

**VIA ELECTRONIC AND U.S. MAIL**

February 25, 2013

Robert Eben, Superintendent  
Southern California Agency  
Bureau of Indian Affairs  
1451 Research Park Drive  
Riverside, CA 92507  
[Shuluukcomments@aecom.com](mailto:Shuluukcomments@aecom.com)

Re: EIS Comments, Shu'luuk Wind Project, San Diego County, CA

Dear Mr. Eben:

We represent the San Diego Rural Fire Protection District ("District") regarding its concerns about the Shu'luuk Wind Project ("Project"). This correspondence is for the purpose of submitting comments on the Draft Environmental Impact Statement for the Project dated December 2012 ("DEIS").

**Mitigation Measures**

**General Comment:**

Language such as the following does not provide a commitment by the Bureau of Indian Affairs ("BIA") to include as part of the Project design mitigation measures to adequately mitigate for the Project's potential impacts to the environment: "it is recommended that the applicant or applicant's contractor" prepare, for instance, a Hazardous Materials Management Plan, a Health and Safety Program, or, a safety assessment. DEIS pgs. ES-13 to ES-16. Where the BIA does not require mitigation measures there would be no legal basis for monitoring compliance and implementation.

Recommending mitigation measures would fail to advance and implement the policies of the National Environmental Policy Act ("NEPA") because the applicant and the applicant's contractor would be under no obligation to avoid or minimize environmental damage. A mere recommendation would not prevent or eliminate damage to the environment as a result of implementation of the Project, thus defeating NEPA's purpose. *See*, 42 U.S.C. §4321. Mitigation measures, to be effective, must mandate compliance. The BIA must require compliance with mitigation measures before the BIA is allowed to approve the proposed Project lease. *See*, Council on Environmental Quality ("CEQ") Regulation 1503.3.

Meaningful coordination with Tribal entities and analysis of a proposed Project's potential affect on Tribal lands, resources, or areas of historic significance is an important part of federal agency decision making. *See*, CEQ Guidance and Executive Orders Related to Native Americans at [http://ceq.hss.doe.gov/nepa\\_information/eo\\_11375.html](http://ceq.hss.doe.gov/nepa_information/eo_11375.html).

Without enforceable mitigation measures, the BIA will be unable to act in response to a wind project lease violation. *See*, 25 CFR §§162.542 and 162.591. Mandatory mitigation measures would provide the BIA with the authority to enforce compliance with those measures which presumably would be included in the wind project lease. *See*, 25 CFR §162.542(c)(3). The BIA would have the authority to issue an order to the lessee to cease operations under the lease until the violation is cured. *See*, 25 CFR §162.591(b)(3).

The District objects to the failure to include a copy of the proposed Project lease in the DEIS. There is no information in the DEIS stating where the lease can be found and available for review. That failure impedes District and public review of the Project. *See*, CEQ Regulation 1502.21. The Shu'luuk Wind Project is the proposed Project that would be enabled by the approval of the lease agreement. *See*, DEIS at pg. ES-1. The failure to include the proposed lease for review and comment by the public fails to meet the legal requirements for NEPA compliance. *See*, CEQ Regulation 1508.20.

On its face, from the clear language in the DEIS, it appears that the DEIS fails to include any legally enforceable Public Health and Safety mitigation measures. The District objects to that failure on the ground that the DEIS fails to meet even minimum environmental protection standards.

#### Comment 1

Pg. ES-13 Public Health and Safety Mitigation Measure PH&S-1a: It is recommended that a Hazardous Materials Management Plan ("HMMP") be prepared which "would be reviewed and approved" by the coordinating agencies. There is no requirement that it be prepared. The language suggests that if the choice is made to prepare the HMMP, agency approval is assured. The language does not require that the HMMP meet agency standards. Even if the HMMP were subject to review and approval, should the agencies find the HMMP to be ineffectual or flawed, there is no procedure included in MMPH&S-1a and b whereby the HMMP would have to be revised or the agencies satisfied that their concerns have been met.

There is no definition of the term "appropriate agencies" who would receive the HMMP as part of the plan for construction activities. The agencies should be identified and the District requests that it be included as one of the "appropriate agencies" referred to in the recommended mitigation measure. Since the District has specific duties and obligations regarding fire and emergency protection, if the HMMP is prepared, the District should be aware of its contents. The District must be prepared to compensate, if necessary, for a flawed or insufficient HMMP.

It is illusory enforcement to state that the contractor “would” designate an employee to “observe, enforce, and document adherence” to the HMMP when preparation of the HMMP is not required. *See*, DEIS at pg. ES-14.

