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UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

DESERT PROTECTIVE COUNCIL *et al.*, Plaintiffs, v. UNITED STATES DEPARTMENT OF THE INTERIOR, *et al.*, Federal Defendants, and OCOTILLO EXPRESS LLC, *et al.* Defendants.	No. 12-cv-1281-GPC-PCL **REPLY MEMORANDUM AND AUTHORITIES IN SUPPORT OF FEDERAL DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT** Date: February 22, 2012 Time: 1:30 pm Courtroom: 9 Judge: The Hon. Gonzalo P. Curiel

After extensive analysis and public participation efforts, the Department of the Interior (Interior) approved the Ocotillo Wind Energy Facility (OWEF or Project), finding that the Project would "further [] the development of environmentally responsible renewable energy" and that it was in "the public interest." OWEF-115; OWEF-27. Plaintiffs ask this Court to ignore this analysis because Plaintiffs disagree with, among other things, the Bureau of Land Management's (BLM) chosen methodology for analyzing certain Project-related impacts and mitigation measures. But Plaintiffs' disagreement with those choices is not tantamount to a violation of the statutes under which they sue: the Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (APA), the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4370H (NEPA), and the Federal Land Policy & Management Act of 1976, 43 U.S.C. §§ 1701-1787 (FLPMA).

Plaintiffs' arguments are based on the flawed premise that the Project could not be in the public interest because of its potential impacts on raptors generally, including Swainson's Hawks, and other bird species. But as discussed below, the Project was modified significantly with the express purpose of reducing its impacts and includes comprehensive mitigation measures to further reduce such impacts. In short, Plaintiffs have not shown – and cannot show – that BLM's extensive analysis or actions with regard to the OWEF were arbitrary or capricious. Thus, this Court should grant summary judgment in favor of Federal Defendants.

ARGUMENT

I. Plaintiffs Fail To Establish Jurisdiction.

A. Laborers International Union of North America Lacks Standing.

Laborers International Union of North America Local Union No. 1184 (LIUNA) fails to adequately assert representational standing. As discussed in Federal Defendants' opening brief, an association has standing to bring suit on behalf of its members when (1) its members would otherwise have standing to sue in their own right; (2) the interests at stake are germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. ECF No. 83 (Fed. Defs.' Br.) at 9-11. *W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 483 (9th Cir. 2011); *Citizens for Better Forestry v. U.S. Dep't of Agric.*,

341 F.3d 961, 976 (9th Cir. 2003). LIUNA fails to provide any allegations sufficient to meet the second requirement of representational standing, *i.e.*, that the interests at stake are germane to LIUNA's organizational purpose. *See Citizens for Better Forestry*, 341 F.3d at 976. Although as Plaintiffs note, a Court need not consider standing of all plaintiffs if one plaintiff has standing, nothing prevents the Court from engaging in this inquiry. *We Are Am./Somos Am., Coal. of Arizona v. Maricopa County Bd. of Supervisors*, 809 F. Supp. 2d 1084, 1093 (D.Ariz. 2011); *Thorsted v. Gregoire,* 841 F. Supp. 1068 (W.D.Wash. 1994), *aff'd other grounds sub nom. Thorsted v. Munro,* 75 F.3d 454 (9th Cir. 1996). The law is clear that a "plaintiff must maintain a personal stake in the outcome of the litigation *throughout* its course." *See Gollust v. Mendell,* 501 U.S. 115, 126 (1991) (internal quotation marks and citation omitted) (emphasis added); *see Black Faculty Ass'n v. San Diego Cmty. College,* 664 F.2d 1153, 1155 (9th Cir. 1981) (citations omitted) ("To obtain and sustain a judgment, a plaintiff must establish facts sufficient to confer standing.").[1] Put another way, "Article III standing is relevant not only with respect to who may access federal courts initially, but it is also relevant to who may obtain a judgment." *We Are Am.*, 809 F. Supp. 2d at 1092. Because LIUNA has different counsel and arguably has a different stake in this suit, judicial economy may be promoted by deciding the issue of standing at the summary judgment stage. *Id.* at 1093.

1. Environmental Interests Are Not Germane to LIUNA's Purpose.

LIUNA argues in its reply brief that its interests "include advocating for environmentally sustainable projects." Br. at 55. But vague assertions of "interest" do not amount to organizational purpose. After two rounds of briefing and two declarations from the Business Manager of LIUNA Local Union No. 1184, LIUNA still has not established that environmental interests are germane to the

[1] Moreover, where, as here, the parties are represented by different counsel, there are practical implications to this rule. If Plaintiffs were to prevail on the merits in this litigation (which Federal Defendants believe is not supported on this record), this Court may need to determine the issue of LIUNA's standing should LIUNA seek attorney's fees under the Equal Access to Judgment Act. Courts may consider whether Plaintiffs are represented by the same counsel in determining whether it should address the standing of all plaintiffs. *Cf. County of Okanogan v. Nat'l Marine Fisheries Serv.*, 347 F.3d 1081, 1084 (9th Cir. 2003) ("Whatever questions exist as to the standing of the various appellants, they are represented by the same counsel and make the same arguments. . .").

labor union's organizational purposes. *See* Declaration of John L. Smith (Smith Decl.) ¶ 3, ECF 27-6; ECF No. 88-3. LIUNA does not dispute that the purpose of labor unions, including LIUNA, is to represent their members' interests in the employment context, which would not impute representational standing with respect to environmental issues. *See Cal. Unions for Reliable Energy v. U.S. Dep't of the Interior,* No. CV 10-9932-GW, 2011 WL 7505030, *4 (C.D. Cal. Nov. 9, 2011); *Scott ex. Rel. N.R.L.B v. Stephen Dunn & Assoc.*, 241 F.3d 652, 673 (9th Cir. 2001) (abrogation on other grounds recognized by *McDermott v. Ampersand Pub., LLC*, 593 F.3d 950, 957 (9th Cir. 2010)). Although LIUNA cites its alliance with certain environmental organizations, it does not dispute that its stated purpose is to promote a living wage and good benefits, not to protect the environment. LIUNA can thus make no showing that the interests at stake here – the environmental effects of the OWEF — are germane to its purpose. Thus, LIUNA cannot credibly argue for purposes of standing that addressing threats to members' recreational and aesthetic interests is germane to its mission or purpose. *See Citizens for Better Forestry*, 341 F.3d at 976.[2]

2. LIUNA Fails to Allege Prudential Standing.

LIUNA also fails to demonstrate prudential standing to raise claims under NEPA. Prudential standing requires plaintiffs to allege an interest within the "'zone of interests to be protected or regulated by the statute or constitutional guarantee in question.'" *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc*., 454 U.S. 464, 475 (1982) (quoting *Association of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 153 (1970)). The First Amended Complaint (FAC), ECF No. 28, alleges economic harm to LIUNA's members, not environmental harm. LIUNA argues that its interests "arguably" fall within NEPA's zone of interests because LIUNA promotes "green jobs" and a "healthy working environment." Br. at 55. While LIUNA recites the zone of interests test's "un-

[2] In an attempt to establish that one of its members has standing, LIUNA has submitted the declaration of Mr. John Norton. ECF No. 88-1. Mr. Norton alleges that he engages in target shooting on the site and that he has "driven on the roads" that pass the site. *Id.* at ¶¶ 4,7. While Mr. Norton, as an individual, may have standing, this fact does not change that his asserted interests may be environmental while those of LIUNA are economic.

demanding standard," LIUNA does not establish how protecting jobs or promoting a healthy workplace is within the zone of interest protected by NEPA. LIUNA cannot evade the fact that its interests are essentially economic, and its attempt to evade prudential standing requirements by implying that its members are interested in environmentally-protective projects should be rejected. "The purpose of NEPA is to protect the environment, not the economic interests of those adversely affected by agency decisions." *Nevada Land Action Ass'n v. U.S. Forest Serv.*, 8 F.3d 713, 716 (9th Cir. 1993); *see also Presidio Golf Club v. Nat'l Park Serv.*, 155 F.3d 1153, 1157-58 (9th Cir. 1998) ("Purely economic interests do not fall within the zone of interests to be protected by NEPA . . . ."). Simply put, the only injury that can be redressed by a successful NEPA challenge is the alleged failure of an agency to consider potential impacts on the environment; a plaintiff cannot use NEPA as a vehicle to protect economic or other non-environmental interests. *See Nevada Land Action*, 8 F.3d at 716.

LIUNA's concerns are fundamentally economic because they ultimately relate to the availability of job opportunities for its members and the conditions of their working environment. *See, e.g.,* FAC ¶¶ 11, 13 (alleging that the Project will decrease opportunities for LIUNA members to secure employment and will result in changes in electricity rates in the region); Smith Decl. ¶ 4 (describing members' interest in "healthy living conditions"). Clothing these fundamentally economic interests in environmental clothes does not confer prudential standing under NEPA. *See W. Radio Servs. Co. v. Espy*, 79 F.3d 896, 902-03 (9th Cir. 1996) (rejecting assertion that alleged interference with broadcast transmission could serve as basis for NEPA standing); *Nevada Land Action*, 8 F.3d at 716 (organization of ranchers lacked standing under NEPA to assert "lifestyle loss" as well as economic loss); *Ashley Creek Phosphate Co. v. Norton*, 420 F.3d 934, 940 (9th Cir. 2005).

