failures, and suggestions for improving the Project.

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### **A. The DEIR's Project Description is Inadequate.**

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CEQA requires that a DEIR include a “clearly written” “statement of objectives sought by the proposed project” as part of the Project description. CEQA Guidelines § 15124(b). While the agency is afforded some discretion in developing those objectives, it “may not give a project’s purpose an artificially narrow definition.” *In re Bay-Delta Programmatic Environmental Impact Report Coordinated Proceedings* (2008) 43 Cal.4th 1143, 1166; *Habitat and Watershed Caretakers v. City of Santa Cruz* (2013) 213 Cal.App.4th 1277, 1299-1300 (“the draft EIR’s description of the project’s objectives failed to illuminate the underlying purpose of the project”). Here, the DEIR does just that: It lists twenty objectives that together, preclude nearly all other alternatives by artificially narrowing the Project’s description. DEIR ES-3 to ES-4, 1.0-4 to 1.0-6. For example, the Project objectives narrowly limit the Project to one that would “generate approximately 250 megawatts of renewable energy” “at a cost that is competitive in the renewable market on sites controlled by the applicant.” DEIR ES-3, 1.0-4 to 1.0-5 (emphasis added). But limiting objectives to only allow a 250 MW project on land owned by the applicant precludes informed decisionmaking and “give[s] the project’s purpose an artificially narrow definition.” CEQA Guidelines § 15144; *Vineyard Area Citizens for Responsible Growth v. City of Rancho Cordova* (“*Vineyard*”) (2007) 40 Cal.4th 412, 428; *Berkeley Keep Jets*, 91 Cal.App.4th at 1355-1356; *In re Bay-Delta*, 43 Cal.4th at 1166.

8-15 cont.

#### **B. The DEIR Fails to Analyze a Distributed Generation Alternative.**

CEQA requires EIRs’ to “describe a range of reasonable alternatives to the project . . . which would feasibly attain most of the basic objectives of the project but would avoid or substantially lessen any of the significant effects of the project, and evaluate the comparative merits of the alternatives.” Guidelines § 15126.6(a). Alternatives that would lessen significant effects should be considered even if they “would impede to some degree the attainment of the project objectives, or be more costly.” *Id.* § 15126.6(b). The range of alternatives considered must “foster informed decisionmaking and public participation.” *Id.* § 15126.6(a). Alternatives may only be eliminated from “detailed consideration” when substantial evidence in the record shows that they either (1) “fail[] to meet most of the basic project objectives,” (2) are “infeasibl[e],” or (3) do not “avoid significant environmental impacts.” *Id.* § 15126.6(c).

8-16

The DEIR here fails to analyze a reasonable range of alternatives and impedes, rather than fosters, informed decisionmaking and public participation because it cursorily dismisses the distributed generation alternative without adequate supporting analysis and data. The DEIR states that it purportedly “considered a “distributed generation alternative,” consisting “of small-scale PV installations on private or publicly owned residential, commercial, or industrial building rooftops, parking lots or areas adjacent to existing structures as substations.” DEIR 6.0-3. But instead of thoroughly analyzing the distributed generation alternative, the County violated CEQA by dismissing the alternative from “detailed analysis” based solely on conclusory and erroneous assertions. *Id.*

#### **1. Distributed Generation Is Technically and Economically Feasible.**

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Imperial County has some of the most “abundant solar resources” in the United States, with all areas of the County receiving “at least 6.5 kWh/m<sup>2</sup>/day. Summit Blue Consulting LLC, April 1, 2008, “Renewable Energy Feasibility Study Final Report,” p. 17 (attached hereto as Exhibit 4). And with such abundant solar energy comes a great “technical potential for rooftop PV in the County,” which was estimated in 2007 to be at least 346 MW, 93 MW on commercial building rooftops and 253 MW on residential rooftops.<sup>3</sup> *Id.* at 20. While Summit Blue concluded in its 2008 report that it was likely only economically feasible to develop 93 MW of commercial rooftop PV, circumstances have changed significantly since then, both in Imperial County and throughout the world. *Id.* at 84.

