

CALIFORNIA ENVIRONMENTAL LAW PROJECT
A Non-Profit Legal Corporation



Of Counsel

Laurens H. Silver, Esq.
P. O. Box 667
Mill Valley, CA 94942
Phone 415 515-5688
Facsimile: 510 237-6598

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Electronic Transmission
mkelley@co.imperial.ca.us
U.S. Mail

Imperial County Board of Supervisors
Chairman of the Board
Michael E. Kelley
940 Main Street
EL Centro, CA 92243

County Clerk of Imperial County
940 West Main Street, Suite 202
El Centro, CA 92243

Re: Ocotillo Wind Energy Facility – Appeal of Planning Commission Approval of Conditional Use Permit, Variance, FEIR, Adoption of Findings and Certification of FEIR.

Dear Chairman Kelley:

This appeal is on behalf of Desert Protective Council and the Center for Biological Diversity. DPC and CBD urge the Board to grant this appeal by setting aside the Conditional Use Permit and Variance for the Project and setting aside the certification of the FEIR. Because the Findings and Statement of Overriding Considerations are, in key instances, not based on substantial evidence, or otherwise incorrect as a matter of law, the Findings and Statement must be set aside as well.

I. The Planning Commission Has No Authority to Issue a Conditional Use Permit for This Project Because It Is Not Permitted in G/S Zones.

The FEIR, at Figure 3.6-3b, shows that the Project is zoned G/S. Chapter 20 of Title 9 (Land Use Code), Division 5 (Zoning Areas), specifies the permitted uses in that zone. Section 90520.00 (Purpose) states:

The purpose of the G/S zone is to designate areas that allow for the construction, development and operation of governmental facilities and special public facilities, primarily this zone allows for all types of government owned and/or government operated facilities, be [sic] the[y] office or other uses. It also allows

for special public uses, such as security facilities, jails, solid and/or hazardous waste facilities, and other similar special public benefit uses.

Section §90520.01 sets forth permitted uses in the G/S zone. These are all uses “intended to be owned and/or operated by a public agency...” Section 90520.02 sets forth “Uses Permitted With a Conditional Use Permit.”

- Communication Towers: including radio, television, cellular, digital, along with the necessary support equipment such as receivers, transmitters, antennas, satellite dishes, relays, etc. (subject to requirements of this zone and Division 24; Section 92401 “Communications Facilities Ordinance” et al).
- Hazardous materials disposal
- Hazardous materials processing
- Hazardous materials recycling
- Hazardous materials treating
- Solid waste landfill facility
- Water treatment facility

Section §90520.03 (Prohibited Uses) states:

All other uses not permitted by Section 90520.01 of this Division are prohibited in the G/S zone.

Finally, Section 90520.12 (Reversion If Privatized) makes it clear that the privately owned OWEC project is not permitted under the G/S zoning designation:

In the event a parcel that is zoned G/S by virtue of the fact that it is under public ownership is sold or otherwise privatized, the zone of the parcel shall be automatically changed to that of S-2.

Any privately owned G/S facility shall only be allowed to operate the business or facility in existence at time of adoption of this Ordinance. Any change in use shall first require a change of zone.

The Planning Commission has no authority, under existing County Zoning Ordinances, to issue a Conditional Use Permit for this Project, which is a private wind energy generation facility. Planning Staff agrees. In its Supplemental Staff Report presented to the Planning Commission prior to the hearings, Staff stated:

“The property is zoned G/SP. Wind facilities are not set out as a permitted use in that zone or as a use allowed with a CUP.” (Supplemental Staff Report at 2).

It appears Planning Staff’s opinion was totally ignored.

II. The Project is Not Exempted From Compliance With Applicable Zoning Pursuant to Planning Code §902.03.10.

The Planning Staff Supplemental Staff Report reads:

The BLM property is zoned G/SP. Wind facilities are not set out as a permitted use in that zone or as a use allowed with a CUP. However, under the similarity of use doctrine utilized by the County and Planning Commission, once a use has been found to be similar by this Commission, it must be listed as a use under that zone by the Planning Staff and may be used by other applicants. In this case, in considering the Tessera project, the Planning Commission previously found that facilities for the generation of power are an allowed use in the G/SP zone with a CUP. (See Imperial County Code Section 90203.10; Planning and Development Services Staff Report to Planning Commission dated September 23, 2009 regarding approval of CUP 09-0011).

Staff Report at p.2

§90203.10, cited by Staff, contemplates that an applicant may make written application for a determination of “similar” use. Section 90203.10 provides that “when an applicant proposes a use that is not specifically authorized or listed as a use or conditional use in a specific zone, he/she may apply for a determination of similar use to the Planning Commission.”

