COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT, DIVISION ONE

BACKCOUNTRY AGAINST DUMPS, et al.,
Plaintiffs and Appellants,

v.

SAN DIEGO COUNTY BOARD OF SUPERVISORS, et al.,
Defendant and Respondent.

Appeal from San Diego County Superior Court
Case No. 37-2013-00052926-CU-TT-CTL
Honorable Timothy B. Taylor, Judge of the Superior Court

APPELLANTS' OPENING BRIEF

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INTRODUCTION

Plaintiffs and Appellants, Backcountry Against Dumps and Donna Tisdale (collectively, "appellants") brought this 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, degrade scenery, emit harmful low frequency noise and radiation, consume scarce ground and imported water supplies, and throw broken blades weighing thousands of pounds hundreds of feet.

Appellants fully support the development of renewable energy, particularly rooftop solar and other low-impact forms of distributed energy, to curtail greenhouse gas emissions. However, energy corporations, in their rush to profit from federal subsidies and tax incentives for renewable energy, have overwhelmed local, state, and federal governments with poorly sited and designed proposals to pave the deserts, agricultural lands, and other backcountry areas of Southern California with industrial-scale projects. Administrative Record ("AR") 4271-4272. Respondent San Diego County ("County") has not been spared this deluge, with dozens of projects proposed throughout the County. AR4287-4288, 4295, 1060.

While science shows that anthropogenic global warming threatens the ecology of the Earth and even the survival of the human race, in

combating global warming, protection of public health and safety, wildlife, water supplies, and scenic and agricultural resources need not be thrown to the wind. By approving amendments to the County General Plan and Zoning Ordinance that greatly expand the number, size and locations of wind energy facilities in the County (collectively, the "Project"),[1] without considering less-impactful alternatives and fully analyzing the Project's impacts in violation of the California Environmental Quality Act ("CEQA"), Public Resources Code ("Pub.Res.Code") section 21000, *et seq.*, the County Board of Supervisors (the "Board") has done just that.

Accordingly, appellants ask this Court to vacate the Board's approval of the Project and direct it to rectify the CEQA violations documented below.

ISSUES ON APPEAL

1. Did the Board's approval of the Project violate CEQA by failing to:

   (a) adequately address and analyze the significant environmental impacts of the Project, including impacts to public safety, water resources, and bats;

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[1]Specifically, this proceeding challenges Ordinance Nos. 10261 and 10262 (N.S.), Resolution Nos. 13-051 and 13-052, Staff Recommendation Nos. 10 and 11, related findings and mitigation measures, and the Final Environmental Impact Report ("FEIR") thereon. AR1-173.

(b) consider a reasonable range of alternatives; and

(c) provide an adequate Statement of Overriding Considerations that is supported by substantial evidence?

STATEMENT OF APPELLATE JURISDICTION

The trial court entered Judgment denying the Petition for Writ of Mandate and Complaint for Declaratory and Injunctive Relief on May 6, 2014. AA137-145. Appellants filed their timely Notice of Appeal on June 6, 2014. AA146-160; Cal. Rules of Court, Rule 8.104(a)(1); Code Civ. Proc. §904.1(a)(1).

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

The Project amends provisions of the County Zoning Ordinance related to wind turbines and meteorological testing ("MET") facilities and modifies two regional components of the County General Plan, the Borrego Springs Community Plan and the Boulevard Chapter of the Mountain Empire Subregional Plan ("Boulevard Community Plan"). AR5-75. These amendments include three major substantive revisions to the County's wind turbine and MET facility permitting regulations and two profound changes to the General Plan, among others. *Id.*; AR4239.

Through these amendments, the Project allows the development and operation of significantly more and larger wind turbines and MET facilities. First, the Project allows temporary MET facilities "*without* a discretionary permit" as long as they meet the height limit of the zone in which they are located. AR4239 (emphasis added); AR55-57.

Second, with respect to *small* wind turbines,[2] the Project (1) *removes* the previous blade swept area restriction altogether (AR54-55, 4786-4787), (2) *reduces by half* the required setback from property lines, private road easements, and public roads (AR58, 4789, 4792, 4793), (3) *increases* the allowable turbine height by 15 feet (AR59, 4790, 4794), and (4) *multiplies by three-to-five times* the number of small turbines that may be developed on each eligible parcel – rather than the single turbine allowed under the prior law – all *without* a discretionary permit (AR58, 60, 4268, 4784).[3] The Project partially mitigates some of the impacts of these changes.[4]

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[2]*I.e.*, turbines with a maximum rated generation capacity of 50 kilowatt ("kW") or less. AR55, 4266.

