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DOCKET 08-AFC-2

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May 3, 2010

California Energy Commission
Attn: Docket No. 08-AFC-2
1516 Ninth Street, MS 4
Sacramento, CA 95814-5512

Re: 08AFC2 Beacon Solar Energy Project

Dear Docket Clerk:

Enclosed are an original and one copy of: Reply Brief of California Unions for Reliable Energy. Please process this document and return a conformed copy in the envelope provided.

Thank you.

Sincerely,

/s/

Tanya A. Gulesserian

TAG:bh
Enclosures

2162-095a

**STATE OF CALIFORNIA
California Energy Commission**

In the Matter of:

The Application for Certification
for the BEACON SOLAR ENERGY
PROJECT

Docket No. 08-AFC-2

**REPLY BRIEF
OF
CALIFORNIA UNIONS FOR RELIABLE ENERGY**

May 3, 2010

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I. AS PROPOSED BY THE APPLICANT, THE BEACON SOLAR ENERGY PROJECT WOULD HAVE UNANALYZED AND UNMITIGATED SIGNIFICANT IMPACTS AND VIOLATIONS OF LORS

CURE knows the Commission is inclined to just say yes. CURE is not asking the Commission to just say no. Instead, CURE is asking the Commission to just say yes in a way that honors the Commission's history and will not prove an embarrassment to the Commission.

The Commission has an opportunity to approve a 250 MW solar power plant if it follows Staff's path of analysis, and lack of analysis, that ultimately leads to what the Commission must require in this case. The Commission can approve the Project if it requires dry cooling for power plant cooling, requires performance standards to measure replication of wildlife habitat and a movement corridor in Pine Treek Creek, requires compensation land at a 3 to 1 ratio to replace 429.5 acres of destroyed habitat for desert tortoise, Mohave ground squirrel, and western burrowing owl, requires mitigation for impacts to burrowing owl nesting and foraging habitat, evaluates and mitigates, as required, unanalyzed impacts from heat transfer fluid ("HTF") spills, requires impermeable lining of the land treatment unit staging area, and requires an interconnection agreement prior to construction of the Project.

There is time to get this right. The Project does not yet have a power purchase agreement, without which the Project cannot be financed or built. With complete analysis and mitigation measures, the Commission would have the opportunity to approve a 250 MW solar power plant.

The record shows that the Commission must require dry cooling in order to prevent the unreasonable use of water and to ensure that water resources be put to their most beneficial uses. There is no dispute that dry cooling is an economically feasible mitigation measure and feasible alternative to wet cooling. Dry cooling would avoid significant impacts from a recycled water pipeline, expansion of wastewater treatment facilities, evaporation ponds, and growth, and would render Staff's failure to analyze the pipeline's impacts and identify mitigation for significant impacts moot.

In large part, the FSA's deficiencies result from Staff's inability to complete its evaluation during the sudden rush to approve the Project before the Commission became overwhelmed by other proposed power plants. This abrupt decision came on the heels of the Applicant deciding to use recycled water – after both Staff and CURE filed testimony based on the Applicant's own data showing that dry cooling is economically feasible for this Project. The Applicant had more than sufficient time to make this decision but, instead, did so on the eve of filing rebuttal testimony, thereby rendering Staff's analysis incomplete. The Applicant also had more than enough time to rebut testimony that dry cooling is feasible for this Project. However, it never did so.

Unfortunately, Staff did not have the time and information to complete its analysis of the Project using recycled water, including the major wastewater treatment projects that would be required to provide water to the Project. The decision to conclude this proceeding is not a valid basis for determining that no

independent analysis is required for the northern 17-miles of the Rosamond pipeline or the California City pipeline. The decision to conclude this proceeding is not a valid basis for determining that no independent analysis is required for the southern portion of the Rosamond pipeline through Edwards Air Force Base, or that no analysis whatsoever is required for 3 miles of pipeline around the northern border of California City. The decision to conclude this proceeding is not a valid basis for determining that, for the southern 23 miles of the Rosamond pipeline, only two days of summer vegetation surveys and no protocol surveys for desert tortoise, Mohave ground squirrel, or burrowing owl is required to establish the baseline and for an adequate impact analysis, especially when protocol surveys were required for other aspects of the Project. Finally, the decision to conclude this proceeding is not a valid basis for skipping spring special status plant species surveys along the southern 23 miles of the Rosamond pipeline that were previously required and anticipated this spring in order to evaluate significant impacts to special status plants along this portion of the corridor. These omissions, which are errors as a matter of law and involve no judgment on the part of the Commission under the substantial evidence standard, leave the Commission with only one option for a legally valid decision – dry cooling.

There is another important precedent at stake. As the Applicant aptly points out, the Project is one of the first large solar projects using HTF that the Commission has considered since the Solar Electric Generating System (“SEGS”) facilities. At the time, the Commission had less information upon which to base its

analysis of potentially significant impacts and consistency with LORS. Now, the Commission has over 20 years of reporting from the SEGS facilities to better analyze the issues. Although CURE has shown that the Applicant's plan for handling of HTF contaminated soil violates LORS, the Commission well knows that even compliance with LORS is not the same as finding that a potentially significant impact is reduced to a less than significant level under CEQA. Also, since a company's bare assertions that technology will prevent accidents is not a substitute for legally-required environmental review, the Applicant's repeated assurances – that it has “20 years of experience,” that it “knows how to handle HTF spills,” that unexplained “technological advancements” would prevent leaks, such as those that occur at the much smaller SEGS facilities, and that the Commission is “familiar” enough with HTF that the Commission need not address the issue – ring hollow. For the sake of all the solar projects that are currently proposing to use HTF and to ensure protection of public health and the environment in the State of California, the Commission has a responsibility to adequately analyze the Applicant's use, handling, and undisputedly expected cleanup of HTF. However, the FSA is silent.

II. STANDARD OF REVIEW AND BURDEN OF PROOF

The Commission itself must determine whether the proposed project complies with “other applicable local, regional, and state, . . . standards, ordinances, or laws,” and whether the proposed project is consistent with Federal standards, ordinances, or laws. (Pub. Res. Code § 25523(d); 20 Cal. Code Regs. § 1752(a).) The Commission may not certify any project that does not comply with applicable LORS

unless the Commission finds both (1) that the project “is required for public convenience and necessity” and (2) that “there are not more prudent and feasible means of achieving public convenience and necessity.” (Pub. Res. Code § 25525; 20 Cal. Code Regs. § 1752(k).)

The Commission also serves as lead agency for purposes of CEQA. (Pub. Res. Code § 25519(c).) Under CEQA, the Commission may not certify the Project unless it specifically finds either (1) that changes or alterations have been incorporated into the Project that “mitigate or avoid” any significant effect on the environment, or (2) that mitigation measures or alternatives to lessen these impacts are infeasible, and specific overriding benefits of the Project outweigh its significant environmental effects. (Pub. Res. Code § 21081; 20 Cal. Code Regs. § 1755.) These findings must be supported by substantial evidence in the record. (Pub. Res. Code § 21081.5; 14 Cal. Code Regs. §§ 15091(b), 15093; *Sierra Club v. Contra Costa County* (1992) 10 Cal.App.4th 1212, 1222-23.)

The Applicant “shall have the burden of presenting sufficient substantial evidence to support the findings and conclusions required for certification of the site and related facility.” (20 Cal. Code Reg. § 1748(d).) Commission Staff must review the application, assess the environmental impacts and determine whether mitigation is required, and set forth this analysis in a report written to inform the public and the Commission of the project’s environmental consequences. (20 Cal. Code Reg. §§ 1744(b), 1742.5(a)-(b).) Staff’s analysis must reflect the “independent judgment” of the Commission. (14 Cal. Code Regs. § 15084(e).) Before approving a

project, the Commission must conclude that Staff's report has been completed in compliance with CEQA, that the Commission has reviewed and considered the information in the report prior to approving the project, and that Staff's report reflects the Commission's independent judgment and analysis. (14 Cal. Code Regs. §15090(a); see Pub. Res. Code § 21082.1(c)(3).)

The Commission must determine whether sufficient substantial evidence is in the record to support its findings and conclusions. (Pub. Res. Code §§ 21080, 21081.5.) "Substantial evidence" is defined as:

[F]act, a reasonable assumption predicated upon fact, or expert opinion supported by fact. Substantial evidence is not argument, speculation, unsubstantiated opinion or narrative, evidence that is clearly inaccurate or erroneous...

(*Id.* § 21080(e).) California courts have made clear that "substantial evidence" is not synonymous with "any" evidence. (*Newman v. State Personnel Board* (1992) 10 Cal.App.4th 41, 47.) As defined by the courts, substantial evidence means evidence of "ponderable legal significance, reasonable in nature, credible and of solid value." (*Lucas Valley Homeowners Ass'n v. County of Marin* (1991) 233 Cal. App. 3d 130, 156-7.)

This requirement also applies to expert opinions. Expert opinion does not constitute substantial evidence when it is "based on speculation and conjecture, and accordingly...not supported by substantial evidence in light of the whole record." (See, e.g., *Friends of the Old Trees v. Department of Forestry and Fire Protection* (1997) 52 Cal.App.4th 1383, 1399, fn. 10; *Coastal Southwest Dev. Corp. v. California Coastal Zone Conservation Commission* (1976) 55 Cal.App.3rd 525, 532.) It does not

include argument, speculation, unsubstantiated opinion or narrative, or evidence that is clearly inaccurate or erroneous. (*Id.*) Additionally, “opinion testimony of expert witnesses does not constitute substantial evidence when it is based upon conclusions or assumptions not supported by evidence in the record.” (*Hongsathavij v. Queen of Angels/Hollywood Presbyterian Med. Ctr.* (1998) 62 Cal.App.4th 1123, 1137.) These requirements ensure that members of the public and interested agencies will have an opportunity to review and comment on significant impacts and proposed mitigation and identify any shortcomings. This public and agency review has been called “the strongest assurance” of the adequacy of an environmental review document under CEQA. (*Sundstrom v. Mendocino County* (1988) 202 Cal.App.3d 296, 308.)

Once substantial evidence of a potential impact is presented to the lead agency, the burden shifts to the agency to investigate the potential significance of the impact. (*Napa Citizens for Honest Government v. Napa County Board of Supervisors* (2001) 91 Cal.App.4th 342, 385 (EIR inadequate for failing to investigate substantial evidence of Project’s potential to impact protected steelhead trout).)

In this case, there is insufficient evidence to support the required findings and, therefore, the Commission cannot certify the Project without additional specific analysis and mitigation.

III. ONLY DRY COOLING WILL ELIMINATE INCONSISTENCY WITH LORS FROM USING EITHER GROUNDWATER OR RECYCLED WATER

There is no dispute that the Project is proposed to be located within the overdrafted Koehn groundwater sub-basin (Exh. 500, pp. 4.9-5, -6, -21) where groundwater quality is “fresh and with minimal treatment, suitable for drinking.” (Exh. 500, pp. 4.9-7, -11, -31.) Groundwater is currently used for agricultural and domestic use in the area. (Exh. 500, p. 4.9-58.) Thus, indisputably, the groundwater is suitable, or potentially suitable, for municipal or domestic water supply pursuant to the State Water Resources Control Board’s 1988 *Adoption of Policy Entitled “Sources of Drinking Water”* (State Board Res. No. 88-63) (“Policy 88-63”).¹

There is also no dispute that the Applicant’s proposal in its Application to use 1,388 AFY of this fresh groundwater for powerplant cooling violates the Warren-Alquist Act’s mandate that the Commission “promote all feasible means of energy and water conservation and all feasible uses of alternative energy and water supply sources.” (Pub. Res. Code § 25008.) There is no dispute that the Applicant’s proposal in its Application violates Article X, section 2 of the California Constitution, which declares that “the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable” and prohibits the waste, unreasonable use or unreasonable method of use of water.

¹ http://www.swrcb.ca.gov/board_decisions/adopted_orders/resolutions/1988/rs1988_0063.pdf

Staff also concluded that the Applicant’s proposal to use 1,388 AFY of this fresh groundwater for powerplant cooling violates the State Water Resources Control Board’s 1975 *Water Quality Control Policy on the Use and Disposal of Inland Waters Used for Powerplant Cooling* (State Board Res. No. 75-58)² (“Policy 75-58” or “Policy”) and the Energy Commission’s 2003 Integrated Energy Policy Report (“IEPR”), both of which prohibit the use of fresh water for powerplant cooling unless alternative water supply sources and alternative cooling technologies are shown to be “environmentally undesirable” or “economically unsound.”³ (Exh. 500, p. 4.9-58.) The Applicant did not address whether the use of groundwater for power plant cooling violates LORS because the Applicant recently decided it will accept the FSA’s proposed conditions regarding the partial use of recycled water from either Rosamond or California City for some of the power plant cooling needs. However, the use of recycled water in this case also violates the Warren-Alquist Act and is inconsistent with applicable LORS.

The Applicant’s and Staff’s opening briefs support a finding that using recycled water from either Rosamond or California City, along with groundwater, would be inconsistent with the Warren-Alquist Act and LORS. First, there is no dispute that Condition of Certification Soil&Water-1 would allow the Applicant to continue to use fresh high quality groundwater from beneath the Project site for power plant cooling for emergencies, which includes anything beyond the control of the project owner under either recycled water option (Exh. 337, p. 1), and for normal

² http://www.swrcb.ca.gov/board_decisions/adopted_orders/resolutions/1975/rs75_058.pdf

³ 2003 Integrated Energy Policy Report, California Energy Commission, December 2003, Docket No. 02-IEP-1, Pub. No. 100-03-019, available at <http://www.energy.ca.gov/reports/100-03-019F.PDF>.

operation for up to five years if California City is selected as the water purveyor. (March 22, 2010 Tr., pp. 121, 390; Exh. 337.) Again, using fresh high quality groundwater that may be suitable for potable domestic drinking water for power plant cooling is an unreasonable use of water under State Board Policy 88-63, California's drinking water standards, the Warren-Alquist Act, the California Constitution and, according to Staff, Policy 75-58 and the Commission's 2003 IEPR.

Second, Staff and CURE found that dry cooling is feasible for this Project and provided substantial evidence supporting this finding. The Applicant did not even try to provide substantial evidence to rebut the finding or evidence, which was based on the Applicant's own data, and thus never explained why Staff and CURE's analysis was anything but correct. Thus, as explained in unrebutted testimony, dry cooling is a feasible measure for this Project to conserve scarce water resources in this overdrafted groundwater basin. Therefore, using recycled water from either Rosamond or California City fails to promote all feasible means of water conservation, as required by Section 25008 of the Warren-Alquist Act.

Third, the Applicant's and Staff's opening briefs readily admitted that if not used for this Project, both Rosamond and California City recycled water would be used for other beneficial uses in a water scarce environment. Both Staff and the Applicant agreed that Rosamond is currently upgrading its facility to treat 0.5 MGD (Exh. 500, p. 6-10; Applicant O.B., p. 32; Staff Opening Brief, p. 13). Rosamond stated that the purpose of its existing upgrade is "to provide service within the community of Rosamond ... [m]ostly for urban irrigation" and "potential[ly] for

future recharge operations.” (March 22, 2010 Tr., p. 145-146.) Also, according to the Applicant’s Opening Brief,

- “Rosamond has other potential customers (including other solar projects and a mining operation) that have expressed interest in Rosamond’s recycled water.” (Applicant O.B., p. 32.)
- “Rosamond also has agreements with other water districts in the Antelope Valley for purchase and exchange of reclaimed water, up to as much as 13 mgd. (Ex. 169.)” (Applicant O.B., p. 32.)
- “Rosamond has many other users and arrangements driving its expansion, which will occur regardless of whether the Project purchases its recycled water.” (Applicant O.B., p. 32 (no citation provided).)

The Applicant also ***agreed*** with CURE that:

- Staff found in the FSA that using recycled water from Rosamond “would allow California City the flexibility to use their reclaimed water for other beneficial purposes in the basin...” (Exh. 500, p. 6-11; Applicant O.B., p. 32.)
- According to California City, the recycled water would be used for irrigation in the City if it is not used for the Project. (March 22, 2010 Tr., p. 151; Applicant O.B., p. 32.)

Therefore, it is undisputed that if not used for this Project, both Rosamond and California City recycled water will be used for other beneficial uses in a water scarce environment.

Using high quality recycled water from either Rosamond or California City also fails to put recycled water “to beneficial use to the fullest extent of which they are capable,” as required by Article X, section 2 of the California Constitution. Because dry cooling is an economically feasible alternative, using recycled water from either Rosamond or California City fails to promote all feasible means of water conservation and all feasible uses of water supply sources, as required by Section 25008 of the Warren-Alquist Act. (Pub. Res. Code § 25008.) Because the Project would continue to use groundwater for power plant cooling and because dry cooling is an economically feasible alternative, using recycled water violates Article X, section 2 of the California Constitution, which declares that “the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable” and prohibits the waste, unreasonable use or unreasonable method of use of water. (See Sections I and V.) Because dry cooling is an economically feasible alternative, using recycled water also violates Policy 75-58 and the Energy Commission’s 2003 Integrated Energy Policy Report, both of which prohibit using fresh water for powerplant cooling unless alternative cooling technologies are shown to be “environmentally undesirable” or “economically unsound.”⁴

Staff agrees that the Commission must consider the reasonableness of allowing the Project to use fresh groundwater suitable for domestic use when lower quality water that cannot be used for domestic purposes without extensive

⁴ 2003 Integrated Energy Policy Report, California Energy Commission, December 2003, Docket No. 02-IEP-1, Pub. No. 100-03-019, available at <http://www.energy.ca.gov/reports/100-03-019F.PDF>.

treatment is available. (Exh. 500, p. 4.9-151.) Similarly, the Commission must consider the reasonableness of allowing the Project to use recycled water that would otherwise be used for beneficial purposes in a water scarce environment (and that, if used for the Project, will ultimately be discharged into evaporation ponds) when a feasible mitigation measure exists that does not require the use of water and would eliminate significant impacts. Also, just as Staff states that California City should retain the flexibility to use its reclaimed water for other beneficial purposes in the basin, Rosamond should retain the flexibility to use its reclaimed water for other beneficial purposes in the basin.

Thus, the California Constitution, the Warren Alquist Act, State Board Policies and the Commission's own IEPR all mandate that dry cooling be required for this Project. Allowing a combination of groundwater and recycled water would violate all four of these legal mandates – a dubious grand slam the Commission can and should avoid.