There is no evidence in this record that the applicant has made any such application in writing. Nor did the Notice of Hearing for the Planning Commission hearing give any indication that the Planning Commission would be hearing a “similar use” application. Even if such notice had been given, Section §90203.10B prohibits hearing a request for “similar use” consideration from being heard concurrently with the hearing for allowing the use.

There is no evidence the Planning Commission made a “similar use” determination. If it did, the Planning Commission exceeded its authority under §90203.10, and its action was *ultra vires*, since it did not hold the required two noticed hearings.

Had appellants been notified that a “similar use” application was being considered they would have demonstrated that the wind energy facility was not of “the same basic nature as an identified use or a conditional use in that zone, that the proposed use does not include activities, equipment, or materials typically employed in the identified use, that the proposed use does not have equal or less impacts on the traffic noise, dust, odor, vibration and appearance than the identified listed use, and that the proposed use would produce impacts that could not be mitigated through conditions (e.g. noise impacts). See §90203.10 (C) (Similar use criteria).

The Supplemental Staff report suggests that the Tessora project is the comparable “identified listed use” that the Planning Commission found previously to be an allowed use (“a facility for the generation of power”) in a G/SP Zone with a CUP. §90203.10 D requires that the identified use be a “listed use in the zone.” (emphasis added) A facility for “generation of power” is not a “listed use” in the G/SP zone, within the meaning of the Ordinance.

II. The OWEF Project Is Not Consistent With ONCAP Or Other Elements of the Imperial County General Plan.

A conditional use permit must be consistent with the County General Plan. *Neighborhood Acton Group v. City of Calaveras* 156 Cal.App.3d 1176, 1187 (1984); *City of Carmel-by-the-Sea v. Board of Supervisors*, 137 Cal.App.3d 964, 992 (1982). The ONCAP maps show that the BLM lands on which OWEF is sited are part of the ONCAP Plan Area.

The ONCAP recites:

“The intent of Imperial County in preparing the Ocotillo-NoMirage Community Area Plan is to maintain and protect the existing rural characteristic of the area and to preserve its natural resources.” (ONCAP at p.5)

The Goals and Objectives are:

Towns and Communities

- Goal 1: Preserve and enhance the distinct character of the Ocotillo/Nomirage Community Area.
- Objective 1.1 Preserve and enhance the townsite of Ocotillo and community of Nomirage.
- Objective 1.2 Encourage distinctive community identities.
- Objective 1.3 Maintain and require compatible land uses with the Ocotillo/Nomirage Community Area.
- Objective 1.4 Prohibit the establishment of non-residential uses in predominantly residential neighborhoods and require effective buffers when appropriate non-residential uses are proposed.

Economic Growth

- Goal 2: Provide employment and economic opportunities in the Ocotillo/Nomirage Community Area to serve the needs of area residents while preserving the unique character of the area.
- Objective 2.1 Provide adequate space and land use classifications to meet current and projected economic needs for commercial development.
- Objective 2.2 Encourage the development of neighborhood commercial land uses in areas currently designated and zoned C-1 and C-2.
- Objective 2.3 Prohibit the rezoning of additional land for C-2, General Commercial.
- Objective 2.4 Encourage the development of tourist-oriented commercial land uses that are compatible with existing adjacent land uses.

Industrial Development

- Goal 4: Limit the expansion of industrial development within the Ocotillo/Nomirage Community Area.

- Objective 4.1 Discourage the rezoning of additional land to M-1, Light Manufacturing unless the proposal meets all development standards.
- Objective 4.2 Prohibit the rezoning of land to M-2, Heavy Manufacturing.
- Objective 4.3 Existing industrial land uses will be monitored to ensure land uses do not pose an environmental threat and/or cause a contamination of groundwater.

Protection of Environmental Resources

- Goal 5: Preserve significant natural, cultural, and community character resources, air quality and water quality.
- Objective 5.1 Preserve as open space those lands containing watersheds, aquifer recharge areas, floodplains, important natural resources, sensitive vegetation, wildlife habitats, historic and prehistoric sites, or lands which are subject to seismic hazards.
- Objective 5.2 Reduce and prevent risk and damage from flood hazards by appropriate regulation.
(Plan at 12-15)

The Plan recites that “in order to define a clear distribution of development and preservation, the following categories have been established:

...(a) Open Space” (Plan at 17)

The Plan establishes “Open Space/Recreation Standards”:

“Open Space land uses consist of environmentally sensitive areas, fault zones, floodways, and parks. Only passive recreational uses are allowed.”

