

STEPHAN C. VOLKER (CBN 63093)
 STEPHANIE L. ABRAHAMS (CBN 257961)
 JAMEY M.B. VOLKER (CBN 273544)
 LAW OFFICES OF STEPHAN C. VOLKER
 436 14th Street, Suite 1300
 Oakland, California 94612
 Tel: 510/496-0600
 Fax: 510/496-1366

Attorneys for Petitioners/Plaintiffs
 THE PROTECT OUR COMMUNITIES FOUNDATION, *et al.*

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
 IN AND FOR THE COUNTY OF SAN DIEGO

THE PROTECT OUR COMMUNITIES
 FOUNDATION, BACKCOUNTRY AGAINST
 DUMPS and DONNA TISDALE,

Petitioners/Plaintiffs,

v.

SAN DIEGO COUNTY BOARD OF
 SUPERVISORS, and DOES I -X,

Respondents/Defendants,

DOES XI-L, inclusive,

Real Parties in Interest.

) Civ. No.

) **VERIFIED PETITION FOR WRIT OF**
) **MANDATE AND COMPLAINT FOR**
) **DECLARATORY AND INJUNCTIVE**
) **RELIEF AND ATTORNEY'S FEES**

) **CEQA CASE**

Petitioners/plaintiffs THE PROTECT OUR COMMUNITIES FOUNDATION,
 BACKCOUNTRY AGAINST DUMPS and DONNA TISDALE (collectively, "petitioners") hereby
 petition the Court for a writ of mandate and for preliminary and permanent injunctions and declaratory
 relief against respondents/defendants SAN DIEGO COUNTY BOARD OF SUPERVISORS (hereinafter
 "the Board") and DOES I through X, and real parties in interest DOES XI through L, and by this verified
 petition allege as follows:

INTRODUCTION

1. This is a public interest lawsuit to protect public health and the environment from poorly
 sited and designed wind energy facilities. Such facilities kill birds and bats, start wildfires, emit low

1 frequency noise that harms human health, and throw broken blades hundreds of feet. Petitioners ask this
2 Court to order the Board's compliance with the California Environmental Quality Act ("CEQA"), Public
3 Resources Code ("PRC") section 21000 *et seq.*, the San Diego County Zoning Ordinance ("Zoning
4 Ordinance"), the Planning and Zoning Law, Government Code section 65000 *et seq.*, and Code of Civil
5 Procedure sections 1085 and 1094.5.

6 2. Petitioners bring this action to challenge the following Board actions (collectively, "Project
7 approvals"):

- 8 (1) Adoption of Ordinance No. 10261 (N.S.), entitled "An Ordinance Amending the San
9 Diego County Zoning Ordinance Related to Small Wind Energy Turbines"
10 (collectively with Ordinance No. 10262 (N.S.), the "San Diego County Wind Energy
11 Ordinance" or "Wind Energy Ordinance," and collectively with Ordinance No.
12 10262 (N.S.), General Plan Amendment 12-003 A and General Plan Amendment
13 12-003 B, the "Project"). These approvals impact the environment because they
14 allow significantly more and larger wind turbines having a maximum electrical
15 generation capacity of 50 kilowatts ("kW") or less (so-called "small wind turbines")
16 by (1) *removing* the blade swept area restriction, (2) *reducing* the setback
17 requirements and (3) *increasing* the allowable turbine height. Ordinance No. 10261
18 also impacts the environment because it allows for the construction and operation of
19 temporary meteorological testing ("MET") facilities *without* any discretionary
20 permits as long as they comply with the height designator of the zone in which they
21 are located;
- 22 (2) Adoption of Ordinance No. 10262 (N.S.), entitled "An Ordinance Amending the San
23 Diego County Zoning Ordinance Related to Large Wind Energy Turbines." This
24 approval impacts the environment because it allows significantly more and larger
25 wind turbines having a maximum electrical generation capacity greater than 50 kW
26 (so-called "large wind turbines") by (1) *eliminating* blade swept area restrictions, (2)
27 *eliminating* the previous 80-foot turbine height limitation, (3) *reducing* the minimum
28 required setback, (4) *allowing* noise setback waivers, (5) *exempting* the Tule Wind

1 Project from the pure tone noise standard in section 6952(f)(3) of the County Zoning
2 Ordinance, and (6) explicitly allowing, for the first time, the exportation for off-site
3 use of electricity generated by large wind turbines;

4 (3) Adoption of Resolution No. 13-051, entitled "Resolution of the San Diego County
5 Board of Supervisors Adopting General Plan Amendment (GPA) 12-003 A," which
6 impacts the environment by amending the Regional Land Use Element, Borrego
7 Springs Community Plan, to allow ministerial permitting – *i.e. without* discretionary
8 review and analysis – of small wind turbines;

9 (4) Adoption of Resolution No. 13-052, entitled "Resolution of the San Diego County
10 Board of Supervisors Adopting General Plan Amendment (GPA) 12-003 B," which
11 impacts the environment by amending the Regional Land Use Element, Mountain
12 Empire Subregional Plan (Boulevard Chapter) to *allow the previously prohibited*
13 development of large wind turbines;

14 (5) Certification of the January 2013 Final Environmental Impact Report ("FEIR") for
15 the Project;

16 (6) Adoption of the CEQA Findings for the Project;

17 (7) Adoption of the Mitigation Monitoring and Reporting Program ("MMRP") for the
18 Project;

19 (8) Adoption of the Statement of Overriding Considerations ("SOC") for the Project;

20 (9) Adoption of the Decision and Explanation Regarding Recirculation of the EIR;

21 (10) Approval of Staff Recommendation No. 10, Policy Decision 1, allowing small wind
22 turbines in the pre-approved "mitigation areas" with only administrative permits
23 potentially exempt from public scrutiny and comment;

24 (11) Approval of Staff Recommendation No. 10, Policy Decision 2, allowing *waivers* of
25 setbacks essential for public protection in the wind resource areas north of Interstate-
26 8 in the Boulevard area;

27 (12) Approval of Staff Recommendation No. 10, Policy Decision 3, asserting contrary to
28 the facts and the law that the Project adequately addresses public health concerns;

- 1 (13) Approval of Staff Recommendation No. 10, Policy Decision 4, asserting contrary to
2 the facts and the law that the Project adequately addresses concerns related to fire;
3 (14) Approval of Staff Recommendation No. 10, Policy Decision 5, exempting the Tule
4 Wind Project from the Wind Energy Ordinance contrary to the Planning and Zoning
5 Law's requirement for uniformity of land use regulation and prohibition against
6 preferential exemption of individual parcels from such regulation commonly known
7 as "spot zoning"; and
8 (15) Approval of Staff Recommendation No. 11, adopting the Wind Resources Map,
9 which establishes allowable locations for large wind turbines based solely on wind
10 resources data.

11 3. The Board approved the Project and the accompanying CEQA documents and staff
12 recommendations despite the fact that (1) the EIR is inadequate, (2) the Project creates internal
13 inconsistencies within the Zoning Ordinance and thus violates the Planning and Zoning Law, and (3) the
14 Board failed to proceed in the manner required by law and its approvals are not supported by the
15 evidence in the record.

16 4. Petitioners therefore seek this Court's declaration that the Board's actions violate CEQA,
17 the San Diego County Zoning Ordinance, the Planning and Zoning Law and Code of Civil Procedure
18 sections 1085 and 1094.5. Petitioners also seek a writ of mandate ordering the Board to set aside and
19 vacate its adoption of the Wind Energy Ordinance and General Plan amendments, its certification of the
20 FEIR, and the balance of its Project approvals. Finally, petitioners seek an injunction forbidding the
21 County from approving the construction or operation of any wind turbines or wind energy projects
22 pursuant to the Wind Energy Ordinance and General Plan amendments, or from taking any other action
23 pursuant to the Project that could result in any change or alteration in the physical environment until the
24 Board has taken all actions necessary to bring the Project into compliance with CEQA, the Zoning
25 Ordinance, the Planning and Zoning Law and Code of Civil Procedure sections 1085 and 1094.5.

26 VENUE AND JURISDICTION

27 5. This Court has jurisdiction over this action pursuant to Code of Civil Procedure ("CCP")
28 sections 526 (injunctive relief), 1060 (declaratory relief), 1085 (traditional mandate), and 1094.5

(administrative mandate); PRC sections 21168 and 21168.5 (judicial review under CEQA); and Article VI, section 10, of the California Constitution.