IV. ONLY DRY COOLING WILL ELIMINATE UNANALYZED AND UNMITIGATED SIGNIFICANT IMPACTS FROM USING EITHER GROUNDWATER OR RECYCLED WATER

Neither Staff nor the Applicant provide substantial evidence to support a Commission finding that using water for power plant cooling would avoid or mitigate significant impacts on the environment. Staff specifically found that only both PV and dry cooling have the added benefit of eliminating significant environmental impacts from evaporation ponds. (Exh. 500, p. 6-1.) Staff reached this conclusion in the FSA, even though Staff had already required both netting of

the evaporation ponds (Bio-14) and a Raven Monitoring, Management, and Control Plan (Bio-13) as proposed conditions in the FSA. (Exh. 500, p. 4.2-100.) Neither Staff nor the Applicant can now argue anything different.

In addition, neither Staff nor the Applicant provide substantial evidence to support a finding that dry cooling would not avoid significant and unanalyzed impacts from recycled water pipelines.

A. Staff and the Applicant Failed to Provide Sufficient Evidence To Support a Finding That Using Water for Power Plant Cooling Will Result in Less than Significant Impacts to Desert Tortoise From Evaporation Ponds

The Applicant did not dispute the FSA's conclusion that if dry cooling is selected and the equipment is located in the current footprint, "no additional analysis of potential significant environmental impacts related to soil and water resources would be required." (Exh. 500, p. 4.9-63.) Furthermore, neither Staff nor the Applicant provide substantial evidence that mitigation is required to reduce impacts from raven predation on desert tortoise to a less than significant level.

The record indisputably shows that desert tortoise reside immediately around the proposed Project site. (Exh. 500, pp. 4.2-16, -17, -18.)

The record also shows that desert tortoise have declined through their range due, in part, to "the loss of individual desert tortoises to increased predation from common ravens." (Exh. 500, p. 4.2-16; see also Exh. 500, p. 4.2-25 (impact from increased risk of predation from ravens).)

The FSA stated that construction and operation of the Project could provide new sources of food, water, and nesting sites that might draw unnaturally high numbers of tortoise predators such as the common raven.

Ravens depend on human encroachment to expand into areas where they were previously absent or in low abundance. Ravens habituate to human activities and are subsidized by the food and water, as well as roosting and nesting resources that are introduced or augmented by human encroachment. Common raven populations in some areas of the Mojave Desert have increased 1,500 percent from 1968 to 1988 in response to expanding human use of the desert (Boarman 2003). Since ravens were scarce in this area prior to 1940, the current level of raven predation on juvenile desert tortoise is considered to be an unnatural occurrence (BLM 1990).

(Exh. 500, p. 4.2-39.) The FSA found that the Project's "attractants and subsidies" may affect the desert tortoise population in the region by increased predation. (*Id.*)

These "attractants and subsidies" include:

- water from evaporation ponds
- potential creation of new perching/roosting/nesting sites
- water ponding from dust suppression
- construction and waste management.

(*Id.*) Staff first analyzed the latter three impacts and stated the "potential impacts to desert tortoise populations and other species resulting from operation of the BSEP's evaporation ponds are discussed later in this subsection." (Exh. 500, p. 4.2-39.)

In the evaporation pond analysis, the FSA explained that "creation of a new water source to an area where water is scarce would attract ravens to the BSEP, potentially increasing predation rates on juvenile desert tortoise in adjacent habitat." (Exh. 500, p. 4.2-21.) The FSA also explained that other birds that drink

and forage at the ponds might be harmed by selenium or hyper-saline conditions resulting from high TDS in the evaporation ponds. However, the FSA only mitigated the latter impact. Specifically, the FSA concluded:

The Soil & Water and Alternatives sections discuss a **dry-cooling alternative that would eliminate the need for evaporation ponds, and would therefore eliminate the significant threat to migratory birds and desert tortoise posed by the ponds. This is the alternative preferred by staff, CDFG, and USFWS because it would entirely avoid the impact.** However, if this alternative is not adopted and evaporation ponds are to be part of BSEP, the applicant would need to implement staff's recommended Condition of Certification BIO-14. This condition requires installation of netting over the evaporation ponds to exclude birds and other wildlife. The measure would reduce evaporation pond **impacts to birds** to less-than-significant levels.

(Exh. 500, p. 4.2-42 (emphasis added).) Although Staff analyzed and found a significant impact to desert tortoise (Exh. 500, p. 4.2-39), Staff completely failed to require mitigation for this significant impact.

Neither Staff nor the Applicant provide substantial evidence that mitigation measures for impacts to migratory and other birds from selenium or other mitigation measures would reduce significant impacts to desert tortoise posed by the ponds. Neither Staff nor the wildlife agencies concluded that requiring netting would also reduce significant threats to desert tortoise posed by the ponds. (Exh. 500, p. 4.2-41-42.) In fact, according to Staff, ravens would still be attracted to the evaporation ponds despite the netting. (March 22, 2010, Tr., p. 376.) Therefore, only PV and dry cooling would eliminate significant unmitigated environmental impacts from evaporation ponds. (Exh. 500, p. 6-1.)

The Applicant and Staff claim that the FSA's conditions of certification require bird deterrence. However, the Staff specifically explained that visual deterrence merely "keeps them from getting to the water." (March 22, 2010 Tr., p. 376.) Staff also specifically concluded, "I think they [ravens] are still attracted." (*Id.*) Furthermore, bird deterrence was already included in the FSA when Staff reached the finding that only both PV and dry cooling have the added benefit of eliminating significant impacts from evaporation ponds. (Compare, Exh. 500, p. 6-1 and p. 4.2-101.) As the FSA makes clear, the attractive feature of the ponds is what causes raven predation on desert tortoise.

Furthermore, the FSA's mitigation measures for other impacts from evaporation ponds (Bio-14) and ravens (Bio-13) did not address significant impacts to desert tortoise from the evaporation ponds. First, Staff had already required both netting of the evaporation ponds (Bio-14) and a Raven Monitoring, Management, and Control Plan (Bio-13) as proposed conditions in the FSA (Exh. 500, p. 4.2-100), when Staff specifically concluded that only both PV and dry cooling have the added benefit of eliminating significant environmental impacts from evaporation ponds. (Exh. 500, p. 6-1.)

Second, the FSA never claimed that either Condition Bio-13 or Bio-14 would mitigate impacts to desert tortoise from the ponds to a less than significant level. To argue so now lacks any evidentiary basis in the record.

Third, Bio-13, which was required to address other significant impacts from the ponds and cumulative impacts, requires the project owner to prepare a Raven

Monitoring, Management, and Control Plan (“Raven Plan”), but does not set forth a single performance standard for that plan, much less a performance standard for mitigating impacts to desert tortoise to less than significant levels. Instead, Bio-13 states that a Raven Plan should set forth measures to address various significant impacts, pay an in-lieu fee to address cumulative impacts, and file reports – without any standards for measuring the success of the plan. (Exh. 502 p. BIO-23.)

Therefore, any claim by the Applicant or Staff that Bio-13 would actually reduce significant impacts to desert tortoise from the evaporation ponds to a less than significant level is completely unsupported.

Fourth, the FSA states that Bio-13’s requirement to prepare a Raven Plan is to address the other three identified attractants, specifically potential creation of new perching/roosting/nesting sites, water ponding from dust suppression, and construction and waste management. This analysis ultimately led to the requirement to include in the Raven Plan design features to reduce raven nesting, using minimal water for dust abatement, and putting all food-related waste in self-closing containers. (Exh. 500, p. 4.2-43.) As explained by Staff, these issues are distinct from significant impacts to desert tortoise from water in evaporation ponds. (Exh. 500, pp. 4.2-39, -40, -41.)

Fifth, the requirement to pay an in-lieu fee is derived from the Project’s significant cumulative, regional impacts from ravens. (Exh. 500, p. 4.2-43.) Project impacts are distinct from and must be analyzed and mitigated in addition to cumulative impacts of a project. (Pub. Res. Code §§ 21083, 21065, 21065.3.) For

cumulative impacts, payment of an in-lieu fee is required to support a regional monitoring plan for cumulative impacts, which the USFWS “is currently developing” in accordance with NEPA and FESA. Again, even for cumulative impacts, Condition Bio-13 requires an in-lieu fee to a plan that is not complete, is not being prepared by CDFG, is not being prepared to comply with CEQA and CESA, and sets forth no performance standards for the plan or for reducing significant cumulative impacts to a less than significant level. (Exh. 500, p. 4.2.41.) This is not a legal substitute for mitigation of Project impacts under CEQA.

Condition of Certification Bio-14 is similarly inapplicable to reducing impacts to desert tortoise from evaporation ponds to a less than significant level. (Exh. 502, p. BIO-24.) Again, the FSA did not claim that Bio-14 would mitigate impacts to desert tortoise from the ponds to a less than significant level. To argue so now lacks any evidentiary basis in the record. The FSA concludes that a dry-cooling alternative “would eliminate the need for evaporation ponds, and would therefore eliminate the significant threat to migratory birds and desert tortoise posed by the ponds.” (Exh. 500, p. 4.2-42.) The FSA also concludes that dry cooling “is the alternative preferred by staff, CDFG, and USFWS because it would entirely avoid the impact.” (*Id.*) If dry cooling is not required, the FSA required Condition of Certification Bio-14 to install netting over the evaporation ponds to exclude birds and other wildlife in order to reduce evaporation pond impacts to birds to less-than-significant levels. (Exh. 500, p. 4.2-42; Exh. 502, pp. BIO-24 and BIO-25.)

The record is clear that netting does not address the issue of ravens being attracted to the ponds and preying on desert tortoise in the area. The wildlife agencies did not conclude that requiring netting would reduce significant threats to desert tortoise posed by the ponds. (Exh. 500, p. 4.2-41-42.) In fact, Staff stated that ravens would still be attracted to the evaporation ponds despite the netting. (March 22, 2010, Tr., p. 376.) Therefore, the Project's proposed use of wet cooling (whether from groundwater or recycled water) and the resultant use of evaporation ponds would cause significant unmitigated impacts to desert tortoise. This would be a textbook violation of CEQA.

The record shows that desert tortoise were found in surveyed areas immediately around the Project site. (Exh. 35, Figure 5.) Despite the Applicant arguing that the plant site provides no desert tortoise habitat, the Applicant does admit that desert tortoise habitat exists to the west of the plant site. (Exh. 35, Figure 7.) Also located on the west side of the plant site are the Project's evaporation ponds. (Exh. 2, Figure 2-4.) The Applicant's Opening Brief admits that ravens can carry desert tortoise over 2,000 feet. (Exh. 326, p. 4.) No mitigation addresses raven predation on desert tortoise. Staff explained that visual or bird deterrence measures merely keep ravens from getting to the water and that ravens are still attracted. (March 22, 2010 Tr., p. 376.) Therefore, using either fresh groundwater or recycled water for power plant cooling will result in unmitigated significant impacts to desert tortoise.

B. Staff and the Applicant Failed to Provide Sufficient Evidence to Support a Finding that Recycled Water Options Will Not Result in Unanalyzed and Unmitigated Significant Adverse Impacts

Under CEQA, the Commission must analyze and mitigate significant impacts from the whole of the Project, which, in this case, includes either California City's development of a centralized sewer system and expansion of a wastewater treatment facility or Rosamond's expansion of its wastewater treatment facility (and as set forth in Section B.2, an as of yet unanalyzed portion of the California City pipeline). Even if the Commission disagrees, the Commission must analyze indirect and growth-inducing impacts from the Project, which include impacts from the wastewater treatment facility projects.

Furthermore, Staff's failure to analyze the water pipeline segments leads to clear legal error, but is not the fault of Staff. If the Applicant had decided earlier than immediately before filing rebuttal testimony that the Project would use recycled water, then Staff would have had an opportunity to complete its analysis.

Even assuming the wastewater treatment plants were completely severable from this Project, the Commission must analyze the cumulative effects of the Project and the wastewater treatment plant upgrades, which would be constructed concurrently and would be directly connected via pipeline.

1. The FSA Failed to Analyze the “Whole of the Project,” Which Includes an Expansion of an Identified Wastewater Treatment Facility That is Required for the Project to Operate and Thus, Failed to Analyze Reasonably Foreseeable Potential Impacts Under CEQA

From the outset, the FSA failed to consider the “project as a whole” and instead unlawfully segmented environmental review by ignoring potentially significant impacts from the wastewater treatment plant expansions and upgrades, at least one of which is necessary for the Project to operate with recycled water. The power plant would directly connect to one of the wastewater treatment facilities via pipeline. The power plant project and the expansions and upgrades of the wastewater treatment facilities are clearly interrelated and, indeed, the power plant project could not proceed as proposed without one of the wastewater treatment plant expansions and upgrades.

The definition of “project” is “given a broad interpretation in order to maximize protection of the environment.” (*Lighthouse Field Beach Rescue v. City of Santa Cruz* (2005) 131 Cal.App.4th 1170, 1180 (internal quotation omitted); see also, *Muzzy Ranch Co. v. Solano County Airport Land Use Com.* (2007) 41 Cal.4th 372, 381-83; *Fullerton Joint Union High Sch. Dist. v. State Bd. of Educ.* (1982) 32 Cal.3d 779, 796-97; *Bozung v. Local Agency Formation Com.* (1975) 13 Cal.3d 263, 277-81.) A “project” is “the whole of an action” directly undertaken, supported or authorized by a public agency “which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment.” (Pub. Res. Code § 21065; 14 Cal. Code Regs. § 15378(a).) Under

CEQA, “the term ‘project’ refers to the underlying activity and not the governmental approval process.” (*California Unions for Reliable Energy v. Mojave Desert Air Quality Mgmt. Dist.* (2009) 178 Cal.App.4th 1225, 1241, (quoting *Orinda Assn. v. Bd. of Supervisors* (1986) 182 Cal.App.3d 1145, 1171-72.) (14 Cal. Code Regs. § 15378(c) (“The term ‘project’ refers to the activity which is being approved and which may be subject to several discretionary approvals by governmental agencies. The term ‘project’ does not mean each separate governmental approval.”).) Even if the cumulative impacts discussion in the FSA described and analyzed the wastewater treatment plant expansions and upgrades, which it does not, a cumulative impact analysis would not cure the FSA’s omission of a Project analysis. CEQA requires an analysis of direct, indirect, *and* cumulative impacts. (Pub. Res. Code §§ 21083, 21065, 21065.3.) The FSA recognizes that the “whole of the action” may include facilities not licensed by the Energy Commission. (Exh. 500, p. 5.5-1.)

Last week, the First District Court of Appeal in *Communities for a Better Environment v. City of Richmond*, 2010 WL 1645906 (Cal.App. 1 Dist.) (April 26, 2010) (“*CBE v. Richmond*”) considered the very same question at issue in this proceeding. In doing so, the Court of Appeal described CEQA’s statutory and regulatory requirements and existing case law regarding whether a lead agency unlawfully segmented its environmental review of a project under CEQA.

The Court of Appeal explained that “[t]here is no dispute that CEQA forbids ‘piecemeal’ review of the significant environmental impacts of a project.” (*Id.* at p. 19, citing *Berkeley Keep Jets Over the Bay Com. V. Board of Port Cmrs.* (2001) 91

Cal.App.4th 1344, 1358 (“*Berkeley Jets*”).) Rather, CEQA mandates “that environmental considerations do not become submerged by chopping a large project into many little ones -- each with a minimal potential impact on the environment -- which cumulatively may have disastrous consequences.” (*Id.* citing *Bozung v. Local Agency Formation Com.* (1975) 13 Cal.3d 263, 283-284.) Thus, CEQA defines “project” broadly as “the whole of an action, which has a potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment” (*CBE v. Richmond* at p. 19, citing 14 Cal. Code Regs. § 15378(a).) The court explained that the question of which acts constitute the “whole of an action” for purposes of CEQA is “one of law which we review de novo based on the undisputed facts in the record.” (*CBE v. Richmond* at p. 19, citing *Tuolumne County Citizens for Responsible Growth, Inc. v. City of Sonoma* (2007) 155 Cal.App.4th 1214, 1224 (“*Tuolumne County*”).)

The Court of Appeal first looked to the California Supreme Court’s decision in *Laurel Heights Improvement Assn. v. Regents of the University of California* (1988) 47 Cal.3d 376 (“*Laurel Heights I*”) that set aside an EIR for failing to analyze the impacts of a reasonably foreseeable second phase of a multi-phased project. The EIR in that case analyzed a university plan to move its school to a new building, of which only about one-third was initially available to UCSF. The EIR failed to analyze the environmental effects of the eventual occupation of the remainder of the building once that space became available. The California Supreme Court established a test that requires an analysis of the environmental impacts of a future

expansion or other action if (1) “it is a reasonably foreseeable consequence of the initial project,” and (2) “the future expansion or action will be significant in that it will likely change the scope or nature of the initial project or its environmental effects.” (*CBE v. Richmond* at p. 19, citing *Laurel Heights I*, 47 Cal.3d at 390.)

In *CBE v. Richmond*, the Court summarized existing case law requiring environmental review of related projects.

Some courts have concluded a proposed project is part of a larger project for CEQA purposes if the proposed project is a crucial functional element of the larger project such that, without it, the larger project could not proceed. For example, in *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, the court concluded the description of a residential development project in an EIR was inadequate because it failed to include expansion of the sewer system, even though the developer recognized sewer expansion would be necessary for the project to proceed. (*Id.* at pp. 729-731.) Because the construction of additional sewer capacity was a “required” or “crucial element[]” without which the proposed development project could not go forward, the EIR for the project had to consider the environmental impacts from such construction. (*Id.* at pp. 731-732.)

More recently, in *Tuolumne County, supra*, 155 Cal.App.4th 1214, the court held that a proposed Lowe’s home improvement center and a planned realignment of the adjacent Old Wards Ferry Road were improperly segmented as two separate projects in light of the dispositive fact that the road realignment was included by the City of Sonora as a condition of approval for the Lowe’s project. (*Id.* at p. 1220.) The court held that this was really one project, not two, because “[t]heir independence was brought to an end when the road realignment was added as a condition to the approval of the home improvement center project. [Citation.]” (*Id.* at 1231.)

(*Id.* at p. 20.)