For example, “[p]hotovoltaic modules have followed a well-documented historical trend of price decline. Since 1976, global module prices declined on average for every doubling of cumulative global production, resulting in a price decline of roughly 95% – from about \$60/W to about \$2/W – between 1976 and 2010.” U.S. Department of Energy, February 2012, “SunShot Vision Study,” Chapter 4, p. 74 (attached hereto as Exhibit 10). While there was a brief spike in PV module costs around 2008 – when the Summit Blue report was published – the costs have since dropped to a new historic low, refuting the DEIR’s assertion that distributed PV would be too costly. *Id.* at 74-75; DEIR 6.0-3. Furthermore, it is fully within Imperial County’s legislative purview to adopt additional incentives for residents and others to install distributed solar PV installation systems, as discussed below.

8-17 cont.

Recognizing the rapidly increasing technological and economic feasibility of distributed generation, along with its many environmental and other benefits, the California Legislature and state agencies including the California Public Utilities Commission have recently authorized and implemented numerous programs designed to incentivize distributed generation development. For example, Public Utilities Code section 2827 requires that “every electric utility . . . develop a standard contract or tariff providing for net energy metering” for residential, commercial, agricultural and other customers of the electric utility who operate distributed generation systems with a capacity of one MW or less. Pub. Util. Code § 2827(c)(1). By May 31, 2014, San Diego Gas & Electric Company – a frequent purchaser of electricity generated by utility-scale generation facilities in Imperial County – already had 301.2 MW of installed net-metered PV capacity in its service territory.<sup>4</sup> The Imperial Irrigation District (“IID”), whose service territory includes Imperial County, had 23.81 MW of installed net-metered distributed generation as of

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<sup>3</sup> Note that this does not even account for the vast potential to develop solar PV systems above parking lots or as part of other hardtop surfaces like roads.

<sup>4</sup> This figure and additional details are provided on SDG&E’s “Overview – NEM Cap” website: <https://www.sdge.com/clean-energy/net-energy-metering/overview-nem-cap> (last accessed June 6, 2014). A screenshot of the website is attached hereto as Exhibit 6.

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September 10, 2014.<sup>5</sup>

In sum, the premier solar resources in Imperial County (as well as the service territories of IID and SDG&E) are primed for harvest by distributed PV systems.

8-17 cont.

#### **2. Promoting Distributed Generation Is Politically Feasible.**

There are many politically workable options for Imperial County to incentivize installation and operation of distributed solar PV. For example, the County could adopt a local loan program to help property owners in the County finance PV installations on their properties, pursuant to Streets and Highways Code section 5898.20 *et seq.* An example of this type of program is Sonoma County's Property Assessed Clean Energy financing program.<sup>6</sup> Imperial County could also institute a local rebate program for installation of PV systems, such as the program developed by the City and County of San Francisco that gives money directly to qualifying PV system purchasers for residential, commercial and other non-residential PV installations.<sup>7</sup> These and many other types of PV incentivization programs Imperial County could adopt are conveniently outlined on the CleanEnergyAuthority's website on "California Solar Rebates and Incentives."<sup>8</sup>

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#### **3. Distributed Generation Is Better for the Environment and the Economy than Remote, Industrial-Scale Generation Projects Like the Wistaria Ranch Solar Energy Center.**

Distributed generation projects such as rooftop solar PV have substantial environmental, aesthetic, economic and public safety benefits over remote, industrial-scale solar energy facilities

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<sup>5</sup> This figure and additional details are provided on IID's "Net Energy Metering" website: <http://www.iid.com/index.aspx?page=583> (last accessed October 10, 2014). A screenshot of the website is attached hereto as Exhibit 7.

<sup>6</sup> Sonoma County's program is summarized on the U.S. Department of Energy's Database of State Incentives for Renewables & Efficiency website, available here: [http://www.dsireusa.org/incentives/incentive.cfm?Incentive\\_Code=CA188F&re=1&ee=1](http://www.dsireusa.org/incentives/incentive.cfm?Incentive_Code=CA188F&re=1&ee=1) (last accessed June 6, 2014).

<sup>7</sup> San Francisco's program is summarized on the U.S. Department of Energy's Database of State Incentives for Renewables & Efficiency website, available here: [http://www.dsireusa.org/incentives/incentive.cfm?Incentive\\_Code=CA168F&re=1&ee=1](http://www.dsireusa.org/incentives/incentive.cfm?Incentive_Code=CA168F&re=1&ee=1) (last accessed June 6, 2014).

<sup>8</sup> <http://www.cleanenergyauthority.com/solar-rebates-and-incentives/california/> (last accessed June 6, 2014).