6. Venue is proper pursuant to CCP sections 393(b) (actions against public officers) and 395 (actions generally) because the Board is the legislative body for and has its office within San Diego County.

7. This petition is timely filed within all applicable statutes of limitations. This action is timely under CEQA because it is filed within 30 days of the Board's May 15, 2013, Notice of Determination ("NOD"). PRC §21167(b).

8. Pursuant to CCP section 388, petitioners are serving the California Attorney General with a copy of this Verified Petition and Complaint, and consistent with PRC section 21167.5, petitioners have served the Board with notice of this suit.

PARTIES

9. Petitioner THE PROTECT OUR COMMUNITIES FOUNDATION ("POC") is a community organization formed in 2009 as the successor to The Protect Our Communities Fund, which had been formed in 2006. POC's mission is to protect rural communities and natural resources including agricultural lands in southern California and northern Baja California. POC is composed of numerous individuals and families who reside and own property, including land in agricultural production, in San Diego County and elsewhere in southern California. Some POC members own land within or near the large wind turbine development areas delineated in the Wind Resources Map. Additionally, numerous POC members rely for their domestic and/or agricultural water supplies on the scarce groundwater from which the wind energy projects allowed by the Project would draw substantial and unsustainable quantities. POC and its members are thus directly and beneficially interested in the decisions of respondent Board purporting to approve the Project and allow a significant increase in San Diego County wind turbine development. The conversion of much of Eastern San Diego County to industrial energy production sites – as allowed by the Project – will create significant public health hazards, kill golden eagles and other protected avian species, kill bats and thereby increase populations of mosquitoes and other harmful insects, damage East County's sensitive ecology, deplete the region's limited groundwater supplies, impair the rural, scenic character of the area, reduce the supply of agricultural and open space

land in the County, reduce the demand for agricultural service businesses, and induce the development of additional large-scale electrical generation facilities, among other impacts. As citizens residing in or near the County who own, use and enjoy its sensitive and vulnerable natural resources, agricultural lands and rural scenery and quality of life, POC's members have a clear and present right to, and beneficial interest in, the performance by the Board of its public duty to comply with the provisions of CEQA, the County's own Zoning Ordinance, the Planning and Zoning Law and the Code of Civil Procedure. *Waste Management of Alameda County v. County of Alameda* (2000) 79 Cal.App.4th 1223. POC was duly authorized to and does bring this action in a representative capacity on behalf of its members.

10. Petitioner BACKCOUNTRY AGAINST DUMPS ("Backcountry") is a community organization formed in 1989 and formally incorporated as a California non-profit public benefit corporation in 1991. Backcountry's purpose is to preserve the rural quality of life and community character in San Diego County and elsewhere in southern California by protecting rural communities from development projects that threaten public health and safety, natural resources, limited groundwater supplies and agricultural resources. Backcountry's membership comprises numerous individuals and families who reside and own property, including land in agricultural production, in San Diego County and elsewhere in southern California. As with POC, some of Backcountry's members own land within or near the large wind turbine development areas delineated in the Wind Resources Map. In addition, numerous Backcountry members rely for their domestic and/or agricultural water supplies on the scarce groundwater from which the wind energy projects allowed by the Project would draw substantial and unsustainable quantities. Backcountry and its members are thus directly and beneficially interested in the decisions of respondent Board purporting to approve the Project and allow a significant increase in San Diego County wind turbine development. The conversion of much of Eastern San Diego County to industrial energy production sites – as allowed by the Project – will create significant public health hazards, kill golden eagles and other protected avian species, kill bats and thereby increase populations of mosquitoes and other harmful insects, damage East County's sensitive ecology, deplete the region's limited groundwater supplies, impair the rural, scenic character of the area, reduce the supply of agricultural and open space land in the County, reduce the demand for agricultural service businesses, and induce the development of additional large-scale electrical generation facilities, among other

1 impacts. As citizens residing in or near the County who own, use and enjoy its sensitive and vulnerable
2 natural resources, agricultural lands and rural scenery and quality of life, Backcountry's members have a
3 clear and present right to, and beneficial interest in, the performance by the Board of its public duty to
4 comply with the provisions of CEQA, the County's own Zoning Ordinance, the Planning and Zoning
5 Law, and the Code of Civil Procedure. *Waste Management of Alameda County v. County of Alameda*
6 (2000) 79 Cal.App.4th 1223. Backcountry was duly authorized to and does bring this action in a
7 representative capacity on behalf of its members.

8 11. Petitioner DONNA TISDALE lives on Morningstar Ranch, located two miles west of Tierra
9 Del Sol Road in Boulevard, California, which sits directly in the middle of the largest high wind area
10 identified on the Wind Resources Map and will soon become the epicenter of the industrial-scale wind
11 energy generation boom allowed by the Project. Mrs. Tisdale is a member of petitioners POC and
12 Backcountry. She is also the Chairwoman of San Diego County's Boulevard Planning Group, and in
13 that capacity was instrumental in drafting the Boulevard Chapter of the Mountain Empire Subregional
14 Plan, which the Project drastically altered. In addition to owning land in the middle of the largest area
15 opened to industrial-scale wind turbine development by the Project, Mrs. Tisdale frequently visits other
16 open space and agricultural lands in San Diego County that the Project opens to increased wind energy
17 development to observe wildlife, enjoy the area's rustic beauty and share its agricultural history with her
18 grandchildren, friends and others. Furthermore, she relies for her domestic water supplies on the scarce
19 groundwater from which the wind energy projects allowed by the Project would draw substantial and
20 unsustainable quantities. Mrs. Tisdale is harmed by the Board's Project approvals because the Project
21 allows the conversion of much of Eastern San Diego County to industrial energy production sites, which
22 will create significant public health hazards, kill golden eagles and other protected avian species, kill
23 bats and thereby increase populations of mosquitoes and other harmful insects, damage East County's
24 sensitive ecology, deplete the region's limited groundwater supplies, impair the rural, scenic character of
25 the area, reduce the supply of agricultural and open space land in the County, reduce the demand for
26 agricultural service businesses, and induce the development of additional large-scale electrical
27 generation facilities, among other impacts. As a citizen who owns land in middle of the key East County
28 area permitted by the Project for large wind turbine development, frequently visits other open space and

1 agricultural land in the area, enjoys the scenic beauty and natural resources thereof, and relies on the
2 local groundwater resources, Mrs. Tisdale has a clear and present right to, and beneficial interest in, the
3 performance by the Board of its public duty to comply with the provisions of CEQA, the County's own
4 Zoning Ordinance, the Planning and Zoning Law and the Code of Civil Procedure. *Waste Management*
5 *of Alameda County*, 79 Cal.App.4th 1223.

6 12. Petitioners have authorized their attorneys to file this lawsuit on their behalf to vindicate
7 their, and the public's, interest in securing the Board's compliance with CEQA, the County's Zoning
8 Ordinance, the Planning and Zoning Law and the Code of Civil Procedure in connection with its review
9 and approval of the Project.

10 13. Respondent SAN DIEGO COUNTY BOARD OF SUPERVISORS at all material times has
11 been and is the governing legislative body of San Diego County and is authorized by the California
12 Constitution to regulate land use within all unincorporated areas of the County in compliance with
13 CEQA, the Planning and Zoning Law and the Code of Civil Procedure. The Board is the lead agency for
14 the Project under CEQA. The Board issued the Project approvals on May 15, 2013. The Board also
15 filed its CEQA NOD for the Project on May 15, 2013.

16 14. The true names and capacities of respondents DOES I-X, inclusive, are unknown to
17 petitioners who therefore sue such respondents by fictitious names pursuant to CCP section 474.
18 Petitioners will, with leave of Court if necessary, amend this verified petition if and when the true names
19 and capacities of said DOE respondents have been ascertained.

20 15. The Board did not identify any real parties in interest in its NOD pursuant to PRC section
21 21167.6.5(a), and petitioners are not otherwise aware that any real parties in interest exist. The true
22 names and capacities of real parties in interest DOES XI-L, inclusive, are thus unknown to petitioners
23 who therefore sue such real parties in interest by fictitious names pursuant to Code of Civil Procedure
24 section 474. Petitioners will, with leave of Court if necessary, amend this verified petition when the true
25 names and capacities of said Doe real parties in interest have been ascertained.