(Plan at 19)

ONCAP also states:

“The Open Space Designation will be applied to all lands...under the administration of [BLM]. Except for limited mining activities and utility corridors, most private enterprises or land uses are not allowed in this classification.”

(Plan at 25)

The Ocotillo Nomirage Community Area Plan shows all the government lands surrounding Ocotillo area as Open Space. The ONCAP map does give the land use designations for the entire planning area (including a 160 acre subdivision located in an inholding within the Yuha Desert ACEC). All surrounding BLM lands are depicted in the ONCAP map as Open Space.

Although the ONCAP Open Space text mentions utility corridors, there is absolutely no mention of privately owned industrial scale energy operations such as industrial scale wind turbines. Indeed, as spelled out above, the ONCAP Open Space text specifically states that most private enterprises or land uses are not allowed in this (land use or zoning) classification.

The Open Space/Recreation Standards for the Community Plan areas of the Land Use Element of the General Plan state that:

Open space land uses within this category consist of environmentally sensitive areas, fault zones, flood ways and flood plains. Recreational land uses within this category are limited to recreational vehicle parks and uses, which consist primarily of outdoor facilities such as parks, athletic fields, golf courses, and swim and tennis clubs. Other more intensive commercial recreation uses may be allowed pursuant to an approved Master Plan for the overall Community Area where adequate public infrastructure exists. Due to potential groundwater overdraft conditions, only passive recreation uses are allowed in the Ocotillo-Coyote Wells groundwater basin. (Land Use Element, p. 52).

Government/Special Purpose

This designation indicates lands generally owned by public agencies which are presently, and for the foreseeable future, used for a specific governmental purpose. This designation includes military bases, schools or school related facilities and public parkland and may also be applied to airports, sewer and water facilities, cemeteries, and other public utilities and facilities. (Land Use Element, p. 53)

Under the Land Use Element discussion of Special Purpose Facilities it states that other uses permitted may include: “facilities operated by public agencies or public utilities”. (Land Use Element p. 59).

Under the Land Use Element and ONCAP there is no provision for the County to legally approve the requested CUP for the privately owned, non-government operated industrial wind turbine project. The OWEF “use” authorized under the Conditional Use Permit is not consistent with the County General Plan.

Even if the “Geothermal/Alternative Energy and Transmission” Element were to be interpreted as authorizing private industrial scale wind energy projects, the public lands managed by BLM in SW Imperial County are designated as Open Space and some are also designated (and zoned) as G/SP. The text of the Land Use Element appears to preclude such private energy development projects with or without a conditional Use Permit in zones S-12, S-2, and G/SP as noted previously.

Because the proposed OWEF is located within the ONCAP, which is a community area Plan of the Land Use Element of the General Plan, any reading of the Geothermal element that is contrary to the ONCAP means that the elements of the General Plan are internally inconsistent. However, the text of ONCAP resolves any inconsistency.

Under “Relationship to the General Plan” it is stated:

“The [ONCAP] shall be consistent with the Imperial County General Plan.”
(ONCAP Plan at p.16).

III. The Variance Granted by the Planning Commission for OWEF Is Invalid. The Planning Commission Has No Power to Grant a Variance. A Variance Cannot Be Granted “To Authorize Land Uses Other Than Those Specified or Allowed Under the Specific Land Use Categories Identified In Title 9.

As demonstrated, supra, the OWEF use is not consistent with applicable County zoning ordinances, and not consistent with the County General Plan. The CUP was not issued lawfully, as the Planning Commission had no authority to approve it. §90202.02 provides that “the variance procedure shall not be used... to authorize land uses other than those specified or allowed under the specific land use categories identified in this Title.” The Planning Commission acted unlawfully, in contravention of §90202.02 when it approved a “height” variance for the project, with respect to its wind turbines. A variance cannot be used to facilitate a use (wind energy generation) not permitted under applicable zoning.

§90202.01 defines a variance as an approval “to construct a structure not otherwise directly allowed by the exact interpretation of Title 9, Divisions 1-8.” The section provides also that a variance “allows for minimal deviation from the standards.” (emphasis added). Pursuant to §90202.08(A) approval of a variance may be granted only if the Director/Commission/Board of Supervisors first determines that the variance satisfies the criteria set forth in Govt. Code §65906. Govt. Code §65906 provides that:

“A variance shall not be granted for a parcel of property, which authorizes a use or activity which is not otherwise expressly authorized by the zone regulation governing the parcel of property.”