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such as the Wistaria Solar Project.<sup>9</sup> They do not mar the landscape with massive and unsightly arrays of glare-producing PV and CPV panels, or their associated powerlines, substations and industrial operations and maintenance buildings. They do not displace agriculture and wildlife habitat. They present a much smaller threat to wildlife. They do not waste electricity due to conductor resistance and corona discharges along lengthy transmission lines.<sup>10</sup> Their reliability is far greater. And they are easier to upgrade as technology improves.

In addition, as these distributed solar PV technologies improve and the liability costs of utility-scale renewable energy facilities become clearer, the per-watt installed price for distributed solar PV systems should soon drop below that of remote, industrial-scale projects like Wistaria Solar, further refuting the DEIR's claim that the distributed generation alternative would be too costly to meet Project objectives. DEIR 6.0-3. In likely recognition of this trend, many utility-scale renewable energy project developers themselves agree that distributed generation is the future of renewable energy power. For example, NRG Energy, Inc., CEO David Crane stated the following in a 2011 call with financial analysts:

8-19 cont.

Ultimately, however, we fully recognize that the current generation of utility-sized solar and wind projects in the United States is largely enabled by favorable government policies and financial assistance. It seems likely that much of that special assistance is going to be phased out over the next few years, leaving renewable technologies to fend for themselves in the open market.

We do not believe that this will be the end of the flourishing market for solar generation. We do believe that it will lead to a *stronger and more accelerated transition from an industry that is currently biased towards utility-sized solar plants to one that's focused more on distributed and even residential solar solutions on rooftops and parking lots.*

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<sup>9</sup> As former California Public Utilities Commission ("CPUC") Commissioner John Bohn acknowledged, "[u]nlike other generation sources, [distributed generation] projects can get built quickly and without the need for expensive new transmission lines. And . . . these projects are extremely benign from an environmental standpoint, with neither land use, water, or air emission impacts." CPUC, "CPUC Approves Edison Solar Roof Program," Press Release, June 18, 2009, available at: [http://docs.cpuc.ca.gov/published/News\\_release/102580.htm](http://docs.cpuc.ca.gov/published/News_release/102580.htm).

<sup>10</sup> The U.S. Energy Information Administration estimates that California lost nearly 18 million kilowatt-hours of electricity in 2010, due primarily to conductor resistance, corona discharges and other transmission and distribution line losses. Energy Information Administration, January 27, 2012, *State Electricity Profiles 2010*, DOE/EIA-0348(01)/2, at p. 30, available at: <http://www.eia.gov/electricity/state/pdf/sep2010.pdf>.

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We are already planning for this transition now within NRG, so that any potential decline in either the availability of utility-sized solar projects or in the attractiveness of the returns being realized on these projects, *will be exceeded in aggregate by the increase in the business we are doing on smaller distributed and residential solar projects . . .* (emphasis added).<sup>11</sup>

8-19 cont.

In sum, distributed generation is not only feasible, it is environmentally and economically preferable to remote, utility-scale renewable energy generation facilities like the Wistaria Ranch Solar Energy Center Project.

#### 4. The DEIR's Rationales for Rejecting the Distributed Generation Alternative Fail.

The DEIR erroneously asserts that “the Distributed Generation Alternative cannot feasibly accomplish most of the Project’s objectives.” DEIR 6.0-3. The DEIR concludes that the “alternative would not meet any of the County’s objectives (i.e., economic investment in the County; diversifying the County’s economic base; generating local jobs and tax revenue; reinforcing the County’s position as a leader in renewable energy production; and expanding the local renewable energy sector).” *Id.* But the DEIR’s underlying assumption – that there is “no guarantee that any portion of the solar installation would occur in Imperial County” – is pure sophistry. *Id.* The DEIR provides no rationale for why the distributed generation alternative could not be confined to Imperial County. As discussed above, there is an abundance of solar energy resources in Imperial County that are ripe for harvesting by distributed PV systems. The DEIR does not satisfy CEQA by creating artificial limitations to avoid the required alternatives analysis. The DEIR’s remaining rationales for rejecting the distributed generation alternative likewise fail.