[3]Prior to the Project, so-called "medium" turbines (a classification that the Project removed) *did* require an administrative permit. AR54, 4791-4792, 48024803.

[4]The Project requires setbacks from "[b]lue line watercourse(s)," "[s]ignificant roost sites for bat species," "[r]ecorded open space easements and designated preserve areas," "[r]iparian vegetation" and "known golden eagle nest site[s]," prohibits small turbines on ridgelines, and adds new design standards. AR58-60, 4793-94. However, the FEIR and the Board's

Third, with respect to *large* wind turbines,[5] the Project (1) *eliminates* blade swept area restrictions (AR65, 4787, 20442), (2) *repeals* the previous 80-foot turbine height limit altogether (AR70, 4799, 20991), (3) establishes permitted turbine locations based on the Wind Resources Map (AR67, 4796, 20987), (4) *reduces* the minimum required setback from existing residences and civic use buildings from *8 times* to *just 1.1 times* the wind turbine height (AR67, 4796-4797, 20987)), (5) *reduces* the minimum required set back from property lines, private road easements and public roads from *4 times* to *just 1.1 times* the turbine height (*id.*), and (6) allows electricity generated by the turbines to be exported off-site (AR65, 4787, 20442). It also *exempts* the Tule Wind Project ("Tule Wind") from new Pure Tone noise limits, which address large turbines' unique noise impacts. AR69. While the required new acoustical analysis may trigger additional property line setbacks, a broad discretionary noise waiver may render that restriction illusory. AR68-69, 4798, 20990.

Through its General Plan amendments, the Project allows widespread development of wind energy projects. First, it eliminates the

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Statement of Overriding Considerations nonetheless conclude that the Project – even as mitigated – will have 24 significant adverse environmental impacts. AR4246-4259, 171.

[5] *I.e.*, turbines with maximum rated generation capacity greater than 50 kW. AR55, 4267.

community-designed and drafted prohibitions on large wind turbines in the Boulevard Community Plan. AR8-53, 4822-4850. Second, it eviscerates the Borrego Springs Community Plan's existing prohibition on wind turbine projects in "areas where viewsheds would be adversely impacted" by allowing ministerial permitting – *i.e. without* discretionary review and public scrutiny and comment – of small wind turbines in such sensitive areas. AR7, 4850.

By expanding the size and number of allowable wind projects in ways that threaten serious health and environmental impacts, the Project poses new impacts never examined under CEQA. The hazards posed by wind turbines – including the tossing of broken blades hundreds of feet onto surrounding lands – were raised by appellants repeatedly,[6] yet ignored. In addition to the public safety risks of wind turbine collapse and blade throw, wind turbines and their associated facilities emit harmful levels of infrasound and low-frequency noise ("ILFN"). AR4569-4573, 19001-19026, 19967-20186.

Wind turbines also kill birds and bats, both through collisions and the abrupt drop in air pressure behind the sweeping blades known as

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[6]AR1247-1248, 5848-5851, 5876-5903, 6598, 6882-6886, 6913-6914, 6924, 9355-9356, 9395-9396, 17710-17711, 17715-17716, 17724, 17935-17936, 19258, 19423-19425, 19932, 19938-19939.

barotrauma. AR4437-4440, 6264, 16235. There are many sensitive birds at risk of turbine collisions, including the golden eagle. AR4422-4426. In addition to harming birds, bats, and other wildlife, wind turbines allowed by the Project will deplete the scarce groundwater on which rural County residents rely. AR4662-4666, 4675. They will also blight pristine vistas and convert agricultural lands to bleak industrial landscapes, with potentially disastrous consequences for the County's impacted rural communities and their tourism-dependent economies. AR4247-4248. Appellants asked the Board to address these significant issues. Instead, the Board swept them under the rug.