B. Plaintiffs Have Not Exhausted Their Administrative Remedies.

Plaintiffs devote almost eight pages in their reply brief to their exhaustion argument (Br. at 4-12) but nowhere do they address the most fundamental problem in their argument: neither Plaintiffs nor any other commentator for that matter put the agency on notice of their claims concerning Section 3503.5 of the California Department of Fish and Game (CDFG) Code and the alleged necessity of turbine curtailment in light of that provision. Indeed, neither issue was raised in Plaintiffs' numerous letters and

1 emails. *See, e.g.* OWEF-52217- 256; OWEF-57337- 345; OWEF-57346-351; OWEF-57352-376. Nor
2 have Plaintiffs identified any other commenter who raised these specific concerns. Because Plaintiffs
3 did not raise these particular objections to the Final Environmental Impact Statement (FEIS), they have
4 forfeited any objection to the FEIS on those grounds. *U.S. Dep't of Transp. v. Pub. Citizen*, 541 U.S.
5 752, 764-65 (2004).

6 The Ninth Circuit has held in challenges similar to this one that "claims raised at the
7 administrative appeal and in the federal complaint must be so similar that the district court can ascertain
8 that the agency was on notice of, and had an opportunity to consider and decide, the same claims now
9 raised in federal court." *Native Ecosystems Council v. Dombeck*, 304 F.3d 886, 899 (9th Cir. 2002)
10 (quoting *Kleissler v. U.S. Forest Serv.*, 183 F.3d 196, 202 (3d Cir. 1999)). Plaintiffs are "obligated to
11 raise their problem 'with sufficient clarity to allow the decision maker to understand and rule on the
12 issue raised.'" *Buckingham v. U.S. Dep't of Agric.*, 603 F.3d 1073, 1080 (9th Cir. 2010) (quoting *Idaho*
13 *Sporting Congress, Inc. v. Rittenhouse*, 305 F.3d 957, 965 (9th Cir.2002)); *see also Forest Guardians v.*
14 *U.S. Forest Serv.*, 495 F.3d 1162, 1171 (10th Cir. 2007) (a party seeking to raise an issue in federal court
15 had "forfeited it" because that party "did not adequately present this issue in its administrative appeal").
16 "[A] plaintiff cannot exhaust an issue merely by making 'general comments' about an environmental
17 feature completely attenuated from the legal authority protecting that feature." *Or. Natural Desert Ass'n*
18 *v. McDaniel,* 751 F. Supp. 2d 1151, 1161 (D. Or. 2011); *see Basin Mine Watch*, 456 F.3d at 967.
19 Plaintiffs also fail to exhaust an issue when they present new arguments before a district court that were
20 not before the agency. *See Buckingham*, 603 F.3d at 1080–81.

21 Plaintiffs point to two categories of comments to demonstrate exhaustion: (1) broad concerns
22 about raptor mortality rates and (2) general comments about golden eagles and the level of protection
23 that they are afforded. Br. at 7-9. First, general allusions to raptor mortality rate or flaws in the analyses
24 of bird impacts do not preserve legal challenges to any and all claims remotely related to those concepts,
25 particularly claims alleging violations of specific statutory provisions and/or standards related to impacts
26 to particular bird species. Plaintiffs characterize and quote comments about an alleged failure to comply
27 with the California Environmental Quality Act's (CEQA) "overriding consideration" and "significant
28

1 impacts" standards. Br. at 8-9. Such comments do not credibly put the agency on notice as to Plaintiffs'
2 claims that the Right-of-Way (ROW) grant must reflect Section 3503.5's purported "strict prohibition"
3 standard or the concomitant need for turbine curtailment to protect certain raptors. *See Silverton*
4 *Snowmobile Club v. U.S. Forest Serv.*, 433 F.3d 772, 784 (10th Cir. 2006). Nor do references to golden
5 eagles, which as discussed *infra* are governed by a distinct regulatory scheme, suffice. That is,
6 Plaintiffs' concerns about golden eagles and protections afforded them are governed by a different plan
7 and a different set of protocols. Plaintiffs' concerns about golden eagle impacts do not put the agency
8 on notice of Plaintiffs' claims concerning turbine curtailment for birds other than golden eagles.
9 Because neither Plaintiffs nor any other commenter raised the specific issues here, they have been
10 forfeited and are not properly before this Court. *Cmty. Advocates for Renewable Energy Stewardship v.*
11 *U.S. Dep't of the Interior*, No. 12cv1499, WQH-MDD, 2012 WL 4471562, at *6 (S.D. Cal. Sept. 23,
12 2012).[3]

13 This is not a case where Plaintiffs have framed their case "in non-legal terms rather than precise
14 legal formulations." *Dombeck*, 304 F.3d 900. Rather, Plaintiffs simply failed to address this argument to
15 the agency "with sufficient clarity to allow the [agency] to understand and rule on the issue raised."
16 *Idaho Sporting Congress*, 305 F.3d at 965. This failure is particularly remarkable given Plaintiffs'
17 voluminous comments and Plaintiffs' citation in their briefs to numerous other comments from other
18 parties. *See, e,g*, OWEF-52217-256; OWEF-57482-005748; OWEF-0057293-300; OWEF-57337-345;
19 OWEF-57346-351; OWEF-57352-376. There is no dispute that BLM provided detailed responses to
20 every concern raised by the public, including those raised by these Plaintiffs. OWEF-3248-3631;
21 OWEF-56282-348. Had Plaintiffs commented on these specific concerns during the public comment
22
23
24 [3] Plaintiffs argue that because the Final Avian and Bat Protection Plan (ABPP) was released after the close of the comment period, any comments on the ABPP would have been futile. Br. at 11-12. This argument is beside the point. The Draft ABPP was available for comment. The Project's mitigation measures were laid out in that document. Moreover, Plaintiffs' argument concerning Section 3503.5 does not depend on the publication of the Final ABPP. At the Draft Environmental Impact Statement (DEIS) stage, the agency acknowledged in both the DEIS and Draft ABPP that the Project could result in raptor deaths. OWEF-60300-01 (Draft ABPP); OWEF -12614-18 (DEIS).
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period, as required, BLM could have provided more detailed responses and could have sought a specific response from the CDFG, the agency with the authority to implement the cited provisions. Instead, Plaintiffs raised their specific concerns for the first time during litigation, and then argued that BLM failed to provide detailed responses. Because these specific issues were never raised during the public comment period, these "belatedly raised issues may not form a basis for reversal of an agency decision." *Havasupai Tribe v. Robertson*, 943 F.2d 32, 34 (9th Cir. 1991).

C. Plaintiffs Waived Certain NEPA Claims.

The FAC falls short because it does not place Federal Defendants on fair notice of Plaintiffs' new NEPA claims raised for the first time on summary judgment.[4] Specifically, Plaintiffs attempt to break new ground by raising three new claims on summary judgment that were not raised in the FAC: (1) the availability of certain studies for public review; (2) the exclusion of turkey vultures from one approach in the Avian and Bat Protection Plan (ABPP); and (3) the alleged "integrity" of BLM's Swainson's Hawks calculations. Br. at 14-28. Under Federal Rule of Civil Procedure 8(a)(2), a pleading must contain a "short and plain statement of the claim showing the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). "Simply put, summary judgment is not a procedural second chance to flesh out inadequate pleadings." *Wasco Prods., Inc. v. Southwall Techs., Inc.*, 435 F.3d 989, 992 (9th Cir. 2006) (quotation omitted). Plaintiffs say their allegation are sufficient because of liberal notice pleading standards, but as the Supreme Court has explained in the motion to dismiss context ""[a] pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a case of action will not do.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512 (2002)). As discussed below, Plaintiffs do not satisfy these threshold pleading requirements.

Plaintiffs point to various, irrelevant paragraphs of their FAC in an attempt to show that Federal Defendants had fair notice of these claims. First, Plaintiffs direct the Court's attention to Paragraph 29 of their FAC. Br. at 13. Paragraph 29 merely recites NEPA's implementing regulations but does not

[4] Federal Defendants will be filing an opposition to Plaintiffs' untimely motion to file yet another amended complaint in a futile attempt correct the defects in the FAC.

specify how Federal Defendants have allegedly violated the regulations. Pls.' Am. Compl. ¶ 29, ECF No. 28. This is insufficient to place Federal Defendants on notice of their new NEPA claims. *Hamilton v. Bank of Blue Valley*, 746 F. Supp. 2d 1160, 1169 (E.D. Cal. 2010) (finding that complaints' reference various statutes without factual support failed to give defendants fair notice); *Qarbon.com Inc. v. eHelp Corp.*, 315 F. Supp. 2d 1046, 1050-51 (N.D. Cal. 2004) (same).