#### Comment 2

Pg. ES-13 Public Health and Safety Mitigation Measure PH&S-1b: The DEIS recommends preparation of a Health and Safety Program (“HSP”) but there is no agency review or approval required. If there is no oversight, the HSP cannot be relied upon to “protect both workers and the general public” during all Project phases or provide education of workers about Project hazards. MMPH&S-1a (pg. ES-14) reads in part as follows: “The plan would be submitted to the appropriate agencies at least 30 days prior to construction.” Clearly, there is no obligation for the applicant or contractor to prepare the HHMP but if either elects to do so, the HSP has to be submitted to unknown agencies. Note that there is no requirement that any agency approve it. Even if there were such a requirement, there is no consequence for the Project if an “appropriate” agency did not approve it. Apparently, the construction would be allowed to proceed with an inadequate or flawed HSP.

No enforcement mechanisms are included in the mitigation measure should the applicant fail to comply with the BIA’s recommendation. The lack of any consequences for a failure to comply with DEIS mitigation measures reinforces the advisory and unenforceable nature of the mitigation measure.

The District objects to the DEIS on the ground that it cannot meaningfully comment on the proposed Project because it is unknown if the future “recommended” mitigation measures would in fact be accomplished and thereafter either avoid or lessen the potentially significant effects on the environment as a result of the Project. On those grounds, the recommendations do not meet the legal standard for mitigation measures. *See*, CEQ Regulation 1508.20.

#### Comment 3

Pg. ES-14 Public Health and Safety MMPH&S-4: Please see Comment 1 above including the District’s objection to the DEIS. The same grounds for objection apply to MMPH&S-4. Recommending that a safety assessment be prepared is merely a suggestion; there is no enforcement mechanism in the DEIS. Without an enforceable mitigation measure requiring the preparation of a safety assessment subject to review and approval by public agencies including the District, the recommendation does not meet the legal standard for mitigation measures. *See*, CEQ Regulation 1508.20.

Should the Project and contractor choose not to accept the recommendation to prepare a safety assessment, there will be no enforceable protocol for site access/hazards, construction hazards, safe work practices, security, heavy equipment transportation, traffic management, emergency procedures, and fire control. Should either party decide to prepare a safety assessment, neither the District nor the public would be allowed to review it because it would be prepared prior to construction and not prior to Project approval.

Comment 4

Pg. ES-15 Public Health and Safety MMPH&S-5: Please see Comment 1 above including the District's objection to the DEIS. The same grounds for objection apply to MMPH&S-5. The "reviewing agencies" is not a defined term. The agencies should be identified and the District requests that it be included as one of the "appropriate agencies" referred to in the recommended mitigation measure.

Merely recommending that a Fire Prevention and Protection Plan ("FPPP") be prepared will not necessarily mean that it would be prepared. There is a lengthy list of topics that at a minimum should be included in the FPPP. If there is no decision to voluntarily prepare a FPPP subject to approval of fire agencies such as the District, the Project site may not, for instance, have appropriate fire suppression equipment on-site at all times, emergency response procedures, or even emergency information. A failure to mandate even minimal fire prevention standards or a protection plan will not only endanger workers on-site, it represents a potential fire threat to the surrounding communities.

As set forth above, late preparation of a voluntary document fails to provide any time for public or District review. Public participation in the DEIS process would be eliminated.

Comment 5

Pg. ES-16 Public Health and Safety MMPH&S-8 and 9: Please see Comment 1 above including the District's objection to the DEIS. These MMPH&S-8 and 9 recommended mitigation measures refer to the "Tribe's Land Use Code". Similarly, the DEIS refers to the Tribe's Land Use Plan (collectively "Land Use Documents"). *See*, DEIS pg. 1-12. There are multiple references in the DEIS to the Land Use Documents.

The District objects to the failure of the DEIS to specify where the Land Use Documents are reasonably available for inspection by interested persons. The DEIS fails to meet legal requirements that govern incorporation of documents by reference. *See*, CEQ Regulation 1502.21. There is no link to an electronic version of the Land Use Documents provided which would allow public review.

Readers of the DEIS are unable to determine whether compliance with elements of the Land Use Documents would avoid or minimize potentially significant environmental damage as a result of implementation of the Project. Readers are not required to accept the DEIS's summary of selective sections of the Land Use Document. At a minimum, the Land Use Documents should be available for inspection and copying at those locations where the DEIS is available. The Land Use Documents are not reasonably available for inspection by interested persons which is a violation of applicable rules and regulations. *Id.*

Fire hazard has been identified as an issue by the public and thus access to complete information and documentation cited to in the DEIS should be available for review and comment. *See*, DEIS pg. ES-16. This constitutes a failure of the DEIS to comply with applicable law governing the

contents of a DEIS. There is no assurance that contractor construction site and Project site actions would prevent accidents from the operation of the proposed wind turbine generators.