II. PROCEDURAL BACKGROUND

The Board issued a Notice of Preparation of an EIR for the Project on September 9, 2010, and its Draft EIR ("DEIR") in November, 2011. AR4854, 277. The Board revised and recirculated its DEIR in April, 2012 ("RDEIR") (AR1367), and held several hearings on the Project.[7] Appellants raised their public health, safety, and other environmental

[7]September 15, 2010, Board Hearing (AR8884, 8890-8891), April 13, 2012 Planning Commission Hearing (AR8980, 8982), April 27, 2012 Planning Commission Hearing (AR8988-8989), May 11, 2012 Planning Commission Special Meeting (AR9282), July 20, 2012 Planning Commission Hearing (AR9285-9286), October 5, 2012 Planning Commission Hearing (AR9294-9295), and October 19, 2012 Planning Commission Hearing (AR9300-9301).

concerns in writing and orally. AR9089-9098, 9152-9169, 9173-9180, 9201-9204, 17300-17320, 17337-17351, 17362, 17375-17554, 17555-17742, 17743-17931, 17932-18025, 18717-18780, 18842-18912. After the Board released its FEIR in January, 2013 (AR4220), appellants submitted additional objections to the Project. AR19185-19252, 19256-19287, 19305-19311, 19332-19431, 19432-19894, 19899-19943, 19966-20186, 20187-20214, 20365-20367. The Board postponed any action on the Project until its May 15, 2013 hearing. AR9347-9359, 9416.

Despite appellants' significant concerns, the Board approved the Project and filed its NOD on May 15, 2013. AR1-75, 9828-9829, 9834-9835, 9841-9842, 9886-9889. On June 12, 2013, appellants filed their petition for writ of mandate and complaint for declaratory and injunctive relief, which the trial court denied on May 6, 2014. AA1-30, 137-145. Appellants timely filed their Notice of Appeal on June 6, 2014. AA146-160.

III. LEGAL BACKGROUND

"[T]he overriding purpose of CEQA is to ensure that agencies regulating activities which may affect the quality of the environment give primary consideration to preventing environmental damage." *Save Our Peninsula Committee v. Monterey County Bd. of Supervisors* (2001) 87

Cal.App.4th 99, 117. "CEQA was intended to be interpreted in such a manner as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language." CEQA Guidelines [14 C.C.R.; "Guidelines"] §15003(f), citing *Friends of Mammoth v. Board of Supervisors* (1972) 8 Cal.3d 247, 259 ("*Friends of Mammoth*").

CEQA requires public agencies to document and consider the environmental implications of their actions, to avoid or mitigate their significant impacts, and to assure the public that their elected officials are making environmentally informed decisions. *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 428-435, 441-443, 449-450 ("*Vineyard*"); Pub.Res.Code §§21002, 21002.1, 21061, 21100, 21151; Guidelines §15004(a). The CEQA process "protects not only the environment but also informed self-government." *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564 ("*Goleta Valley*").

Preparation of an EIR is the cornerstone of CEQA. Pub.Res.Code §21002.1. "The [EIR] is the 'heart of CEQA' and the 'environmental alarm bell' whose purpose it is to alert the public and its responsible officials to environmental changes before they have reached ecological points of no return." *Sierra Club v. State Board of Forestry* (1994) 7 Cal.4th 1215, 1229

("*Sierra Club*"). An EIR must discuss the significant direct and indirect environmental impacts of a project. Guidelines §§15126(a), 15126.2(a). A "significant effect" occurs when a project causes a "substantial, or potentially substantial, adverse change in any of the physical conditions within the area affected by the project." Guidelines §15382. In addition, the EIR must "describe a range of reasonable alternatives to the project" that would achieve at least some of its objectives with less environmental impact. Guidelines §15126.6(a); *Goleta Valley,* 52 Cal.3d at 566.

"An EIR should be prepared with a sufficient degree of analysis to provide decisionmakers with information which enables them to make a decision which intelligently takes account of environmental consequences." Guidelines §15151; *Watsonville Pilots Association v. City of Watsonville* (2010) 183 Cal.App.4th 1059, 1080 ("*Watsonville*"). "A prejudicial abuse of discretion occurs" where the agency fails "to include relevant information [and that failure] precludes informed decisionmaking and informed public participation, thereby thwarting the statutory goals of the EIR process." *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 712 ("*Kings County*").

If an agency approves a project that has significant and unavoidable impacts, CEQA requires the agency to document the infeasibility of

mitigation, demonstrate that those impacts are outweighed by specific economic, legal, social, technological, or other benefits, and "state in writing the specific reasons to support its action based on the final EIR and/or other information in the record. The statement of overriding considerations shall be supported by substantial evidence in the record." Guidelines §15093; Pub.Res.Code §§21002.1, 21081, 21081.5. A project's benefits must outweigh its unavoidable impacts. *Id*.