Nor does Plaintiffs reference to various paragraphs in their FAC alleging unrelated NEPA claims that involve the Peninsular Bighorn Sheep (PBS), alleged inadequacies of BLM's direct, indirect, and cumulative impacts analysis, or BLM alleged failure to take a 'hard look' at the impacts to Bald Eagles demonstrate that BLM had sufficient notice of Plaintiffs' new NEPA claims. Br. at 13-14. There is no connection whatsoever with these allegations and Plaintiffs' new claims on summary judgment involving alleged failure to circulate documents pursuant to NEPA's regulations or the failure to adequately analyze raptors, in particular Swainson's Hawks. Plaintiffs may not make a broad, sweeping NEPA claim in their FAC and assume that these new allegations give them license to raise any NEPA claim, no matter how attenuated to the claims in the Complaint.

Because Plaintiffs have failed to adequately plead these allegations in their Complaint but raise them for the first time on summary judgment, this Court may not consider them. *Navajo Nation v. United States Forest Serv.*, 535 F.3d 1058, 1080 (9th Cir. 2008) (en banc); *see also 389 Orange St. Partners v. Arnold*, 179 F.3d 656, 665 (9th Cir. 1999) (holding that district court did not err in failing to consider issues in summary judgment order that were never plead by plaintiffs); *Wasco Prods., Inc.*, 435 F.3d at 992 (9th Cir. 2006) (noting that at the summary judgment stage, inadequate pleadings should not be filled-in through briefing).[5]

[5] Plaintiffs contend that they could not adequately plead these new claims because they were without the benefit of the full administrative record until October 4, 2012. Br. at 12. Plaintiffs' claim rings hollow. First, Plaintiffs provide no explanation why they did not seek leave to amend their complaint to include these claims after receiving the full administrative record but before filing their motion for summary judgment on November 20, 2012, ECF No. 63. Second, the full administrative record is unnecessary to set forth sufficient facts to support these new claims. For example, Plaintiffs argue that BLM did not make scientific studies referenced in the ABPP available to the public because these studies were identified for the first time in the FEIS and not the DEIS. These studies were either (Footnote continued)

II. **Plaintiffs' NEPA Challenge Lacks a Sound Basis.**

A. BLM Fully Complied With NEPA and Its Public Comment Procedures.

Notwithstanding the robust public participation process leading up to the Record of Decision (ROD) and the voluminous record in this case, Plaintiffs argue that the NEPA process is deficient because the agency did not make available subsidiary studies cited in the ABPP. As discussed below, NEPA's implementing regulations do not require that the agency make available every scrap of paper to the public but rather places reasonable limitations on disclosure.

NEPA's implementing regulations allow for, and indeed encourage, agencies to incorporate other stand-alone documents by reference. 40 C.F.R. § 1502.21. When an agency does so, however, the regulations require that the incorporated material "be cited in the [EIS] and its content briefly described" and prohibits an agency from incorporating material by reference "unless it is reasonably available for inspection by potentially interested persons within the time allowed for comment." *Id.* BLM has fully complied with these requirements. The ABPP is summarized in the DEIS; the draft ABPP was made available during the DEIS comment period[6]; and the final version of the ABPP was circulated with the FEIS. OWEF-2922 (Appendix L6 to the FEIS). The regulations do not, however, require BLM to take the additional step of providing Plaintiffs with the underlying studies that support the incorporated material; they only require that the incorporated material itself be reasonably available for inspection. As explained in Federal Defendants' opening brief, to require an agency to provide such tertiary materials to the public is counter to NEPA's goal of reducing unnecessary paperwork. Fed. Defs.' Br. at 15.

Plaintiffs cite to no case that supports their claim that BLM must provide Plaintiffs the studies underlying the ABPP. The cases they do cite merely stand for the uncontroversial proposition that if an

in the Draft ABPP or they were not. Accordingly, Plaintiffs need only reference the Final ABPP and the Draft ABPP which have long been publicly available from BLM's web-site.

[6] While not an Appendix to the DEIS, the Draft ABPP is properly part of the record here, OWEF-60287, and was made available concurrently with the DEIS. *See, e.g.,* Imperial County Planning & Development Services, Ocotillo Wind Energy Facility website *available at* http://www.icpds.com/?pid=2843 (lasted visited January 31, 2013).

agency relies upon a document to support its conclusion in an Environmental Impact Statement (EIS), it must be made reasonably available to the public. *See* Br. at 15 (listing cases). As established above, BLM has fulfilled this obligation by making the ABPP available for public review and comment. None of these cases purport to require that an agency must provide all of the material referenced in the ABPP at the same time. *See id.*

In any event, both the Draft and Final versions of the ABPP identified studies and reference materials based on the development stage of the plan. OWEF-60320 (Draft); OWEF-2985-95 (Final). Thus, BLM disclosed the underlying studies to the public. Plaintiffs' real complaint, however, is not that the ABPP fails to reveal the underlying studies. The crux of Plaintiffs' argument is that the Final ABPP listed additional studies and reference materials that were not in the Draft ABPP. Pls.' Opening Br. at 15, ECF No. 63-1 ("The final Avian Plan added numerous references to ***34 raptor use studies*** at other wind turbine projects and relied upon a number of tables and conclusions purported to be derived from those studies." (emphasis in original)); Br. at 20. Under Plaintiffs' logic, BLM would be bound to the contents of its draft documents because any change from draft to final would be perceived as an "attempt to hide the relevant data." Pls.' Opening Br. at 15. NEPA does not mandate such a result but instead, encourages changes from draft to final. *Russell Country Sportsmen v. U.S. Forest Serv.*, 668 F.3d 1037, 1045 (9th Cir. 2011). That the draft ABPP was further refined and more robustly developed between the draft and final EIS is laudatory and should not be interpreted as BLM's "attempt to hide the relevant data." *Compare* OWEF-60287-326 (draft ABPP) *with* OWEF-2922-3008 (final ABPP).

Next, Plaintiffs devote almost four pages to explaining that once a document is incorporated by reference in an FEIS, it becomes a part of the FEIS. Br. at 15-19. This point is not in dispute. Contrary to Plaintiffs' claim, Federal Defendants have never asserted that the ABPP does not become a part of the FEIS once it is incorporated by reference. *See* Fed. Defs.' Br. at 14-15. Federal Defendants simply point out that the ABPP itself is not a NEPA document that requires compliance with NEPA's implementing regulations. *See* 40 C.F.R. § 1508.10 (listing the NEPA documents that are governed by the regulations); *Idaho Sporting Congress Inc. v. Alexander*, 222 F.3d 562, 565-66 (9th Cir. 2000) (recognizing NEPA documents as defined by 40 C.F.R. § 1508.10 and all other documents not

referenced by this provision as non-NEPA documents); *cf. Knowles v. U.S. Coast Guard*, No. 96-CIV-1018-JFK, 1997 WL 151397, at *11 n.7 (S.D.N.Y. Mar. 31, 1997) (finding that a National Historic Preservation Act Programmatic Agreement is a non-NEPA document that is not subject to NEPA's public notice provisions). As explained above, BLM may incorporate the ABPP by reference, and if it chooses to do so, BLM must make the ABPP reasonably available to the public, which is what happened here. The regulations, however, do not further obligate BLM to do the same for materials referenced in the incorporated document. Plaintiffs have failed to cite any authority that would support such a proposition.

Finally, and without any support, Plaintiffs baldly claim that "[i]t is obvious that BLM did not review the 34 referenced studies [in the ABPP] . . . ." Br. at 20. Federal Defendants beg to differ. The administrative record clearly demonstrates that BLM was involved during the development of the ABPP and the studies underlying it. *See* OWEF-32587; OWEF-35164. Thus, the record here provides no basis on which to accept Plaintiffs' assertion that BLM blindly accepted the ABPP "without question" as Plaintiffs claim. Without any evidence, Plaintiffs' assertion is mere speculation. Moreover, Plaintiffs' argument completely ignores the fact that United States Fish & Wildlife Service (USFWS), the agency with jurisdiction over the resource and statutes the ABPP is designed to address, had conducted a detailed review of the ABPP prior to BLM's final decision on the Project. OWEF-799.[7]

In short, NEPA does not require BLM to provide reference materials from secondary, non-NEPA documents. Plaintiffs have neither shown that these materials were even necessary for their participation in the administrative process nor that BLM failed to consider information relevant to the ABPP.

[7] Nor does the fact that the administrative record does not contain the underlying studies to the ABPP demonstrate that BLM failed to review them as Plaintiffs' suggest, Br. at 20. To require an agency to include all reference material in an administrative record would "stretch[] the chain of indirect causation to its breaking point" as it would "fail[] to give appropriate deference to the agency's designation of the record." *W. Watersheds Project v. Bureau of Land Mgmt.*, No. 3:11-cv-00053-HDM-VPC, 2012 WL 13937, at *1 (D. Nev. Jan. 4, 2012) (quotation omitted).