The court also noted other decisions which did not require combined environmental review of separate projects. In *National Parks & Conservation Assn.*

v. County of Riverside (1996) 42 Cal.App.4th 1505, the court found that an EIR for a landfill was not inadequate for failing to discuss impacts from materials recovery facilities (“MRFs”) needed to process solid waste before transport to the landfill because the MRFs were not “crucial elements” without which the landfill project cannot go forward, and the exact location of the MRFs were not yet known. (*Id.* at p. 1519.) In *Christward Ministry v. County of San Diego* (1993) 13 Cal.App.4th 31, the court found that even though there were a number of separate waste management projects occurring at the same time, there was “no record reflecting a contemplated larger project” that should have been considered in an EIR for a landfill expansion. (*Id.* at p. 46.) Furthermore, the court noted that the other projects were addressed in the cumulative impacts analysis of the EIR. (*Id.* at p. 47.) Finally, in *Berkeley Jets*, the court rejected an argument that an EIR for an airport development plan should have included long-range plans for potential runway expansions, because the potential runway expansions were unnecessary for completion of the airport plan. (*Berkeley Jets, supra*, 91 Cal.App.4th at pp. 1361-1362.) The court noted, the airport plan “does not depend on a new runway and would be built whether or not runway capacity is ever expanded.” (*Id.* at p. 1362.) Because the runway expansion was not a crucial element of the airport plan or a reasonably foreseeable consequence of the airport plan, the court concluded the EIR’s project description was adequate and did not violate the policy against piecemealing. (*Id.*)

The court in *CBE v. Richmond* concluded that the facts in CBE's case presented a similar scenario to that considered in *National Parks, Christward Ministry*, and *Berkeley Jets*. The court found that a hydrogen pipeline to supply excess hydrogen from the refinery to consumers was not part of the refinery project because the two projects "are not interdependent." (*CBE v. Richmond* at p. 21.)

According to the Court,

Because Chevron's efforts to process a larger percentage of California fuel at the Refinery does not 'depend on' construction of the hydrogen pipeline, the City's treatment of the hydrogen pipeline as a separate project does not constitute illegal piecemealing. (See *Berkeley Jets*, *supra*, 91 Cal.App.4th at p. 1362.)

(*Id.* at 21.) However, like the Court in *Christian Ministry*, the court in *CBE v. Richmond* found that the City analyzed the two project's cumulative impacts because the two projects were related. (*Id.* at 17.)

In the FSA for the Beacon Project, Staff did neither. The FSA did not analyze Rosamond's wastewater treatment plant expansion and upgrade or California City's development of a sewer system and wastewater treatment plant upgrade as part of the Project. The FSA also did not analyze either of the wastewater treatment plant expansions and upgrades as part of the cumulative impact analysis. The FSA is clearly inadequate.

The facts in this proceeding present a similar scenario to those considered in *San Joaquin Raptor v. County of Stanislaus* (1994) 27 Cal.App.4th 713 and *Tuolumne County Citizens for Responsible Growth v. City of Sonora* (2007) 155 Cal.App.4th 1214. There is no dispute that the Project would be dependent upon

upgrades to either the Rosamond or California City wastewater treatment facilities, neither of which currently exist, if the Project is required to use recycled water for power plant cooling. Based on evidence provided by Staff and the Applicant, upgrades to one of these facilities are necessary, conditions-precedent for the Project to operate. As Staff and the Applicant readily argue (March 22, 2010 Tr., p. 121-123), Condition of Certification Soil&Water-1 and -18 prohibit operation of the Project without documentation that either California City or Rosamond will provide disinfected tertiary recycled water to meet the Project's operational cooling water requirements. (Exh. 337.)

The Applicant argues that the Commission is not required to analyze impacts from a wastewater treatment facility expansion because an expansion would have occurred regardless of the Project and will be subject to environmental review. (Applicant O.B., p. 31.) Whether or not environmental review could occur by another agency is irrelevant to the Commission's responsibility to analyze the whole of the power plant project under CEQA. Also, in arguing that no analysis of a wastewater treatment facility is required if the facility would have occurred regardless of the power plant project, the Applicant turns the Supreme Court's legal test on its head. The issue is not whether the wastewater treatment facility could proceed without the power plant, but *whether the power plant cannot proceed without a wastewater treatment facility*. Here, there is no dispute that it cannot, if recycled water is used.

Furthermore, there is no evidence that adequate environmental review has occurred for either Rosamond's or California City's wastewater treatment plant projects that would be required to serve the Project. Rosamond stated that it will work with the Commission and Edwards Air Force Base to complete the required environmental documentation. (Exh. 506: August 14, 2009 Rosamond Letter of Intent, p. 3.) Similarly, according to the FSA,

If the Energy Commission requires the use of recycled water from California City, staff notes that additional environmental analysis of potential impacts would be required. [The Project] would have to provide information on the project design and alignment.

(Exh. 500, p. 4.9-63.) Since the Applicant argues that the FSA already analyzes the California City pipeline (Applicant O.B., p. 14), the FSA's statement that further analysis is required would necessarily have to apply to the development of a sewer system and wastewater treatment plant if California City will be the water purveyor and is evidence that the analysis is not done. To argue otherwise would only prove that the analysis of the pipeline is also not done, as CURE has shown.

The Applicant's argument that the Commission need not analyze the wastewater treatment plant projects presents an insurmountable hurdle for the Commission. The Applicant argues that the upgrades are already underway as evidenced, in part, by Rosamond and California City's statements that the existing and future tertiary treated water will be used for other beneficial uses in the area, with or without the Project. (Applicant O.B., pp. 31-33.) If the Commission agrees, then the Commission must find that the recycled water is and will be used for other beneficial purposes. Thus, using recycled water for power plant cooling, when dry

cooling is feasible for this Project, would not promote all feasible means of water conservation (Pub. Res. Code § 25008) and would not put water resources “to beneficial use to the fullest extent of which they are capable.” (California Constitution, Art. X, §2.)

Fortunately, the Commission need not make this finding, except with respect to Rosamond’s current upgrade to 0.5 MGD. The Applicant’s bold argument that all of the upgrades necessary to serve the Project are already underway is wildly overstated. The record shows that Rosamond has no plans to construct the expansion necessary to provide 1.3 MGD to the Project without a signed contract and California City is nowhere near a point at which the Commission could find that the City is already converting 2,500 homes from septic to a centralized sewer system with an expanded wastewater treatment plant. (March 22, 2010 Tr., p. 134; Exh. 500, p. 6-10; March 22, 2010 Tr., p. 132; Exh. 506.) Instead, the record shows that Rosamond is currently developing only a 0.5 MGD upgrade. (Exh. 500, p. 6-10; March 22, 2010 Tr., pp. 133, 140-142.) The record shows that, in order to provide the Project with its required water for power plant cooling, Rosamond must expand its facility to provide 1.3 MGD. (Exh. 506; March 22, 2010 Tr., p. 140.) Rosamond explained that in order to begin construction of a 1.3 MGD upgrade, Rosamond would need an executed contract with a customer and that it has no plans to develop an expansion otherwise. (March 22, 2010 Tr., pp. 140-141.) The Applicant provided no evidence that Rosamond has any other customer that would require an

upgrade to the Rosamond facility, other than that other people are “interested.”
(March 22, 2010 Tr, p. 137.)

For California City, conversion of 2,500 homes from septic to a centralized sewer system and expansion of the City’s wastewater treatment plant are necessary for California City to serve recycled water to the Project. (March 22, 2010 Tr., p. 134; Exh. 500, p. 6-10; March 22, 2010 Tr., p. 132; Exh. 506.) According to California City’s letter of intent, California City would be “expanding our Recycled Water production to meet the needs of the Beacon Solar Project.” (Exh. 506: August 13, 2010 California City Email, p. 1.) Although the Applicant argues that California City issued a request for proposal (“RFP”) for the upgrade (Applicant O.B., p. 32), an RFP is a far cry from undertaking conversion of the City’s residents from septic to a centralized sewer system, and no such requests are in the record.

To argue that these massive sewer systems and wastewater treatment expansion and upgrade projects are already underway and thus, are not part of the “whole of the Project, is a grand overstatement for these small desert communities and lacks substantial evidence in the record for this proceeding. The claim is obviously false,

Like the sewer system in *San Joaquin Raptor*, the FSA is deficient because it did not consider the impacts of the wastewater treatment plant expansions and upgrades from either Rosamond or California City that are necessary to serve water to the power plant project. Since the power plant cannot operate without the sewer expansion and wastewater treatment upgrade in California City or the wastewater

treatment plant expansion and upgrade in Rosamond, the “total project” includes both the power plant and the wastewater treatment upgrades necessary to serve it. The Commission is required to analyze the whole project, including the power plant construction and operation and the sewer and wastewater treatment plant expansions and upgrades, and their growth-inducing capabilities, that are reasonably foreseeable components of the Project.

Also, like the home improvement center and road alignment in *Tuolumne County*, the power plant and one of the wastewater treatment plant expansions and upgrades are part of a single “project” for purposes of CEQA review. Like the road alignment, even though Rosamond and California City may have “historically recognized the advantages of” expanding and upgrading their wastewater treatment facilities and/or developing a centralized sewer system, because the Project cannot proceed without them, the projects must be considered together. (Tuolumne County, *supra*, 155 Cal.app.4th at 1227-1228 (rejecting the argument that a CEQA project excludes a planned activity that was not necessitated by the project under consideration or “if the need for that activity was not fully attributable to the project as originally proposed”).) Unlike the home improvement center and road alignment which could be achieved independently of one another, yet were found to be part of one project, the power plant could not be achieved independently of a wastewater treatment project capable of providing recycled water to the Project. Finally, like *Tuolumne County*, because approval of the power plant is conditioned upon a signed agreement with a recycled water purveyor to

provide disinfected tertiary recycled water to meet the Project’s operational cooling water requirements and these options are clearly identified in the FSA, the two actions are part of a single “project” for purposes of CEQA review. “Their independence was brought to an end” when an executed Recycled Water Purchase Agreement “was added as a condition to the approval” of the Project. (*Tuolumne County Citizens for Responsible Growth v. City of Sonora*, 155 Cal.App.4th at 1231.)

Because the Commission failed to properly consider the whole of the action, including the wastewater treatment expansions and upgrades, the direct and indirect impacts of the Project were underestimated from the outset and the FSA failed to provide adequate identification and analysis of reasonably foreseeable environmental impacts of the project as a whole in violation of CEQA.

2. The FSA Failed To Analyze Cumulative and Growth-Inducing Impacts Related to the Wastewater Treatment Plant Expansions Necessary to Serve the Project Recycled Water

Both Staff and the Applicant admit that the FSA ignored the cumulative impacts from constructing and operating the wastewater treatment facility upgrades, despite referring to these projects as a source of recycled water for the Project. As justification for this lack of analysis, Staff and the Applicant argue that such an analysis is not required because 1) these facilities are not within the same geographical area affected by the Project and 2) because the impacts are not the same. (Applicant O.B., p. 31; Staff O.B., pp. 17-18.) These arguments are legally inaccurate and not supported by substantial evidence in the record.

CEQA section 21083 requires a finding that a project may have a significant effect on the environment if “the possible effects of a project are individually limited but cumulatively considerable. . . . ‘Cumulatively considerable’ means that the incremental effects of an individual project are considerable when viewed in connection with the effects of past projects, the effects of other current projects, and the effects of probable future projects.” “Cumulative impacts” are defined as “two or more individual effects which, when considered together, are considerable or which compound or increase other environmental impacts.” (14 Cal. Code Reg. §15355(a).) “Cumulative impacts can result from individually minor but collectively significant projects taking place over a period of time.” (*Communities for a Better Environment v. Cal. Resources Agency* (“*CBE v. CRA*”), (2002) 103 Cal.App.4th 98, 117; 14 Cal. Code Reg. §15355(b).) Cumulative impacts include impacts “similar to, or related to,” those of the project under review. (Remy, Thomas, Moose, Manley, *Guide to CEQA*, 11th Ed. (2007); 14 Cal. Code Regs. § 15130.) The geographic scope of projects that should be considered in a cumulative impact analysis is determined by the resource that is potentially impacted. (14 Cal. Code Regs. § 15130.) The courts have made clear that the lack of specific detail regarding the nature of a future project is no basis for refusing to account for such project in a cumulative impact analysis.⁵ (*Terminal Plaza Corp. v. City and County of San Francisco* (1st Dist. 1986) 177 Cal.App.3d 892, 904-905.)

⁵ This is not an issue here since both Rosamond and California City provided the specifics of each project proposal. (Exh. 506.)

Like every aspect of CEQA, “[t]he requirement for a cumulative impact analysis must be interpreted so as to afford the fullest possible protection of the environment within the reasonable scope of the statutory and regulatory language.” (*Citizens to Preserve the Ojai v. County of Ventura* (2nd Dist. 1985) 176 Cal.App.3d 421, 431-432.) In *Citizens to Preserve the Ojai*, the court explained:

It is vitally important that an EIR avoid minimizing the cumulative impacts. Rather, it must reflect a conscientious effort to provide public agencies and the general public with adequate and relevant detailed information about them. [Citation.] A cumulative impact analysis which understates information concerning the severity and significance of cumulative impacts impedes meaningful public discussion and skews the decisionmaker’s perspective concerning the environmental consequences of a project, the necessity for mitigation measures, and the appropriateness of project approval. [Citation.] An inadequate cumulative impact analysis does not demonstrate to an apprehensive citizenry that the governmental decisionmaker has in fact analyzed and considered the environmental consequences of its actions.

(*Citizens to Preserve the Ojai*, 176 Cal.App.3d at p. 431 (quoting *San Franciscans for Reasonable Growth v. City and County of San Francisco* (1st Dist. 1984) 151 Cal.App.3d 61, 79).)

CEQA also requires a separate and distinct analysis of growth-inducing impacts. The requirement to assess “growth-inducing impacts” includes a discussion of the following:

[T]he ways in which the proposed project could foster economic or population growth, or the construction of additional housing, either directly or indirectly, in the surrounding environment. Included in this are projects which would remove obstacles to population growth (a major expansion of a waste water treatment plant might, for example, allow for more construction in service areas). Increases in the population may tax existing community service facilities, requiring construction of new facilities that could cause significant

environmental effects. Also discuss the characteristic of some projects which may encourage and facilitate other activities that could significantly affect the environment, either individually or cumulatively. It must not be assumed that growth in any area is necessarily beneficial, detrimental, or of little significance to the environment.

(14 Cal. Code Regs. § 15126.2(4).)

Here, the facilities proposed as part of the wastewater treatment projects are certainly within the scope of projects that must be considered in a cumulative impact analysis, and certainly provide indisputable evidence that the Commission must analyze the Project's growth-inducing impacts, under CEQA. First, the wastewater treatment facilities are within the geographic scope which must be considered in a cumulative impact analysis under several resource areas. (14 Cal. Code Regs. § 15130.) There can be no dispute that Staff and the Applicant believe that the wastewater treatment facilities are at least close enough to construct water pipelines to connect the wastewater treatment facilities to the Project.

Furthermore, the Conditions of Certification require pipelines from a point of delivery at either California City or Rosamond's wastewater treatment facility, and extending to and connecting to the Project. (Exh. 500, p. 4.2-128.) Thus, one of the wastewater treatment facilities would be directly connected to the Project via pipeline.

Second, substantial evidence in the record shows that the impacts from construction and operation of the Project and from either California City's construction and operation of a new centralized sewer system and wastewater treatment plant expansion and upgrade or Rosamond's wastewater treatment plant

expansion and upgrade, may be cumulatively significant. There is no dispute that the Project, including the pipelines, may result in significant impacts related to air quality during construction (significant adverse PM10 and ozone impacts) (Exh. 500, pp. 4.1-40, -41), biological resources (significant impacts on threatened and other special-status species, wildlife, habitat, and waters of the State) (Exh. 500, pp. 4.2-72-75), cultural resources (significant impacts on cultural resources) (Exh. 500, p. 4.3-95), and water resources (ownership of groundwater undetermined, potential for significant drawdown that could impact nearby wells) (Exh. 500, p. 4.9-64), all of which require mitigation.

Furthermore, the record shows that the wastewater treatment projects may also result in potentially significant impacts. There is no dispute that California City is currently limited to building two homes per acre. (March 22, 2010 Tr., p. 134.) However, California City has “23,000 currently platted residential unbuilt-on lots.” (March 22, 2010 Tr., p. 138-139.) California City cannot currently allow development of those lots because, to do so, would cause the City to violate planning areas for carbon footprint reductions. (*Id.* at 139.) Instead, California City needs to upgrade its sewer system in order to allow further development. Regardless of whether California City decides to allow urban sprawl or dense development in its City, California City testified that one of the benefits of expanding its wastewater treatment plant and sewer main for the power plant project “is that it will ***allow our City to grow...***” (March 22, 2010 Tr., p. 135, emphasis added.)

Similarly, Rosamond submitted evidence and testified that with a contract to provide 1.3 MGD of recycled water to Beacon, Rosamond would expand its wastewater treatment plant to 2.0 MGD, “which would provide treatment for all the existing flow and *room for future growth*.” (March 22, 2010 Tr., p. 142, emphasis added.) This “room for future growth” would be a direct result of signing a contract to develop recycled water for the Project. (Exh. 506: Rosamond Letter, p. 2.)

At a minimum, the Commission must adequately analyze growth-inducing impacts from the Project. The FSA contains no analysis of the Project’s growth-inducing impacts in California City or Rosamond. (Exh. 500, p. 4.8-6.) Instead, the FSA only analyzes whether the Project will induce substantial population growth from workers moving to the area during construction and operation of the power plant. (Exh. 500, p. 4.8-6.) CEQA is clear that the requirement to assess “growth-inducing impacts” includes analyzing:

[P]rojects which would remove obstacles to population growth (a major expansion of a waste water treatment plant might, for example, allow for more construction in service areas). Increases in the population may tax existing community service facilities, requiring construction of new facilities that could cause significant environmental effects. Also discuss the characteristic of some projects which may encourage and facilitate other activities that could significantly affect the environment, either individually or cumulatively.

(14 Cal. Code Regs. § 15126.2(d).)

Growth in California City and Rosamond may also result in potentially significant cumulative impacts which have not been analyzed. Staff implicitly recognized, at least in the water resources section, that the Commission must analyze cumulative impacts on groundwater resources from growth in California

City. However, Staff did not evaluate cumulative impacts from growth in California City combined with the Project using recycled water that eliminates California City's septic system's current contributions to groundwater recharge. (Exh. 500, p. 4.9-6.) Instead, Staff attempted to determine cumulative impacts on water resources from the Project using groundwater for power plant cooling (not recycled water) and growth in California City and concluded that the impacts are uncertain and monitoring should be required. (Exh. 500, p. 4.9-57.) With respect to that analysis, Staff concluded that "[p]otential cumulative impacts to high quality fresh groundwater resources resulting from use by BSEP for power plant cooling can be avoided by using degraded water..., recycled wastewater obtained from the City of Rosamond and California City or employing a different cooling technology such as dry cooling..." (*Id.*) Hence, the FSA admittedly did not evaluate cumulative impacts from removing 2,500 residences from septic systems, which the record shows currently contributes water to the groundwater basin (recharge). (Exh. 500, p. 4.9-6.) While the Applicant attempted to create a tamarisk removal program to offset groundwater impacts in the region, the FSA concluded:

Water savings estimates from removing tamarisk have been provided but it appears there is insufficient data currently available to identify where there is significant growth of tamarisk in the Fremont Valley. Since the potential to remove tamarisk is unknown it is not possible to estimate what water savings could be considered in a groundwater impact analysis.