#### Comment 6

Pgs. 4.15-32 to 33 Public Health and Safety Cumulative Effects: The cumulative study area for public health and safety is limited to the proposed Project site. The second sentence in the subsection entitled "Geographic Scope" lacks any basis or authority regarding potential health and safety issues where it asserts that safety issues are typically local in nature since they relate to hazards caused by the construction and operation of the Project. This broad statement is not substantiated by any facts; it is conclusory in nature. The District objects to the broad characterization on the ground that it is a conclusion and not fact-based. This is an unsubstantiated assumption that is contrary to fundamental NEPA concepts.

A geographic scope limited only to the actual Project site is inadequate. Fire hazards are not limited only to wildfire. An on-site fire, if not properly controlled and managed, can easily spread to surrounding areas. It is not sufficient to address the potential impact of a fire only on the Project site based on the false assumption that fire will not spread beyond the Project site. There is no analysis of the potentially significant cumulative impact of the additional hazardous and flammable fluids that would be used on the Project site including "gasoline, diesel fuel, lubricating oil, grease and solvents". The addition of these fluids to an area that is already prone to wildfires is not addressed in any substantive way as required by NEPA.

The narrow geographic focus fails to meet NEPA standards requiring an analysis of the potential cumulative effect of a fire that may ignite at the Project site. Should it spread and reach nearby projects, residences, or the adjacent gas station, the fire could result in cumulatively considerable environmental impacts. The District objects to the narrow geographic focus on the ground that it fails to analyze the cumulative impact of a fire that has a real potential to spread beyond the Project site.

The DEIS is internally inconsistent. The Cumulative Impact Analysis (at pg. 4.15-33) reads in part as follows: "Additionally, mitigation measures require an HMMP and HSP to further minimize potential risk. . ." That is inconsistent with the Public Health and Safety mitigation measures. Neither an HMMP nor an HSP is required: the preparation thereof is merely a recommendation. *See*, Comments 1 and 2 above.

The DEIS further states that "the applicant and contractor shall be responsible for developing and implementing an FPPP. . ." *Id.* Again, the preparation of an FPPP is merely recommended and is not required. *See*, Comment 4, above. If a reader did not carefully review the Public Health and Safety mitigation measures, the plain language of the Cumulative Impacts text would mislead a reader who would reasonably interpret the inaccurate statements to mean that the mitigation measures require the preparation of an HMMP, an HSP, and an FPPP.

At a minimum, the Cumulative Impact Analysis must be revised to state that it is merely recommended that such documents be prepared for the project. The text is misleading and fails to

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accurately describe the mitigation measures as mandated by NEPA. However, as discussed above, preparation and implementation of an HMMP, an HSP, and an FPPP that has been approved by the appropriate agencies, including the District, should be required, not merely recommended.

### Summary

The District hereby objects to the DEIS on the ground that it fails to meet minimum standards for implementation and enforcement of Public Health and Safety mitigation measures. The DEIS's recommendations will not prevent or eliminate damage to the environment as a result of implementation of the Project. The DEIS is legally insufficient and fails to comply with NEPA and applicable environmental protection rules and regulations.

In an attempt to ensure a complete record on the District's comments, I am enclosing copies of the District's June 16, 2011 EIS Scoping Comments and the District's November 13, 2012 letter protesting omission of the District's EIS Scoping Comments in the EIS Scoping Report.

Very truly yours,



Cynthia L. Eldred, Esq.  
THE LAW OFFICE OF CYNTHIA L. ELDRED, APC  
Enclosures

cc: (via electronic mail only)  
San Diego Rural Fire Protection District  
Congressman Duncan D. Hunter, 50<sup>th</sup> Congressional District  
Dianne Jacob, Supervisor, Second District San Diego County Board of Supervisors  
Amy Dutschke, Bureau of Indian Affairs Regional Director  
Lenore Lamb, Bureau of Indian Affairs Natural Resources Officer  
Ralph Goff, Chairman, Campo Band of Mission Indians of the Kumeyaay Nation  
Bo Alley, Project Manager, Invenergy Wind California, LLC  
John Bridges, Principal in Charge, AECOM  
Matthew Valerio, Project Manager, AECOM  
Donna Tisdale, Chair, Boulevard Community Planning Group  
Miriam Raftery, Editor, East County Magazine  
Mark Ostrander, Cal Fire Battalion Chief, ret.