B. BLM's Analysis of Raptor Use is Sound

Plaintiffs' challenge to BLM's analysis of raptor impacts ignores that numerous studies — not just one — establish that raptor use on the Project site is low. Three different approaches to measure raptor impacts supported the conclusions reached in the ABPP. Fed. Defs.' Br. at 5; *see also* OWEF-2958-60; OWEF-2967-69. Rather than address this issue directly, Plaintiffs focus on the propriety of one approach and the calculations supporting it. But even if the study of interest to Plaintiffs were removed from the ABPP, the conclusion that the direct impacts to raptors would be low would likely remain the same. Likewise, even without this study, this Court would have sufficient information to deem BLM's analysis of raptor impacts neither arbitrary nor capricious. Plaintiffs' silence on this point is telling.

Instead, Plaintiffs devote their entire argument to pick apart one footnote from Federal Defendants' opening brief that illustrated Plaintiffs' assessment of Table 7[8] in the 2002 Erickson report could not be correct. Br. at 21-24; Fed. Defs.' Br. at 17 n.14. Plaintiffs' counsel performs elaborate mathematical calculations in an attempt to show that Federal Defendants' misinterpret Table 7 and that turkey vultures were removed only for this Project, while all of the other comparative studies included turkey vultures. This is a variant of the same argument advanced by Scott Cashen, whose declaration this Court ordered stricken from the record. Declaration of Scott Cashen (Cashen Decl.) ¶¶5-8, ECF No. 63-5. In its stead, Plaintiffs resort to after-the-fact attorney argument that was never before the agency decision-maker.[9] *See* Fed. Defs.' Br. at 18-20. Such arguments are improper and must be rejected.

Even if the Court considers counsel's argument, it only serves to illustrate that deference to the agency is owed on such technical matters, not to the post-hoc arguments of Plaintiffs' attorney. *See,*

[8] Plaintiffs note that they inadvertently cited Erickson Table 7 rather Table 9 for one comparison in their opening brief. Br. at 24 n. 15. Regardless, as explained above, Plaintiffs' calculations are suspect and not the appropriate focus of a NEPA lawsuit.

[9] Plaintiffs contend that counsel's argument is supported by reference to the ABPP and the 2002 Erickson report. Br. at 21. Plaintiffs miss the point. It is Plaintiffs' counsel's interpretation of the data in these reports that amount improper attorney argument. Neither document states that all of the other comparative studies once referenced in the ABPP included turkey vulture counts. Plaintiffs can only arrive at this erroneous conclusion based on counsel's mathematical calculations.

1 *e.g., Sierra Club v. U.S. Envtl. Prot. Agency*, 346 F.2d 955, 961 (9th Cir. 2003) ("[W]here 'analysis of
2 the relevant documents requires a high level of technical expertise,' we must 'defer to the informed
3 discretion of the responsible federal agencies.'" (quoting *Marsh v. Or. Natural Res. Council*, 490 U.S.
4 360, 377 (1989)). First, Plaintiffs' contention that Figure 3 in the ABPP is flawed rests upon the
5 assumption that Figure 3's raptor use numbers for the other wind facilities referenced in the 2002
6 Erickson report come directly out of Table 7 of the Erickson report. This assumption is derived from the
7 Declaration of Scott Cashen. Cashen Decl. ¶¶ 7-8. Plaintiffs' argument as to the accuracy of this one
8 study lives or dies on this assumption. But this argument quickly unravels because Plaintiffs readily
9 concede that the numbers reported in Table 7 of the 2002 Erickson report do not align exactly with the
10 numbers reported in Figure 3 of the ABPP. Rather than address the inconsistencies, Plaintiffs brush
11 them under the rug. Br. at 22 ("[T]he use numbers reported in Table 7 are either the same or lower than
12 those reported in the Avian Plan."); *see also id.* at 23 ("The raptor use levels reported for each, although
13 slightly different, are about the same . . . ."). The largest discrepancy involves the raptor use numbers
14 for Altamont Pass. Plaintiffs provide no explanation why the use numbers in Table 7 of the Erickson
15 report differ from the use numbers in Figure 3 of the ABPP. While Plaintiffs contend that the
16 discrepancies, particularly with the Altamont Pass project, do not necessary show that turkey vulture
17 counts were removed from the Erickson report when that data were transferred to the ABPP, the
18 converse is equally true: nothing from the administrative record suggests that when the 2002 Erickson
19 report was referenced, the studies for the other wind projects included the turkey vulture counts. In light
20 of the differences between the numbers in Figure 3 of the ABPP and Table 7 of the 2002 Erickson report
21 and Plaintiffs' failure to account for them, even Plaintiffs' counsel's arithmetic does not help save their
22 claim. Rather, it illustrates that the appropriate focus of a NEPA lawsuit is not a mathematical dispute.
23 Second, the comparative study as outlined in Figure 3 of the ABPP compared the OWEF against
24 44 other wind facilities. OWEF-2958. Only eight of those studies come from the 2002 Erickson
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report.[10] OWEF-2959. Thus, even if this Court assumes that turkey vulture counts were included in the eight studies referenced in the 2002 Erickson report and the ABPP, the Court cannot also assume that the 36 other projects in the ABPP have the same alleged flaws. Other than the 2002 Erickson report, Plaintiffs have not identified any other study referenced in Figure 3 of the ABPP that allegedly included turkey vulture counts.

In sum, while Plaintiffs nit-pick at one aspect of the ABPP, that does not invalidate the ABPP. BLM's conclusion that the impacts to raptors would be low must be upheld.

C. BLM's Analysis of Swainson's Hawks is Entitled to Substantial Deference.

As with many of their arguments, Plaintiffs remain fixated on alleged flaws to minor aspects of BLM's decision-making process for the OWEF. Thus, Plaintiffs take issue with the timing of the raptor migration survey periods because Plaintiffs believe that it does not correspond with the Swainson's Hawk migration period. But the record on the whole rebuts Plaintiffs' claim. The record is clear that Swainson's Hawk use of the Project site would still be considered low regardless of the results of the raptor migration surveys. *See, e.g.*, OWEF-3349-50 (documenting that two years of raptor migration counts found only a total of 71 Swainson's Hawk during the 2 years of counts); OWEF-2302 (finding that the OWEF site does not appear to be a part of the Swainson's Hawk fall or spring migration route); OWEF-1141 (finding that because of the low numbers of migratory species, the Project site is not a major migratory corridor with the exception of four species, which do not include Swainson's Hawk).

But even if this Court were to entertain Plaintiffs' argument, it is flawed for a number of reasons. First, Plaintiffs' flyspecking of the agency's methodology ignores the basic tenet of administrative law that courts defer to an agency in matters involving a "high level of technical expertise." *The Lands Council v. McNair*, 537 F.3d 981, 993 (9th Cir. 2008); *Forest Guardians v. U.S. Forest Serv.*, 329 F.3d 1089, 1099 (9th Cir. 2003). Plaintiffs contend that their disagreement with the ABPP's designation of the raptor migratory periods for its migration surveys is not a dispute over methodology. But this is

[10] The data for the other wind projects listed in the ABPP that are derived from 2002 Erickson report are referenced as "Erickson et al. 2002b."

precisely the issue. Neither the CEC guidelines nor the USFWS guidelines prescribe when a raptor migration survey must occur, as Plaintiffs suggest. OWEF-50772-73; OWEF-52112-34. Indeed, the guidelines give the Applicant discretion in formulating the survey design taking into consideration the type of project, the potentially impacted species, the geographic location, etc. *See* OWEF-50764 (listing the various ways in which the Applicant can assess impacts to birds depending on unique features of the project); OWEF-50766. Moreover, the USFWS, the lead agency on matters impacting wildlife, concurred with the ABPP. OWEF-799.[11] Because of the wide latitude in survey design afforded the Applicant, that Plaintiffs believe the raptor migration surveys should have occurred a month earlier cannot be viewed as anything but a disagreement in methodology. Under such circumstances, BLM's and the Applicant's acceptance of the appropriate surveys periods deserve deference. *See* Fed. Defs.' Br. at 18-19; *see also Coal. On Sensible Transp., Inc. v. Dole*, 826 F.2d 60, 66 (D.C. Cir. 1987) ("The NEPA process involves an almost endless series of judgment calls" and "[t]he line-drawing decisions necessitated by this fact of life are vested in the agencies, not the courts.").