(Exh. 500, p. 4.9-33.) Since the Project's short-term and long-term impacts on the groundwater basin from construction and operation, respectively, are also uncertain, may be significant, and therefore require detailed groundwater

monitoring to measure drawdown (Exh. 500, p. 4.9-31, Exh. 500, p. 4.9-73), the cumulative impacts of the unanalyzed proposed Project may be significant.

Finally, construction of expanded wastewater treatment plants and the Project may result in other potentially significant cumulative impacts that have not been analyzed. There is no dispute that construction of the power plant and wastewater treatment plant projects will occur concurrently. Rosamond would have “a construction period of two years from the notice of intent.” (March 22, 2010 Tr., p. 151.) California City would have a construction period of five years from the notice of intent. (March 22, 2010 Tr., pp. 159-160.) The projects may also result in significant cumulative impacts to desert tortoise, Mohave ground squirrel and western burrowing owl, among other wildlife, and to native and special-status plant species in this fragile desert environment. (See, e.g., Exh. 500, pp. 4.2-14, -15, -19, -23, -37, -42, -45, -147; Exh. 35, pp. 36, 38, 41, Figure 11; Exh. 92, Figures 3a and 4b.) The Project site is located 3 miles west of the Desert Tortoise Natural Area (“DTNA”), approximately 1 mile south of the Jawbone/Butterbrecht Area of Critical Environmental Concern, and approximately 7 miles west of federally designated desert tortoise critical habitat, which are also located within the vicinity of California City. (Exh. 500, p. 4.2-18.)

Clearly, the Commission must, at a minimum, evaluate potentially significant cumulative impacts of the Project when combined with an expansion and upgrade of either the California City sewer and wastewater treatment plant or the Rosamond waste water treatment plant. Also, at a minimum, the Commission must

conduct an analysis of growth-inducing impacts from the Project. Neither of these analyses has been completed.

Of course, requiring dry cooling would eliminate any need to analyze or mitigate these impacts.

3. Staff and the Applicant Failed to Provide Substantial Evidence to Support a Finding that the FSA Analyzed and Mitigated All Potentially Significant Impacts from Recycled Water Pipelines

The FSA would permit the Applicant to construct and operate a pipeline located along any of the alternative pipeline routes it mentions in the FSA. However, the FSA provides no independent analysis of the northern 17.6-mile segment of the Rosamond pipeline, no independent analysis of the Eastern Alternative of the southern 23-mile segment of the Rosamond pipeline through Edwards Air Force Base, no independent analysis of the California City pipeline and, as Staff's and the Applicant's brief point out, no analysis whatsoever of approximately 3 miles of pipeline along the northern border of California City. The only review that Staff attempted was of the Western Alternative of the southern 23-mile segment of the 40-mile Rosamond pipeline, and that analysis is deficient.

i. Neither Staff, nor the Applicant, cite any independent analysis of the northern 17.6 mile segment of the Rosamond pipeline, which also includes most of the California City pipeline

Staff and the Applicant implicitly argue that the FSA provides an independent analysis of potentially significant impacts to biological resources along the northern 17.6-mile segment of the Rosamond pipeline, which encompasses most

of the California City pipeline route. There is no evidence to support these contentions. If there were, the parties would certainly cite to it. But they did not. Thus, the Commission has insufficient evidence to conclude that construction and operation of the northern 17.6 miles of the Rosamond pipeline, which includes most of the California City pipeline, would result in less than significant impacts.

First, the FSA specifically stated, “[t]he biological resources of the northern 17.6 mile segment of the pipeline alignment ***are not addressed*** in this report because they have already been assessed as part of the [Project] (the previously proposed natural-gas pipeline).” (Exh. 500, p. 4.2-127.) CEQA requires the Commission to conduct an independent analysis of potential impacts from proposed projects. (Pub. Res. Code §21082.1.) Environmental review must be prepared directly by, or under contract to, the Commission and must reflect the independent judgment of the Commission. (*Id.*) Instead, the FSA admitted that the northern 17.6 mile segment was only analyzed by the Applicant. (*Id.*)

The Applicant provides no cite to Staff’s analysis of the 17.6 mile segment in the FSA (Applicant O.B., pp. 11, 12, 30), and Staff provides no cite to any such analysis in the FSA (Staff O.B., pp. 13-14). The Applicant only cites to its own conclusions that also lack supporting analysis and are inconsistent with the evidence in the record. Staff only cites to the FSA’s project description and figures to explain where the 17.6 mile segment is located and various mitigation measures, which is not the same as citing to its analysis of potential impacts. (Staff O.B., p. 14-15.) It is difficult to understand the relevance of cites to mitigation measures

when the FSA does not contain and the briefs cannot cite to the analysis conducted for this 17.6 mile segment of proposed pipelines.

The Applicant and Staff's attempt to include any cite where the words "gas pipeline" were not deleted in the FSA would be insufficient to meet the substantial evidence standard. Random cites to the words "gas pipeline" when there is no substantive analysis of the issues is not a substitute for an adequate analysis of impacts under CEQA. There are only four references to the "gas pipeline" route in the Biological Resources section of the FSA. One is a conclusory sentence, similar to those in the Applicant's and Staff's briefs, that the impact analysis for construction of the gas pipeline is applicable to the assessment of the water pipeline impacts for the 17.6 mile portion of the pipelines. (Exh. 500, p. 4.2-8.) The following eleven pages provide no discussion of what that assessment is. The second reference is two sentences that a burrowing owl was observed within the buffer at the southwest end of the natural gas pipeline corridor next to a burrow, and the majority of "the other 7 active and 13 inactive/potential burrowing owl burrows documented during the 2008 surveys were located within the 1,000-foot buffer associated with the natural gas pipeline corridor." (Exh. 500, p. 4.2-21.) The following pages provide no assessment of the Applicant's discovery of 7 active and 13 potential burrowing owl burrows located within the buffer for the gas pipeline corridor. Instead, the FSA concludes in its third reference to the gas pipeline that the pipeline could impact State and federal threatened desert tortoise:

"...the Mohave creosote bush scrub west of SR-14 supports relatively undisturbed habitat with moderately diverse vegetation that could

provide adequate forage and cover for a resident population of desert tortoise...[d]uring construction in this area, along the gas pipeline and in vegetated portions of the plant site, desert tortoise could be harmed during clearing, grading, and trenching activities or might become entrapped within open trenches and pipes.”

(Exh. 500, p. 4.2-37.) This conclusion is alarming in that it requires the Commission to guess whether the 7 active and 13 potential burrowing owl burrows are impacted by the Project and shows a new impact to desert tortoise. Finally, the fourth reference to this segment of the pipeline is not located in a mitigation measure, but in Staff’s verification for Condition of Certification for Bio-11 regarding desert tortoise and Mojave ground squirrel habitat compensatory mitigation:

Within 90 days of completion of project construction, the project owner shall provide to the CPM verification...that construction activities...along the gas pipeline alignment did not result in impacts to Mojave creosote scrub habitat adjacent to work areas.

(Exh. 500, p. 4.2-97.) This verification shows that Staff does not know whether impacts to desert tortoise will or will not occur. These vague statements in the FSA do not provide substantial evidence upon which the Commission can find a less than significant impact.

CEQA requires Staff’s conclusions to be supported by substantial evidence. (Pub. Res. Code § 21081.5; 14 Cal. Code Regs. § 15091(b).) Conclusory statements “unsupported by empirical or experimental data, scientific authorities, or explanatory information of any kind” are insufficient to support a finding of insignificance. (*People v. County of Kern* (1974) 39 Cal.App.3d 830, 841-842.) Furthermore, the Commission’s analysis must provide the reader with the analytic

bridge between its ultimate findings and the facts in the record. (*Topanga Association for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 515; *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 733; 14 Cal. Code Regs. § 15091.)

The Applicant's reference to its own analysis is not a substitute for an adequate independent analysis of potentially significant impacts under CEQA. Even were the Commission to consider the Applicant's analysis as a substitute for Staff's analysis, the Applicant's conclusions are inconsistent with the FSA and the Applicant's own evidence in the record. According to the AFC:

"A natural gas pipeline will be constructed from California City to the solar block along California City Boulevard, Neuralia Road, and an existing dirt road that accesses the eastern edge of the plant site. This approximately 17.6-mile pipeline will occur entirely within the disturbed and developed shoulders of the existing roads and will avoid native habitat. Approximately 60.0 acres of disturbed habitat will be temporarily disturbed for the natural gas pipeline."

(Exh. 35, p. 55.) However, the Applicant's statement that the 17.6 mile pipeline will occur within "disturbed" habitat says nothing about the potential for significant impacts to habitat or species. The record is clear that "disturbed" habitat is still potential habitat. (Exh. 500, pp. 4.2-12, -14; March 22, 2010 Tr., p. 316.) In fact, the Applicant's statement is an admission that the pipeline transects habitat, which requires an independent analysis under CEQA.

In addition, the Applicant's conclusion that impacts are temporary is inconsistent with the Applicant's statement that temporary impacts are considered permanent "due to the slow recovery of native communities in the desert

ecosystem.” (Exh. 35, p. 55, p. 51.) That the impacts are insignificant because they are “temporary” is also impermissible under CEQA. CEQA requires the Commission to evaluate *all* significant impacts of the proposed project, including “both the short-term and long-term effects.” (14 Cal. Code Regs. § 15126.2; Pub. Res. Code § 21100(b)(1).) The Applicant’s dismissal of the Project’s impacts merely because they are not permanent impacts violates the requirements of CEQA.

Finally, the Applicant’s own evidence shows that the gas pipeline corridor/17.6-mile pipeline alignment traverses miles of Mojave creosote bush scrub (Exh. 92, Figure 3a and Figure 4b), which the Applicant admits in other documents is potential habitat for the desert tortoise, Mojave ground squirrel and western burrowing owl. (Exh. 35, pp. 36, 38, 41, Figure 11.) Furthermore, the Applicant admits it conducted some surveys along the 17.6 mile segment during which a desert tortoise carcass and scat were noted along the corridor. (Exh. 92, Figure 4b.) Multiple active and potential burrowing owl burrows were also documented within the 27.6 mile pipeline corridor. (Exh. 500, p. 4.2-21.) With respect to Mohave ground squirrel, the Applicant did not survey anywhere for Mojave ground squirrel, even though the Applicant mapped Mojave creosote bush scrub along the segment and admitted in other documents that Mojave creosote scrub is potential habitat for Mojave ground squirrel. (Exh. 35, p. 36.)

For each of these reasons alone, the Commission lacks substantial evidence to support a finding that 17.6 miles of the Rosamond (and California City) recycled

water pipeline segment was independently analyzed and will not result in significant unmitigated impacts to biological resources.

ii. Neither Staff, nor the Applicant, cite to any independent analysis of the southern 23-mile segment of the Rosamond pipeline through EAFB and 2.8 miles of pipeline along Mendiburu Road

Neither the Applicant nor Staff dispute that the FSA did not analyze potentially significant impacts to biological resources along the Eastern Alternative of the southern 23-miles of the 40-mile Rosamond pipeline through Edwards Air Force Base (“EAFB”). (Applicant O.B., p. 14; Exh. 500, pp. 6-10, Alternatives – Figure 2.) The FSA states that “EAFB completed an environmental review and approved installation of the pipeline” (Exh. 500, p. 6-10), but the Applicant admits that EAFB actually *exempted* this pipeline segment from environmental review under the National Environmental Policy Act. (*Id.*) While the Applicant suggests that mitigation measures were required, there is no evidence that such measures would mitigate significant impacts under CEQA or fully mitigate take under the California Endangered Species Act. (See e.g., “*Habitat disturbance* shall be contained to pre-disturbed areas *as much as possible.*” Exh. 639, p. 4 (emphasis added).)

Staff confirmed that the FSA did not analyze the segment through EAFB as part of the Project, as part of the cumulative impacts, or in any other way under CEQA and the Warren-Alquist Act. (March 23, 2010 Tr., p. 358 (“So technically we did not analyze it, but we did refer to the fact that it was analyzed by Edwards...”).) This is critically important because the FSA *admits* that “[a]s the route moves

north towards the north boundary of [EAFB], the habitat quality improves and becomes moderate to good quality habitat for desert tortoise and Mohave ground squirrel.” (Exh. 500, p. 4.2-145.) Therefore, except to note that Staff did not analyze the Eastern Alternative pipeline route under CEQA, the FSA says nothing more. At the same time, the Conditions of Certification have no limits on using this unanalyzed route.

Both Staff and the Applicant concede that a 2.8 mile segment of the California City pipeline along Mendiburu Road that generally bounds the north end of the City along undeveloped areas was also not analyzed. (Staff O.B., p. 15; Applicant O.B., p. 14.) Staff made no excuses and only stated that the proposed conditions in the FSA “will adequately address potentially significant impacts.” (Staff O.B., p. 15.) The Applicant claimed, not surprisingly, that the pipeline “would be built in disturbed areas...” (Applicant O.B., p. 14.) These statements, without more, fail to provide any information and are not substantial evidence that construction and operation of 3 miles of pipeline on the northern limit of California City will result in a less than significant impact. Clearly, Staff must investigate and analyze – as a matter of law – approximately 3 miles of pipeline that the FSA allows to deliver water to the Project site.

iii. Neither Staff, nor the Applicant, provide substantial evidence to support a finding that the western alternative of the southern 23-miles of the 40-mile Rosamond pipeline will result in less than significant impacts and will comply with LORS

Although CURE's opening brief focused on unanalyzed and significant impacts on biological resources from the Rosamond and California City pipelines, the FSA admitted that at least 21.1 miles of the Rosamond pipeline and 2.8 miles of the California City pipeline will also result in unanalyzed significant impacts on cultural resources. According to the FSA,

“[P]otential significant direct impacts to historical resources along the surface of the balance of the routes for both the Rosamond Community Services District and City of California City alternatives, approximately 21.1 and 2.8 miles respectively, are presently unknown due to the late addition of the specific alternatives to the project application. The construction of either alternative, as presently proposed or as subsequently redesigned, may also lead to the whole or partial destruction of presently unknown buried archaeological deposits along the full extent of each route.”

(Exh. 500, p. 4.3-91.) The Applicant similarly admitted that “another approximately 23 miles of new route would need to be assessed for environmental impact such as biological and cultural resources and land use.” (Exh. 169.)

With respect to biological resources, both the Applicant and Staff argue that the FSA adequately analyzed and mitigated the southern 23-miles of the Rosamond pipeline corridor that 1) transects habitat for desert tortoise, western burrowing owl and Mohave ground squirrel, among other wildlife species, 2) crosses the alignment of multiple branches of Cache Creek, ephemeral drainages that are jurisdictional waters of the State, and 3) transects potential habitat for special status plant species. However, the Applicant and Staff provide insufficient evidence to support a

finding that the 23-mile pipeline segment will result in a less than significant impact to biological resources and is consistent with LORS.

a. The Applicant failed to submit an incidental take permit application for the entire pipeline corridor

First, contrary to the implied claim made by the Applicant and Staff that CDFG agreed that the FSA's conditions are adequate to mitigate impacts from the pipeline under CESA, the Applicant's incidental take permit application to CDFG does not describe or seek coverage for the southern 23-mile pipeline segment. (Exh. 92, pp. 2-3.) To the contrary, the Applicant's incidental take permit application makes no mention of this segment of the pipeline which Staff determined resulted in a Study Area of over 5,000 acres. (Exh. 500, p. 4.2-138; Exh. 92, pp. 2-3 (Incidental Take Permit Application to CDFG).)

b. The Applicant failed to conduct protocol surveys for species along the 23 mile pipeline segment

Second, the FSA never made a finding regarding whether the 23-mile pipeline segment will directly or indirectly impact any species. (14 Cal. Code Regs. § 15065(a)(1) and (b)(2).) It is undisputed that no protocol surveys were conducted for desert tortoise or western burrowing owl along the 23-mile segment of the Rosamond pipeline, even though desert tortoise protocol surveys for both species were required for every other proposed Project area. (Applicant O.B., p. 12.) It is also undisputed that no protocol surveys were conducted for Mohave ground

squirrel or special-status/rare plant species along the 23-mile segment of the Rosamond pipeline.

The Applicant argues that, despite not doing any protocol surveys, Staff assumed presence and thus the Commission need not worry. (Applicant O.B., p. 12.) This is a classic red herring. Staff assumed presence on only 11 acres of 92.36 acres of native plant communities that Staff had already concluded would be directly and indirectly impacted by construction. (Exh. 500, p. 4.2-156.) Without protocol surveys, an assumption of presence would be required for at least 92.36 acres of native plant communities that will be directly and indirectly impacted, if not the entire 23-mile segment (and unanalyzed segments) of the pipeline corridor. Staff's failure to require protocol surveys for species along 23 miles of pipeline is legal error, but only the fault of the Applicant for waiting a few weeks before planned evidentiary hearings to try to use recycled water.

c. The FSA's conclusion that the 23-mile segment will impact only 11.2 acres of habitat is unsupported

Third, the FSA lacks substantial evidence to conclude that the 23-mile pipeline segment "will result in impacts to 11.2 acres of habitat for desert tortoise and Mohave ground squirrel, all but 1.9 acres of which would be temporary." (Staff O.B., p. 16.) Table 4 of the Biological Resources Appendix A in the FSA summarizes construction impacts to 92.36 acres of native plant communities and other cover types. (Exh. 500, p. 4.2-156.) The FSA also states that "[d]irect impacts to native plant communities due to pipeline construction would total 16.2 acres, including

4.29 acres of undisturbed Mojave creosote scrub and 6.91 acres of undisturbed saltbrush scrub.” (Exh. 500, p. 4.2-162.) Staff’s ultimate conclusion that the pipeline would only temporarily impact 11.2 acres of desert tortoise and Mohave ground squirrel habitat, of which 1.89 acres would be permanent, is based on Staff’s statements that only those amount of acres are “good quality” (March 22, 2010 Tr., p. 367) and fails to address the myriad of other direct and indirect impacts from the pipeline. (Exh. 500. at p. 4.2-163.) There is no way to follow Staff’s analysis regarding which areas it believes contain native plant communities, low quality habitat, high quality habitat, habitat worth protecting, or temporary and permanent impacts. The FSA’s conclusions provide numbers and appear definitive, but they are completely unverifiable and unsupported as explained further below.

d. The FSA improperly deferred analysis of significant impacts to special status plant species

Fourth, the FSA improperly deferred analysis of direct and indirect impacts to special status plant species along the southern 23-mile segment of the Rosamond pipeline. In the FSA, Staff’s proposed conditions required Spring 2010 surveys for special status plant species (Exh. 500, p. 4.2-114), since the only vegetation surveys for this portion of the route were conducted on two days in July of 2009. (Exh. 500, pp. 4.2-127-163.) However, Condition of Certification Bio-20 no longer requires spring 2010 surveys. Staff admits in its opening brief that “[b]ecause only reconnaissance level vegetation surveys were conducted along the 23-mile alignment, pre-construction floristic surveys would be conducted in spring” in

accordance with Condition of Certification Bio-20 “to determine whether special-status plants occur within areas that might be directly or indirectly impacted by pipeline construction.” (Staff O.B., p. 16.) Deferring surveys for special status plants to determine direct and indirect impacts until after Project approval violates CEQA. CEQA does not allow deferring the formulation of mitigation measures to post-approval studies. (14 Cal. Code Reg. § 15126.4(a)(1)(B); *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 308-309.)