STANDARD OF REVIEW

This Court reviews the Board's approval of the Project in light of the administrative record, independently of the findings of the superior court. *Vineyard,* 40 Cal.4th at 427-435. The Board's amendments of the County General Plan and Zoning Ordinance are legislative actions subject to judicial review under Public Resources Code section 21168.5. *Id.* at 426. Section 21168.5 directs that in reviewing an agency's legislative actions for compliance with CEQA, "the inquiry shall extend only to whether there was a prejudicial abuse of discretion. Abuse of discretion is established if the agency has not proceeded in a manner required by law or if the . . . decision is not supported by substantial evidence." *Id.*

Courts afford no deference to agency decisionmaking when an agency has "fail[ed] to proceed in a manner required by law." *Laurel*

Heights Improvement Association v. Regents of University of California (1988) 47 Cal.3d 376, 392 fn. 5 (*"Laurel Heights I"*); *Vineyard*, 40 Cal.4th at 435. "Only by requiring the [agency] to fully comply with the letter of the law can a subversion of the important public purposes of CEQA be avoided." *Rural Landowners Association v. City Council of Lodi* (1983) 143 Cal.App.3d 1013, 1022. Accordingly, courts "determine *de novo* whether [an] agency has employed the correct procedures, 'scrupulously enforc[ing] all legislatively mandated CEQA requirements.'" *Vineyard*, 40 Cal.4th at 435, quoting *Goleta Valley,* 52 Cal.3d at 564. Any "[f]ailure to comply with the CEQA procedures is necessarily prejudicial." *Resource Defense Fund v. Local Agency Formation Commission* (1987) 191 Cal.App.3d 886, 898.

Where, as here, an agency has failed to proceed in the manner prescribed by CEQA because it has *omitted* essential environmental review, this omission constitutes a "prejudicial abuse of discretion." *Sierra Club,* 7 Cal.4th at 1237. "'The EIR must contain facts and analysis, not just bare conclusions of a public agency.'" *Kings County*, 221 Cal.App.3d at 736 (quoting *Santiago County Water Dist. v. County of Orange* (1981) 118 Cal.App.3d 818, 831 ("*Santiago County*"). The public needs the underlying facts and analysis "'to enable them to make an independent, reasoned

judgment.'" *Id.* "An adequate EIR requires more than raw data; it requires also an analysis that will provide decision makers with sufficient information to make intelligent decisions." *County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, 955 ("*County of Amador*") (citing Guidelines §15151).

The court *must* overturn an agency's approval when its FEIR "fails to adequately address an issue." *Citizens to Preserve the Ojai v. County of Ventura* (1985) 176 Cal.App.3d 421, 428 ("*Ojai*"). Because the Board's FEIR is deficient in substantial, prejudicial respects as shown below, its certification must be set aside.

ARGUMENT

I. THE BOARD FAILED TO PERFORM ADEQUATE ENVIRONMENTAL REVIEW AS REQUIRED BY CEQA

The Board failed to adequately analyze the Project's impacts on public health, safety, and the environment, failed to analyze a reasonable range of alternatives, and prepared a legally inadequate statement of overriding considerations that was not supported by substantial evidence, in violation of CEQA.

A. The EIR's Analysis of Impacts Is Deficient

An EIR must discuss the significant environmental impacts of a project "with a sufficient degree of analysis to . . . enable[] . . . a decision

which intelligently takes account of environmental consequences." Guidelines §§15126(a), 15126.2(a), 15151 (quote), 15382; *Watsonville*, 183 Cal.App.4th at 1080. A lead agency must "use its best efforts to find out and disclose all that it reasonably can," to demonstrate it has fully "considered the environmental consequences of [its] action." Guidelines §15144; *Vineyard*, 40 Cal.4th at 428; *Berkeley Keep Jets Over the Bay Committee v. Board of Port Commissioners* (2001) 91 Cal.App.4th 1344, 1355-1356 ("*Berkeley Keep Jets*"). Failing to do so, as the Board did here, is a "prejudicial abuse of discretion." *Kings County*, 221 Cal.App.3d at 712.