Second, while Plaintiffs may take a special interest in the Swainson's Hawk, it is not the only bird species that passes through the Project site. In that vein, Swainson's Hawk was not the sole focus of the ABPP as Plaintiffs' argument might suggest. OWEF-1138 ("The purpose of the raptor migration study was to document the diurnal raptor activity within the proposed OWEF area in order to provide a risk assessment *for these species*.") (emphasis added)). Indeed, forty-seven of the seventy-seven bird species that are analyzed as part of the ABPP are migratory birds, only one of which is the Swainson's Hawk. OWEF-2941. And, as evident in the Raptor Migration Surveys, large numbers of raptors other

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[11] Plaintiffs' suggestion that the USFWS did not concur on the various surveys that are a part of the ABPP is flatly wrong. The face of the USFWS memorandum clearly discusses concurrence with the Eagle Plan and the ABPP, and explains that the its review of those plans was conducted in the context of its "legal mandate and trust responsibility to maintain healthy migratory bird populations…." OWEF-799. That the letter does not mention Swainson's Hawk specifically is irrelevant, as the ABPP analyzed the impacts to not only the Swainson's Hawk but numerous other bird species. Moreover, the Memorandum of Understanding between BLM and the USFWS regarding renewable energy development in the California Desert District, which is applicable here, specifically contemplates that the USFWS would provide technical assistance regarding survey protocols. OWEF-17770.

than the Swainson's Hawk, were analyzed to include the Cooper's hawk, ferruginous hawk, merlin, and northern harrier, to name a few. OWEF-49907. Some of these other species have special designations, such as Species of Special Concern. OWEF-49917-23 (listing other raptor species as a Species of Special Concern or on the CDFG Watch List). All of these species have different patterns of migration with differing peak counts for the Fall and Spring raptor surveys. OWEF-49908-09; *see also* OWEF-49917-23 (listing the general migratory habits of twelve raptor species). Thus, in preparing a survey design, the Applicant selected survey periods that not only addressed the Swainson's Hawk, but that would also reasonably capture the migratory period for a variety of bird species. If the Applicant were required to survey for each and every bird species with a known presence in the area and within its own unique migration period, the Applicant would have to prepare many additional surveys. The Applicant was only required to prepare one raptor migration survey. OWEF-1138. Here, the Applicant prepared four. *Id.* NEPA's "rule of reason" must be applied. *See Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 767 (2004) (The Supreme Court has made clear that "inherent in NEPA and its implementing regulations is a 'rule of reason.'"). The ABPP need not examine an endless array of raptor migration periods, particularly when the Applicant prepared more surveys than required and when faced with the daunting challenge of accounting for numerous bird species.

Third, while Plaintiffs' argument is largely directed at the Spring surveys, they also take aim at the Fall 2009 survey by claiming that the survey period should have begun earlier in September. Plaintiffs cannot substantiate this claim. In fact, they cite nothing to support this argument. The data show that the peak migration period for all raptors, including Swainson's Hawk, occurred in the month of October. OWEF-49908. Without any support, Plaintiffs imply that the Fall migration period fails to cover Swainson's Hawk even though they readily admit that for "the fall migration period, the record indicates that Swainson's Hawks migrate in September and October." Br. at 28. The Fall 2009 survey covers that timeframe. OWEF-49907-08. Indeed, the only Swainson's Hawk observed during the Fall 2009 survey was observed in October, while none was observed in September. OWEF-49920. Thus, Plaintiffs' claim that the Fall 2009 survey should have begun early September should be rejected. The Fall 2009 survey further supports BLM's assessment that potential impacts to Swainson's Hawk from

1 the Project are low. And when the Spring and Fall surveys are considered together, Plaintiffs' claim that
2 BLM and the Applicant failed to consider impacts to Swainson's Hawk is without any merit.
3 Fourth, Plaintiffs give short shrift to the Avian Bird Count, criticizing the study for only looking
4 at "a single year from September 1, 2009 – August 30, 2010." Br. at 27. But the Avian Bird Count was
5 critical to the ABPP's analysis of Swainson's Hawk, and it is another acceptable way to assess impacts
6 to that species, contrary to Plaintiffs' assertion. Plaintiffs' citation to the CEC Guidelines to show that
7 the Avian Bird Count is somehow irrelevant only further undermines their argument. Br. at 27. Bird
8 counts alone do not suffice and migration surveys are recommended "if [the] project site is within a
9 known or likely migration corridor . . . ." OWEF-50766. The Project site is not within a known
10 migration corridor for Swainson's Hawk. OWEF-1141 (noting that the use of the OWEF site by
11 migratory species generally is low); OWEF-2249 (same); OWEF-1596 (explaining the basis for BLM
12 conclusion that the Swainson's Hawk primary migration route is not through the Project site). This
13 conclusion has been confirmed by the Department of Birds and Mammals, San Diego Natural History
14 Museum. OWEF-50847-48. Thus, the Avian Bird Count alone was sufficient to assess impacts on the
15 Swainson's Hawk without the need for preparing a separate migration survey, according to the CEC
16 guidelines. This undermines Plainitffs' argument that the Avian Bird Count is irrelevant. Moreover, the
17 Avian Bird Counts demonstrate that the BLM's assessment of potential impacts to Swainson's Hawk
18 was based on much more than simply the raptor migration survey.[12]
19 In sum, Plaintiffs' attempt to flyspeck one aspect of a comprehensive study that numbers over 69
20 pages is improper. While Plaintiffs may have preferred the ABPP to give special consideration to the
21 Swainson's Hawk, nothing compels that result, particularly in light of BLM's conclusion that they are
22 not common on the site. OWEF-1596. The ABPP appropriately designated raptor survey periods that
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24 [12] Plaintiffs claim that Federal Defendants cite only to the raptor migration surveys to support their
25 claim that that the BLM took a "wholistic [*sic*]" approach to assessing impacts to Swainson's Hawk. Plaintiffs are mistaken. Federal Defendants noted that the Project site is not within a migration corridor
26 for the Swainson's Hawk and that their use of the site was low based on four seasons of raptor counts. OWEF-1596; *see also* OWEF-3483-85 (BLM response to comments submitted by Plaintiffs regarding
27 the alleged presence of migration corridors on the project site).
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made sense for the unique aspects of the Project, the species present and their relative prevalence, and other relevant information, and thus, BLM's assessment of impacts to Swainson's Hawk must stand.

D. Plaintiffs' Demand for Turbine Curtailment Lacks a Legal Basis.

Although there is no dispute that NEPA requires an agency to discuss possible mitigation measures, 42 U.S.C. § 4332(C)(ii), BLM was not obligated to both consider and ultimately require turbine curtailment for all raptors species as one such measure, as Plaintiffs suggest. Br. at 29. NEPA's implementing regulations specify that an EIS must include a discussion of "appropriate mitigation measures not already included in the proposed action or alternatives," 40 C.F.R. § 1502.14(f), but the determination of what constitutes "appropriate mitigation measures" is left to the agency's discretion. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 353 (1989) (holding that NEPA does not impose a substantive duty to mitigate adverse impacts); *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190 (D.C. Cir. 1991) (holding that NEPA does not require an agency to effect specific types of mitigation). Put another way, an agency need not consider every feasible mitigation measure so long as "mitigation [is] discussed in sufficient detail." *Robertson*, 490 U.S. at 352.

Such is the case here. Plaintiffs wholly ignore the ABPP's robust discussion of mitigation measures that address every stage of the OWEF. OWEF-2970-2973. Plaintiffs would rather focus on one issue: the possibility of turbine curtailment for raptors generally. Plaintiffs' critique of the Project's mitigation measures in no way shows that BLM failed to discuss mitigation in sufficient detail. As set forth in the ABPP, the process for addressing potential impacts to birds and bats includes both post-construction monitoring and adaptive management. The former evaluates actual impacts, while the latter determines what impacts are significant or unique. Should there be significant or unique impacts on birds or bats, the ABPP provides that BLM should implement measures to reduce them to acceptable levels. OWEF-2972. A centerpiece of the ABPP is the Technical Advisory Committee (TAC), which monitors Project activities, including mortality data, to recommend appropriate mitigation measures to BLM. OWEF-2972-73. Upon consideration of the TAC's recommendation, BLM determines what prophylactic measures may be necessary, if any. *Id.* A guiding principle of the TAC is to "[p]rovide sufficient flexibility to adapt as more is learned about the Project as well as strategies to reduce avian

and bat impacts." *Id*. Plaintiffs' suggestion that BLM rejected curtailment takes an unduly narrow view of the ABPP, which affords BLM significant flexibility to determine the appropriate mitigation in light of mortality rates and other concerns. Plaintiffs' argument also ignores BLM's role after the Project is operational. BLM expressly retains the authority under FLPMA to change the terms and conditions of the ROW grant to "protect public health or safety or the environment." 43 C.F.R.§ 2805.15(e).

Plaintiffs further suggest that BLM's analysis of mitigation measures lacked "sufficient detail" because BLM did not consider implementing the same protective measures for raptors as eagles. Br. at 29. This argument is without merit. No one could rationally argue that a document that is over 69-pages in length lacks "sufficient detail." Rather, Plaintiffs' complaint is really with the substance of the mitigation measures. Moreover, this argument ignores the mitigation measures developed to address impacts to Golden Eagles were in response to the statutory requirements that apply to eagles, not raptors. The Golden Eagle Conservation Plan (Eagle Plan) was specifically developed to ensure compliance with the Bald and Golden Eagle Protection Act (BGEPA) in accordance with the Draft Eagle Conservation Plan Guidance issued by the USFWS. OWEF-49744-849. The USFWS guidance specifies that "conservation measures must avoid and minimize take of eagles *to the maximum degree*. . ." *See* OWEF-23569-7. Given the different regulatory scheme applicable to golden eagles, BLM's analysis of mitigation for eagles need not include other species of raptors.