As fully explained in CURE’s opening brief, Staff found in the FSA that the 23 mile segment of Rosamond’s pipeline may potentially impact nine special-status species (Exh. 500, p. 4.2-150), and the record shows that appropriately timed surveys are necessary to evaluate potentially significant impacts (Exh. 632, p. 11-12). (CURE O.B., pp. 35-36.) Also, this segment of the pipeline crosses two forks of Cache Creek, an ephemeral drainage and jurisdictional water of the state, and 12 smaller ephemeral drainages. (Exh. 500, p. 4.2-13.) The record shows that Staff illegally deferred spring surveys that are required to analyze potentially significant direct and indirect impacts to special-status plants along the 23 mile pipeline corridor.

e. The FSA failed to consider indirect impacts along the 23-mile pipeline corridor

Neither Staff nor the Applicant provided substantial evidence that Staff adequately analyzed and required any mitigation for *indirect* significant impacts on plant communities and protected species. Staff limited its assessment to direct impacts from a 25-foot wide pipeline construction footprint. (Exh. 500, p. 127.)

Although the FSA calculated over 4,000 acres of impacts associated with the pipeline corridor, Staff explained that it ultimately only considered direct impacts:

I think you're talking about indirect impacts for the most part...But actual impacts of the pipeline are going to be about 11 acres to the native plant communities, to creosote bush scrub and atroplex scrub...Only about two acres of that will be permanent, because it's a buried pipeline. There's a 25-foot construction corridor that we used as the basis for that impact analysis.

(March 22, 2010 Tr., p. 350.) However, the Applicant shows that indirect impacts to special status plant species could occur within 50 feet of the pipelines. (Applicant O.B., p. 13.) Also, the FSA states that impacts to burrowing owls along the pipeline corridor could occur within 500 feet of construction activities. (Exh. 500, 4.2-160.) Thus, Staff's conclusion that only 11.2 acres of *desert tortoise and Mojave ground squirrel habitat* are impacted by the 23-mile pipeline and only 11.2 acres must be compensated at a 3:1 ratio is especially egregious since the FSA finds that the pipeline alignment crosses plant communities that provide moderate to high quality habitat for desert tortoise, Mohave ground squirrel and *western burrowing owl*. (Exh. 500, p. 4.2-14.)

Finally, Staff did not incorporate any indirect impacts to desert tortoise or Mohave ground squirrel (Exh. 500, p. 4.2-161), which the record shows could result from elevated noise and dust levels, soil compaction and increased human activity, among other activities. (Exh. 35, p. 51.) Indirect impacts may be potentially significant, especially in a fragile desert ecosystem. (Exh. 500, p. 4.2-24.) However, no assessment was made upon which to review potential indirect impacts.

f. The FSA improperly dismisses impacts that are temporary

The FSA also incorrectly assumes that impacts to special-status plant species along the 23 mile pipeline segment are not significant under CEQA because the impacts would be temporary in nature. (Exh. 500, p. 4.2-157.) However, the evidence in the record is undisputed that temporary impacts “for these arid plant communities from pipeline construction can span decades to centuries.” (Exh. 500, p. 4.2-157.) If these impacts are ultimately dismissed, then the FSA must identify a timeline for how long it takes desert special-status plant species to recover. The FSA did not. Regardless, the FSA’s conclusory assumption that a temporary destruction of special-status plant species would not be substantial is erroneous. CEQA requires the Commission to evaluate *all* significant impacts of the proposed project, including “both the short-term and long-term effects.” (14 Cal. Code Regs. § 15126.2; Pub. Res. Code, § 21100(b)(1).) The FSA’s dismissal of impacts merely because they are not permanent impacts violates the requirements of CEQA.

In other words, depending solely on the outcome it wishes to reach, the FSA arbitrarily renders contradictory and wholly inconsistent findings of fact. This contradictory and irrational approach to evaluating the Project’s impacts renders the FSA’s findings and analysis arbitrary. Moreover, these contradictory assertions violate CEQA by demonstrating a lack of reasoned and good faith effort to evaluate impacts. (*Berkeley Keep Jets*, 91 Cal.App.4th 1344.)

The decision to move ahead with evidentiary hearings in this proceeding, despite the Applicant’s last minute decision to try to use recycled water for the

Project, resulted in near total failure to obtain information about the affected environment and to analyze and mitigate significant impacts from piping water to the Project site. This confluence of events is not a valid basis for the Commission to forgo its long history of complying with the Warren-Alquist Act and CEQA. All of these impacts can be avoided by requiring dry cooling.

V. DRY COOLING IS A FEASIBLE MITIGATION MEASURE AND ECONOMICALLY VIABLE ALTERNATIVE

Dry cooling will avoid significant impacts from a recycled water pipeline and other aspects of the Project and will render Staff's failure to analyze impacts from a recycled water pipeline moot.

CEQA mandates that an agency not approve a project with significant environmental impacts if "there are feasible alternatives or mitigation measures" that can substantially lessen or avoid those impacts. (*Mountain Lion Foundation v. Fish & Game Commission* (1997) 16 Cal.4th 105, 134; *Sierra Club v. State Board of Forestry* (1994) 7 Cal.4th 1215, 1233; *see also* Pub. Res. Code § 21002 ("public agencies should not approve projects as proposed if there are feasible alternatives or feasible mitigation measures available which would substantially lessen the significant environmental effects of such projects"); *see also* 14 Cal. Code Regs. § 15091(a).) CEQA defines "feasible" as "capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, social, and technological factors." (Pub. Res. Code 21061.1.) "The fact that an alternative may be more expensive or less profitable is not sufficient to show that the alternative is financially infeasible. What is required is evidence that

the additional costs or lost profitability are sufficiently severe as to render it impractical to proceed with the project.” (*Citizens of Goleta Valley v. Board of Supervisors* (1988) 197 Cal.App.3d 1167, 1181; Exh. 500, p. 6-11.)

Even under the Commission’s 2003 IEPR, the Commission may not approve the Project unless and until it makes an affirmative finding that “alternative water supply sources and alternative cooling technologies are shown to be ‘environmentally undesirable’ or ‘economically unsound.’” (2003 IEPR, p. 41.) This finding must be based on substantial evidence in the record of the proceeding. It may not be based on speculation or unsupported assertions. Finally, the Applicant bears the burden of presenting sufficient substantial evidence to support any finding that dry cooling is infeasible. (20 Cal. Code. Regs. § 1748.)

Substantial evidence, indeed the only evidence in the record, shows that dry cooling is an economically feasible mitigation measure and feasible alternative to wet cooling that would entirely avoid significant impacts from the Project. (Exh. 500, pp. 4.9-66, 6-19.) The FSA’s and CURE’s analyses and conclusions were based on data and models supplied by the Applicant to Staff and CURE. (Exh. 500, FSA, p. 6-12.)

The Applicant provided *no rebuttal testimony* to either Staff’s or CURE’s testimony in this proceeding that using the Applicant’s own data and revenue model, the Project as proposed, without expanding the solar field, and with dry-cooling, would still meet or exceed the benchmark Internal Rate of Return of 11%. (Exh. 500, FSA, pp. 6-13, 6-19.) Both Staff and CURE reviewed all of the

Applicant's filings prior to submitting testimony and prepared thorough analyses showing that ***dry cooling is economically feasible***. (Exh. 500, pp. 6-13, 6-9; Exh. 616, pp. 6-7.) The Applicant provided no response whatsoever. Therefore, there is simply no contradictory evidence in the record. None.

CEQA mandates that an agency, when approving a project, must either find that: (1) the project has been changed to avoid or substantially lessen the significant environmental impacts; (2) the changes are within the responsibility and jurisdiction of another agency; or (3) identified mitigation measures or alternatives are infeasible. (14 Cal. Code. Reg. § 15091(a).) Without a finding (supported by substantial evidence) that dry cooling is infeasible, it cannot be rejected. (14 Cal. Code. Reg. § 15091; *Resource Defense Fund v. Local Agency Formation Commission of Santa Cruz County* (1987) 191 Cal. App. 3d 886, 896-897.) Failing to require dry cooling would be a fundamental violation of CEQA.

VI. USING FRESH GROUNDWATER FOR POWER PLANT CONSTRUCTION WOULD VIOLATE THE WARREN-ALQUIST ACT AND LORS

If recycled water is required for power plant cooling despite the many violations of law, recycled water options could be implemented sooner to mitigate other violations of LORS. (See CURE Opening Brief, pp. 42-43.) Staff and the Applicant never provided evidence to rebut CURE's testimony showing that it would be feasible mitigation to require that recycled water be in place prior to the start of on-site construction in order to reduce the consumption of fresh potable groundwater and to use non-potable water to meet part of the construction water

requirements during the first five months of on-site construction, and all of the construction water requirements thereafter.

Staff and the Applicant argue that using 8,086 acre feet (AF) of fresh groundwater for construction of the Project (equating to 7.6 million gallons per day for 26 months of construction (March 22, 2010 Tr., p. 104; Exh. 500, p. 4.9-115)) is appropriate and that it is not feasible to use recycled water during construction.

The sole reason for Staff and the Applicant's opposition to this measure is because, according to the Applicant, most of the construction water is required in the first five months. (Applicant O.B., p. 29; March 22, 2010 Tr., pp. 104 and 102.)

Therefore, Staff and the Applicant argue, wastewater plant upgrades will not be complete by the time construction commences. (*Id.*) These excuses lack substantial evidence to show that requiring a non-potable water supply to be in place prior to the start of construction is infeasible, especially when undisputed testimony shows that 27% of construction water requirements could be met using recycled water from either Rosamond or California City. (Exh. 616, p. 4; March 22, 2010 Tr., pp. 114-115.)

The record is clear that construction of the wastewater treatment facilities can begin as soon as the Applicant signs a letter of intent with either of the proposed recycled water purveyors. (March 22, 2010 Tr., p. 140.) The Applicant certainly has the ability to do so at any time, and at least as soon as the Project is approved by the Commission. Nothing in the record exists to show that executing this agreement is not feasible, or that the timing of the execution of this agreement

is dependent on any particular action. In fact, leaving the timing of execution up to the whim of the Applicant allows the Applicant to select a recycled water option that merely delays the delivery of recycled water to the Project and allows the Applicant to begin using fresh potable groundwater for power plant construction if the California City option is exercised. This discretion is inconsistent with the Commission's duty to promote all feasible means of water conservation under the Warren-Alquist Act.

There is also no evidence in the record that the majority of grading and, hence, water use must occur immediately upon Project approval, or even during the initial five months of construction. First, the timing of construction is unknown since the Applicant has no executed power purchase agreement. Second, the timing of construction is also unknown because the Applicant has months of pre-construction activity that must occur prior to grading. In fact, according to Mr. Busa with the Business Development Group of the Applicant:

I would just comment that there are a number of months of prework before dirt gets moved. There are a lot of conditions. One comes to mind, like cultural studies that need to be done for many months actually prior to us moving dirt. So, you know, it wouldn't be before the end of the year if we stuck to Mr. Celli's schedule, maybe even a little bit longer....At the end of this year or early next year, yeah, that would be the earliest.

(March 22, 2010 Tr., pp. 424-425.) Thus, it would be feasible to require the Applicant to sign a letter of intent with a recycled water purveyor immediately upon approval of the Project in order to complete the projects necessary to deliver recycled water and reduce consumption of fresh groundwater sooner.

As explained in CURE's opening brief, Staff did not analyze the feasibility of the Project receiving water during construction, even when Staff was provided with substantial evidence regarding how and why earlier delivery is feasible to reduce groundwater consumption during construction. In fact, the FSA is inconsistent regarding the amount of water required during the first five months of construction. Construction water use figures for the first five months of construction was given as both 2,701 AF (Exh. 500, p. 4.9-115) and 3,376-5,404 AF. (Exh. 500, p. 4.9-15; Exh. 616, p. 4.) Staff analyzed the Project as presented by the Applicant and even increased the amount of water the Project should use while never being clear on whether and why the bulk of water would be required during the first five months of construction. (March 22, 2010 Tr., p. 105-106.) According to Staff,

The project plan is to excavate as much as 8 million cubic yards of soil during the construction phase. The schedule is, I'm not real clear on the exact schedule. Initially I thought they were going to do the drainage channel first. They may not be obligated to do that.

(*Id.*) Thus, there is no evidence that the bulk of construction water is required during the first five months, and no evidence that CURE's proposed mitigation measure is infeasible.

If recycled water is selected for power plant cooling despite the legal obligation on the Commission to require dry cooling, feasible mitigation to reduce the use of fresh groundwater includes requiring the non-potable water supply to be in place prior to the start of on-site construction. Since the Applicant already must submit a Report of Waste Discharge ("ROWD") to the Lahontan Regional Water Quality Control Board (Applicant O.B., p. 40; Exh. 203), which must be revised to

properly address HTF (see below), the filing of a ROWD is not a procedural hurdle to requiring the use of non-potable water during construction, as the Applicant contends (Applicant O.B., p. 29).

VII. THE PROJECT WILL RESULT IN UNMITIGATED SIGNIFICANT IMPACTS TO BIOLOGICAL RESOURCES

A. Staff and the Applicant Failed to Provide Substantial Evidence to Support a Finding That The Project Will Result in Less Than Significant Adverse Impacts to Sixteen Acres of Waters of the State and Will Not Violate LORS

As explained fully in CURE's opening brief, one of the most significant impacts of the Project is the mass grading of more than 7 million cubic yards of soil and the total destruction of Pine Tree Creek and an unnamed ephemeral wash through the Project site that will result in the loss of 16 acres of jurisdictional waters of the State. (Exh. 500, p. 4.9-167.) The Applicant and Staff recognize this significant impact, but argue that performance standards are sufficiently set forth in mitigation measures to ensure that the impacts will be reduced to less than significant. However, the bulk of their arguments focus on measures to replicate hydrological functions, as set forth in the Soil and Water conditions, rather than on performance standards for measuring the success of replicating the biological functions of the existing washes. For the alleged performance standards for measuring the success of replicating such biological functions, both Staff and the Applicant direct the Commission to Bio-18. However, as set forth in CURE's opening brief, Bio-18 fails to set forth performance standards necessary to measure the success of providing "wildlife habitat and a movement corridor," one of the

existing functions that Staff specifically found must be replicated by the proposed mitigation measure. (Exh. 500, p. 4.2-13.)

The basis for the FSA's requirement that the Project replicate wildlife habitat and a movement corridor is CDFG's requirements for issuing a streambed alteration agreement. (Fish and Game Code § 1602.) In 2008, CDFG first recommended that the Project avoid impacts to state waters. (Exh. 500, p. 4.2-28.) After the Applicant ignored CDFG's request, CDFG and Lahontan Regional Water Quality Control Board requested assurances that the Project "restores elements of the natural character of the existing Pine Tree Creek wash." (Exh. 500, p. 4.9-43.) The Applicant initially agreed to replicate the hydraulic and biological function of the existing waters in the re-routed engineered channel for Pine Tree Creek. (Exh. 500, p. 4.9-167.) Accordingly, Staff set forth existing hydrological and biological functions that must be achieved in order to obtain the functional equivalent of a streambed alteration agreement. Among other functions, Staff found that Pine Tree Creek provides "support for vegetation communities that help stabilize stream banks *and* provide wildlife habitat and a movement corridor." (Exh. 500, p. 4.2-13.) Staff specifically required Condition of Certification Bio-18 to allegedly mitigate the functions of providing wildlife habitat and a movement corridor. (Staff O.B., p. 10; Applicant O.B., p. 34.)

As explained in CURE's opening brief, Condition of Certification Bio-18 requires a Desert Wash Revegetation Plan that establishes three success criteria for shrub cover, none of which is a performance standard necessary to measure the

success of providing wildlife habitat and a movement corridor. (CURE O.B., pp. 54-55; Exh. 502, p. BIO-30.) The performance standards in other paragraphs of the conditions that may have measured the success of providing wildlife habitat and a movement corridor have recently been deleted. Specifically, the Applicant recently sought and obtained the agreement of Staff to modify Bio-18 to **abandon** long-term **biological** monitoring and management and instead only monitor and manage to minimize weeds and keep the channel safe from wildlife entrapment. (Exh. 502, p. BIO-32 (Item #7 for redline: “Long-Term ~~Biological~~ Monitoring and Management. Long-term ~~biological~~ monitoring and management of the channel shall begin at the end of the 10-year revegetation period...”); Exh. 338, p. BIO-14 (Item #6 with revised condition.) The Applicant also recently sought and obtained the agreement of Staff to modify Bio-18 to **abandon** reports from a Designated Biologist describing the results of inspections assessing entrapment hazards for desert tortoise and other wildlife (Exh. 502, p. BIO-33 (Item #7 for redline); Exh. 338, p. BIO-15 (Item #6 for revised condition) and to **abandon** reporting of observed special status species to the California Natural Diversity Data Base with forms and maps of the locations of the observations (Exh. 502, p. BIO-33 (Item #10 for redline); Exh. 338, p. BIO-15 (no longer a condition). None of these performance standards and no other performance standards for measuring the success of replicating biological functions by the “revegetation plan” to install shrub cover were included in any other biological resource condition.