26 **FACTUAL BACKGROUND**

27 16. In recent years, there has been increasing pressure on San Diego County landowners –
28 including the federal government, Native American tribes, farmers, ranchers and other private

landowners — to sell or lease their often ecologically rich, agriculturally bountiful and culturally important lands for use by renewable energy projects. The increase in demand for renewable energy and resultant pressure to convert ecologically, agriculturally and culturally important lands to energy production has been spurred by state and federal renewable energy mandates like California's Renewables Portfolio Standard, which under Senate Bill X1 2 (Simitian) requires California's investor-owned utilities, electric service providers and community choice aggregators to provide 33 percent of their retail electricity sales from renewable energy sources by 2020. PRC §25740 *et seq.* Petitioners fully support the rapid development of renewable energy facilities to curtail greenhouse gas emissions and global warming. However, in their rush to profit from this mandate and the federal subsidies and tax incentives for developing wind energy and other renewable energy resources, renewable energy development companies have inundated land owners, Native American tribes, and local, state and federal governments with poorly designed and sited proposals to pave the deserts, agricultural lands and other backcountry areas of central and southern California with wind, solar, geothermal and other ostensibly renewable energy projects. San Diego County has not been spared from this deluge, with dozens of these projects proposed throughout the County.

17. Petitioners believe — and the science shows — that anthropogenic global warming is real and threatens our very existence and the ecology of Earth as we know it. And that is why petitioners advocate fiercely for the adoption of smart and effective energy policies to halt global warming, such as increased use of rooftop solar photovoltaics and other distributed generation sources. But in combating global warming, the protection of public health and safety, local ecosystems and agricultural resources must not be thrown to the wind in the process. Indeed, it is the *primary duty* of the San Diego County Board of Supervisors to ensure the health and welfare of the County's residents and environment even as the Board takes measures to stop global warming. *See* California Constitution, Art. 11, §7; San Diego County General Plan (revised August 3, 2011), pp. 2-5 ("The County of San Diego recognizes its long-term obligations to future residents by simultaneously promoting ecological health, economic vitality, and social well-being"), 3-24 (Goal LU-5 is to plan land uses so as to "reduce emissions of local greenhouse gases in accordance with state initiatives, *while promoting public health*" (emphasis added)). Here, however, the Board betrayed its duties to the public and the environment by approving a

1 framework for greatly expanding industrial-scale and other wind energy development in the County
2 without adequately studying and mitigating the resultant public health and environmental impacts.

3 18. The Project amends the provisions of the County Zoning Ordinance related to wind turbines
4 and MET facilities, and also modifies the County General Plan – specifically the Borrego Springs
5 Community Plan and the Boulevard Chapter of the Mountain Empire Subregional Plan (“Boulevard
6 Community Plan”) – to allow the Zoning Ordinance changes. In addition to various minor
7 “clarifications, deletions, and revisions to . . . [the prior] set of definitions, procedures, and standards for
8 review and permitting of wind turbines and MET facilities,” the Project makes three major substantive
9 changes to the County’s wind turbine and MET facility permitting regulations, and two drastic changes
10 to the General Plan. FEIR S.1-1.

11 19. Through its Zoning Ordinance amendments, the Project allows the development and
12 operation of significantly more and larger wind turbines and MET facilities. First, with respect to MET
13 facilities, the Project “allows a temporary MET facility that complies with the height designator of the
14 zone [in which it is located] *without* a discretionary permit.” FEIR S.1-1 (emphasis added).

15 20. Second, with respect to small wind turbines (maximum rated generation capacity of 50 kW
16 or less), the Project (1) *removes* the previous blade swept area restriction, (2) *reduces* the required
17 setback from property lines, private road easements and public roads, (3) *increases* the allowable turbine
18 height, and (4) allows “small wind turbines that meet the definition and specifications of the Zoning
19 Ordinance to be developed *without* a discretionary permit” (emphasis added), whereas before only some
20 smaller turbines did not require a discretionary permit and so-called “medium” turbines (a classification
21 that the Project removed) required an administrative permit. In a purported but ineffectual attempt to
22 mitigate the environmental and public health impacts from these relaxations on small wind turbine
23 development restrictions and permitting requirements, the Project also adds new requirements for
24 setbacks from, among other things, “[b]lue line watercourse(s),” “[s]ignificant roost sites for bat
25 species,” “[r]ecorded open space easements and designated preserve areas,” “[r]iparian vegetation” and
26 “known golden eagle nest site[s].” Zoning Ordinance §6951(a)(1). In addition, the Project prohibits
27 siting small wind turbines on ridgelines and adds various new design requirements, such as prohibiting
28 the use of trellis-style towers and guy-wires. *Id.* §6951(a)(10).

1 21. Third, with respect to large wind turbines (maximum rated generation capacity greater than
2 50 kW), the Project eliminates blade swept area restrictions, eliminates the previous 80-foot turbine
3 height limitations, establishes permitted turbine locations based on the Wind Resources Map, greatly
4 reduces the minimum required setback from existing residences and civic use buildings (from *8 times* to
5 *just 1.1 times* the wind turbine height), property lines, private road easements and public roads (from *4*
6 *times* to *just 1.1 times* the turbine height), and explicitly allows, for the first time, the exportation for off-
7 site use of electricity generated by the turbines. While additional property line setbacks may be required
8 based on the outcome of the new acoustical analysis required by the Project, the Project makes it easy to
9 sidestep that restriction by including a broad discretionary noise waiver provision. Zoning Ordinance
10 §6952(f)(2).

11 22. Through its General Plan amendments, the Project allows for even greater expansion of
12 wind energy projects. First, the Project eliminates the community-designed and drafted prohibitions on
13 large wind turbines in the Boulevard Community Plan. Second, the Project vitiates the Borrego Springs
14 Community Plan's prior blanket prohibition on wind turbine projects in "areas where viewsheds would
15 be adversely impacted" by allowing allow ministerial permitting – *i.e. without* discretionary review and
16 public scrutiny and comment – of small wind turbines. Borrego Springs Community Plan, p. 62.

17 23. By allowing development and operation of significantly more and larger wind turbines and
18 MET facilities in the County, the Project threatens to cause serious public health, environmental and
19 economic impacts. Indeed, the immense public hazard posed by wind turbines was ominously revealed
20 *the night after* the Board approved the Project, when one of the turbines at the Ocotillo Wind Energy
21 Facility – which abuts the San Diego County Border in southwestern Imperial County – hurled one of its
22 *11-ton* blades into the sky, halting operations at the facility, and at other facilities using the same turbines
23 and blades, indefinitely.¹ In addition to the public safety risks of wind turbine collapse and blade throw,
24 wind turbines and their associated electrical generation and transmission facilities can also emit harmful
25

26 ¹ See Bureau of Land Management, May 24, 2013, "Notice of Temporary Suspension of
27 Operations," *available here*:
28 [http://www.blm.gov/pgdata/etc/medialib/blm/ca/pdf/elcentro/nepa/ocotilloexpress.Par.73577.File
dat/Ocotillo%20Express%20Notice%20of%20Temporary%20Suspension%205-24-13.pdf](http://www.blm.gov/pgdata/etc/medialib/blm/ca/pdf/elcentro/nepa/ocotilloexpress.Par.73577.File.dat/Ocotillo%20Express%20Notice%20of%20Temporary%20Suspension%205-24-13.pdf)

1 levels of energy, including infrasound and low-frequency noise (“ILFN”), electric and magnetic fields
2 (“EMF”), increased ground current and dangerous stray voltage.

3 24. With respect to environmental impacts, wind turbines are known bird and bat killers,
4 through collision and other means, including the abrupt drop in air pressure behind the sweeping blades
5 known as barotrauma. And in San Diego County, there are many sensitive and ecologically important
6 birds at risk of turbine collisions, including the golden eagle. Furthermore, in addition to harming birds,
7 bats and other wildlife, wind turbines allowed by the Project will likely deplete the scarce groundwater
8 on which rural San Diego County residents and farmers rely for their livelihood and domestic uses. They
9 will also blight the pristine vistas in many areas of East County and convert productive agricultural lands
10 to expansive industrial landscapes, with potentially disastrous consequences for the County’s agricultural
11 economy.