Nevertheless, the mitigation measures directed at Golden Eagles may apply to raptors. This issue is completely glossed over by Plaintiffs. The Eagle Plan contemplates collecting data to understand the efficacy of curtailment and to understand raptor risks:

> In addition to real-time curtailment of turbines, a large amount of data will be collected to help understand golden eagle *and raptor behavior and risks* in an operating wind energy facility, to help validate and possibly refine the radar, video, and curtailment technologies being tested, and to provide assessments of the efficacies of these technologies for more wide spread use. Flight paths of raptors from the radar and biological monitoring will be mapped and analyzed.

OWEF 3197 (emphasis added).

This analysis will allow BLM to refine mitigation measures directed at golden eagles and raptors as appropriate. *Id.* No more is required under NEPA. While "[a]n agency must implement the

measures it chooses to adopt in its decision… NEPA, as a purely procedural statute, does not require an agency to adopt particular mitigation measures." *Pac. Coast Fed'n of Fishermen's Ass'ns v. Blank,* 693 F.3d 1084, 1103, n. 16 (9th Cir. 2012).

III. **Plaintiffs Fail to Show Any Violation of FLPMA.**

A. Plaintiffs Fail to Establish a FLPMA Violation Based on Allegations of Anticipated Non-Compliance with a State Code.

Plaintiffs' contention that the ROW grant must include "specific conditions" reflecting "more stringent state environmental standards" is not only an unworkable standard but also one without legal support. Br. at 30-33. Plaintiffs suggest that BLM must interpret the scope of state and local law, and where state standards are more protective, the ROW grant must expressly incorporate conditions reflecting those standards. *Id.* But FLPMA only requires that the ROW grant "require compliance" with state standards for environmental protection. 43 U.S.C. § 1765. It is left to the Secretary's discretion how to condition the ROW to most effectively carry out the purposes of the Act. Plaintiffs have not shown — and presumably cannot show — that there was any FLPMA violation here.

Citing to California Fish & Game Code (F&G Code) Sections 3503.5, 3511, and 2080, Plaintiffs contend that the ROW grant should have included conditions that will prevent the Project from taking any raptors, Swainson's Hawks, or golden eagles because California regulations strictly prohibit take of the species. Br. at 30. Plaintiffs conflate FLPMA's general provision to "require compliance with State standards" with a requirement that BLM interpret and enforce compliance with those standards. The latter is not what FLPMA requires.

Section 505 of FLPMA and its implementing regulations provide that each right of way must contain terms and conditions that will, *inter alia,* "require compliance with State standards for public health and safety, environmental protection, and siting, construction, operation, and maintenance of or for rights-of-way for similar purposes if those standards are more stringent than applicable Federal standards . . . ." 43 U.S.C. § 1765. Separate from that requirement, BLM regulations provide that the Applicant comply with project-specific terms, conditions, and stipulations, including those "state standards that are more stringent than Federal standards", 43 C.F.R. § 2805.12(i)(6), and more generally

1 the Applicant must comply "to extent practicable" with "state laws and regulations applicable to the
2 authorized use. . ." 43 C.F.R. § 2805.12(a). Section 505 of FLPMA broadly requires BLM to "require
3 compliance" with state standards without specifying how that end is achieved. In contrast, Section
4 2805.12 requires *the Applicant* to comply with project-specific conditions. Section 2805.12 does not
5 mandate, as Plaintiffs argue (Br. 33), that BLM articulate "project-specific" conditions for every state
6 standard that is more stringent than its federal counterpart. Here, BLM met its obligation under Section
7 505 of FLPMA. The OWEF ROW expressly includes a provision that the Applicant must comply with
8 all laws, including state laws. *See* OWEF-458; OWEF-860 (list of required federal, state and local
9 permits and approvals); *see also* OWEF-1641-42. The ROD explains that the ROW grant conditions
10 also reflect conditions articulated in the FEIS and related environmental reviews:

11 In addition, the BLM has included grant conditions based on the Final EIS/FEIR,
12 the [Biological Opinion] BO, the [Memorandum of Agreement] MOA, the Bald
13 and Golden Eagle Protection Act consultation, and other applicable Federal rules
14 and regulations (any and all of which may be amended) to protect public health
15 and safety, prevent unnecessary damage to the environment, and ensure that the
Project will not result in unnecessary or undue degradation of public lands. The
ROD requires the Applicant to secure all necessary local, state, and Federal per-
mits, authorizations, and approvals. OWEF-119.

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17 Plaintiffs contend that such ROW grant conditions are "generic" and insufficient. Br. at 30. But
18 as explained above, these conditions are articulated, *inter alia*, in the FEIS, BO, MOA and BGEPA
19 consultation. In arguing that the ROW grant conditions are "too subjective and vague," Plaintiffs
20 improperly read the ROW grant in isolation, ignoring the fact that the grant incorporates conditions
21 articulated in the supporting NEPA documents. Neither 43 C.F.R. § 2805.12 nor 43 U.S.C. § 1765
22 requires more. Nor does *Montana v. Johnson* dictate another result. 738 F.2d 1074, 1077-80 (9th Cir.
23 1984). The *Montana v. Johnson* court held that the Bonneville Power Administration was required
24 under FLPMA to comply with Montana's ad-hoc route-specific substantive standards. *Id.* In *Montana*
25 *v. Johnson*, the state agency attempted to enforce its own laws against the Applicant. The issue before
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the Ninth Circuit was whether the state agency could do so. *Id.* As discussed above, the state entity charged with enforcing the F&G Code has been conspicuously silent.[13] At bottom, none of the regulations, statutes, or precedents relied on by Plaintiffs holds that BLM must interpret the scope and breadth of state laws or otherwise enforce them; that is the responsibility of the State. BLM met its obligation here to "require compliance" with state laws. 43 U.S.C. § 1765.

Sections 3503.5, 3511 and 2080 are applicable here as construed and enforced by the state. Plaintiffs disagree. Relying on Section 1765, Plaintiffs contend that BLM must nonetheless include the ROW grant conditions reflecting each and every state standard that is more stringent than the federal counterpart regardless of what the state does or does not do. But as discussed *supra*, FLPMA does not impose a proactive obligation on BLM to interpret, and then enforce compliance with, state laws. Rather, BLM is simply obligated to require compliance. Here, State and local actors were involved at every stage of the environmental review process. Imperial County was the CEQA lead agency on this Project and was actively involved in its environmental review, including an analysis of whether the project was in conformance with local laws. OWEF-828-29. The California Governor's Office reviewed the environmental analysis and found no inconsistencies with state or local plans, policies, or programs. OWEF-475-76. BLM worked with CDFG, which is charged with interpreting and administering the F&G Code, on understanding the potential effects of the Project. OWEF-110-11. CDFG did not object to the Project or the proposed mitigation measures. OWEF-853 ("CDFG has the authority to regulate potential impacts to species that are protected under [the F&G Code]. The Applicant may need to file an Incidental Take Permit application with CDFG"). At no time did CDFG articulate the "strict prohibition" standard for Section 3503.5 advanced by Plaintiffs.[14] *See Envt'l Prot.*

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[13] Plaintiffs' reliance on *Columbia Basin Land Prot. Ass'n v. Schlesinger* is also misplaced. 643 F.2d 585, 605 (9th Cir. 1981) (holding that the Bonneville Power Administration was required under FLPMA to comply with Washington's substantive standards, but it need not go through the state certification process or obtain a state siting certificate). In *Columbia*, the state agency was also asserting that its laws applied to the applicant. *Id.* As explained above, the state has made no such claim here.

[14] CDFG commented on the DEIS and it never raised the interpretation of the subject regulations advanced by Plaintiffs. OWEF-56263-76. Indeed, CDFG entered into a "Streambed Agreement" with the Applicant in which the agency noted that the Project could have impacts on fish and other species, (Footnote continued)

Info. Ctr. v. U.S. Fish and Wildlife Serv., No. C. 04-4647-CKB, 2005 WL 3877605, at * 4 (N.D. Cal. Apr. 22, 2005) (finding that California enforces its own laws against an applicant and rejecting argument that a USFWS take permit was illegal because it allegedly violated, *inter alia*, Section 3503.5). Nor did CDFG view any of the regulations relied upon by Plaintiffs as prohibiting the Project. Plaintiffs discount the state's role in the Project's NEPA process and the State's role in ensuring compliance with its own laws when it suggests that BLM was somehow obligated to interpret and apply these statutes for which it has no jurisdiction *de novo*. While the ROW grant did include a term and condition requiring compliance with state law, it did not in any way divest CDFG of its exclusive enforcement authority, nor did it give Plaintiffs that right in the state's stead.