In any event, considered on the merits, the 450 feet tall wind turbines in OWEF are not comparable to communication towers. The grant of a variance is not consistent with the height limit in Zone S-1, because the proposed wind turbine is not a communication tower.

90518.07 HEIGHT LIMIT

Buildings or structures in the S-1 zone shall not exceed 35 feet, except for communication towers, which are 100 feet..

The same is true for Open Space Zone , Zone S-2 which gives the same height limit:

90519.07 HEIGHT LIMIT

Maximum height limit in the S-2 zone shall be 40 feet, except for communication towers which are 100 feet

Similarly the Government/Special Public G/S Zone mentions no towers other than communication towers:

90520.07 HEIGHT LIMIT

Buildings or structures in the G/S zone shall not exceed six (6) stories or 80 feet, except communication towers which are 100 feet

Contrary to the Land Use Analysis of the Staff Report at p. 4, none of the Open Space zones nor the G/S zone have any height limit “for WTGs”. A wind turbine is not remotely similar to a

communication tower. A variance cannot be granted for wind turbines when the height limits of the applicable zoning ordinances apply only to communication towers.

IV. The OWFC FEIR, With Respect to “Noise,” Is Inadequate As An Informational Document, In That It Omits Essential Information, Fails To Include Data Gathered to Establish Ambient Noise Levels, Fails to Disclose Limitations of the Models Used, and Makes Conclusions Concerning Ambient Noise and Noise Generated By the Project That Are Lacking In Foundation In the Document. Relevant Information Is Not Disclosed.

A. The FEIR Does Not Use Proper Methods To Establish The Noise Level of the Project When Operated.

The Noise Pollution Clearinghouse report concludes that the FEIR modeling of wind turbine noise is flawed, and that the FEIR as a result underestimates future noise levels. Given the inadequacies of the model, it is impossible to determine if the criteria of significance of the Noise Element (an increase of 5dBA CNEL) has been violated. In this regard, *inter alia*, the FEIR fails as an informational document.

The NPC Report finds:

The FEIR modeling uses software that is based on the international standard ISO 9613. This standard is not appropriate for use with overhead sources such as wind turbines. Computer models specifically designed for wind turbines predict higher noise levels than the ISO based models.

Moreover, the ISO standard describes a 3 dBA margin of error in its accuracy. That error has not been applied in the modeling. If the error were applied, the 43.1 dBA level for Alternative 1 would be 46.1 dBA. It would violate the Noise Element and Noise Ordinance property line limits.

Also, the noise modeling did not consider worst case weather conditions. The FEIR modeled 5, 10, 40, and 50% humidity levels. Weather data indicates that the 50% levels are often exceeded, particularly in the nighttime during the winter. Temperatures below what were modeled also occur. This is a key omission, because warm, dry air absorbs far more acoustical energy than does more humid air. If higher humidity levels were modeled, the noise levels would be several decibels higher.

The result of these three issues is that the expected noise levels of the project were significantly understated. Therefore, they cannot be used to judge compliance with the Imperial County Noise Element or Noise Ordinance.

Pub. Res. Code §21005(a) provides:

“The Legislature finds and declares that noncompliance with the information disclosure provisions of this division, which precludes relevant information from being presented to the public agency, or non-compliance with the substantive requirements of this division, may constitute a prejudicial abuse of discretion within the meaning of Sections 21168 and 21168.5, regardless of whether a different outcome would have resulted if the public agency had complied with these provisions.”

Guideline §15247 requires that the “information contained in an EIR shall include summarized technical detail...and similar relevant information sufficient to permit full assessment of significant environmental impacts by reviewing agencies and members of the public.”

In *Association of Irrigated Residents v. County of Madera* (2003) 107 Cal.App.4th 1383 the Court stressed the importance of the public information requirements of CEQA:

“An EIR is an educational tool not just for the decisionmaker, but for the public as well. It is a document of accountability, "an `environmental "alarm bell" whose purpose it is to alert the public and its responsible officials to environmental changes before they have reached ecological points of no return."... It is for this reason that CEQA's investigatory and disclosure requirements must be carefully guarded. "If CEQA is scrupulously followed, the public will know the basis on which its responsible officials either approve or reject environmentally significant action, and the public, being duly informed, can respond accordingly to action with which it disagrees. (Citations.)”

107 Cal.App.4th at 1392.

In *BCLC v. City of Bakersfield*, 124 Cal.App.4th 1184, 1198, the court stated that the substantial evidence standard is applied to conclusions, findings and determinations, and also applies to the methodology used for studying an impact and the reliability or accuracy of the data upon which the EIR relied because these types of challenges involve factual questions, citing *Federation of Hillside and Canyon Associations v. City of Los Angeles* (2000) 83 Cal.App.4th 1252.