12 25. Petitioners raised these public health, environmental and economic impacts and others
13 throughout the lengthy administrative review process that preceded the Board’s May 15, 2013, Project
14 approvals, beginning with the written comments that petitioner Donna Tisdale (on behalf of the
15 Boulevard Planning Group) submitted to the County on March 11 and April 6, 2010, months before the
16 County even issued its September 9, 2010, Notice of Preparation (“NOP”) of the EIR for the Project.
17 After the County issued the NOP, petitioner Tisdale submitted additional scoping comments on October
18 11, 2010, on behalf of herself, co-petitioner Backcountry and the Boulevard Planning Group. The Law
19 Offices of Stephan C. Volker (“Volker Law”), on behalf of conservation groups including petitioners
20 POC and Backcountry, also submitted scoping comment letters, one on October 11, 2010, and one on
21 November 24, 2010.

22 26. Nearly one year later, on or about November 8, 2011, the County released for public review
23 the Project Draft EIR (“DEIR”). Petitioners submitted extensive written comments on the DEIR on
24 December 30, 2011, which they later supplemented and resubmitted on January 26, 2012. On April 12,
25 2012, after the County had revised and re-released its DEIR earlier that month, Volker Law submitted
26 additional comments on the Project and its EIR. Petitioners then submitted further comments on the
27 Project and the revised DEIR at the Planning Commission hearing on the Project on April 13, 2012.
28 Petitioner Tisdale also presented oral comments on behalf of all petitioners at the April 13, 2012,

1 Planning Commission hearings, as well at each of the subsequent Planning Commission hearings on the
2 Project and the related Tule Wind Project – held on May 18, June 8, July 20, August 8 and October 19,
3 2012 – and at the April 27, 2012, Planning Commission workshop on the Project. Other members of
4 petitioners POC and Backcountry also presented oral comments at these Planning Commission hearings,
5 including engineer Bill Powers, a member of the POC Board and preeminent expert on energy
6 generation, distribution and conservation, who demonstrated in a detailed presentation at the July 20,
7 2012, hearing that there are feasible and environmentally preferable alternatives to large-scale wind and
8 solar projects in the County. Besides their written EIR comments and oral comments at public hearings
9 and workshops, Petitioner Tisdale and other POC and Backcountry members also submitted substantial
10 additional information in writing to various County staff, Planning Commissioners and Board members
11 throughout the Planning Commission’s review of the Project.

12 27. Subsequent to the July 20 and October 19, 2012, Planning Commission hearings at which
13 the Commission recommended approval of the Project to the Board, the County released the Project
14 FEIR in January 2013. On May 7, 2013, in response to the FEIR and prior to the Board’s May 8, 2013,
15 hearing on the Project, Volker Law submitted extensive written comments to the Board on behalf of
16 petitioners. Petitioner Tisdale also submitted detailed comments and information on Project impacts to
17 the Board and various County staff members prior to the Board’s May 8 hearing. Due in part to the
18 serious public health and environmental impacts raised again in those written comments, as well as oral
19 comments presented during the Board’s May 8 hearing by Petitioner Tisdale and others, the Board
20 postponed any action on the Project until its May 15 hearing.

21 28. On May 13, Volker Law submitted additional written comments to the Board on petitioners’
22 behalf. Among other things, Volker Law’s May 13 comments transmitted the preliminary Kumeyaay
23 Wind Facility Noise Study report prepared by Dr. Richard Carman, which documents the emission of
24 significant levels of ILFN from the Kumeyaay wind turbines on the Campo Indian Reservation in
25 southeast San Diego County. On behalf of all petitioners, Ms. Tisdale also submitted supplemental
26 written comments to the Board on May 13, 2013.

27 29. Despite the illegality of the Project, the EIR’s inadequacies under CEQA and the written
28 and oral objections to the Project made by petitioners and others throughout the environmental review

1 and administrative approval process, the Board approved the Project at its May 15, 2013 hearing, with
2 most Project approvals passing by a 4-1 vote. The Board filed its CEQA NOD for the Project the same
3 day.

4 GENERAL ALLEGATIONS

5 30. Petitioners have performed any and all conditions precedent to the filing of this Verified
6 Petition and, to the extent required, have exhausted any and all available administrative remedies.

7 31. Petitioners have no plain, speedy, and adequate remedy in the ordinary course of law, within
8 the meaning of CCP section 1086. Unless this Court issues a writ of mandate ordering the Board to set
9 aside and vacate its Project approvals, the public health and environmental interests of petitioners and
10 the public will be substantially and irreparably harmed. No monetary damages or other legal remedy
11 could adequately compensate for the harms to petitioners and the environment that would arise if the
12 Board's unlawful conduct were allowed to stand.

13 32. Petitioners are also entitled to injunctive relief under CCP section 526 because the Project
14 threatens irreparable environmental harm. Unless enjoined, the Board and other County officials and
15 staff will implement the Project despite its lack of compliance with applicable laws, causing unlawful
16 and unnecessary environmental degradation. Petitioners would thereby suffer irreparable harm due to
17 the Board's failure to take the steps required by law to adequately protect the environment. Injunctive
18 relief is thus warranted under CCP section 525 *et seq.* and PRC section 21168.9 to prevent irreparable
19 harm to the environment.

20 33. An actual controversy exists between petitioners and respondents under CCP section 1060.
21 Petitioners contend that respondents have acted in violation of applicable laws, including but not limited
22 to CEQA, the San Diego County Zoning Ordinance, the Planning and Zoning Law and the Code of Civil
23 Procedure as alleged herein, and must therefore vacate and set aside the Project approvals. Petitioners
24 are informed and believe that the Board disputes this contention. A judicial resolution of this
25 controversy is therefore necessary and appropriate.

26 ///

27 ///

28 ///

1 ///

2 **FIRST CAUSE OF ACTION**

3 **(Writ of Mandate and Declaratory Relief to Set Aside the Board's Project**
4 **Approvals as Contrary to the San Diego County Zoning Ordinance**
5 **and the Planning and Zoning Law)**

6 34. The paragraphs set forth above are realleged and incorporated herein by reference.

7 35. Petitioners bring this First Cause of Action on the grounds that the Board's approval of
8 the Project was *ultra vires* and must be set aside because it allows the development of large wind
9 turbines on agricultural and open space land whose zoning classifications *do not allow* large wind
10 turbines or any other industrial-scale energy facilities, and exempts the Tule Wind Project from the new
11 requirements that the Wind Energy Ordinance amendments impose on the development of large wind
12 turbines. The Board's approval of Ordinance No. 120262 (pertaining to large wind turbines) creates
13 internal inconsistencies within the Zoning Ordinance and renders the zoning regulations non-uniform
14 within the agricultural and open space zones, thereby violating the Planning and Zoning Law. The
15 Board's exemption of the Tule Wind Project from the acoustical study requirement (Zoning Ordinance
16 section 6952(f)(1)), pure tone noise restriction (section 6952(f)(3)) and other new requirements imposed
17 by the Wind Energy Ordinance amendments renders the large wind turbine zoning regulations non-

18 **The Project Conflicts with the Zoning Ordinance**

19 36. Just as the County General Plan and each "element[] and part[] thereof" must be "internally
20 consistent" (Government Code section 65300.5), and just as the County Zoning Ordinance must be
21 "consistent with the general plan" (Government Code section 65860(a)), so too must the County Zoning
22 Ordinance be consistent with itself. *See* Government Code §65300.5, 65852, 65860(a); *Neighborhood*
23 *Action Group v. County of Calaveras* ("Neighborhood") (1984) 156 Cal.App.3d 1176, 1184. Here,
24 however, the Project is inconsistent with the County Zoning Ordinance, and the Board's approval thereof
25 thus violated the Planning and Zoning Law and was *ultra vires*.

26 37. By adopting Ordinance No. 10262 as part of the Project, the Board amended section
27 6952(b) of the Zoning Ordinance to mandate that large wind turbines "shall be located in a wind
28 resources area shown on the Wind Resources Map [also] approved by the Board of Supervisors" as part

1 of the Project. But the Board *failed* to concurrently amend the zoning regulations governing the zones in
2 which the wind resources areas are located to allow for large wind turbine projects.