(via first class mail only)  
Melody E. Ponchot, Secretary, Boulevard Community Planning Group  
Leroy J. Elliot, Chairman, Manzanita Band of the Kumeyaay Nation  
Mr. Don Bonfiglio  
Mr. Don Renard

June 16, 2011

Robert Eben, Superintendent  
Southern California Agency  
Bureau of Indian Affairs  
1451 Research Park Drive  
Riverside, CA 92507

Re: EIS Scoping Comments, Shu'luuk Wind Project, San Diego County, California

Dear Mr. Eden:

This office represents San Diego Rural Fire Protection District ("District"). On behalf of the District, we appreciate the opportunity to identify issues relevant to the Shu'luuk Wind Project ("Project") and topics of concern to the District. The District's jurisdiction essentially surrounds the Campo Indian Reservation ("Reservation"). Because of this proximity, potential fire and emergency issues on and about the Reservation are of concern to the District.

The issues listed below are those that are immediately apparent. As the Project progresses and is clarified, further areas of concern may arise and therefore the District reserves the right to raise other topics at a later date. Preliminarily the District would like to see the following issues (in no particular order of relevance) addressed in the EIS:

- Project site safety during construction of turbines and infrastructure;
- Access route for construction trucks/equipment to project site;
- Site maintenance during construction and Project operation;
- Water availability for firefighting during construction and operation;
- Fire and emergency safety practices during wind farm operation;
- Ignition resistant construction;
- Fire protection plan for the Project and compliance measures;

- Provision of adequate fire and emergency services during construction and Project operation;
- Analysis of sources of wind farm fire risk;
- Project design features to minimize fire risk;
- Compliance with County Wildland Fire and Fire Protection Guidelines or similar authorities;
- Identification of applicable fire regulations;
- Fire protection systems;
- The effect on firefighting of the 5 miles of new 3-phase 138 kV overhead transmission lines;
- Defensible space and vegetation management;
- Enforceability of mitigation measures including fire protection plan components; and,
- Storage of fuels and hazardous materials at and near the Project site.

If you have any questions or require further information please feel free to contact me at the telephone number above or by e-mail at [cindy@eldredlaw.com](mailto:cindy@eldredlaw.com). We look forward to participating in the environmental process for the Project.

Very truly yours,



Cynthia L. Eldred, Esq.  
THE LAW OFFICE OF CYNTHIA L. ELDRED

cc: San Diego Rural Fire Protection District

**VIA ELECTRONIC MAIL ONLY**

November 13, 2012

Robert Eben, Superintendent  
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Amy Dutschke, Regional Director  
Pacific Regional Office  
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1420 Kettner Boulevard, Suite 500  
San Diego, California 92101

Matthew Valerio, Project Manager  
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1420 Kettner Boulevard, Suite 500  
San Diego, California 92101

Re: EIS Scoping Report Shu'luuk Wind Project Campo Band of Mission Indians

Dear Messrs. and Mses.:

This office represents San Diego Rural Fire Protection District ("District"). On behalf of the District and with reference to the Shu'luuk Wind Project ("Project"), we submitted EIS Scoping Comments to Mr. Robert Eben on June 16, 2011 ("Comment Letter"). A copy of that letter is attached for your reference. The Comment Letter was sent prior to the expiration of the comment period.

On behalf of the District:

1. We hereby protest that the Comment Letter was not included in the record of the Scoping Process;

Mr. Robert Eben, Ms. Amy Dutschke, Ms. Lenore Lamb, Ms. Monique La Chappa, Mr. Bo Alley, Mr. John Bridges, Mr. Matthew Valerio  
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2. We hereby protest that the Comment Letter was not considered in scoping the EIS or drafting the Draft EIS;
3. We request that this firm and the District be listed as set forth below on the Project's notice list and receive copies of all communication with respect to the Project; and,
4. We request that representatives of the BIA, the Campo Band of Mission Indians, Invenergy Wind California, LLC, and AECOM meet with the District and this firm to discuss the District's concerns and to begin a discussion of Project mitigation.

Please add to the Project's notice list:

Cynthia L. Eldred, Esq.  
THE LAW OFFICE OF CYNTHIA L. ELDRED  
2481 Congress Street  
San Diego, CA 92110

Fire Chief Dave Nissen  
San Diego Rural Fire Protection District  
14024 Peaceful Valley Ranch Road  
Jamul, CA 91935

This office will be following up to schedule a meeting. We look forward to participating in the environmental process for the Project despite the fact that the Comment Letter was not appropriately addressed or considered.

Very truly yours,



Cynthia L. Eldred, Esq.  
THE LAW OFFICE OF CYNTHIA L. ELDRED  
enclosure

cc: San Diego Rural Fire Protection District