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The DEIR states that the distributed generation alternative does not meet the Project objectives because “the Applicant does not control the approximately 25,000 small rooftops and parking lots necessary to install solar panels that could generate 250 MW of electricity.” DEIR 6.0-3. But as discussed above in section III(A), “generat[ing] approximately 250 megawatts of renewable energy” “at a cost that is competitive n the renewable market *on sites controlled by the applicant*” is an impermissibly narrow Project objective. DEIR 6.0-1.

8-21

The DEIR claims that “distributed generation systems typically do not have an energy storage component and therefore would not meet the Project objective of contributing to State’s

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<sup>11</sup> Seeking Alpha, April 22, 2011, “NRG Energy’s CEO Discusses Q4 2010 Results – Earnings Call Transcript,” at p. 7, *available at*: <http://seekingalpha.com/article/254272-nrg-energy-s-ceo-discusses-q4-2010-results-earnings-call-transcript> (attached hereto as Exhibit 13)

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[sic] target of procuring 1.3 GW of energy storage by the end of 2020.” DEIR 6.0-4. But the DEIR provides no explanation why the County could not develop or incentivize development of distributed generation systems that *do* have an energy storage component. The DEIR’s unsupported conclusion fails to satisfy CEQA’s “substantial evidence” requirement. *Vineyard*, 40 Cal.4th at 426; *Laurel Heights Improvement Association of San Francisco v. Regents of the University of California* (1988) 47 Cal.3d 376, 409 n. 12.

8-22 cont.

The DEIR is also wrong in asserting that “[d]istributed generation does not contribute significantly to a utility company meeting [the] high current and future” Renewables Portfolio Standard (“RPS”). DEIR 6.0-4. More and more distributed PV sources are qualifying as RPS eligible and thus able to directly help utilities meet the RPS target of 33 percent renewables by 2020. For example, the California Energy Commission recently approved as RPS eligible (at least some) renewable energy credits associated with energy from customer-side distributed generation installations.<sup>12</sup> Furthermore, even those distributed PV sources that are not RPS eligible still indirectly assist utilities in achieving their RPS goals by reducing the amount of electricity that they would otherwise have to purchase from the grid, and thereby reducing the amount of RPS-eligible resources that they must purchase to achieve that 33-percent-renewables goal.

8-23

In sum, once the DEIR’s artificial restrictions on the distributed generation alternative are removed, the alternative becomes fully feasible and compliant with the majority of the Project objectives.

8-24

#### **C. The DEIR Fails to Analyze Significant Agricultural Impacts from the Project.**

As discussed above, the Project would have a significant impact on agricultural production by terminating and preventing all agricultural use of the subject lands for up to *30 years*, and potentially indefinitely. DEIR 2.0-67. Yet the DEIR ignores or mistakenly dismisses many of the Project’s significant negative impacts on Imperial Valley agriculture, including the following five.

8-25

First, the DEIR ignores the fact that the Land Use Element’s use standards on lands designated as “Agriculture” *prohibit* the proposed utility-scale electrical generation and transmission uses proposed here, as discussed above. DEIR 4.9-54 (asserting, without analysis of the Land Use Element’s use standards, that the “proposed solar energy generation use is

8-26

<sup>12</sup> CEC, April 2013, “Renewables Portfolio Standard Eligibility Guidebook,” Seventh Edition (attached hereto as Exhibit 8), available at: <http://www.energy.ca.gov/2013publications/CEC-300-2013-005/CEC-300-2013-005-ED7-CMF.pdf>

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consistent with [the ‘Agriculture’] land use designation and the zoning (A-2, A-2-R and A-3)”. This violates CEQA, which requires a thorough General Plan consistency analysis. Where, as here, general plan requirements are adopted to protect environmental quality, departure from those general plan standards constitutes evidence of a significant environmental impact. The Governor’s Office of Planning and Research has made this clear in its *CEQA Technical Advice Series* (September 1994):

The agency should also rely upon its general plan as a source of environmental standards. For instance, policies for the conservation of agricultural land may yield a threshold based on soil type, project size, and water availability.

*Id.*, “Thresholds of Significance: Criteria for Defining Environmental Significance.” Here, the General Plan has gone one step further by specifically designating the subject sites for exclusively “Agriculture” use. Thus, it is clear that the General Plan’s land use standards and policy for the conservation of agricultural land forbid the proposed utility-scale energy generation and transmission use. Violation of this environmental standard demonstrates the significance of the Project’s impacts on the environment. *The Pocket Protectors v. City of Sacramento* (2004) 124 Cal.App.4th 903, 930 (holding that “if substantial evidence supports a fair argument that the proposed project conflicts with [the applicable land use policies and regulations, and those policies were adopted *in order to avoid or mitigate environmental impacts*], this constitutes grounds for requiring an EIR”).