Plaintiffs argue that CDFG's failure to act here should have no bearing on this Court's analysis.[15] Rather, Plaintiffs contend that the ROW should include conditions and mitigation measures that reflect Plaintiffs' interpretation of the F&G Code, conditions and measures that Plaintiffs have not shown that the CDFG has ever adopted. Plaintiffs have not shown — and presumably cannot show — that their interpretations of Sections 3503.5, 3511 or 2080 are the correct interpretations. Plaintiffs cite a report on the Burrowing Owl dealing with an unrelated project in an inapposite context to support their interpretation of Section 3503.5. But even if this report were properly before this Court (which it is not), it is not relevant to CDFG's interpretation of Section 3503.5 as applicable to the OWEF. This is particularly true where, as here, CDFG was involved in Project review and commented on the Project but did not raise the concerns now articulated by Plaintiffs. OWEF-56263-276.

Further undermining Plaintiffs' argument is that CDFG has acknowledged that wind projects such as the OWEF could result in raptor and owl take. *See* OWEF-50755-757; *see also* OWEF-50857

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including certain bird species. *See* OWEF POSTROD-5074. Despite this acknowledgement, CDFG did not object to the Project or indicate it would be in violation of any standards.

[15] Plaintiffs argue that the BLM is the proper defendant given their claims under FLPMA. Not so. Assuming *arguendo* that Plaintiffs are attempting to invoke Section 3503.5 under California's "public trust" doctrine, FLPMA is not the proper mechanism. Plaintiffs have not brought these claims against the proper party or in the proper forum. *Ctr. for Biological Diversity, Inc. v. FPL Group, Inc.*, 166 Cal. App. 4th 1349, 1367 (Cal. App. 1st Dist. 2008) (noting that CDFG has exclusive authority to protect the affected resources under the statutes in question).

1 (noting additional mitigation measures may be necessary for raptors). As discussed in Federal
2 Defendants' opening brief, (Fed. Defs.' Br. at 24-25), the CDFG, in conjunction with other state entities,
3 has developed Guidelines for Reducing Impacts to Birds and Bats from Wind Energy Development
4 (Guidelines). *See* OWEF-50710-846. Those Guidelines specifically contemplate raptor take and
5 distinguish Section 3503.5 from provisions that prohibit take altogether. *See* OWEF-50710-846;
6 OWEF-17107. They also discuss at length how projects can go about avoiding and minimizing impacts
7 to raptors and other birds. OWEF 50,785-793. The CDFG Guidelines endorse adaptive management if
8 the number of bird fatalities at a wind project exceeds the projected amount. OWEF-50, OWEF-792.
9 The ABPP used those guidelines for determining the appropriate monitoring methods. OWEF-17107.

10 Plaintiffs argue that the Guidelines are irrelevant here as they cannot trump the plain language of
11 the regulations. Br. at 36. But Federal Defendants' argument is not that the Guidelines supplant the
12 F&G Code. Rather, given CDFG's silence here on whether or how Section 3503.5 applies to this
13 Project, the Guidelines inform the interpretation of the F&G Code. In other words, while Plaintiffs
14 argue repeatedly that the text of Section 3503.5 is crystal clear (Br. at 37-39), whether and to what
15 extent it applies to this Project is not. If all wind energy projects will inevitably result in impermissible
16 take of bird and other protected species under the F&G Code as Plaintiffs contend, it would be
17 unfathomable for the regulatory agency charged with implementing the F&G Code to issue guidelines
18 promoting the development of wind energy.

19 Further, Plaintiffs contend that *Center for Biological Diversity, Inc. v. FPL Group, Inc.*, 166 Cal.
20 App. 4th 1349, 1372-1373 (Cal. App. 1st Dist. 2008), merely establishes that they are suing the proper
21 entity. But as argued in Federal Defendants' opening brief, *Center for Biological Diversity* is one of the
22 few published cases challenging a wind project as violating Section 3503.5. Fed. Defs.' Br. at 25.
23 There, in interpreting Section 3503.5 and other provisions of the F&G Code, the California Court of
24 Appeals observed *in dicta* that the agency had "not ignored [concerns, about raptor impacts], … [but]
25 are attempting to mitigate the harm to birdlife by imposing appropriate conditions and restrictions on the
26 operation of the turbines." *Center for Biological Diversity*, 166 Cal. App. 4th at 1372-1373. The Court
27 notably did not find that any raptor death violates Section 3503.5. Rather, it considered the agency's
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mitigation measures and efforts to reduce bird impacts. Similarly, mitigation and bird impact reduction measures with involvement from USFWS and CDFG have been put in place here. Moreover, the ROW grant imposes sophisticated avoidance and detection measures that were developed, in consultation with USFWS, to avoid raptor impacts. *See supra* at 18-19. Thus, Plaintiffs' reliance on the F&G Code to show that BLM was arbitrary and capricious is erroneous.

Third, Plaintiffs' argument has significant practical implications that underscore its lack of validity. If Plaintiffs' interpretation of Section 3503.3 were correct, numerous completed Projects would have never been constructed in the first place. Any state or federal project in California that could lead to an incidental killing of certain bird species (even something as common as permitting the construction of a two-or-more story glass building) would be a violation of Section 3503.5 and thus would be prohibited. For example, the new glass courthouse for this District would likely be prohibited under Plaintiffs' reading of Section 3503.5. Plaintiffs argue such "common sense" arguments should be rejected. Br. at 30. But nowhere do Plaintiffs attempt to reconcile the practical implication of their arguments with reality.

Finally, compelling policy reasons justify leaving enforcement decisions to public prosecutors or to the agency vested with enforcement authority. As Plaintiffs note, the Guidelines state that good faith efforts by the Applicant to minimize bird impacts "will be considered by CDFG before *taking enforcement actions* for violation of a California wildlife protection law." Br. at 36 (citing AR 50755) (emphasis added). As the Guidelines make plain, any enforcement decision as to a violation of the F&G Code lies with CDFG, not BLM. In *Heckler v. Chaney*, 470 U.S. 821 (1985), the Court recognized that enforcement decisions involve the complex balance of various factors that lie within the agency's discretion and are generally not suitable for judicial review. *Id.* at 831-32. As the Second Circuit observed in discussing a different statute in language that could equally apply here: "[c]ertainly construction that would bring every killing within the statute, such as deaths caused by automobiles, airplanes, plate glass modern office buildings or picture windows in residential dwellings into which birds fly, would offend reason and common sense. . . . Such situations properly can be left to the sound discretion of prosecutors and the courts." *United States v. FMC Corp.,* 572 F.2d 902, 905 (2d Cir.

1978). Such is the case here, and, as a result, there is no violation of FLPMA. To the extent that the any of the provisions cited by Plaintiffs is construed by California to apply here, the Applicant by the terms of the ROW must comply. *See supra*. No more is required under FLPMA.

B. Plaintiffs Fail to Establish a FLPMA Violation Based on Allegations of Anticipated Non-Compliance with a State Code

Plaintiffs argue that the ROW grant does not contain terms and conditions that minimize damage to fish and wildlife habitat because the grant does not mandate turbine curtailment for raptors. Br. at 43. Plaintiffs' argument is myopic, focusing only on their preferred mitigation measure rather than looking at the record as a whole. Prior to the ROW grant's authorization, the Applicant prepared, and BLM approved and USFWS concurred with, the Eagle Plan and the ABPP. Both plans contain numerous measures to protect birds. *See supra* at18-19. Nonetheless, Plaintiffs emphasize that the ABPP provides only for adaptive management, which does not mandate curtailment for raptors. According to Plaintiffs, BLM was required to consider curtailment for raptors as a potential mitigation measure before it authorized the Project. There is no such requirement in FLPMA. Rather, the agency has wide discretion to determine what mitigation measures to consider and the proper time to consider them. FLPMA delegated authority to BLM in broad and general terms (e.g., to manage public lands to prevent "impairment"), which reflect Congress' choice to leave the agency with considerable discretion with respect to how to exercise that authority. *See Chevron U.S.A., Inc. v. NRDC, Inc*., 467 U.S. 837, 842-843 (1984).

Here, the Project's adaptive management strategy is dynamic and allows the Applicant and BLM to respond to changing circumstances on the Project site.[16] *Pacific Coast*, 693 F.3d at 1103 -

[16] Adaptive management by definition involves establishing a plan that includes rigorous monitoring, implementing that plan, monitoring implementation in "real time," evaluating the plan's efficacy based on that monitoring, and making changes to the plan if dictated by the results of that evaluation. Consistent with that approach, ROW grants are not static as Plaintiffs suggest. Moreover, as noted above, BLM's ROW regulations give it the express authority to modify the grant when conditions justify it, such as the protection of the environment, 43 C.F.R. § 2805.15(e), or terminate the grant if the grantee fails to comply with applicable laws regulations, or any terms, conditions or stipulations of the grant itself. 43 C.F.R. § 2807.17(a).