1. Public Safety

a. The EIR Fails to Analyze Significant Public Safety Impacts

The FEIR *entirely* fails to address public safety concerns regarding turbine blade throw, does not support its inadequate discussion of turbine collapse, and provides only a half-page list of performance and safety standards that fails to adequately address the safety of small turbines and *entirely* fails to address large turbines. Blade throw occurs when wind turbine blades – which spin at speeds up to 200 mph at their tip – break apart or fly off the turbine rotor, or "nacelle." AR1198-1199, 2291-2292, 3379, 6144, 6883, 11720-11722, 18735, 19939. An average blade assembly

weighs about 36 tons, the nacelle 56 tons, and the tower 71 tons, for a total weight of 164 tons. AR15995, 6924, 1212. Individual blades can weigh from 4 to 8 tons, roughly equivalent to several full size vehicles. AR3083, 19354. Blades can be thrown hundreds and even thousands of feet and many times the height of the tower. AR3083 (750 feet, 3.7 times tower height), 1198 (1650-2220 feet, 5 to 8 times tower height); SAR20-23 (same). Turbine collapse describes the disintegration of the turbine itself – often associated with failed bearings, overheating, and resulting fire and flaming debris – that poses both collision and wildfire hazards. AR1249-1267 (photos), 6886, 6924, 11723-11724, 17557, 17746, 18738, 18768, 19930, 19938-19939. As discussed below, these hazards are widely documented and have led to adoption of appropriate setbacks in other local jurisdictions. Appellants requested analysis of this hazard in the EIR, but were ignored. *Id.*

Below, the Board argued these hazards were too uncertain to analyze. AA90-91. But CEQA requires the Board to "'use its best efforts to find out and disclose all that it reasonably can.'" *Vineyard*, 40 Cal.4th at 428, quoting Guidelines §15144. "Drafting an EIR . . . necessarily involves some degree of forecasting." Guidelines §15144. Therefore, "an EIR must address the impacts of 'reasonably foreseeable' future activities related to

the proposed project." *Vineyard,* 40 Cal.4th at 428, *citing Laurel Heights I*, 47 Cal.3d at 398-99; *Ojai,* 176 Cal.App.3d at 431, Guidelines §§15144, 15151. Since blade throw and turbine collapse are *foreseeable* Project impacts, the Board had a duty to address them.

Despite the CEQA duty to address these impacts, the FEIR omits *any* analysis of blade throw – a serious threat to public safety, local residents, wildlife, and natural resources. Public comments apprised the Board of several blade toss incidents (including, for example, the propulsion of blade parts nearly *one-third mile* from the Kumeyaay wind energy project into the Interstate 8 median near Boulevard) and the need for setbacks to protect the public from the flying debris danger zones of 1,650'-2,200'-radius that other jurisdictions have recognized in regulating turbines. AR1198, 1247-1248 (documenting Kumeyaay blade throw), 5848-5851, 5876-5903, 6598, 6882-6886, 6913-6914, 6924, 9355-9356, 9395-9396, 10832 (location of Kumeyaay project and I-8 with scale on 10030), 17303 (turbine debris fields recognized by other jurisdictions),[8] 17710-17711, 17715-17716,

[8]The Boulevard Planning Group apprised the Board of a study prepared by the Town of Bethany, New York documenting setbacks adopted by local jurisdictions both in the United States and Europe to protect the public from the flying debris danger zones around wind turbines. AR17303 (providing specific URL cite per *Consolidated Irrigation District v. Superior Court* (2012) 205 Cal.App.4th 697, 725); Supplemental Administrative Record ("SAR") 1-68 (Town of Bethany report).

17724, 17935-17936, 19258, 19423-19425, 19932, 19938-19939; Supplemental Administrative Record ("SAR") 1-68 (debris fields report).

The Project's meager setback of just 1.1 times the turbine height will not protect the public (AR4796, 20987), since "[d]ocumented blade throw has been recorded at 1,650 to 2,220" feet. AR1198, 1247-1248, 10832, 13232, 17303; SAR20-23. Yet the Board failed to analyze the significant hazard posed by blade throw anywhere. AR4491-4546 (FEIR's Hazards and Hazardous Materials section omits any mention of blade throw). The EIR provides *no explanation or analysis* of the likelihood and resultant impacts of blade throw despite the issue being raised repeatedly in comments. *Id.*; AR5848-5851, 5876-5903, 6882-6886, 6913-6914, 6924, 9355-9356, 9395-9396, 17303, 17710-17711, 17935-17936, 19258, 19423-19425, 19932. But "CEQA's informational purposes are not satisfied by an EIR that simply ignores or assume a solution to [a] problem." *Vineyard*, 40 Cal.4th at 431.