If, however, a conclusion that the noise impact of a project is not significant lacks foundation because the methodology of determining the noise output of the project is not appropriate, and it is impossible to assess the reliability of the data upon which the EIR is based, either the substantial evidence standard is not satisfied, or there has been a prejudicial abuse of discretion because of violation of Guideline §§15147 and §15125(a).¹

As the *BCLC* Court stated:

“The EIR must contain facts and analysis, not just the bare conclusions of the agency.” [Citation.] “An EIR must include detail sufficient to enable those who did not participate in its preparation to understand and to consider meaningfully the issues raised by the proposed project.” (*Irrigated Residents*, *supra*, 107 Cal.App.4th at p. 1390.) ... Failure to comply with the information disclosure requirements constitutes a prejudicial abuse of discretion when the omission of

¹ A reviewing court is not to “uncritically rely on every study or analysis presented by a project proponent in support of its position. A clearly inadequate or unsupported study or analysis is entitled to no judicial deference.” *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 409 (fn. 12).

relevant information has precluded informed decision making and informed public participation, regardless whether a different outcome would have resulted if the public agency had complied with the disclosure requirements. (*Dry Creek*, supra, 70 Cal.App.4th at p. 26; *Irrigated Residents*, supra.”

124 Cal.App.4th at 1198 (emphasis added).

B. CEQA Guideline 15125(a) Requires A Description of The Actual Ambient Noise Levels Existing at the Project Boundary As They Exist At the Time Environmental Analysis is Commenced. This Was Not Done.

Another serious flaw pointed out by NPC is that the FEIR background noise monitoring was insufficient to accurately describe the existing environment or analyze the impact of the project when considered in light of the ambient noise levels.

As discussed in the Noise Pollution Clearinghouse (NPC) report, there is no adequate or appropriately calculated environmental baseline for ambient noise at the project boundary adjacent to the rural community of Ocotillo and at the Anzo Borrego State Park boundary. What is involved here is a question of compliance with a substantive CEQA requirement. Use of an incorrect baseline for assessing the impacts of a proposed project is generally treated as a prejudicial abuse of discretion. See *Sunnyvale West Neighborhood Association v. City of Sunnyvale* (2010) 190 Cal.App.4th 1351, 1386. In *Sunnyvale*, the Court explained:

“The implementing CEQA Guidelines state with regard to an EIR's description of a proposed project's environmental setting: "An EIR must include a description of the physical environmental conditions in the vicinity of the project, as they exist at the time the notice of preparation is published, or if no notice of preparation is published, at the time environmental analysis is commenced, from both a local and regional perspective. This environmental setting will normally constitute the baseline physical conditions by which a lead agency determines whether an impact is significant." (CEQA Guideline, § 15125, subd. (a), italics added.)

Case law makes clear that "[a]n EIR must focus on impacts to the existing environment, not hypothetical situations.” (See *City of Carmel-by-the-Sea v. Board of Supervisors* (1986) 183 Cal.App.3d 229, 246-247; *Environmental Planning & Information Council v. County of El Dorado* (1982) 131 Cal.App.3d 350, 352-355) (*County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, 955) "It is only against this baseline that any significant environmental effects can be determined. (Guidelines, §§ 15125, 15126.2, subd. (a).)" (Id. at p. 952.)

Recently, in *Communities for a Better Environment v. South Coast Air Quality Management Dist.* (2010) 48 Cal.4th 310, the Supreme Court concluded that the South Coast Air Quality Management District abused its discretion in evaluating a petroleum refinery project proposed by Conoco Phillips Company by using a "baseline" of the maximum operating capacity of the equipment under existing permits. (Id. at p. 316.)

The Supreme Court explained: "An approach using hypothetical allowable conditions as the baseline results in 'illusory' comparisons that 'can only mislead the public as to the reality of the impacts and subvert full consideration of the actual

environmental impacts,' a result at direct odds with CEQA's intent. [Citations omitted].” 190 Cal.App.4th at 1372-1375.

Although the Noise Element sets forth a threshold of significance (p.25), the FEIR did not determine that the noise levels on adjoining properties would not increase by more than 5 dBA CNEL. No such analysis was undertaken, nor could have been, since no projected CNEL levels were modeled. See Guidelines §15064.7(a). The FEIR relies on hypothetical estimates for background noise levels, even though some daytime ambient noise measurements were taken at four locations.