8-26 cont.

Second, the DEIR fails to analyze the many ways in which the Project would impede agricultural operations on farmland surrounding the Project sites. DEIR 2.0-6 (figure showing substantial surrounding farmland), 2.0-8 (same). Instead, the DEIR erroneously concludes that “no conflict with surrounding lands in agricultural production would occur because the proposed Project is subject to the County’s Right to Farm Ordinance and is a solar in-fill project.” DEIR 4.9-15 (quote), 4.9-56 (concluding that “[t]he proposed Project would not involve other changes to the existing environment which, due to their location or nature, could result in conversion of farmland to non-agricultural use”). To understand the fallacy of the DEIR’s conclusion, one need only observe the increasingly rapid conversion of farmland to non-agricultural uses in the Project area as more and more industrial-scale electrical generation projects are proposed and built there. See DEIR 2.0-8 (figure showing projects in the area).

8-27

As local farmer Michael Abatti explains, one of the reasons for this increasing exodus and agricultural land conversion is that the solar projects “cause the air to be warmer than normal creating heat dams,” which in conjunction with “the Valley’s south and southwest winds . . . would have a huge effect on the crops in [the] fields” to the north and east of the projects. Michael Abatti, October 28, 2013, Letter to David Black re: Wistaria Ranch Solar (included in DEIR Appendix A). Mr. Abatti concludes that his “aerial and ground applications will be [made] more difficult by the proximity of this project.” *Id.* Ben Abatti, another local farmer, agrees that the “Solar Projects create[] hotter temperatures, which hurt our commodities and

8-28

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create more dust with the increasing loss of farm land,” and concludes that “[a]ll Solar Projects present and future [have] and will [hurt] and will be hurting the Imperial Valley.” Ben Abatti, October 25, 2013, Letter to Armando Villa re: Wistaria Ranch Solar (included in DEIR Appendix A). The DEIR ignores these concerns and thereby violates CEQA.

8-28

Third, the DEIR fails to analyze how the Project would affect agriculture *countywide* due to the cumulatively significant conversion of fertile farmland to non-agricultural uses. As these utility-scale energy projects convert more and more agricultural land to non-agricultural uses, more and more agriculture-serving businesses will be forced to close, due to both declining revenues and logistical problems. And as the quantity and quality of agriculture-serving businesses decrease in the County, more and more farmers will find it uneconomical or impractical to keep farming and be forced to sell, lease or use their lands for non-agriculture purposes. The DEIR violates CEQA by ignoring this “spiral of death” leading to ever more farmland conversion to industrial uses.

8-29

Fourth, the DEIR fails to analyze whether the Wistaria Solar Project could disrupt the functioning of the lone local airport servicing agricultural spraying operations and put local pilots at significant risk due to the glint and glare from the Project’s solar panels. The airport – the Johnson Brothers Airstrip – is located just over a mile “east of the easternmost boundary (Ferrell Road) of CUP 13-0052) (APN 052-210-020).” DEIR 4.2-24. The DEIR claims that the “Project includes non-reflective PV and/or CPV panels which are not anticipated to create glare,” but it fails to specify the make or model of the panels or provide visual evidence to support its assertion. DEIR ES-7. Without more, especially given the history of utility-scale solar panels producing significant glare,<sup>13</sup> the DEIR lacks the requisite “substantial evidence” to support its conclusion that the Project would not produce glare. *Vineyard*, 40 Cal.4th at 426; *Laurel Heights Improvement Association of San Francisco v. Regents of the University of California* (1988) 47 Cal.3d 376, 409 n. 12.