None of these measures, or similar biological performance standards, is included in the FSA’s Soil and Water conditions either. Instead, the Soil and Water conditions address efforts to replicate hydrological functions and simply refer to condition Bio-18 or “applicable biological mitigation measures” for the alleged performance standards to mitigate significant biological resource impacts. (Exh. 501, pp. 14-15 (Soil & Water -7: future Reclamation District shall be developed in accordance with Bio-18 to coordinate on “other biological resources compliance efforts...as they related to maintenance district responsibilities”); Exh. 501, p. 15 (Soil & Water -8: Following creation of a Maintenance District, prepare a Channel Maintenance Program “to facilitate *applicable* biological mitigation measures”) (emphasis added); Exh. 501, p. 21 (“Soil & Water 17 deleted see BIO-18”).) The Applicant and Staff’s reference to Soil and Water conditions do not address the FSA’s prior requirement to “provide wildlife habitat and a movement corridor.” (Exh. 500, p. 4.2-13.) In fact, Staff found that the Soil and Water conditions will not even mitigate “vegetation communities that help stabilize stream banks” or other hydrological functions. (*Id.*) Instead, the Staff found that there is a significant level of uncertainty as to whether the revegetation criteria can even be met. (Exh. 500, p. 4.9-168.) The FSA concluded the proposed rerouted channel will bear “no resemblance to any natural hydrological feature in the Mojave Desert...” (Exh. 500, p. 4.2-29.)

Staff ultimately recognized that the Applicant’s entire experiment is doomed to fail and added a condition that, if after 10 years, the success criteria in the Desert

Wash Revegetation Plan is not achieved, the project owner shall acquire land that includes at least 16 acres of desert wash state jurisdictional waters and their immediate watershed. (Exh. 502, p. BIO-31.) However, the Desert Wash Revegetation Plan with three success criteria for shrub cover, as set forth in Condition BIO-18, was never designed to mitigate impacts to “wildlife habitat and a movement corridor” in the first place. If the Applicant achieves the three criteria for shrub cover in the plan, then no more is required. And, as shown, the three criteria for shrub cover are not performance standards for measuring the success of replicating biological functions of the existing washes. (CURE O.B., pp. 54-55.)

Even if the Commission were to find that significant impacts to “wildlife habitat and a movement corridor” (Exh. 500, p. 4.2-13) need not be mitigated or, for some reason, the vegetation criteria in Bio-18 with none of the now deleted biological mitigation measures is sufficient to mitigate significant impacts to “wildlife habitat and a movement corridor,” the condition requiring acquisition of an off-site desert wash is vague, deferred and inadequate. The only guidance for the compensation land is that it “1) include at least 16 acres of state jurisdictional waters; 2) be characterized by similar soil permeability and hydrological and biological functions as the impacted wash; and 3) be within the same watershed as the impacted wash.” (Exh. 502, p. BIO-31.) Clearly, CDFG, Staff and the Applicant’s interpretation of the existing biological functions of the wash are unknown.

CEQA prohibits agencies from approving projects “if there are feasible alternatives or feasible mitigation measures available which would substantially lessen the significant environmental effects of such projects.” (Pub. Res. Code §§ 21002, 21081.) The Commission must propose and describe mitigation measures sufficient to minimize the significant adverse environmental impacts. (Pub. Res. Code §§ 21002.1(a), 21100(b)(3).) Also, mitigation measures must be designed to minimize, reduce, or avoid an identified environmental impact or to rectify or compensate for that impact. (14 Cal. Code Reg. § 15370.) Therefore, mitigation must replace the functions and values that are impacted. In short, the mitigation plan is entirely inadequate to mitigate significant impacts to wildlife habitat and wildlife movement, which Staff found are current functions of the existing desert wash on the Project site.

- B. Staff and the Applicant Failed to Provide Substantial Evidence to Support A Finding That The Project Will Result in Less Than Significant Impacts to State-Threatened Mohave Ground Squirrels**
- 1. The FSA Fails to Set Forth an Accurate Description of the Current Environment By Relying on an Unsupported Conclusion That the Site Provides No Habitat for Threatened Mohave Ground Squirrels**

Neither the Applicant nor Staff cite to any protocol surveys that were conducted for the Mohave ground squirrel (*Spermophilus mohavensis*), a threatened species under the California Endangered Species Act (“CESA”). (Exh. 500, p. 4.2-18.) CESA requires that impacts to the Mohave ground squirrel are minimized and “fully mitigated.” (Fish and Game Code § 2081(b).) Impacts of taking include “all

impacts on the species that result from any act that would cause the proposed taking.” (*Id.*) CEQA similarly requires the Commission to determine whether the Project will have a substantial adverse effect “either directly” to a protected species or “through habitat modifications.” (14 Cal. Code Regs., Appendix G, IV.) Therefore, neither CESA nor CEQA allow Staff to limit its analysis of impacts to Mohave ground squirrel habitat.

The Applicant has argued throughout this proceeding that the Project site lacks habitat for Mohave ground squirrel – a threshold that all parties agree would trigger mandatory protocol surveys for the species per CDFG requirements. (Applicant O.B., p. 9; Exh. 603, p. 1.) Specifically, CDFG requires that surveys be conducted on proposed project sites that support desert scrub vegetation and that are within or adjacent to the Mohave ground squirrel geographic range. (Exh. 603.) The purpose of the surveys would be to determine the presence of Mohave ground squirrel in the Project site’s desert scrub vegetation to identify whether that occupied habitat can be avoided, whether impacts can be minimized or whether lost habitat must be replaced at another identified site. CDFG typically requires that Projects that result in “take” of Mohave ground squirrel and habitat must, if the habitat cannot be avoided and preserved, pay for the purchase and preservation of land with similar habitat at a 3 to 1 ratio. (Fish and Game Code § 2081(b)(2); Exh. 500, p. 4.2-36.)

The Project site satisfies CDFG criteria that surveys be conducted on proposed project sites that support desert scrub vegetation and that are within or

adjacent to the Mohave ground squirrel geographic range (Exh. 603): it has 429.5 acres of saltbrush scrub and desert scrub vegetation (Exh. 500, p. 4.2-9) and it is within the squirrel's geographic range. (Exh. 600, p. 1.)

When protocol surveys (which include trapping) for the Mohave ground squirrel are not conducted, CDFG requires an assumption of "presence" in all areas where potential habitat for the species is present. (Exh. 603.) Then, mitigation is required at a 3 to 1 ratio. By arguing that the Project site does not have potential habitat, the Applicant avoids not only conducting protocol level surveys, but avoids CDFG assuming "presence" and requiring mitigation. It is a fool proof way for the Applicant to avoid analyzing significant impacts to the threatened Mohave ground squirrel species and to avoid identifying mitigation for the loss of the threatened species' habitat. Thus, the ability to verify the conclusions of the one and only expert in this case who concluded that the Project site is not habitat for the Mohave ground squirrel is absolutely critical. It is also critical because the Mohave ground squirrel occupies the smallest geographic range of any of the seven *spermophilus* ground squirrels in California. (Exh. 604.) Fortunately, it is not even required in this case since CDFG specifically and explicitly testified:

MS. VANCE: Just to clarify, Fish and Game was not willing to concede that the species was not absent with no trapping surveys...we did not concur that it's not habitat or that they're not there. And I just want to be clear on that.

(March 22, 2010 Tr., p. 316 (emphasis added).)

Despite the fact that CDFG disagreed with the Applicant regarding its conclusion that the Project site is not habitat, Staff relied on the Applicant's

conclusion that the Project site does not provide potential habitat for the species and found that 429.5 acres of saltbush scrub and desert wash scrub on the plant site does not provide suitable habitat for the species. (Exh. 500, p. 4.2-35; Exh. 600, p. 1.) Thus, despite the fact that CDFG disagreed, since a finding of no habitat is a **fool proof way** for the Applicant to avoid analyzing significant impacts to the species and to avoid identifying mitigation for the loss of habitat, to be absolutely clear, CURE also showed that the Applicant's expert's conclusion is ***not supported by the evidence, not independently verifiable*** and ***inconsistent with his own published reports on the species***. (CURE Opening Brief, pp. 55-60; Exh. 600, pp. 1-5.)

CDFG stated that Mohave ground squirrels have been detected in areas where they have not been expected and that portions of the Project site have a fairly well established community of burrowing animals. (Exh. 605.) At the evidentiary hearing, CDFG confirmed that habitat assessments for Mohave ground squirrel are not valid indicators of presence of the species because there have been high numbers of Mojave ground squirrel detected via trapping in areas not predicted to support Mojave ground squirrel based on habitat and soil type alone. (March 22, 2010 Tr., p. 380.) Finally, Staff acknowledged that ***“the analysis by Dr. Leitner and the studies he cites supporting his conclusions...are necessarily speculative...”*** (Exh. 500, p. 4.3-36, emphasis added.) Therefore, either protocol surveys must be conducted or presence of Mojave ground squirrel must be assumed.

In the absence of protocol surveys, the Commission must assume that Mohave ground squirrels are present on at least 429.5 acres of *Atriplex* scrub community (also referred to as saltbush scrub) and desert wash scrub that provide suitable habitat on the plant site. (Exh. 500, pp. 4.2-9, -10; Exh. 600, p. 3.; Exh. 604.) Vegetation communities where Mohave ground squirrel occur include creosote bush scrub and saltbush scrub, both of which are present on the Project site and in the surrounding area. (Exh. 600, pp. 3-4, Exh. 500, pp. 4.2-10, 4.2-26.) Major food resources for Mohave ground squirrel were detected during plant surveys conducted on the Project site, one of which occurred in dense stands along the terminus of Pine Tree Creek on the Project site, (Exh. 600, pp. 4-5; Exh. 500, pp. 4.2-9, 4.2-17), and a total of 56 native, annual plant species were reported growing in the Project survey area that could provide sustenance for the species. (Exh. 87, p. 26; Exh. 600, p. 5.)

Even if some of the habitat is degraded, the Applicant must still mitigate for the loss of that habitat. In the desert, degraded habitat in the process of recovery takes hundreds, if not thousands of years, to fully recover. (Exh. 500, p. 4.2-24.) For degraded habitat, CDFG states the Mohave ground squirrels in reduced numbers can continue to occupy the habitat during the natural process of restoration. (Exh. 604, p. 30.) Thus, CDFG concluded destruction of, or damage to, any native plant community in the range constitutes destruction of the Mohave ground squirrel's habitat. (Id.) Staff's and the Applicant's conclusion regarding habitat is inconsistent with CDFG's conclusion regarding habitat.

2. The Mohave Ground Squirrel Impact Analysis is Flawed and, Hence, Mitigation is Inadequate

Staff reviewed “the analysis by Dr. Leitner and the studies he cites supporting his conclusions, and while acknowledging that such estimates are necessarily speculative,” agreed to a conclusion that only two transient individual Mohave ground squirrels would be “lost” during construction on the plant site. (Exh. 500, p. 4.3-36.) CURE thoroughly explained why this conclusion is unsupported when 1) a more reliable estimate could have been done per CDFG guidelines for Mohave ground squirrel, 2) the presumption of only “transient” squirrels is completely arbitrary with no protocol survey data examining the movement of animals and determining residency or dispersal, and 3) the Applicant’s methods used to estimate take and determine compensation relied on calculations that incorporated habitat quality and animal density *extrapolated from other areas*, an approach that has been firmly rejected by CDFG (Exh. 604, p. viii), independent scientists and the Applicant’s consultant in one of his own previously published reports. (CURE O.B., pp. 61-63 (citing the Applicant’s previous finding that “[i]n the absence of a randomized sampling procedure, the results of such surveys apply only to the trapping site and *cannot be extrapolated to the general region.*”))

Not only does Staff lack substantial evidence to agree with the Applicant’s analysis that only two transient Mohave ground squirrels would be impacted by the plant site, but Staff’s mitigation measure does not in any way show that significant impacts to the species and its habitat would be reduced to a less than significant level. The FSA never explains its justification for accepting the Applicant’s proposal

to provide 100 acres of compensation land for impacts to Mohave ground squirrel (and desert tortoise and burrowing owl) on the plant site. CEQA requires Staff's conclusions to be supported by substantial evidence. (Pub. Res. Code § 21081.5; 14 Cal. Code Regs. § 15091(b).) Conclusory statements "unsupported by empirical or experimental data, scientific authorities, or explanatory information of any kind" are insufficient to support a finding of insignificance. (*People v. County of Kern* (1974) 39 Cal.App.3d 830, 841-842.) Furthermore, the Commission's analysis must provide the reader with the analytic bridge between its ultimate findings and the facts in the record. (*Topanga Association for a Scenic Community. v. County of Los Angeles* (1974) 11 Cal.3d 506, 515; *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 733; 14 Cal. Code Regs. § 15091.) The FSA's mitigation to provide 100 acres of compensation land is arbitrary, lacks any actual relationship to the impacts, is not justified by Staff and is inadequate to mitigate significant impacts to the species and its habitat.

3. Feasible Mitigation Exists to Reduce Significant Impacts and Compensate for Take of State-Threatened Mohave Ground Squirrel

The 2,012-acre Project site provides Mojave ground squirrel habitat that could be occupied. The Project site provides 429.5 acres of *Atriplex* scrub community (saltbush scrub) and desert wash scrub that provides suitable habitat on the plant site for State-threatened Mohave ground squirrel.

However, the FSA requires only an arbitrary 100 acres of compensation for potential construction and operation related impacts for Mohave ground squirrel,

desert tortoise and burrowing owl on the plant site. (Exh. 500, p. 4.2-37.) The record is clear that no rationale is provided for 100 acres of compensation land. 100 acres as mitigation results in a compensation ratio well below the 3 to 1 mitigation ratio recommended by CDFG for a project site that a) CDFG “did not concur that it’s not habitat” for threatened Mohave ground squirrel habitat (March 22, 2010 Tr., p. 316), b) Staff acknowledged the Applicant’s conclusions are speculative (Exh. 500, p. 4.3-36), c) provides 429.5 acres of *Atriplex* scrub community (saltbush scrub) and desert wash scrub (Exh. 500, p. 4.2-9) that CDFG states provides suitable habitat for Mohave ground squirrel (Exh. 604, p. viii-ix), and d) is within the threatened species’ geographic range. (Exh. 600, p. 1.) Therefore, the Commission should require compensation for 429.5 acres of saltbush and desert wash scrub at CDFG’s 3:1 compensation ratio.

4. Staff Must, But Did Not, Determine the Location of the Required Compensation Land

Neither the Applicant nor Staff determined the location of the FSA’s required 100 acres of compensation land. (Exh. 502, p. BIO-16; Exh. 338, p. BIO-3.) The FSA’s failure to identify the location of the compensation land constitutes an improper deferral of mitigation. Without identifying the compensation land, the agency is unable to determine whether significant impacts to Mohave ground squirrel (and desert tortoise and burrowing owl) are mitigated to a less than significant level, as required by CEQA.

CEQA prohibits agencies from approving projects “if there are feasible alternatives or feasible mitigation measures available which would substantially

lessen the significant environmental effects of such projects.” (Pub. Res. Code §§ 21002, 21081.) The Commission must propose and describe mitigation measures sufficient to minimize the significant adverse environmental impacts. (Pub. Res. Code §§ 21002.1(a), 21100(b)(3).) Also, mitigation measures must be designed to minimize, reduce, or avoid an identified environmental impact or to rectify or compensate for that impact. (14 Cal. Code Reg. § 15370.)

A public agency may not rely on mitigation measures of uncertain efficacy or feasibility. (*Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 727 (finding groundwater purchase agreement inadequate mitigation measure because no record evidence existed that replacement water was available).)

“Feasible” means capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, legal, social, and technological factors. (14 Cal. Code Reg. § 15364.) Moreover, mitigation measures must be fully enforceable through permit conditions, agreements, or other legally binding instruments. (14 Cal. Code Reg. § 15126.4(a)(2).) Finally, CEQA does not allow deferring the formulation of mitigation measures to post-approval studies. (14 Cal. Code Reg. § 15126.4(a)(1)(B); *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 308-309.) Nor does CEQA permit the delegation of mitigation of significant impacts to responsible agencies. (*City of Marina v. Board of Trustees of the California State University*, (2006) 39 Cal.4th 341, 366.) Without identifying the mitigation land, the Commission cannot determine if the impact will be mitigated.

C. Staff and the Applicant Failed to Provide Sufficient Evidence to Support a Finding that the Project Will Reduce Significant Adverse Impacts to State and Federally-Listed Threatened Desert Tortoise And Will Comply With The Federal Endangered Species Act

1. Staff Failed to Set Forth an Accurate Description of the Environmental Setting Because it Relied on an Unsupported Conclusion That the Site Provides No Habitat for Threatened Desert Tortoise

Although there is no dispute that the plant site has “sign” of desert tortoise, a state and federally threatened species, and that desert tortoise have been observed surrounding the plant site, Staff and the Applicant agreed that the site provides no habitat and only two transient individual desert tortoise would be impacted during construction on the plant site. CURE thoroughly explained in its opening brief that this conclusion is not based on an intensive survey to verify that the Applicant’s survey is accurate, as recommended by USFWS. (CURE O.B., pp. 65-66.) The Applicant’s rebuttal testimony did not dispute that an intensive survey was not done or that a quantitative measurement of habitat was not made. (Exh. 326, p. 3.)

However, even assuming the Commission agrees the Applicant’s survey was adequate, the Commission has insufficient evidence upon which to conclude that the 2,012-acre plant site provides little or no desert tortoise habitat because, based on Staff’s conclusion that the site is either barren or shrub cover is less than 2 percent. (Exh. 500, p. 4.2-17) First, Staff found elsewhere in the FSA that saltbush scrub cover on the Project site “is approximately 22% to 25%.” (Exh. 500, p. 4.2-9.) Second, Staff found elsewhere in the FSA that Mojave desert wash scrub cover on the Project site is “approximately 15%.” (Exh. 500, p. 4.2-10.) Third, desert tortoise

also use areas with sparse shrub cover because it promotes growth of herbaceous plants. (Exh. 600, p. 16.) Fourth, the FSA admitted that desert tortoise might occur within the 429.5 acre portion of the Project site that supports saltbrush scrub and desert wash scrub. (Exh. 500, p. 4.2-37.) Fifth, the FSA's conclusion that "transient" desert tortoises might occasionally occur in the 369.2 acres of *Atriplex* scrub patches or in the 60.3 acres of vegetated desert wash that crosses the site (Exh. 500, pp. 4.2-17, -9) is an admission that the site provides habitat, even if, as CURE explains, "[t]he ability to make such an inference would have required a detailed occupancy study, which was not conducted." (Exh. 600, p. 18.) As a result, any portions of the Project site where a desert tortoise could occur are habitat, and this habitat requires mitigation to offset significant impacts. In this case, desert tortoise could occur in a total of 429.5 acres of *Atriplex* scrub community (saltbush scrub) and desert wash scrub that provide suitable habitat for desert tortoise.