3 38. The wind resources areas depicted on the Wind Resources Map include land zoned for both
4 agriculture and open space, under zoning classifications A70 (Limited Agricultural Use), A72 (General
5 Agricultural Use) and S80 (Open Space Use). *See, e.g.*, FEIR 2.2-21, 2.7-21. Yet the County Zoning
6 Ordinance *does not allow* either large wind turbines or any other industrial-scale energy facilities in *any*
7 of those three zones. Zoning Ordinance §§2700-2705 (governing limited agricultural use zones), 2720-
8 2725 (governing general agricultural use zones), 2800-2805 (governing general agricultural use zones).

9 39. By authorizing the future development of large wind turbines on land zoned for agriculture
10 or open space under zoning classifications that *do not allow* this type of industrial development, the
11 Project – and specifically Ordinance No. 10262 – creates an internal conflict within the County Zoning
12 Ordinance. The Board’s approval of the Project thus violated the Planning and Zoning Law and was
13 *ultra vires*. *See* Government Code §65300.5, 65852, 65860(a); *Neighborhood*, 156 Cal.App.3d at 1184.

14 **The Project Violates Government Code Section 65852**

15 40. Government Code section 65852 requires that all zoning “regulations shall be *uniform* for
16 each class or kind of building or use of land throughout each zone, but the regulation in one type of zone
17 may differ from those in other types of zones.” *Id.*, emphasis added. By approving the Project – and
18 specifically Ordinance No. 10262 – the Board created non-uniform zoning regulations and violated
19 section 65852.

20 41. By authorizing the future development of large wind turbines on land zoned for agriculture
21 or open space under zoning classifications (A70, A72 and S80) that do not allow this type of industrial
22 development, the Board created two conflicting regulations governing the use of that land for large wind
23 turbines. It is the antithesis of uniformity to apply two sets of regulations to the same land, one of which
24 *prohibits* the development of large wind turbines and the other of which *allows* it.

25 42. Second, by approving County Staff Recommendation 10, Policy Decision 5, and exempting
26 the Tule Wind Project from the Wind Energy Ordinance amendments, the Board created an inherent
27 discord within the large wind turbine zoning regulations. While the amended Wind Energy Ordinance
28 imposes the acoustical study requirement (Zoning Ordinance section 6952(f)(1)), pure tone noise

1 restriction (section 6952(f)(3)) and other new requirements on every other potential future large wind
2 turbine project, the Board purported to singularly exempt the Tule Wind Project. This is the epitome of
3 a non-uniform zoning regulation that Government Code section 68582 forbids.

4 43. In sum, by approving the Project – and specifically adopting Ordinance No. 10262 and
5 exempting the Tule Wind Project from it – the Board created non-uniform zoning regulations and
6 violated Government Code section 65852.

7 **SECOND CAUSE OF ACTION**

8 **(Writ of Mandate and Declaratory Relief to Set Aside the Board's Certification** 9 **of the Environmental Impact Report for the Project and Associated Project** 10 **Approvals as Contrary to the California Environmental Quality Act)**

11 44. The paragraphs set forth above are realleged and incorporated herein by reference.

12 45. Petitioners bring this Second Cause of Action pursuant to PRC sections 21168 and 21168.5
13 on the grounds that the Board failed to act in accordance with the law, and committed a prejudicial abuse
14 of discretion, in that the Board certified an FEIR that does not comply with CEQA and adopted a
15 Statement of Overriding Considerations that is not supported by substantial evidence in the record.

16 46. The EIR does not comply with CEQA because it (1) fails to analyze significant public safety
17 impacts of wind turbines, including from blade throw and turbine collapse, (2) fails to respond to
18 comments on the Project's public safety impacts, (3) fails to adequately analyze the public health
19 impacts of infrasound and low-frequency noise, (4) fails to adequately analyze the public health impacts
20 of wind turbine-generated electric and magnetic fields including excessive ground currents and
21 dangerous stray voltage, (5) fails to analyze the impacts on bats of barotrauma caused by wind turbine
22 operations, and (6) fails to analyze the Project's water supply impacts.

23 **The EIR Fails to Analyze Significant Impacts to Public Safety**

24 47. An EIR must provide a discussion of the significant environmental impacts of the proposed
25 project, including both direct and indirect impacts. 14 Cal. Code Regs. ("CEQA Guidelines" or
26 "Guidelines") §§15126(a), 15126.2(a). A "significant effect" occurs when a project causes a
27 "substantial, or potentially substantial, adverse change in any of the physical conditions within the area
28 affected by the project." Guidelines §15382. "An EIR should be prepared with a sufficient degree of
analysis to provide decisionmakers with information which enables them to make a decision which

1 intelligently takes account of environmental consequences.” Guidelines §15151; *Watsonville Pilots*
2 *Association v. City of Watsonville* (2010) 183 Cal.App.4th 1059, 1080. Further, a lead agency must “use
3 its best efforts to find out and disclose all that it reasonably can,” to demonstrate it has fully “considered
4 the environmental consequences of [its] action.” Guidelines §15144; *Vineyard Area Citizens for*
5 *Responsible Growth, Inc. v. City of Rancho Cordova* (“*Vineyard*”) (2007) 40 Cal.4th 412, 428; *Berkeley*
6 *Keep Jets Over the Bay Committee v. Board of Port Commissioners* (“*Berkeley Keep Jets*”) (2001) 91
7 Cal.App.4th 1344, 1355-56. “A prejudicial abuse of discretion occurs” where the agency fails “to
8 include relevant information [and that failure] precludes informed decisionmaking and informed public
9 participation, thereby thwarting the statutory goals of the EIR process.” *Kings County Farm Bureau v.*
10 *City of Hanford* (“*Kings County*”) (1990) 221 Cal.App.3d 692, 712; *Barthelemy v. Chino Basin*
11 *Municipal Water District* (1995) 38 Cal.App.4th 1609, 1620 (“The failure to include information in an
12 EIR normally will rise to the level of a failure to proceed in the manner required by law only if the
13 analysis in the EIR is clearly inadequate or unsupported”).

14 48. Here, the County committed a prejudicial abuse of discretion by *entirely* failing to address
15 numerous public safety impacts of the Project. For example, the FEIR omits *any* analysis of blade
16 throw. As discussed in paragraph 23 above, on the night after the Board approved the Project here, one
17 of the wind turbines at the Ocotillo Wind Energy Facility just east of Boulevard hurled a *173-foot, 11-ton*
18 turbine blade off its rotor, causing it fly 100 yards away and land in the middle of a fortunately
19 unoccupied roadway. And this was not the first incident of its kind. Petitioners and others apprised the
20 County of these kinds of incidents, including a blade tossed into the median strip of Interstate 8 (“I-8”)
21 near Boulevard several years ago from the Kumeyaay wind energy project north of I-8, in petitioners’
22 extensive comments. Yet the County *still* did not analyze the significant blade throw hazard and other
23 wind turbine safety issues.

24 49. The EIR’s only discussion of wind turbine safety issues consists of a half-page list of
25 “Small Wind Turbine Performance and Safety Standard[s]” (FEIR 2.6-16 to 17), and an unsupported
26 assertion in response to a comment by retired CalFire Battalion Chief Mark Ostrander that a buffer equal
27 to 1.1 times the turbine height is sufficient to “keep the fall-area of a turbine on the project site” in the
28 event of a collapse.” FEIR, Response to Comment Q-3, p. Q-2. Neither of these cryptic references is

1 sufficient to allow a decisionmaker to “intelligently take[] account of the environmental consequences.”
2 Guidelines §15151. The EIR’s brief discussion of the regulatory setting surrounding small wind turbines
3 not only provides *no* analysis of the impacts that those standards are meant to protect against, it *entirely*
4 *fails* to analyze the much more significant large wind turbine safety issues. And the EIR fails to provide
5 *any* evidentiary support for its conclusory assertion, in response to Mr. Ostrander’s comments, that a
6 setback of just 1.1 times the height of a turbine provides adequate public safety. Furthermore, the
7 response to Mr. Ostrander’s comments *completely fails* to address similar and potentially more
8 dangerous safety issues besides wind turbine collapse, such as blade throws.