8-30

Fifth, the DEIR wrongly concludes that the “conversion of land under Williamson Act Contract is not an issue” and presents no significant impact. DEIR 4.9-41. As discussed above, the proposed cancellation of the Williamson Act contract on 438 acres of high-quality farmland is *not* “consistent with the applicable provisions of the . . . county general plan.” Government Code § 51282(b)(3). As a result, and because the benefits of cancellation do *not* “outweigh the

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<sup>13</sup> Glint and glare from a utility-scale solare energy generation facility in southern Imperial County may have caused or contributed to the June 4, 2014 military jet crash in the City of Imperial, which severely damaged at least three homes and hospitalized the pilot. Infoscape.com, June 9, 2014, “Did the Glint of a Few Million Solar Panels Cause a Military Jet to Crash in California?,” *available here*: <http://infoscape.com/did-the-glint-of-a-few-million-solar-panels-cause-a-military-jet-to-crash-in-california/> (attached as Exhibit 10 hereto).

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objectives of [the Williamson Act],” any Williamson Act contract cancellation as part of the Project would violate the Act and constitute a significant impact under CEQA. *Id.* § 51282(c).

8-31 cont.

#### **D. The DEIR’s Analysis of the Project’s Impacts on Biological Resources is Inadequate.**

CEQA mandates that the DEIR adequately analyze the Project’s effects in order to foster informed decisionmaking and to allow the public to understand the Project’s impacts. Public Resources Code § 21002.1; Guidelines §§ 15121, 15126, 15126.2. Where possible, the lead agency must employ feasible mitigation measures that could minimize the significant adverse impacts of a Project. Public Resources Code § 21002; Guidelines §§ 15121, 15126.4. As shown below, the DEIR fails to adequately address the Project’s impacts to biological resources and mitigate these impacts. In addition, the Project’s impacts to migratory birds run counter to the Migratory Bird Treaty Act, 16 U.S.C. section 703, *et seq.* (“MBTA”). The DEIR’s biological resources analysis must be revised.

8-32

##### **1. Inadequate Surveys**

In order to fully understand the Project’s adverse impacts, the agency must complete adequate biological surveys to document the current resources in the area and how they would be affected. Public Resources Code § 21002.1; Guidelines §§ 15121, 15125, 15126, 15126.2. However, the surveys completed for this Project were inadequate. *Id.*; DEIR 4.12-63 to 4.12-66.

The time spent surveying was too limited to obtain a thorough view of the biological resources. Vegetation mapping was only completed over two consecutive days in April, potentially limiting what species may have been in bloom and therefore, more readily detectable. DEIR 4.12-63. “A rare plant assessment was conducted concurrently with vegetation mapping on April 25 and 26, 2012.” DEIR 4.12-65. The rare plant assessment is inadequate for the same reasons as the vegetation mapping survey. Furthermore, both of these surveys were completed nearly 18 months ago, and vegetation could have changed significantly since that time. Such limited surveys risk overlooking a significant number of resources that utilize the project area, or bloom, at different times during the year.

8-33

The wildlife surveys completed for the Project were similarly inadequate. Not only were the general habitat assessment and burrowing owl surveys completed in 2012, the habitat assessment only lasted for one day. DEIR 4.12-65 to 4.12-66. One day is not enough to understand wildlife use of the Project area during all seasons and “wintering avian surveys were not conducted for the Project.” DEIR 4.12-52. Furthermore, as the DEIR admits, the burrowing owl surveys failed to follow CDFW protocol in three ways – (1) no survey was *completed* between February 15 and April 15, (2) “two dirt roads were scanned using binoculars during the second survey; during the third survey the roads were visited twice,” and (3) “driving surveys were conducted in combination with walking surveys” for survey four. DEIR 4.12 65 to 4.12-67.

8-34

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While the latter two “protocol deviations were approved by CDFW prior to completion,” nowhere in the DEIR is there evidence that CDFW approved the first, and most concerning deviation. DEIR 4.12-66; DEIR Appendix J: Biological Technical Report, Appendix C – California Department of Fish and Wildlife Correspondence. CDFW specifically requires that at least one of four burrowing owl surveys be completed “*between February 15 and April 15.*” DEIR 4.12-65 (emphasis added). Yet that did not occur here, potentially affecting the survey results. DEIR 4.12-66.