1104 (adaptive management strategy is consistent with NEPA because mitigation measures need not amount to complete plan); *Nat'l Parks & Conservation Ass'n v. U.S. Dep't of Transp.,* 222 F.3d 677, 681 n.4 (2000) ("a mitigation plan need not be legally enforceable, funded or even in final form to comply with NEPA's procedural requirements."). While Plaintiffs might prefer turbine curtailment, nothing requires BLM to adopt this measure. *See supra.* Most importantly, BLM, not the Applicant, determines what mitigation measures are necessary, if any at all. This makes this case readily distinguishable from *Trout Unlimited v. Dep't of Ag.,* 320 F. Supp. 2d 1090 (D. Colo. 2004), where the lessee offered only voluntary mitigation to meet Forest Service goals on federal land. *Nat'l Parks*, 222 F.3d at 1107. In light of BLM's role as the ultimate arbiter of Project mitigation measures, Plaintiffs' characterization of those measures as merely "voluntary" on the part of the Applicant is wrong. Moreover, unlike in *Trout*, BLM did not place financial interests above environmental concerns. BLM selected an alternative that removed 43 turbines from the action as originally proposed and included only three more turbines than the most environmentally protective alternative in an effort to, among other things, minimize damage to fish and wildlife habitat. OWEF-865-65.

C. The OWEF Conforms to the California Desert Conservation Area Plan Because the Plan Does Not Restrict Wind Energy Facilities on Class L Lands.

The California Desert Conservation Area (CDCA) Plan clearly states that the Plan's Multiple Use Class designation must be read in conjunction with the guidelines created for a given class, OWEF-5921, and that those guidelines are given more specific application and treatment in the twelve Plan elements. *Id.* at 5928. The guidelines are outlined in Table 1 of the CDCA Plan, which states that wind and solar energy facilities on Class L lands "[m]ay be allowed after NEPA requirements are met." OWEF-5922. The CDCA Plan element governing "Energy Production" states, with respect to renewable energy, that "Plan Amendment procedures will adequately provide for the coordination needed for assuring rapid implementation of these important. . . energy programs in an environmentally sound manner," and that "[s]ites associated with power generation or transmission not identified in the Plan will be considered through the Plan Amendment process." OWEF-6002. In evaluating a proposed use for compliance with the CDCA Plan, the BLM's "[Authorized Officer] is directed to use his/her

judgment in allowing for consumptive uses by taking into consideration the sensitive natural and cultural values that might be degraded." OWEF-141 (emphasis added). Notably, it is BLM's judgment, not that of Plaintiffs, that is relevant in determining whether consumptive uses may be allowed on Class L lands. In fully considering these requirements, BLM exercised its judgment and found that the OWEF met the Class L guidelines. OWEF-141-48. Nothing in the CDCA Plan compels BLM to focus solely on whether or not the proposed use would "not significantly diminish" sensitive values as Plaintiffs suggest. Br. at 47. Nor, under BLM's judgment, did the analysis show that the Project was inconsistent with the CDCA Plan. *Id.* at 49. Quite the contrary, BLM went through the required processes and determined that the OWEF conforms to the CDCA Plan. OWEF-140-45.

Plaintiffs' narrow reading of the CDCA Plan that any adverse impact, however small, to any resource on Class L lands is prohibited is unworkable because it would mean that virtually no wind energy or other development could ever be allowed. This is inconsistent with the Plan, which allows for various consumptive uses (e.g., wind energy, microwave towers, fossil fuel and nuclear power plants, livestock grazing, temporary aircraft landing strips) on Class L lands, which all presumably have some impact. Plaintiffs' interpretation precluding all consumptive uses is inconsistent with FLPMA's mandate to manage for multiple uses and requiring Interior to "recognize all competing values." *Rocky Mountain Oil & Gas Ass'n v. Watt*, 696 F.2d 734, 738 (10th Cir. 1982).[17]

Plaintiffs also mischaracterize Federal Defendants' position regarding Class L lands. At no time have Federal Defendants stated that any renewable energy project is allowable on Class L lands simply because a NEPA analysis has been prepared. *See* Fed. Defs.' Br. at 26-27. Nor have Federal Defendants stated that "all renewable energy development is permissible on Class L lands regardless of impact." Br. at 48. Rather, Federal Defendants maintain that renewable energy projects are allowed on Class L lands so long as the applicable requirements are met, which is not the same as stating that any

[17] Plaintiffs have offered no support for their argument that the identification of some adverse effects during the NEPA process necessarily means that the Project will cause "significant diminishment" of Class L resources as that phrase is used in the CDCA Plan.

and all development is allowable on Class L lands.[18] *See* Fed. Defs.' Br. at 26-27. Quoting directly from the CDCA Plan, the ROD states that "wind and solar electrical generating facilities '. . . *may be* allowed [on such lands] after NEPA requirements are met.'" OWEF-140 (emphasis added). Here, BLM determined, after the NEPA analysis, that the Project site is suitable for wind development on Class L lands, *see supra*, contrary to Plaintiffs' assertion, Br. at 48.

While Plaintiffs dismiss the NEPA process, it is not *a pro forma* exercise as they suggest. The NEPA analysis is the very procedure by which BLM determines whether a use is "environmentally acceptable" on Class L lands. *See Anderson v. Evans*, 314 F.3d 1006, 1016 (9th Cir. 2002). Notably, as a result of its NEPA analysis, BLM significantly redesigned the Project by eliminating approximately forty percent of the wind turbines and then required numerous mitigation measures, resulting from BLM's public participation leading to informed decision-making. Fed. Defs.' Br. at 3, 5. The fact that some adverse impacts may occur does not mean that the Project may not proceed, as Plaintiffs suggest. Nothing in NEPA, FLPMA, or the CDCA Plan compels this result. Moreover, Plaintiffs' only examples of alleged "significant diminishment" of wildlife resources involve loss of foraging habitat and deaths to burrowing owls and Swainson's Hawk. As demonstrated in Federal Defendants' opening brief, these claims are unsubstantiated and contradicted by the administrative record. Fed. Defs.' Br. at 29. For example, Federal Defendants have pointed out that Golden Eagles have low use of the Project site for foraging and no Swainson's Hawk have ever been seen to forage in the area. *Id.*[19] In response, Plaintiffs decline to address the flaws in Plaintiffs' original arguments as pointed out by Federal Defendants and proceed down a different path by alleging that aerial foraging habitat will be reduced by the presence of the wind turbines. Br. at 46. As an initial matter, Plaintiffs have waived this argument

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[18] Plaintiffs suggest in a footnote that fossil fuel and nuclear power plants, which are not even at issue here, can only be situated in Class L lands if the Class L designation is changed to either Class M or Class I. Br. at 50, n. 31. This is pure conjecture as Plaintiffs cite nothing to support this proposition. More importantly, Plaintiffs miss the main point – there are many consumptive uses that would not normally qualify as "lower-intensity" but are entirely appropriate on Class L lands.

[19] Plaintiffs' argument mischaracterizes the FEIS. The FEIS does not conclude that foraging habitat will be eliminated. Rather, the FEIS acknowledges that those birds that do forage in the Project site would be subject to increased collision risk. OWEF-1596-97.

because it is being raised for the first time in their reply brief.[20] *See, e.g.*, *United States v. Romm*, 455 F.3d 990, 997 (9th Cir. 2006). Second, like many of Plaintiffs' other arguments, there is no record support for their claim. Without any reference to the administrative record Plaintiffs simply contend that the turbine swept zones and the spaces between each turbine will result in a reduction of 342 or more acres of aerial foraging habitat. Br. at 46 n.30. Not only do Plaintiffs fail to provide any record support, Plaintiffs do not even identify what species of animal will allegedly be impacted by loss of "aerial foraging habitat."

Moreover, Plaintiffs' continued reliance on *Brong* to support its strained reading of the CDCA Plan is misplaced. The Northwest Forest Plan (NFP) at issue in *Brong*, which involves an entirely different area and purpose, provides no meaningful comparison to the CDCA Plan. Fed. Defs.' Br. at 8. The NFP generally prohibited the commercial logging activities challenged in that case. *Or. Natural Res. Council Fund v. Brong*, 492 F.3d 1120, 1127 (9th Cir. 2007). No such prohibition exists here. In *League of Wilderness Defenders Blue Mountains Biodiversity Project v. Allen*, the Ninth Circuit considered the same NFP restrictions that were raised in *Brong*, but held that the agency's decision allowing logging was reasonable because it "offered a plan that does not 'run[ ] counter to the evidence before the agency or is so implausible that it could be not ascribed to a difference in view or the product of agency expertise." 615 F.3d 1122, 1131 (9th Cir. 2010) (citations omitted). If the NFP has any bearing here, *League of Wilderness* emphasizes that where, as here, matters of agency's technical expertise are at issue, courts "should be loathe to second guess their efforts absent some glaring error, oversight, or arbitrary action . . . ." *Id.* at 1134. Plaintiffs' second-guessing of BLM's reasoned conformance analysis should be rejected outright.

CONCLUSION

For the reasons stated above, this Court should deny Plaintiffs' Motion for Summary Judgment and grant Federal Defendants' cross-motion.

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[20] While Plaintiffs claim that the issue of "aerial foraging" was raised in their opening brief, Br. at 46, there is no indication of this on the face of the brief, *see* ECF No. 80.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Marissa A. Piropato, hereby certify that, on February 1, 2013, I caused the foregoing to be served upon counsel of record through the Court's electronic service system.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: February 1, 2013 /s/*Marissa A. Piropato*
Marissa A. Piropato