9 50. In sum, the EIR provides *no explanation or analysis whatsoever* of the likelihood and
10 resultant impacts of blade throw, turbine collapse and other similar wind turbine safety issues. Indeed,
11 the EIR does not even mention the term “blade throw.” As a result, the EIR “precludes informed
12 decisionmaking and informed public participation, [and] thereby thwart[s] the statutory goals of the EIR
13 process.” *Kings County*, 221 Cal.App.3d at 712; Guidelines §§15126(a), 15126.2(a).

14 **The EIR Fails to Respond to Comments on Significant Public Safety Impacts**

15 51. CEQA requires the lead agencies to provide detailed responses to comments, based on a
16 reasoned analysis; “[c]onclusory statements unsupported by factual information will not suffice.” CEQA
17 Guidelines §15088(c). Specifically, when a major environmental issue is raised, the lead agency must
18 respond fully and in good faith, explaining why specific comments and suggestions were or were not
19 accepted, and what changes if any were made to the EIR as a result. The Board failed to meet this
20 requirement here by summarily dismissing public comments that raised the significant public safety
21 impacts of wind turbines, including blade throws and wind turbine collapse, instead of providing a
22 complete, good faith discussion of those issues as required by CEQA. *See* FEIR, Response to Comments
23 Q-3, GG-43, GG-118.

24 52. For example, the Board’s responses *completely ignore* the significant impact of blade throw
25 discussed in the comments. FEIR Response to Comments Q-3, GG-43, GG-118. As demonstrated in
26 petitioners’ January 26, 2011, DEIR comments (comment letter “GG”), Mark Ostrander’s December 22,
27 2011, DEIR comments (comment letter “Q”) and elsewhere, and as further evidenced by the recent
28 incident at the Ocotillo Wind Energy Facility, blade throws are a serious threat to public safety. Yet the

1 Board's responses to those comments *do not even mention* blade throw. *Id.* This violates CEQA, which
2 requires a "good faith, reasoned analysis in response," not silence. Guidelines §15088(c).

3 53. In addition, with respect to comments on turbine collapse, including those presented in
4 petitioners' January 26, 2011, DEIR comments and Mr. Ostrander's December 22, 2011, DEIR
5 comments, the County provides *no evidence whatsoever* to support its conclusory assertions that (1)
6 turbine collapse is "not likely or foreseeable," and, (2) even if it occurred, turbine collapse would be
7 without consequence because the required setback of 1.1 times the turbine height would ensure that no
8 equipment flew out of the project area. Without any discussion of or evidence as to *why* turbine collapse
9 is unlikely, *how* the Project protects workers, wildlife and other sensitive resources *on a wind energy*
10 *project site*, and *why* wind turbine collapse would not cause impacts outside the project area, the Board's
11 response violates CEQA. Guidelines §15088(c) ("Conclusory statements unsupported by factual
12 information will not suffice"); *Vineyard*, 40 Cal.4th at 427 (holding that there must be "substantial
13 evidence to support the [EIR's] factual determinations").

14 **The EIR Fails to Analyze the Project's Water Supply Impacts**

15 54. CEQA requires that EIRs discuss the likely water sources for projects, the "environmental
16 impacts of exploiting those sources," and "how those impacts are to be mitigated." *Vineyard*, 40 Cal.4th
17 at 421 (quote), 434, 440-441. These same requirements apply to EIRs for general plans, zoning
18 ordinances and other more "conceptual plan[s]," though "the necessary degree of confidence involved"
19 for "identifying likely water sources" is lower. *Id.* at 434; *Watsonville Pilots Association*, 183
20 Cal.App.4th at 1092. For these types of plans, such as the Zoning Ordinance and General Plan
21 amendments comprising the Project here, CEQA requires that the EIR identify potential water sources
22 for the project and

23 address[] the reasonably foreseeable *impacts* of supplying water to the project. If the
24 uncertainties inherent in long-term land use and water planning make it impossible to
25 confidently identify the future water sources, [the] EIR may satisfy CEQA if it
26 acknowledges the degree of uncertainty involved, discusses the reasonably foreseeable
27 alternatives – including alternative water sources and the option of curtailing the
development if sufficient water is not available for later phases – and discloses the
significant foreseeable environmental effects of each alternative, as well as mitigation
measures to minimize each adverse impact.

28 *Vineyard*, 412 Cal.4th at 434 (quote, emphasis in original); *Watsonville Pilots Association*, 183

1 Cal.App.4th at 1092.

2 55. The EIR here ignores *Vineyard* and fails to identify and analyze the water sources likely to
3 supply the future wind energy projects that will be developed under the Project or the uncertainties
4 surrounding those sources. The EIR *hints* in a brief discussion on groundwater impacts that large wind
5 turbine projects may use groundwater, but it provides no analysis of the likelihood that groundwater
6 would be available to serve the projects. And the EIR *omits entirely* any discussion on the availability of
7 water supplies other than groundwater or the likelihood that the wind energy projects would use them.
8 This violates CEQA. *Vineyard*, 412 Cal.4th at 434; *Watsonville Pilots Association*, 183 Cal.App.4th at
9 1092.

10 56. The EIR also violates CEQA by failing to adequately “address[] the reasonably foreseeable
11 impacts of supplying water to the [wind energy] project[s].” *Vineyard*, 412 Cal.4th at 434 (emphasis in
12 original). For one, the EIR fails to provide any analysis *whatsoever* of the impacts of supplying future
13 wind energy projects with surface water. And while the EIR purports to analyze the Project’s impacts to
14 “groundwater supply and recharge,” in reality it just kicks the analytical can down the road. FEIR 3.1.2-
15 15 to 16. The EIR asserts without analysis or evidentiary support that “[b]ecause all future large turbines
16 are required to comply with the Groundwater Ordinance, WPO, and Major Use Permit process prior to
17 approval, the proposed project **would not result in significant impacts** to groundwater resources with
18 respect to large turbines.” *Id.* at 3.1.2-16 (emphasis in original). This in no way suffices under CEQA.
19 The EIR’s analysis here stands in stark contrast to the analysis in the City of Watsonville’s EIR for its
20 2030 General Plan, which the court of appeal upheld because it

21 *did* identify the likely source of water for the new development: the Basin’s groundwater[,
22 while] “also not[ing] the uncertainties surrounding the Basin’s overdraft condition and
23 discuss[ing] the various measures that the City and [the relevant water agency] were
24 undertaking to address the long-term overdraft situation in the foreseeable future[,
including offsetting the new demand through] conservation, conversion of agricultural
lands to urban use, and other measures.

25 *Watsonville Pilots Association*, 183 Cal.App.4th at 1092 (emphasis added).

26 **The EIR Fails to Analyze the Project’s Barotrauma Impacts to Bats**

27 57. As with its failure to address numerous public safety impacts of the Project in the EIR, the
28 Board violated CEQA by completely failing to analyze in the EIR the impact of wind turbine-induced

1 barotrauma on bats. *Kings County*, 221 Cal.App.3d at 712; Guidelines §§15126(a), 15126.2(a).

2 58. Barotrauma is the physical damage to body tissue and internal organs such as lungs caused
3 by excessive or rapid changes in pressure. Because their moving blades create abrupt waves of low
4 pressure, wind turbines can cause barotrauma in passing bats. When bats enter these low pressure zones,
5 the rapid and/or excessive change in pressure can cause numerous, potentially fatal impacts, including
6 pulmonary hemorrhage, lung collapse, and edema.

7 59. Despite the fact that petitioners informed the Board through their EIR comments that wind
8 turbines can and do kill or otherwise harm bats via barotrauma, and requested that the Board analyze
9 barotrauma impacts in the EIR, the EIR fails to *even mention* barotrauma. *See* FEIR, section 2.4
10 (Biological Resources). Instead, the FEIR's discussion of bats only considers collision impacts. FEIR
11 2.4-27 to 28; 2.4-29 to 31; 2.4-36 to 37; 2.4-40. The FEIR fails to mention any concerns related to
12 changes in pressure around the wind turbines and the resultant impacts on bats and birds that use the
13 same air space. *Id.* The FEIR's failure to include *any* information about the significant and potentially
14 fatal impact of barotrauma violates CEQA's clear duty that the lead agency provide a thorough analysis
15 of all potentially significant impacts caused by the project. *Kings County*, 221 Cal.App.3d at 712;
16 Guidelines §§15126(a), 15126.2(a).