8-35

Finally, the surveys omitted important areas of the Project. First, the DEIR glossed over its failure to survey CUP 13-0047. “Subsequent to the completion of vegetation mapping, rare plant assessments, and [burrowing owl] surveys in 2012, CUP area 13-0047 was added to the Project.” DEIR 4.12-62. “No [] field surveys” – other than a jurisdictional waters and wetlands delineation – “have been conducted on these newly added areas.” *Id.*; See also DEIR 4.12-55. Second, the DEIR admits that “[i]t is unknown if the number of occupied burrows within the Mount Signal Solar Farm Project’s Gen-Tie corridor has changed” since “[a]pproximately 16 occupied burrows were detected . . . during surveys conducted in 2010 and 2011.” DEIR 4.12-55. New surveys of the Mount Signal Gen-Tie corridor must be completed. Without this information, decisionmakers and the public cannot gain an accurate and thorough understanding of the Project’s impacts. CEQA Guidelines § 15144; *Vineyard*, 40 Cal.4th at 428; *Berkeley Keep Jets*, 91 Cal.App.4th at 1355-1356.

8-36

#### 2. Burrowing Owls

The Project poses significant threats to the burrowing owl but the DEIR’s analysis of these threats is inadequate. Without adequate surveys of the Project area the public and decisionmakers cannot accurately determine the impacts of the Project on burrowing owls and their habitat, in violation of CEQA. CEQA Guidelines § 15144; *Vineyard*, 40 Cal.4th at 428; *Berkeley Keep Jets*, 91 Cal.App.4th at 1355-1356. Not only were the burrowing owl surveys incomplete, the DEIR’s conclusions on impacts to the owl are not supported by the facts, as shown below. DEIR 4.12-55, 4.12-65 to 4.12-66, 4.12-115 to 4.12-125.

8-37

The DEIR admits that “[a]pproximately 148 occupied burrows were detected within the [survey area] and buffer.” DEIR 4.12-38, 4.12-49 (map), 4.12-55. Furthermore, it confirms that “Project construction, operation and decommissioning would result in temporary and permanent, direct and indirect impacts to burrowing owls, burrowing owl foraging habitat, and burrowing owl breeding habitat” that would be “considered potentially significant.” DEIR 4.12-115. These impacts include “[v]ehicular collisions . . . involve[ing] eggs, nestlings, and recently fledged young that are within burrows and cannot safely avoid equipment” and adult owls (DEIR 4.12-116, 4.12-119), collision with solar panels, sometimes due to light pollution “affect[ing] foraging behavior, navigation, and orientation” (4.12-119), and “permanent removal of [burrowing owl] foraging and breeding habitat” (DEIR 4.12-116). Yet despite these explicit admissions, the DEIR assumes that with monitoring, barriers, and eviction from burrows the impacts to

8-38

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burrowing owls will be less than significant. DEIR 4.12-125. In fact, this assumption does not follow from the facts, for three reasons.

8-38 cont.

First, such significant impacts to the burrowing owl – direct mortality, entrapment or injury in crushed burrows, and loss of burrows or other habitat – cannot simply be mitigated by avoiding burrows or evicting the owl from its burrow through a one-way door. DEIR 4.12-122. Indeed, given the physical dimensions of the solar collections, avoiding burrows is not always possible, and even where it is, it does not mitigate the impacts of noise or night lighting. DEIR 2.0-35, 4.12-63 (“Higher ambient noise levels can disturb species and/or cause direct habitat avoidance;” “Artificial night lighting could impact habitat value for some species particularly for nocturnal species, through potential modification of predation rates, obscuring of lunar cycles, and/or causing direct habitat avoidance.”), 4.12-118, 4.12-122.

8-39

Second, the DEIR erroneously asserts that construction noise and lighting impacts would be mitigated by a buffer of 164 feet during the non-breeding season – 246 feet during the breeding season – and some “hay bales, fencing,” or other barrier. DEIR 4.12-121 to 4.12-122. However, these insignificant buffers would not be sufficient to protect the burrowing owl. As the DEIR confirms, “40 percent of [burrowing owl] foraging occurs within 0 to 656 feet,” 20 percent occurs from 656 to 1,312 feet, and another 20 percent between 1,312 and 1,969 feet. DEIR 4.12-153 (emphasis added). The owls regularly use areas well beyond the insignificant buffers proposed in the DEIR, and contrary to the DEIR’s assertion, these mitigations would not make the impacts to the burrowing owl less than significant.

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Third, the DEIR downplays many of the impacts to burrowing owls, especially given their abundance within the Project site. The DEIR’s discussion of collisions due to glare, the pseudo lake effect, and the thousands of Project photovoltaic panels that are likely the same height at which the owls typically forage are all scant. 4.12-115 to 4.12-125. Relatedly, the photovoltaic panels would also greatly hinder the owls’ ability to forage by eliminating burrowing animals and their burrows, reducing the abundance of prey and destroying their nesting habitat.