2. Staff Failed to Provide Adequate Mitigation to Reduce Significant Impacts to Desert Tortoise and Their Habitat

Not only does Staff lack substantial evidence to agree with the Applicant's analysis that only two transient desert tortoise would be impacted by the plant site, but Staff's mitigation measure does not in any way show that significant impacts to the species and its habitat would be reduced to a less than significant level. The FSA never explains its justification for accepting the Applicant's proposal to provide 100 acres of compensation land for impacts to desert tortoise (and Mohave ground squirrel and burrowing owl) on the plant site.

CEQA requires Staff's conclusions to be supported by substantial evidence. (Pub. Res. Code § 21081.5; 14 Cal. Code Regs. § 15091(b).) Conclusory statements “unsupported by empirical or experimental data, scientific authorities, or explanatory information of any kind” are insufficient to support a finding of insignificance. (*People v. County of Kern* (1974) 39 Cal.App.3d 830, 841-842.) Furthermore, the Commission's analysis must provide the reader with the analytic bridge between its ultimate findings and the facts in the record. (*Topanga Association for a Scenic Community. v. County of Los Angeles* (1974) 11 Cal.3d 506, 515; *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 733; 14 Cal. Code Regs. § 15091.)

Even for the compensation land that the FSA does require, Staff improperly deferred identifying the location of the FSA's compensation land. (Exh. 338 (Bio-11).) With respect to that land, the FSA provides insufficient evidence to show that the financial \$250 per acre “security” for enhancement of compensation habitat is adequate to ensure enhancement measures can be accomplished (Exh. 500, p. 4.2-94), especially when provided with substantial evidence that it does not. (Exh. 600, p. 20; Exh. 92, p. 47.) Finally, because the location of the compensation land is not identified, the FSA improperly defers preparation of a land management plan for the compensation area until after the purchase of the unidentified land. (Exh. 500, p. 4.2-97). The FSA's mitigation is arbitrary, lacks any actual relationship to the impacts, is not justified by Staff, is improperly deferred and is inadequate to mitigate significant impacts to the species and its habitat.

3. Neither Staff nor the Applicant Provide Substantial Evidence to Support a Finding that the Project Complies with FESA, as Required by the Warren-Alquist Act

The Applicant argues that FESA’s prohibition against taking a threatened species, and requirement to obtain a permit from the USFWS, is not relevant to the Commission’s review and approval of the Project. Nothing could be further from the truth. To the contrary, the Warren-Alquist Act specifically states that the Commission must determine whether the proposed project complies with “any other applicable local, regional, and state, and federal standards, ordinances, regulations or laws.” (20 Cal. Code Regs. § 1752(a); see also Pub. Res. Code § 25523(d).) The Commission’s requirement to determine compliance with FESA is not insignificant. According to CDFG,

MS. VANCE: I just wanted to clarify regarding the requirements of the California Endangered Species Act, and what full mitigation means.

CESA requires that the impacts of the taking be fully mitigated. It does not specify regarding the habitat. And the state definition of take is less broad than that in the federal Endangered Species Act. It’s defined in section 86 of the Fish and Game Code, which is -- take is hunt, pursue, catch, capture or kill or any attempt to do so. So it’s very much regarding the direct impacts to the animal, as opposed to habitat.

(March 22, 2010 Tr., pp. 352-353.)

There is no substantial evidence that the Project complies with FESA, as proposed. As a preliminary matter, Staff and the Applicant’s suggestions that the Project need not obtain a take permit under FESA is disingenuous. (Staff O.B., p. 4; Applicant O.B., p. 14.) The Applicant specifically admitted that “[a] permit will be

obtained from the U.S. Fish and Wildlife Service under Section 10 of the ESA for minor impacts to Mojave desert tortoise, a federally listed species, and will involve preparation of a Low Effect Habitat Conservation Plan.” (Exh. 35, p. vii.) In the Applicant’s draft Low Effect Habitat Conservation Plan (“HCP”), the Applicant stated that the Project is seeking take coverage under FESA. (Exh. 110, p. 4.) The FSA explained that the Applicant is consulting with USFWS under section 10 of FESA, submitted an application for an incidental take permit under section 10 and submitted a “Low-Effect” HCP to USFWS. (Exh. 500, pp. 4.2-47, -63.) Thus, there is no dispute that the Project seeks an incidental take permit under FESA.

Furthermore, neither Staff nor the Applicant provides substantial evidence that the Project complies with FESA, as proposed. The FSA explained that the Applicant submitted an application for an incidental take permit and a “Low-Effect” HCP to USFWS, but that the Low Effect HCP was *rejected* because the Project “did not meet the criteria for a Low-Effect HCP.” (Exh. 500, pp. 4.2-47, -63; Exh. 220 (rejected HCP).) Neither Staff nor the Applicant cite to any revised application for an incidental take permit or any revised HCP. The USFWS’ affirmative response during the evidentiary hearing regarding support for the analysis in the FSA (March 22, 2010 Tr., p. 356) is not the same as stating the USFWS agrees that the Project, as proposed, complies with FESA.

In fact, the HCP submitted by the Applicant does not describe the 23 mile segment of the Rosamond recycled water pipeline at all. (Exh. 220.) Thus, there is no evidence in the record from USFWS that it has reviewed this portion of the

Project. Without more, Staff has no substantial evidence upon which to base a conclusion regarding compliance with FESA.

Finally, it is clear that the Project Applicant's consultant does not necessarily see eye-to-eye with the USFWS indicating that, without a written agreement, or HCP, there is little evidence that the USFWS knows exactly what the proposed Project entails. According to the Project Applicant, "[d]esert tortoise sign does not necessarily indicate present [sic] on the site." (March 22, 2010 Tr., p. 336.) However, according to USFWS survey guidelines "tortoise sign (burrows, scats, and carcasses) in the action area indicates desert tortoise presence and therefore requires formal consultation with USFWS." (Exh. 600, p. 18.) USFWS also stated that "[t]he presence of sign is an indication that tortoises might be present and might be using the area." (March 22, 2010 Tr., p. 376.) Therefore, the Commission has no basis to conclude whether the Project complies with LORS.

D. Staff and the Applicant Failed to Provide Substantial Evidence To Support a Finding that the Project Will Result in Less Than Significant Impacts to Western Burrowing Owl

Unlike for State and Federal threatened desert tortoise or State threatened Mohave ground squirrel, the Applicant does not dispute that the Project site provides habitat for the western burrowing owl, a State species of special concern. (Applicant O.B., p. 7.) Likewise, the FSA concluded that the Project would result in significant impacts to burrowing owls from the "permanent loss of 2,012 acres that are currently used by burrowing owls for nesting and foraging." (Exh. 500, p. 4.2-34.) However, in attempting to assure the Commission that significant impacts

are mitigated, the Applicant incorrectly argues that Staff “assumed presence” of western burrowing owl and provided mitigation. This is wildly inaccurate and misleading.

Staff did not assume presence of western burrowing owl on 2,012 acres and provide mitigation for that area. Instead, Staff agreed with the Applicant that the Project would impact two pairs of owls and required construction of four artificial burrows on 6 acres as mitigation. (Exh. 500, pp. 4.2-34, -35, -104.) To mitigate direct impacts to burrows from permanently eliminating more than 2,000 acres of habitat that is currently used by burrowing owls for nesting and foraging, the FSA allowed “acquisition and protection of 20 acres of land suitable for burrowing owls at some off-site location yet to be determined.” (Exh. 500, pp. 4.2-35, -104.)

1. Staff and the Applicant Fail to Provide Substantial Evidence to Support the FSA’s Conclusion that Only Two Burrowing Owl Pairs are on the Project Site

CURE explained that the Commission does not have sufficient evidence to conclude that only four owls are on the site. A total of 27 burrows with burrowing owl sign were identified within an area assessed for potentially significant direct and indirect impacts. (Exh. 500, p. 4.2-27.) The FSA does not explain how burrows could be active or potentially active, yet not contain an owl. (Exh. 600, p. 11.) The FSA also does not explain the basis for only mitigating impacts to two pair when indirect impacts may occur to burrowing owl up to 500 feet away. (Exh. 500, 4.2-160.) Therefore, “staff’s impact analysis should have assumed most (or all) active burrows were, and are, occupied by owls.” (Exh. 600, p. 12.)

CURE explained that at least nine burrowing owls were positively identified, and there is no evidence that any owls were identified in the same area twice. (Exh. 500, p. 4.2-27; Exh. 600, pp. 10, 11; Exh. 606; Exh. 35, Figure 11; March 22, 2010 Tr., p. 272; Exh. 7, p. 5.3-18, Table 5.3-6.) The Applicant argued that “there is no reason to assume that the individuals detected in different years during different protocol surveys were independent individuals. (Applicant O.B., p. 11.) However, **the Applicant provided no basis whatsoever to explain why individuals observed in different years at different locations on the Project site *would all be the same birds***. (Exh., 500, p. 4.2-21.) Importantly, “[b]urrowing owls exhibit strong burrow fidelity, with owls regularly reusing burrows from one year to the next.” (Exh. 600, pp. 11-12.)

2. Staff and the Applicant Failed to Provide Substantial Evidence that 26 Acres of Compensation Land Will Reduce Significant Impacts to Over 2,000 Acres of Nesting and Foraging Habitat

The FSA concluded that the Project would result in significant direct impacts to burrowing owls from the “permanent loss of 2,012 acres that are currently used by burrowing owls for nesting and foraging.” (Exh. 500, p. 4.2-34.) The FSA then states that “[h]abitat loss is one of the primary threats to California’s burrowing owl population (Gervais et al. 2008), and the BSEP project would contribute incrementally to this significant loss.” (Exh. 500, p. 4.2-34.) However, Staff concluded this “significant” loss of nesting and foraging habitat (i.e., 2,012 acres) would be off-set through the acquisition of 20 acres of suitable habitat located at “some off-site location yet to be determined.” (Exh. 500, p. 4.2-35, -104.) CURE’s

opening brief thoroughly explains that Staff provides no basis to conclude that the destruction of over 2,000 acres of nesting and foraging habitat for burrowing owls on the Project site is an impact that will be reduced to a less-than-significant level. (CURE O.B., pp. 73-80.)

CEQA prohibits agencies from approving projects “if there are feasible alternatives or feasible mitigation measures available which would substantially lessen the significant environmental effects of such projects.” (Pub. Res. Code §§ 21002, 21081.) The Commission must propose and describe mitigation measures sufficient to minimize the significant adverse environmental impacts. (Pub. Res. Code §§ 21002.1(a), 21100(b)(3).) Also, mitigation measures must be designed to minimize, reduce, or avoid an identified environmental impact or to rectify or compensate for that impact. (14 Cal. Code Reg. § 15370.)

Staff and the Applicant do not provide substantial evidence to remedy the FSA’s failure to provide an ecological basis for the conclusion that acquisition and enhancement of 20 acres will offset significant impacts from mass grading of more than 7 million cubic yards of soil and destroying over 2,012 acres of nesting and foraging habitat occupied by burrowing owls. (Exh. 500, pp. 4.2-104, 6-5; Exh. 600, p. 15.) The location of the 20 acre compensation land is not identified in order to ensure the public that the mitigation measure will actually reduce the impact. Although criteria are selected for identifying a site, no performance standards are required to ensure that the land will reduce significant impacts. (Exh. 500, p. 4.2-105.) This is clearly insufficient to ensure that impacts to the species are reduced to

less than significant. In contrast, the FSA included two goals for the 6-acre relocation parcel. However, even for this area, neither of the goals has an “ecological” relationship to the impact. (Exh. 600, pp. 14-15; Exh. 500, p. 4.2-104.)

Finally, Condition of Certification Bio-17 improperly defers preparing a Burrowing Owl Mitigation and Monitoring Plan until burrowing owls are detected within the impact area or within 500 feet of any proposed construction activities. (Exh. 338, p. Bio-10.) However, owls were already detected within 500 feet of and on the project site and related facilities in 2007 and 2008. According to the condition, “[t]his plan must include detailed measures to avoid and minimize impacts to burrowing owls in and near the construction areas and shall be consistent with CDFG guidance (CDFG 1995).” (*Id.*) However, setting forth the CEQA standard and requiring compliance with LORS in a condition of certification is not the same as ensuring that performance measures reduce the impacts to a less than significant level. The FSA’s deferral of identifying avoidance and minimization measures for significant impacts to western burrowing owl is improper under CEQA.

VIII. THE PROJECT WILL RESULT IN UNANALYZED AND UNMITIGATED SIGNIFICANT IMPACTS FROM HTF SPILLS

The Commission well knows that compliance with LORS is not the same as finding that a potentially significant impact is reduced to a less than significant level under CEQA. The Applicant’s repeated assurances – that it has “20 years of experience,” that it “knows how to handle HTF spills,” that unexplained “technological advancements” would prevent leaks, such as those that occur at the

much smaller SEGS facilities, and that the Commission is “familiar” enough with HTF that the Commission need not address the issue fail to show compliance with the law.

The claim by Staff and the Applicant that the Project will not result in unanalyzed and significant unmitigated impacts from spills of heat transfer fluid (“HTF”), or Therminol VP-1, and violations of LORS related to hazardous materials and waste management is conclusory, lacks foundation and is contrary to undisputed evidence in the record. An EIR must contain “facts and analysis, not just the bare conclusions of a public agency.” (*Santiago County Water District v. County of Orange* (1981) 118 Cal.App.3d 818, 831.)

Here, no evidence or expert analysis is provided to support the finding that HTF spills will not result in potentially significant impacts. To the contrary, CURE provided substantial evidence in this proceeding that potential spills of HTF may be much larger and different in composition than potential spills that were analyzed in the FSA, resulting in Project activities and significant unmitigated impacts both on-site and off-site to people, wildlife, and the environment from potential and likely exposure to toxic levels of contamination, none of which were analyzed in the FSA.

There is no dispute with the FSA that HTF is regulated as a hazardous material by the State due to the constituent biphenyl, an “extremely hazardous waste.” (Exh. 500, p. 4.13-9; 22 Cal. Code Reg., Chap 11, App. X, #299.) In fact, the FSA explains that a listing of a chemical in Appendix X creates a regulatory presumption that a waste containing that chemical, i.e. HTF contaminated soil, is

hazardous unless determined otherwise, pursuant to specified procedures. (Exh. 500, p. 4.13-9.) There is also no dispute that HTF poses acute and chronic health hazards (Exh. 627; Exh. 625, p. 3; Exh. 628, p. 2), toxic emissions (Exh. 500, p. 4.7-11), is highly flammable (Exh. 500, p. 4.4-8), and bio-accumulates in the environment. (Exh. 203, p. 8.) Therefore, spills of HTF may result in significant impacts to humans, wildlife and the environment.

A. Staff and the Applicant Failed to Provide Substantial Evidence To Support A Finding that the Commission Analyzed Reasonably Foreseeable Impacts and Mitigated Significant Adverse Impacts From HTF Spills

The Applicant argues that it has over 20 years of experience with HTF from the existing SEGS facilities and that it knows how to handle HTF spills. If that were the case, then one would expect that somewhere in the Application for Certification or in the thousands of pages of testimony, the Applicant would have described its process for handling wax-like HTF, such as vacuuming the HTF, filtering it in a mobile truck, and re-using the HTF at the proposed Project. However, the Applicant did not.

Because the Applicant did not describe its planned activities for handling HTF, the Applicant also did not provide the Commission with an analysis of potentially significant impacts associated with this handling process. Neither the Commission, nor the public, have been provided with any information regarding the process for handling, vacuuming, scooping, filtering or re-using or recycling wax-like solid HTF. Neither the Commission, nor the public, have been provided with any information regarding potential emissions associated with free standing HTF,

potential emissions associated with on-site filtration, constituents of vapor clouds that result from HTF spills, noxious odors associated with HTF spills, potential closure of highways, affected sensitive receptors, or other reasonably foreseeable potential risks to public health and the environment, as set forth in CURE's opening brief.

The Applicant also argues that the Commission is "familiar" with the use of HTF, as if the Commission's familiarity somehow excuses the FSA's failure to analyze reasonably foreseeable Project activities. The failure is legal error, but it is not the fault of Staff. Under Commission regulations, the Applicant has "the burden of presenting sufficient substantial evidence to support the findings and conclusions required for certification of the site and related facility." (20 Cal. Code Reg. § 1748(d).) Despite the years of familiarity, it was not until CURE set forth its independent investigation of HTF use that the Applicant, for the first time in evidentiary hearings, admitted planned activities related to handling wax-like HTF spills. The Applicant's statements at the hearing alone, without more, are not substantial evidence that these issues have been adequately analyzed and mitigated or that the Project will comply with LORS.

The Applicant also repeatedly argues – with no cites to the record – that "improvements" or "technological developments" make the proposed Project safer than the existing SEGS facilities. The Applicant provided no evidence to support this repeated claim. If they did, then Staff and CURE would have been able to evaluate whether this contention is true. But the Applicant did not. In fact, the

Applicant specifically estimated that approximately 750 cubic yards of HTF-affected soil may be treated per year at the proposed project site “based on their operation data from the SEGS facility.” (Exh. 500, p. 4.13-10.) The Applicant made no mention anywhere in its AFC or testimony that changes have been made which would reduce the volume of HTF contamination at the proposed Project. The Applicant also provided no evidence that the alleged “technological developments” are not already employed at the SEGS facilities. Without any evidentiary basis in the record to show how the Project is different from the SEGS facilities, the Applicant’s argument that somehow these impacts will not occur at the Project is meaningless.

CURE presented the Commission with substantial evidence that potentially significant impacts may occur from reasonably foreseeable HTF spills at the Project based on evidence of reported spills on the order of *thousands* of gallons of HTF and *thousands* of cubic yards of HTF-contaminated soil that have occurred at the SEGS facilities. (Exh. 612, pp. 1-2; Exh. 615; Exh. 625, p. 6; Exh. 631.) The Applicant provided no evidence to rebut that these spills are not reasonably foreseeable. The Applicant and, thus, Staff only summarily stated that it evaluated impacts from the annual treatment of an estimated 750 cubic yards of HTF-contaminated soil at the Project’s Land Treatment Unit (“LTU”) based on the Applicant’s experience and operation of the SEGS facilities. (Exh. 500, pp. 4.13-10, 4.4-8, 4.9-174.) Neither the Applicant nor Staff explain how many gallons of HTF would be spilled to reach the volume of 750 cubic yards of HTF contaminated soil.

Thus, the FSA provided no valid basis for limiting its assessment of potential impacts from undisclosed-sized spills that result in 750 cubic yards of contaminated soil. Therefore, the FSA failed to analyze potentially significant impacts from reasonably foreseeable spills.