C. The NPC study also found that there are no proposed mitigation measures to address identified significant impacts.

An EIR shall describe feasible measures which could minimize significant adverse impacts. Guidelines 15126.4(a). Despite finding, inter alia, that ambient sound levels would double at night in the surrounding area and that sleep could be affected, there was no mitigation set forth in the Mitigation and Monitoring Program for sound produced during operation of the turbines. Instead, the Statement of Overriding Considerations recites that all feasible mitigation measures relating to sound have been considered and required. This statement is patently false, and lacking any foundation in the record.

In fact, the Planning Commission made no attempt whatsoever to impose feasible mitigation measures. It did just the opposite, allowing the Project to exceed County standards. The Conditional Use Permit, as approved, provides:

“During operation of the facility, the maximum permitted continuous sound level shall not be more than 70dB Leq., as measured at the nearest residence using the “A” scale and measured with a sound level meter and associated octave band analyzer. The level may be exceeded by 10% if the noise is intermittent and during daylight hours.”

Thus, rather than mitigating noise impacts the County is allowing the applicant (in violation of the explicit provisions of the Noise Ordinance and the Noise Element of the General Plan) to exceed the limits in the noise ordinance and noise element by 25 Dba. Moreover, this limit is many decibels greater than the noise levels projected in the FEIR. The higher noise limit encourages the intensification of impacts, not the mitigation of them.

Table 4.9-5 shows “Alternative 3 Predicted Worst Case Noise Levels for OWEF Wind Turbines Compared to Alternative 1, DBA.” This table shows that for Alternative 3 (Scenario 1, 50° F/50% humidity) at Locations L1, L2, L3, the projected LEQ would be 38.0, 39.9, and 33.2.

Under the Noise Element, a 5 DBA increase is the threshold for significant impact, yet the CUP permits increases of 25 DBA over the Noise Element and Noise Ordinance criteria.²

² The Imperial County General Plan Noise Element, Section IV(C)(4), provides limits on the increase of noise levels compared to ambient noise levels. The Noise/Land Use Compatibility Guidelines are not intended to allow the increase of ambient noise levels up to the maximum without consideration of feasible noise reduction measures. The following are guidelines for the evaluation of significant noise

Table 1 of the Noise Element notes that 70 DBA is the sound of a freeway at 100 feet. The effect of that noise is that persons standing 3 feet away from each other are required to shout to be heard. This is a severe and significant impact in a quiet rural community.

Figure 3.10-2 (Percent of Community Highly Annoyed by Wind Turbine Noise) shows that a 70 dBA 100% of the community was predicted to be highly annoyed from wind turbine noise. There would be “severe threats of legal action, or strong appeals to local officials to stop the noise.” Figure 3.10-2. This is a severe and significant impact on a quiet rural community.

Table 3.10-5 (guidelines for Land Use Compatibility) shows that at 70 Ldn or CNEL, the noise levels would be “normally unacceptable” for residences, neighborhood parks, libraries, hospitals and schools. Applying the 5 DBA evening and 10 DBA nighttime noise penalty to the 70 DBA leq limit would push the permitted CNEL value into the clearly unacceptable range. This is a severe and significant impact on a quiet rural community.

The County Property Line Noise Limits are found in Table 3.10-6. The applicable one hour average sound level (dB) limits are 50dB from 7 am to 10 pm and 45 dB from 10 pm to 7 am.

V. The FEIR Does Not Discuss Feasible Alternatives to the Project

To comply with CEQA, agencies must consider a "reasonable range" of alternatives. CEQA Guidelines §15126.6(a); *Village of Laguna Beach, Inc. v. Board of Supervisors* (1982) 134 Cal.App.3d 1022, 1028. A project *cannot* be approved if its significant impacts can be feasibly reduced to insignificance through project alternatives or mitigation measures. P.R.C §§ 21002,21081.

Here, the reviewing agencies unacceptably eliminated feasible - not to mention less environmentally damaging and more economically beneficial- alternatives from careful review. Most notably, they dismissed the Distributed Solar Generation alternative and *entirely* failed to consider a distributed generation alternative that includes more than just solar generation. FEIS/FEIR 2-48, 2-50.

The FEIS/FEIR describes the Distributed Solar Generation alternative as follows: A distributed solar alternative would consist of PV panels that would absorb solar radiation and convert it directly to electricity. The PV panels could be installed on building rooftops or in other disturbed areas such as parking lots or adjacent to existing substations. (FEIS/FEIR 2-48).