8-41

The impacts to burrowing owls must be better understood with a more thorough survey covering the entire Project area. Only then can the impacts be adequately analyzed and appropriate mitigation measures presented. Even with attempted avoidance or eviction as mitigation, however, the impact to burrowing owls would remain significant.

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#### 3. Loggerhead Shrike

“The loggerhead shrike is a CDFW [Species of Special Concern]” and was “observed twice during [burrowing owl] surveys.” DEIR 4.12-56. The DEIR admits that “[c]onstruction, operation and decommissioning of the Mount Signal Solar Farm Project Gen-Tie upgrades may [] result in indirect impacts to loggerhead shrike.” DEIR 4.12-125. Yet no new surveys of that corridor have been completed, leaving the public and decisionmakers to speculate about impacts

8-43

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to this imperiled species. DEIR 4.12-55; CEQA Guidelines § 15144; *Vineyard*, 40 Cal.4th at 428; *Berkeley Keep Jets*, 91 Cal.App.4th at 1355-1356.

8-43 cont.

#### 4. Migratory and Wintering Avian Species

The public and decisionmakers cannot fully understand the impact to the migratory birds and avian species that winter in Imperial Valley because “wintering avian surveys were not conducted for the Project.” DEIR 4.12-52, 4.12-57, 4.12-58. “Biological surveys were not conducted in the winter but the Imperial Valley is known to have an abundance and diversity of birds in the winter and is considered one of the premier winter birding spots in the country.” DEIR 4.12-58. Indeed, the survey area “is part of the Pacific Flyway” and “Imperial Valley is a designated Audubon State Important Bird Area.” DEIR 4.12-59. Furthermore, 70 of the 72 avian species detected in the survey area are protected under the MBTA. *Id.* For example, the “greater sandhill crane is a CDFW fully protected, state-listed threatened species within its breeding and wintering ranges.” DEIR 4.12-51. The “Mountain Plover is a CDFW [Species of Special Concern],” which winters primarily in the Central and Imperial valleys. DEIR 4.12-57. Wintering surveys are especially important for migratory and wintering species, such as the greater sandhill crane and the Mountain Plover, which “regularly winters in Imperial Valley.” DEIR 4.12-52, 4.12-57. Without such surveys, the impacts to these species and the effectiveness of the mitigation measures proposed cannot be determined. CEQA Guidelines § 15144; *Vineyard*, 40 Cal.4th at 428; *Berkeley Keep Jets*, 91 Cal.App.4th at 1355-1356.

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#### 5. Collisions and the Pseudo-Lake Effect

As discussed above, the Project area is “part of the Pacific Flyway” and an “Audubon State Important Bird Area. DEIR 4.12-59. Of the 72 avian species detected in the survey area, 70 are protected under the MBTA. *Id.* Solar projects’ reflective panels often attract migratory birds searching for water. This “pseudo-lake effect” is suspected to be one of the main causes of migratory bird trauma and death at the PV facility Desert Sunlight. *See e.g.* National Fish and Wildlife Forensics Laboratory *Avian Mortality at Solar Energy Facilities in Southern California: A Preliminary Analysis*, Rebecca A. Kagan, Tabitha C. Viner, Pepper W. Trail, and Edgard O. Espinoza (“FWS”), pp. 1, 11.<sup>14</sup> Yet here, the DEIR admits that some collisions may occur with the PV and CPV panels but then downplays this impact, claiming that the panels will only be as reflective as asphalt, not water, and therefore will be less than significant with mitigation. DEIR 4.12-111, 4.12-114, 4.12-127, 4.12-131, 4.12-135, 4.12-140, 4.12-151, 4.12-152, 4.12-158, 4.12-159.

8-45

<sup>14</sup> This study is available for download here: [http://docketpublic.energy.ca.gov/PublicDocuments/09-AFC-07C/TN201977\\_20140407T161504\\_Center\\_Supplemental\\_Opposition\\_to\\_Motion.pdf](http://docketpublic.energy.ca.gov/PublicDocuments/09-AFC-07C/TN201977_20140407T161504_Center_Supplemental_Opposition_to_Motion.pdf) (attached hereto as Exhibit 9).