Furthermore, Staff does not dispute that the FSA only analyzed significant impacts from HTF spilled as a liquid (Exh. 500, p. 4.4-8) even though, in attempting to address the concerns of the Lahontan Regional Water Quality Control Board, the Staff incorporated the Applicant's responses to comments, that HTF may not remain liquid when spilled and may become a "wax-like solid." (Exh. 500, p. 4.4-14.) The Applicant's opening brief also finally admitted that HTF may not only contaminate soils, as described in the FSA, but will consist of "spilled material piled atop the ground surface." (Applicant O.B., p. 40.) As CURE explained, this discrepancy is alarming in that Staff did not analyze significant impacts from HTF as a "wax-like solid" on top of the soil surface in either the Hazardous Material section or the Waste Management section of the FSA. (Exh. 500, pp. 4.4-1-18, 4.13-1-19.) Staff and the Applicant do not provide any cites to show otherwise.

Instead, Staff provides the same cite to the FSA referenced by CURE that comprises Staff's analysis of HTF spills. According to Staff, "[s]pills of HTF at BSEP would be cleaned up within 48 hours, and the contaminated soil would be placed in the staging area of the LTU and covered with plastic sheeting." (Exh. 500, p. 4.13-10; Staff O.B., p. 20.) Not only is this planned activity illegal, but this analysis fails to describe any process, or project description, related to "wax-like"

solid HTF and, thus, fails to consider significant impacts from HTF that is different in composition, or more “wax-like,” than liquid HTF, which contaminates soil.

The Applicant admitted at the evidentiary hearing that spills will result in the generation of freestanding “tar-like” hazardous waste (March 23, 2010 Tr., p. 468), which is completely unaddressed by Staff in the FSA. Not until after CURE submitted public records showing that massive volumes of spilled HTF may be recovered from the ground surface and filtered or recycled (Exh. 625, p. 5; Exh. 629) did the Applicant confirm that the Project involves vacuuming up HTF, filtering particulates out of the HTF on the Project site, and returning the HTF to a tank. (March 22, 2010 Tr., pp. 468, 479-480.) Therefore, spills of free-standing HTF would involve different environmental and public health impacts than those analyzed or mitigated in the FSA.

Although the Applicant did not admit that impacts may result in significant unanalyzed and unmitigated impacts, CURE provided substantial independently verifiable evidence that impacts may be more dangerous than impacts from only HTF-contaminated soil. Public records shows that a spill resulted in “a vapor cloud that traveled 3,500 feet south to be visible on highway 58 and resulted in the closure of that highway by the California Highway Patrol.” (March 22, 2010 Tr., p. 427; Exh. 625, p. 8; Exh. 629.) According to the spill report, numerous reports of “noxious smells” were made to the Kern County Fire Department in Boron, six miles away from the HTF spill. (Exh. 629, p. 2.) Furthermore, “spills may be so dangerous that safe access to stop the leaks is impossible...” (Exh. 332.) These

spills can result in significant adverse health and environmental impacts. (Exh. 627; Exh. 625, p. 3; Exh. 628, p. 2; Exh. 500, p. 4.7-11.) The Commission cannot find that the likely and expected and, hence, reasonably foreseeable, impacts from HTF spills have been evaluated and analyzed based on this record.

The Applicant argues that details regarding potential HTF spills are not required. The Applicant is wrong.

The FSA violates CEQA by failing to investigate and evaluate substantial evidence of significant impacts from HTF use. CEQA “contemplates serious and not superficial or pro forma consideration of the potential environmental consequences of a project.” (*Leonoff v. Monterey County Bd. of Supervisors* (1990) 222 Cal.App.3d 1337, 1347.) “[A]n agency must use its best efforts to find out and disclose all that it reasonably can.” (14 Cal. Code Regs. § 15144.) The FSA’s silence on Project activities related to HTF and on substantial evidence of potentially significant impacts from HTF is glaring.

Furthermore, Staff and the Applicant’s underlying assumption that it need not explain its proposed activities related to anticipated HTF spills under CEQA has no legal basis. No CEQA case law, statute or guideline has ever identified the use of HTF, the cleanup of HTF, vacuuming of HTF, onsite filtering of HTF, or staging of HTF as being exempt from CEQA review. Far from being outside the scope of CEQA, planned activities involving HTF use go to the very heart of CEQA review. The purpose of CEQA is to ensure reasonable alternatives and measures are considered to prevent potential impacts, thus ensuring that projects with known

and anticipated HTF-related activities are not approved without appropriate mitigation. (14 Cal. Code Regs. §§ 15002(a)(2)-(3) and (h), 15126.6(b).) As conceded in the FSA, HTF spills will occur. This is thus a foreseeable risk that must be evaluated and, if feasible, mitigated.

The FSA's failure to provide a serious and meaningful evaluation of the potential significant impacts and consistency with LORS for Project activities related to HTF spills violated CEQA's investigatory and informational requirements. Furthermore, the Applicant's argument that HTF spills at the facilities operated by the Applicant do not present evidence of potentially significant impacts is conclusory and not supported by any evidence.

B. Staff and the Applicant Failed to Provide Substantial Evidence to Support A Finding That HTF "Plans" and Compliance With LORS Will Reduce Impacts to a Less Than Significant Level

The Applicant and Staff argue that a Spill Prevention Control Countermeasure Plan ("SPCC") will address procedures to prevent discharges of free standing HTF from reaching navigable waters. (Applicant O.B., p. 38.) This argument is just a diversion, since the FSA states that no navigable waters exist in the Project area. (Exh. 500, p. 4.2-144.) More importantly, the SPCC plan has not been prepared and reviewed by the Commission to determine if it would actually mitigate potentially significant impacts. Similarly, the Project documents, including the Report of Waste Discharge, did not describe or include provisions for handling spilled free-standing HTF. (Exh. 203.) Neither the Applicant nor Staff cite to any other analysis or mitigation for free-standing HTF.

Furthermore, Staff and the Applicant's arguments lack substantial evidence for their conclusion that compliance with other plans, laws or regulations would address significant impacts from HTF spills. Consistency with goals, policies, guidelines and other regulations is not a valid basis for finding that a potential impact from HTF spills is not significant. CEQA requires that the impacts of a project be measured against the "real conditions on the ground." (*Save Our Peninsula Committee v. Monterey County Board of Supervisors* (2001) 87 Cal.App.4th 99, 121; 14 Cal. Code Regs. § 15064(d).) Numerous cases have rejected environmental impact reports that compare a project under review to what is allowed under current regulations and policies rather than to the existing physical environment. (See, e.g., *Communities for a Better Environment v. South Coast Air Quality Management District* (March 15, 2010) 48 Cal.4th 310, 316; *Environmental Planning & Information Council of Western El Dorado County v. County of El Dorado* (1982) 131 Cal.App.3d 350; *Christward Ministry v. Superior Court* (1986) 184 Cal.App.3d 180; *City of Carmel-By-The-Sea v. Board of Supervisors* (1986) 183 Cal.App.3d 229.) Without substantial evidence that regulations will, in fact, reduce the risks from HTF spills to a less than significant impact, the FSA may not rely upon these regulations to avoid evaluation of this potential impact. (See *Californians for Alternatives to Toxics v. Department of Food and Agriculture* (2005) 136 Cal.App.4th 1, 17.)

Furthermore, Staff and the Applicant repeatedly cite mitigation measures that are vague or so undefined that it is impossible to evaluate their effectiveness.

(See *San Franciscans for Reasonable Growth v. City & County of San Francisco* (1984) 151 Cal.App.3d 61, 79.) According to Haz-7, the project owner shall place an adequate number of isolation valves in the HTF pipe loops so as to be able to isolate a solar panel loop in the event of a leak. (Exh. 500, p. 4.4-18.) The FSA's reliance on unknown and vague "isolation valves" is speculative and is not supported by substantial evidence that this measure will mitigate significant impacts.

The FSA's reliance on a vague condition to include an adequate number of isolation valves also lacks substantial evidence because there is no way to ensure that the placement of isolation valves would reduce a significant impact. The Applicant's own witness testified that it does not know how much HTF is between two valves. (March 22, 2010 Tr., p. 478.) Hazardous Materials Staff incorrectly analyzed 1.3 million gallons of HTF used by the Project, even though approximately 2.4 million gallons of HTF will be utilized at any one time. (Exh. 500, pp. 4.4-8, 4.9-174; March 22, 2010 Tr., p. 502.) A public agency may not rely on mitigation measures of uncertain efficacy or feasibility. (*Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 728.) Because there is no way to know how much HTF will be contained with the placement of an unknown number of isolation valves at unknown locations along the HTF pipeline, the effectiveness of Haz-7 is virtually impossible to determine for even the most conscientious decisionmakers. Accordingly, the FSA's reliance upon placing an adequate number of isolation valves is not supported by substantial evidence.

Finally, the Commission cannot accept Staff and the Applicant's approach of

“Don’t Ask, Don’t Tell” for the management of hazardous waste. As explained fully in CURE’s opening brief, Condition of Certification Waste-7 for the handling of HTF contaminated soil fails to mitigate significant impacts from HTF spills and violate LORS. Specifically, the staging area of the Project’s LTU does *not* meet the requirements for a temporary staging area under Section 25123.3(a)(2) of the Health and Safety Code. The hazardous waste being accumulated 1) contains free liquids, and 2) is not “accumulated on an impermeable surface, such as high density polyethylene (HDPE) of at least 20 mills that is supported by a foundation, or high density polyethylene of at least 60 mills that is not supported by a foundation.” This is a direct violation of LORS.

Waste-7 contains inconsistent directives and permits the Applicant to stage large volumes of contaminated soil in violation of Section 25123.3 of the California Health and Safety Code. According to Waste-7, for discharges into the LTU, the project owner shall comply with the Waste Discharge Requirements contained within Appendix E, F, and H in the Soil & Water Resources section of the FSA. (Exh. 500, p. 4.13-17.)

Appendix H states that “[t]he June 2009 ROWD [Report of Waste Discharge] outlines the procedure for removing contaminated soils from the facility and temporarily staging the soils within the Land Treatment Unit for hazardous waste testing.” (Exh. 500, p. 4.9-210.) However, the ROWD’s procedure is removing contaminated soils and temporarily staging the soils in the LTU. (Exh. 500, p. 4.4-8.; Exh. 612, p. 7.) Since the hazardous waste being accumulated contains free

liquid, the LTU does not comply with the requirements for temporary waste staging. (Health and Safety Code § 25123.3(a)(2).)

Additionally, “[t]he LTU will not incorporate a liner containment system or LCRS, but will be constructed with a prepared base consisting of 2 feet of compacted, low permeability, lime-treated material.” (Exh. 500, p. 4.9-173.) A low permeability surface is not the same as an impermeable surface. (March 22, 2010 Tr., p. 438.) Since the hazardous waste is not being accumulated on an impermeable surface in the LTU (which uses a clay semi-permeable layer), the LTU does not comply with the requirements for temporary waste staging. (Health and Safety Code § 25123.3(a)(2).)

As conditioned, the FSA allows HTF contaminated soils to be placed in the LTU without testing and later found to exceed hazardous waste levels, thereby resulting in improper staging of hazardous waste. This violates California hazardous waste regulations.

C. The Applicant Failed To Meet Its Burden

The Applicant “shall have the burden of presenting sufficient substantial evidence to support the findings and conclusions required for certification of the site and related facility.” (20 Cal. Code Reg. § 1748(d).) Here, they did not meet that burden. Commission Staff must review the application, assess the environmental impacts and determine whether mitigation is required, and set forth this analysis in a report written to inform the public and the Commission of the project’s environmental consequences. (20 Cal. Code Reg. §§ 1744(b), 1742.5(a)-(b).) Staff’s

analysis must reflect the “independent judgment” of the Commission. (14 Cal. Code Regs. § 15084(e).)

Once substantial evidence of a potential impact is presented to the lead agency, the burden shifts to the agency to investigate the potential significance of the impact. (*Napa Citizens, supra* 91 Cal.App.4th at 385 (EIR inadequate for failing to investigate substantial evidence of Project’s potential to impact protected species).) The Applicant has not met its burden to provide sufficient evidence that the Project will not result in potentially significant impacts and compliance with LORS.

In the case at hand, the Commission had in its possession substantial evidence that HTF can have significant public health and environmental impacts and HTF spills are expected. The failure to provide enough information to permit informed decisionmaking is fatal. (*Napa Citizens for Honest Government v. Napa County Board of Supervisors* (“*Napa Citizens*”) (2001) 91 Cal.App.4th 342, 361).

IX. TRANSMISSION SYSTEM ENGINEERING MEASURES ARE FEASIBLE TO PROTECT THE PEOPLE OF THE STATE

Given the uncertainty regarding the delivery of the Project’s full 250 MW output, CURE recommended a condition of certification that the Project owner be required to submit a copy of a signed large generator interconnection agreement prior to the start of power plant construction, that the interconnection agreement must allow for delivery of the full 250 MW of Project generation at all times when the Owens Gorge – Rinaldi line and Barren Ridge switching stations are in service (i.e., under N-0 conditions), and that the interconnection agreement must not be

based on Los Angeles Department of Water and Power (“LADWP”) sacrificing some of its own generating capacity to make room for the Project’s generation. (Exh. 616, p. 3.)

CURE called for clarification of the ambiguity about the Barren Ridge-Rinaldi line rating, and was right to do so. A clarifying e-mail from LADWP to Staff shows that the correct number for the line rating is 459 MW, with a possible future upgrade to 530 MW (Exh. 638), not the 571 MW claimed by Applicant in their rebuttal testimony (Ex. 334), and not the 571 MW used in the System Impact Study (“SIS”) (Exh. 616). Thus, the Commission cannot rely upon the SIS to conclude that the Project will not cause overloads of the Barren Ridge-Rinaldi line. CURE therefore reiterates its proposal that Condition of Certification TSE-5 be amended to require that the actual interconnection agreement be signed before construction can start. CURE’s proposed condition would guarantee that California ratepayers would not be paying for a 250 MW Project, with no assurance of getting the full 250 MW.

CURE also pointed out that, in the absence of LADWP’s Barren Ridge Renewable Transmission Project (“BRRTP”), the SIS left the door open for curtailment of LADWP’s own hydro generation to make room for the Project’s generation. CURE proposed that the Commission amend TSE-5 to require the Project interconnection agreement to not allow such a scenario. LADWP apparently agrees, since the clarifying e-mail from LADWP says that the current interconnection study contemplates a condition under which the Project’s

generation would be subject to curtailment during the period prior to BRRTP operation. (Exh. 638.) CURE therefore reiterates its proposal that TSE-5 be amended to require that the interconnection agreement make clear that the Project's generation will be subject to curtailment as needed prior to BRRTP operation if required to avoid Barren Ridge-Rinaldi overloads, as suggested by the LADWP e-mail.

CURE also suggested that TSE-5 be amended to require that Project construction be conditional on an interconnection agreement under which the Project would not be subject to curtailment under N-0 conditions. The clarification letter from LADWP does not indicate whether the triggering conditions for the proposed Remedial Action Scheme ("RAS") could occur under N-0 conditions. If the RAS could be triggered under N-0 conditions, that means California ratepayers would be paying for 250 MW of Beacon output, with no assurance of getting the full 250 MW even under N-0 conditions (CURE accepts that curtailment below 250 MW could and would occur under certain N-1 conditions, and would be implemented by the RAS discussed in the LADWP clarifying e-mail).

Therefore, CURE reiterates its position that TSE-5 should forbid construction until an interconnection is available under which all the Project's 250 MW of generation can be delivered when all transmission lines are in service (i.e., under N-0 conditions). That condition would certainly be met once the BRRTP is built, and may well be met even with the RAS currently contemplated by LADWP.

In its response, the Applicant admitted that even if LADWP needs to use a special protection scheme (“SPS”) to address overload and reduce the Project’s generation, “LADWP is getting an additional 180 MW of renewable generation to meet LADWP’s daily peak.” (Applicant O.B., p. 44.) However, the Applicant incorrectly implies that there is a contract between the Applicant and LADWP. While the point of injection of power into the grid would be at an LADWP-owned switching station, there is nothing in the record showing that the ultimate purchaser to whom the delivery would be made would be LADWP. Indeed, there is no record that the Project has any purchaser under contract for its generation.

X. THE PROJECT’S UNAVOIDABLE SIGNIFICANT ADVERSE VISUAL IMPACTS DO NOT OUTWEIGH THE PROJECT’S BENEFITS

The Applicant admits that its economic benefits are not substantial. (Applicant O.B., p. 3.) Instead, it argues that the Commission should base its statement of overriding considerations for unavoidable significant adverse aesthetic impacts “primarily on environmental, rather than economic, benefits.” (*Id.*) To do so, the Commission would have to conclude that its environmental benefits “outweigh the unavoidable significant adverse environmental effects” caused by the Project. (20. Cal. Code Reg. § 1755(d).) However, the Commission cannot.

XI. CONCLUSION

The Commission has an opportunity to approve a 250 MW solar power plant if it requires analysis and mitigation befitting the Commission’s history and obligations. The Commission can approve the Project if it requires dry cooling for power plant cooling, requires performance standards to measure replication of

wildlife habitat and movement in Pine Tree Creek, requires compensation land at a 3 to 1 ratio to replace 429.5 acres of destroyed habitat for desert tortoise, Mohave ground squirrel, and western burrowing owl, evaluates and mitigates, as required, unanalyzed impacts from spills, requires impermeable lining of the land treatment unit staging area, and requires an interconnection agreement prior to construction of the Project.

Dated: May 3, 2010

Respectfully Submitted,

_____/s/_____

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Energy Resources Conservation
and Development Commission

In the Matter of:

The Application for Certification for the
BEACON SOLAR ENERGY PROJECT

Docket No. 08-AFC-2

PROOF OF SERVICE

I, Bonnie Heeley, declare that on May 3, 2010 I served and filed copies of the attached **REPLY BRIEF OF CALIFORNIA UNIONS FOR RELIABLE ENERGY**. The original document, filed with the Docket Unit, is accompanied by a copy of the most recent Proof of Service list, located on the web page for this project at www.energy.ca.gov/sitingcases/beacon. The document has been sent to both the other parties in this proceeding as shown on the Proof of Service list and to the Commission's Docket Unit via email and by U.S. Mail with first-class postage thereon, fully prepaid and addressed as provided on the Proof of Service list to those addresses NOT marked "email preferred." An original paper copy and one electronic copy, mailed and emailed respectively, was sent to the Docket Office.

I declare under penalty of perjury that the foregoing is true and correct. Executed at South San Francisco, CA on May 3, 2010.

_____/s/_____
Bonnie Heeley

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