The FEIS/FEIR dismisses the Distributed Solar Generation alternative on the grounds that it would (1) not meet technical or economic feasibility criteria, (2) only partially meet the objectives of achieving California's RPS through wind power generation, and (3) not meet the objective of

impacts (Imperial County, 1993):

If the future noise level with implementation of the project will be within the “normally acceptable” noise levels shown in Table 3.10-5, above, but will result in an increase of 5 dB CNEL or greater, the project will have a potentially significant noise impact and mitigation measure must be considered.

developing wind power generation. FEIS/FEIR 2-48,2-50. But the FEIS/FEIR is wrong: distributed generation (both solar and not) *is* feasible, it *would* meet the Project objectives and it *would* provide additional environmental and economic benefits.

First, as discussed above, distributed solar and combined heat and power generation, among other sources, are not only technically and economically feasible, but are *already occurring*. SDG&E will add between 80 and 100 MW of distributed solar PV capacity alone in its service territory each year from 2011 through 2020. Under the San Diego Smart Energy 2020 Plan developed by mechanical engineer Bill Powers, SDG&E could install either approximately 900 MW of local PV resources with an incentive budget of \$700 million, or approximately 2,000 MW of local PV resources with an incentive budget of \$1.5 billion. Indeed, distributed renewable generation is being developed at such a rate that SDG&E will be able to meet its 33 percent renewable energy target by 2020 without the Ocotillo Wind Project.

Using wind energy development to satisfy the applicant's objective as a criterion for winnowing Project alternatives unduly precludes analysis of *any other* type of energy generation, many of which, like distributed solar PV, have fewer environmental impacts than wind energy. Furthermore, the FEIS/FEIR entirely fails to analyze the development of small-scale, distributed wind generation. The reviewing agencies should consider a distributed generation alternative that includes small-scale wind generation.

Distributed power generation projects often have environmental and economic advantages over industrial-scale wind projects and other generation sources. As former CPUC Commissioner John Bohn acknowledged, "[u]nlike other generation sources, [distributed generation] projects can get built quickly and without the need for expensive new transmission lines. And ... these projects are extremely benign from an environmental standpoint, with neither land use, water, or air emission impacts."

Finally, the FEIS/FEIR's claim that the County considered a reasonable range of alternatives likewise fails. Under CEQA, the County has a duty to consider alternatives that can "feasibly attain most of the [Project's] basic objectives" at lower environmental cost. Guidelines § 15126.6(a). And, it has a substantive duty to adopt any feasible alternatives that can reduce the significant impacts of the Project to insignificant levels. P.R.C §§ 21002, 21081. Here, the County has failed to perform its CEQA duty to consider and to adopt a distributed generation alternative that would accomplish just that.

In sum, a distributed solar generation alternative is feasible, cost-effective, environmentally beneficial, and would meet the basic Project objectives. The reviewing agencies must thus fully examine this alternative. Further, the agencies should examine a distributed generation alternative that includes small-scale wind and CHP generation, along with other non-solar distributed generation sources.

VI. There is Significant New Information Concerning Peninsula Bighorn Sheep and Swainson's Hawk That Warranted Preparation of a Supplemental EIR, or an Addendum, That the Planning Commission Ignored.

The Center for Biological Diversity, by letter dated March 27, 2012 identified new information relating to use of the site by Peninsula Bighorn Sheep, as well as use of the site and nearby areas by

Swainson's Hawks during spring migration on their way to rest and refuel near Borrego Springs and in Anzo Borrego State Park. The Center stated:

While we recognize that the FEIR has deleted some wind towers from the proposed project that will benefit habitat for the federally and state listed endangered Peninsular bighorn sheep (PBS), we submit recent documentation of PBS within 500 meters of one of the turbine locations (Attachment 1a-e). These photographs and GPS locations were documented on March 11, 2012. These data suggest that PBS are currently using the project area, and that impacts to them and their existing habitat needs to be reanalyzed at a minimum. Because little data exists on how PBS use their range, especially in the early spring months when they are more likely to use the lower bajadas for forage, because of the "green up" of plant growth at lower elevations, we recommend that additional surveys be done on the project site to evaluate how PBS actually use the site.

The project site lies directly within one of the great migration corridors for the state-listed threatened Swainson's hawk (*Buteo swainsoni*), and a sizeable migration corridor for turkey vultures (*Cathartes aura*) which are protected under the Migratory Bird Treaty Act. While we knew that Swainson's hawks traversed the project site and submitted comments on that issue on the DEIR, we were unaware until recently that a significant migration corridor has been detected in the area in 2003. This migration corridor for both species has been systematically documented each spring since 2003 from February through April, and continues to currently be monitored.