17 **The EIR Fails to Adequately Analyze the Project's Electric and Magnetic Field Impacts**

18 60. Over the past two decades, scientists have developed substantial evidence showing that
19 electric and magnetic field ("EMF") exposure can cause health impacts. Recent studies, such as those
20 cited, discussed and included as exhibits in petitioners' and others' comments on the Project EIR, have
21 shown that EMF can cause damage to the nervous system, disruption of circadian rhythms, changes in
22 heart function, impairment of immunity and fertility, and genetic and developmental problems.
23 Specifically, reports have linked EMF exposure with an increase in ailments such as diabetes,
24 fibromyalgia, chronic fatigue syndrome, and attention deficit disorder. And as demonstrated in
25 petitioners' and others' comments submitted to the County during the administrative review process for
26 the Project, wind turbines and their associated electrical transmission and other facilities produce
27 substantial EMF radiation, including through stray voltage and dirty electricity.

28 61. However, instead of even "consider[ing] EMFs . . . in the context of CEQA/NEPA" *at all*,

1 let alone analyzing their impacts on human health and nearby wildlife, the EIR sweeps the issue under
2 the rug with the conclusory assertions that (1) “there is no agreement among scientists that EMFs . . .
3 create a health risk,” (2) “there are no defined CEQA/NEPA standards for defining health risks from
4 EMFs,” and (3) “[t]here is inadequate or no evidence of health effects at low exposure levels.” FEIR
5 2.6-52. The EIR’s excuses fail for two reasons.

6 62. First, the EIR’s conclusions that “there is no agreement among scientists that EMFs . . .
7 create a health risk” and that “[t]here is inadequate or no evidence of health effects at low exposure
8 levels” are out of date and refuted by the numerous recent studies cited and discussed by petitioners and
9 others in their EIR comments and other comments submitted to the County during the administrative
10 review process for the Project. FEIR 2.6-52. Yet the EIR *wholly ignores* these recent studies and
11 instead discusses just one outdated source: a preliminary investigation initiated by the CPUC in 1993 –
12 *20 years ago* – that contends there was insufficient evidence of health impacts from EMF at low
13 exposure *two decades ago*. But even the CPUC acknowledged in its Decision (93-11-013) that “the
14 body of scientific evidence continues to evolve.” And evolve it has. The CPUC’s obsolete claim fails to
15 address numerous recent studies documenting the potential for significant health impacts from EMF
16 emissions, and thus provides no basis for sound decisionmaking today. Because it ignores recent
17 science, the EIR fails to provide the substantial evidence that CEQA requires to support its assertion that
18 EMF exposure presents no established health hazard to humans and need not be thoroughly analyzed.
19 *Vineyard*, 40 Cal.4th at 427; *Laurel Heights Improvement Association v. Regents of the University of*
20 *California* (1988) 47 Cal.3d 376, 407.

21 63. Second, even if true, the fact that “there are no defined CEQA/NEPA standards for defining
22 health risks from EMFs,” does not excuse the Board from fully analyzing EMF impacts in the EIR.
23 FEIR 2.6-52. To paraphrase the court of appeal’s holding in an analogous case involving air pollution
24 from an airport expansion, “[t]he fact that a single methodology does not currently exist that would
25 provide [the County] with a precise, or ‘universally accepted,’ quantification of the human health risk
26 from [EMF] exposure does not excuse the preparation of a health risk assessment – it requires [the
27 County] to do the necessary work to educate itself about the different methodologies that *are* available.”
28 *Berkeley Keep Jets*, 91 Cal.App.4th at 1370.

1 64. In sum, the Board's decision to omit from the EIR any detailed analysis of the Project's
2 EMF impacts on human health and wildlife violates CEQA.

3 **The EIR Fails to Adequately Analyze the Project's Infrasound and Low-Frequency Noise Impacts**

4 65. As with EMF, scientists have recently made significant breakthroughs in identifying the
5 human health and other impacts of infrasound and low-frequency noise, including wind turbine-
6 generated ILFN. In a 2010 published review of the literature, one group of researchers concluded that
7 "there is increasingly clear evidence that [both] audible *and* low-frequency acoustic energy from [wind]
8 turbines is sufficiently intense to cause extreme annoyance and inability to sleep, or disturbed sleep, in
9 individuals living near them."² More recent studies, such as those cited, discussed and included as
10 exhibits in petitioners' and others' comments on the Project EIR, bolster this conclusion and provide
11 additional details as to the extent and mechanisms through which ILFN affects human health. Yet again
12 as with EMF, the EIR fails to adequately assess the health and environmental impacts of ILFN despite
13 the fact that the wind turbines allowed by the Project will likely produce enough ILFN to cause
14 significant adverse impacts to human health and the environment.

15 66. Instead of fully analyzing the human health and other impacts of wind turbine-generated
16 ILFN, as CEQA requires, the EIR attempts to sweep the issue under the rug with the conclusory
17 assertion that "there is currently no published scientific evidence to conclude wind turbine noise could
18 cause health effects." FEIR 2.8-15. But the EIR is wrong and violates CEQA for two reasons.

19 67. First, the EIR *entirely* ignores the copious recent studies on ILFN and its human health
20 impacts, including the studies and articles submitted by petitioners and others in their EIR comments. In
21 so doing, the EIR fails to both include essential information and, at the very least, "summarize the main
22 points of disagreement among the experts," as CEQA requires. Guidelines §15151. As a result, the EIR
23 "precludes informed decisionmaking and informed public participation, [and] thereby thwart[s] the
24 statutory goals of the EIR process." *Kings County*, 221 Cal.App.3d at 712.

25
26 ² Punch, Jerry, Richard James & Dan Pabst, 2010, "Wind-Turbine Noise: What Audiologists
27 Should Know," *Audiology Today*, July/August 2010, p.24 (emphasis added). Petitioners
28 submitted this article to the County multiple times, including as Exhibit 1 to Volker Law's
October 11, 2010, scoping comments submitted on behalf of petitioners POC and Backcountry,
which are included in FEIR Appendix C.

1 68. Second, the EIR's conclusion that "there is currently no published scientific evidence to
2 conclude wind turbine noise could cause health effects" is unsupported by the substantial evidence that
3 CEQA requires. *Vineyard*, 40 Cal.4th at 427; *Laurel Heights Improvement Association*, 47 Cal.3d at
4 407. For one, the two studies on which the EIR relies, which were issued in 2009 and 2010, are too old
5 to support a conclusion on the *current* – i.e. as of January 2013 when the FEIR was released – state of
6 the scientific evidence. Furthermore, as demonstrated by the aforementioned 2010 study cited and
7 submitted to the County by petitioners in their scoping comments on the Project, even as of 2010 there
8 was "increasingly clear evidence" that wind turbine-generated ILFN can harm nearby humans.

9 69. In sum, the Board's decision to omit from the EIR any detailed analysis of the impacts of
10 wind turbine-generated ILFN on human health and wildlife violates CEQA.

11 **The EIR Fails to Analyze a Reasonable Range of Alternatives**

12 70. CEQA requires EIRs to "describe a range of reasonable alternatives to the project, or to the
13 location of the project, which would feasibly attain most of the basic objectives of the project but would
14 avoid or substantially lessen any of the significant effects of the project, and evaluate the comparative
15 merits of the alternatives." Guidelines §15126.6(a). The "discussion of alternatives shall focus on
16 alternatives to the project or its location which are capable of avoiding or substantially lessening any
17 significant effects of the project, even if these alternatives would impede to some degree the attainment
18 of the project objectives, or be more costly." *Id.* §15126.6(b). Alternatives may only be eliminated
19 from "detailed consideration in an EIR" where there is substantial evidence in the record showing that
20 they either (1) "fail[] to meet most of the basic project objectives," (2) are "infeasibl[e]," or (3) do not
21 "avoid significant environmental impacts." *Id.* §15126.6(c). The EIR here fails to identify and analyze
22 a reasonable range of alternatives.

23 71. Petitioners extensively documented in the record the feasibility and environmental benefits
24 of alternatives to industrial-scale wind energy projects, particularly the promotion and expansion of
25 distributed energy projects like rooftop solar photovoltaics. For example, in his July 20, 2012,
26 presentation to the San Diego County Planning Commission, renewable energy expert and POC board
27 member Bill Powers demonstrated both the feasibility of renewable distributed generation and its ability
28 to meet the primary underlying goal of the Project – "meet[ing] the current and future federal and state

1 goals for renewable energy production.” FEIR 1-1.

2 72. The EIR, however, dismisses the “Distributed Generation Policy” alternative from detailed
3 consideration on the grounds that (1) “The California Public Utilities Commission [“CPUC”] would be
4 the appropriate authority to implement a distributed generation policy since it has the global oversight to
5 rank and incentivize renewable energy projects,” and (2) “Incentivizing distributed generation in
6 urbanized areas would discourage wind projects away from the areas of the County with the greatest
7 wind potential.” FEIR 4.0-4. These excuses are insufficient grounds for dismissing a distributed
8 generation alternative, and are not supported by substantial evidence in any event.

9 73. The first excuse is patently unreasonable and contrary to CEQA’s core goal of “foster[ing]
10 informed decisionmaking and public participation.” Guidelines §15126.6(a). While the CPUC may
11 have broader “oversight” than the County, that is not an allowable ground for failing to consider a
12 localized alternative to a localized project. If this were a valid rationale for not analyzing alternatives, it
13 would eviscerate CEQA’s alternatives requirement. Agencies would just have to argue that some
14 “higher body” could implement the alternative at issue more effectively or over a broader geographical
15 or population spectrum. This would turn the rule of reason on its head.

16 74. The second excuse is likewise unavailing. For one, the assertion that “[i]ncentivizing
17 distributed generation in urbanized areas would discourage wind projects away from the areas of the
18 County with the greatest wind potential” is *wholly* unsupported by evidence in the record. FEIR 4.0-4.
19 Furthermore, even if it *were* supported by evidence, which it is not, it would still not be a valid rationale
20 for dismissing the distributed generation alternative. The purpose of CEQA’s alternative requirement is
21 to “foster informed decisionmaking and public participation” (Guidelines §15126.6(a)) by forcing
22 agencies to consider *alternatives* to proposed actions that achieve “most of the basic project objectives.”
23 *Id.* §15126.6(c). An alternative, by definition, is something *other than* the proposed project. The EIR
24 cannot dismiss from consideration the distributed generation alternative because it would not achieve the
25 Project objectives in the same way as the proposed project, *i.e.* “meet[ing] the current and future federal
26 and state goals for renewable energy production” (FEIR 1-1) by encouraging “wind projects . . . [in] the
27 areas of the County with the greatest wind potential.” FEIR 4.0-4. By definition, “alternatives”
28 *necessarily* meet the basic project objectives by means *other than* the project. Otherwise, they would not

1 be “alternatives.”

2 **The Board’s Statement of Overriding Considerations Is Invalid**

3 75. Despite the Project’s numerous significant environmental impacts, as identified in the EIR
4 and by petitioners and others throughout the administrative review process, the Board adopted a
5 Statement of Overriding Considerations concluding that the “considerable benefits of the Project
6 outweigh the unavoidable adverse effects, and that the ‘adverse environmental effects’ of the Project that
7 cannot be mitigated to a level of environmental insignificance are deemed ‘acceptable.’” But the
8 Board’s SOC, and the findings and conclusions adopted therein, are invalid for two reasons.

9 76. First, the SOC is premised on the erroneous ground that there are “significant effects on the
10 environment that *cannot* be mitigated to a less than significant level” through implementation of
11 mitigation measures or adoption of alternatives to the Project. This premise – and the entire SOC – is
12 “necessarily invalid” because the Board failed to consider feasible alternatives, such as the distributed
13 generation alternative, that would avoid or reduce many if not all of the Project’s environmental impacts.
14 *Uphold Our Heritage v. Town of Woodside* (2007) 147 Cal.App.4th 586, 603 (“since the record does not
15 support the Council’s finding that all of the alternatives included in the EIR are infeasible, the Council’s
16 statement of overriding circumstances is *necessarily invalid*” (emphasis added)).

17 77. Second, the Project “benefits” claimed in the SOC are not supported by substantial evidence
18 in the record. For example, the Board contends in its SOC that the “Project will help reduce the
19 potential for energy shortages and outages by facilitating the development of small and large wind
20 turbines that will help to provide a local energy supply.” Yet as petitioners demonstrated in their May 7,
21 2013, comments (submitted by Volker Law), there is no current or near-future electrical supply shortfall
22 in San Diego Gas & Electric Company’s service area. The record contains no contrary evidence. And
23 without “substantial evidence in the administrative record” to support this and other claimed benefits, the
24 SOC violates CEQA. *Koster v. County of San Joaquin* (1996) 47 Cal.App.4th 29, 32; *Sierra Club v.*
25 *Contra Costa County* (1992) 10 Cal.App.4th 1212, 1222-1224 (holding that a statement of overriding
26 considerations was defective because three of the twelve stated project benefits were not supported by
27 substantial evidence in the record).

28 ///

1 **THIRD CAUSE OF ACTION**

2 **(Writ of Mandate, Declaratory and Injunctive Relief to Set Aside**
3 **Project Approvals as Contrary to CCP Sections 1085 and 1094.5)**

4 78. The paragraphs set forth above are realleged and incorporated herein by reference.

5 79. The Board proceeded in excess of its jurisdiction and abused its discretion in purporting to
6 approve the Project and certify its EIR because such approvals violate CCP sections 1085 and 1094.5 in
7 the following respects, among others:

- 8 a. such approvals were not granted in accordance with the procedures required by law;
9 b. such approvals were not based on the findings required by law; and
10 c. such approvals were not based on, or were contrary to, the evidence in the record
11 before the Board.

12 80. The Board failed to proceed in the manner required by law in the following respects, among
13 others:

- 14 a. the Board violated CEQA as alleged hereinabove; and
15 b. the Board approved a Project that violates the Planning and Zoning Law as alleged
16 hereinabove.

17 81. The Board's actions in approving the Project without complying with the procedures
18 required by CCP sections 1085 and 1094.5 exceeded the Board's jurisdiction and constitute a prejudicial
19 abuse of discretion, and therefore are invalid and must be set aside.

20 **RELIEF REQUESTED**

21 WHEREFORE, petitioners pray for judgment and further relief as follows:

- 22 1. For interlocutory and permanent injunctive relief restraining respondents and real parties in
23 interest from taking any action to carry out the Project pending, and following, the hearing of this matter;
24 2. For a peremptory writ of mandate and declaratory judgment directing respondent Board to
25 set aside and vacate its certification of the FEIR;
26 3. For a peremptory writ of mandate and declaratory judgment directing respondent Board to
27 set aside and vacate its Project approvals;
28 4. For a peremptory writ of mandate and injunctive relief directing respondents to suspend all

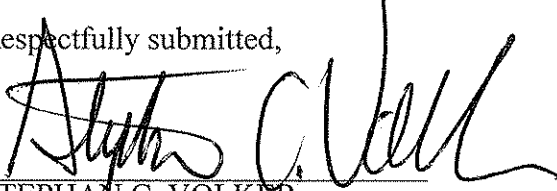
1 activity pursuant to the Project that could result in any change or alteration in the physical environment
2 until respondents have taken all actions necessary to bring their approval of the Project into compliance
3 with CEQA, the San Diego County Zoning Ordinance, the Planning and Zoning Law and the Code of
4 Civil Procedure;

5 5. For an award to petitioners of their attorney fees and costs of suit (including but not limited
6 to reasonable attorney fees, and the costs of reproducing the administrative record) as authorized by CCP
7 section 1021.5;

8 6. For such other equitable or legal relief as the Court deems appropriate.

9 Dated: June 12, 2013

Respectfully submitted,

10 
11 STEPHAN C. VOLKER
12 Attorney for petitioners THE PROTECT OUR
13 COMMUNITIES FOUNDATION, *et al.*
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

VERIFICATION

I, Donna Tisdale, am a named petitioner in this action. I am also a member of the board of directors of each of the other two petitioners, The Protect Our Communities Foundation and Backcountry Against Dumps. I make this verification on behalf of all petitioners. I have read the foregoing Verified Petition for Writ of Mandate and Complaint for Declaratory and Injunctive Relief and Attorney's Fees and know its contents. The facts therein alleged are true and correct to the best of my knowledge and belief, and are based on documents within respondents' record underlying the approvals challenged herein.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this Verification was executed in Oakland, California, on June 12, 2013.