Last year alone (2011), 8,902 Swainson's hawks were counted in nearby Borrego Valley. 1,437 turkey vultures were also documented last year. All these data are available at <http://hawkcount.org/siteinfo.php?rsite=545> and we provide Attachment 2, which is an Excel workbook of Hawkcount statistics from 2003-2011. Clearly these data were not considered in the environmental impact analysis, and therefore need to be re-analyzed, considered for ways to avoid, minimize and mitigate any impacts and be incorporated into the FEIR in order to comply with CEQA.

Recently, on March 23, 2012, the U.S. Fish and Wildlife Service published their final version of the land-based wind energy guidelines. While voluntary, this document provides additional guidance for land-based wind energy project that help to avoid and minimize impacts to avian species. We believe the County should consider these new guidelines and defer action until the mitigation measures in the FEIR can be reevaluated in light of these guidelines.

The County's conditions of the CUP also needs to fully incorporate all of the mitigation measures identified in the Mitigation and Monitoring Plan, which is included in Appendix I of the FEIR/S. Consistency of the terms and conditions between the local and federal process is required in order to minimize confusion. This issue also needs to be addressed prior to the planning commission's action on the FEIR certification.

DPC and CBD further incorporate by reference into this appeal (as Exhibit C) the Protest filed by CBD dated April 9, 2012 with BLM ("Resource Management Plan Protest for the Proposed Amendment to the CDCA Plan for the Ocotillo Express Wind Energy Facility"). CBD, based on the BLM Protest letter, raises the following issues in this appeal:

1. The FEIR and OWEF Project Approval fail adequately to document and mitigate direct, indirect, and cumulative impacts to endangered Peninsular bighorn sheep populations.
2. The Project, as approved, will destroy and fragment habitat currently occupied by FTHL and other imperiled species.
3. The Project as approved, will disrupt a migratory pathway for the State threatened Swainson's Hawk, impact Golden Eagle foraging habitat, and significantly impact wilderness quality in adjacent areas of Anzo Borrego State Park.

VII. The Environmental Background or Baseline of the OWEF Project Lacks Adequate or Accurate information Concerning Elsinore Fault Location.

USGS maps from 1983 and 1987 depicting fault locations for the wind turbines indicate that to the east and north of Ocotillo cross the Elsinore Fault. This is confirmed by the maps of the California Geological Survey released March 7, 2012, just 2 days before the Federal Register Notice for the FEIS. All the assurances about the location of the project in relation to the Elsinore fault are substantially inaccurate and potential impacts discussions need to be altered accordingly. See FEIS Figure 2.1-6. The FEIR at §4.11-40 states that the “applicant shall not locate project facilities on or immediately adjacent to a fault trace.” As shown in Exhibits A and B, many of the project wind turbines are located near or on faults.

Attached as Exhibits A and B are diagrams and maps showing the locations of wind turbines overlying the Elsinore Fault. Exhibit A shows the text of relevant portions of the OWEF FEIR/FEIS related to seismic and faulting issues. See also Exhibit D (“Information Supporting DPC and CBD appeal by Edie Harmon”).

Larry Silver



California Environmental Law Project
Counsel for Desert Protective Council and Center for Biological
Diversity

Lisa Belenky

Counsel for Desert Protective Council and Center for Biological
Diversity

cc: Michael Rood, County Counsel
Angelina Havens
Elizabeth Martyn, Esq.

EXHIBITS

- A. Overlay of OWEF FEIR Fig. 2.1-6 “Refined Project” over topo map showing locations of OWEF project in relation to faults ...from Jansen 1983 Plate 1 (overlay map by Pelley)
- B. Overlay of OWEF FEIR Fig. 2.1-6 “Refined Project” over 2010 Fault Activity Map at CGS (overlay by Pelley)
- C. Comments from Center for Biological Diversity (10 pgs)
- D. Info supporting DPC Appeal of Planning Commission Certification of OWEF FEIR and project approvals by Harmon 4 pgs with 6 pgs text related to seismic issues (10 pgs both)
- E. “Baja earthquake shook up view of Southern California faults” My desert.com 2012-04-08 (3 pgs)
- F. California Geological Survey – Preliminary Alquist-Priolo Earthquake Fault Zone Maps March 7, 2010 (3 pages)
- G. Location of faults (Elsinore Fault) to north and east of proposed OWEF project north of Ocotillo from Mark Plate 1, 1987
- H. Generalized Geology & faulting and monitoring water well locations, compilation of information by Harmon 1991