While the FEIR briefly mentions the possibility of turbine collapse, that discussion is limited to a single unsupported response (to a comment by retired CalFire Battalion Chief Mark Ostrander) claiming that a buffer equal to 1.1 times the turbine height is sufficient to "keep the fall-area of a turbine

on the project site" in the event of a collapse. AR6599.[9] The FEIR fails to provide *any* evidentiary support for this claim. *Id*. Without an explanation why a setback 1.1 times the turbine height is sufficient to protect public safety, regardless of slope, wind and other variables – and contrary to undisputed record evidence documenting the casting of wind turbine debris up to 2220 feet – decisionmakers cannot "intelligently take[] account of the [Project's] environmental consequences." Guidelines §15151.

The EIR fails to analyze the causes and likelihood of turbine collapse, and the potential range of impacts under different wind, topographic, and vegetative conditions. AR6598-6600 (FEIR's perfunctory rejection of turbine collapse concerns); AR5884-5885 (comments

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[9]The FEIR also discusses in general terms the adequacy of this buffer in another response to comment. However, that response does not specifically concern turbine collapse, let alone the much larger setback required to protect the public from blade toss, such as in areas downslope or downwind from the wind turbine. AR5269, 5271-5272 (Response to Comment J-13). Even if the Board intended that discussion to apply to public safety and turbine collapse, the FEIR provides no data and analysis to support the Board's erroneous assumption that these minimal setback requirements will protect public safety, in violation of CEQA. *Id.* Guidelines §§15126(a), 15126.2(a), 15144, 15151, 15382; *Kings County*, 221 Cal.App.3d at 736 ("'The EIR must contain facts and analysis, not just bare conclusions of a public agency . . . . so as to enable [the public] to make an independent, reasoned judgment.'" (quoting *Santiago County*, 118 Cal.App.3d at 831)); *County of Amador*, 76 Cal.App.4th at 953-956 (EIR must provide sufficient data and analysis to support its conclusions about project impacts).

identifying turbine collapse concerns), 5897-5899 (same), 17710-17711 (same), 17715-17716 (same), 19423-19424 (same). As a result, the EIR "precludes informed decisionmaking and informed public participation, [and] thereby thwart[s] the statutory goals of the EIR process." *Kings County*, 221 Cal.App.3d at 712; Guidelines §§15126(a), 15126.2(a). Therefore the EIR's cursory dismissal of turbine collapse fails under CEQA. Guidelines §§15126(a), 15126.2(a), 15144, 15151, 15382; *Vineyard*, 40 Cal.4th at 428 (agency must use "best efforts").

The FEIR's half-page list of voluntary "Small Wind Turbine Performance and Safety Standard[s]" – none of which specifically address or prevent blade throw or turbine collapse – also fails to meet CEQA's informational and impact mitigation requirements. AR4506-4507. CEQA requires that foreseeable project impacts be analyzed, and if potentially significant, they must be mitigated to insignificance where it is feasible to do so. Pub.Res.Code §§21002, 21002.1(b), 21100(b)(1), (2), (3); Guidelines §§15091, 15092(b). It is indisputable that the potential for property damage, human injury or even death from blade toss or turbine collapse is a significant impact. AR1247-1248, 6883, 10832, 11721-11724, 13232, 17303, 17746, 18755, 18738, 18746, 19423, 19927-19939; SAR20-23, 43-46, 56-58; Guidelines §15382 ("'Significant effect on the

environment' means a substantial, or potentially substantial, adverse change in any of the physical conditions within the area affected by the project . . .").

Yet this impact is never discussed. AR4491-4546, 6599. Even the EIR's brief discussion of the regulatory setting surrounding small wind turbines provides no analysis of the potentially significant impacts that those standards are meant to avoid or reduce. *Id.* Instead, the voluntary "standards" never discuss the impacts they are intended to guard against, and defer the question whether they should be adopted as mandatory mitigation measures, leaving that evaluation to a vague future review.[10]

Moreover, because these standards are merely voluntary, they fail CEQA's mandate that they be "fully enforceable through permit conditions, agreements, or other legally-binding instruments." Guidelines §15126.4(a)(2). But "[f]ormulation of mitigation measures should not be deferred until some future time." Guidelines §15126.4(a)(1)(B). "CEQA's demand for meaningful information 'is not satisfied by simply stating information will be provided in the future.'" *Vineyard*, 40 Cal.4th at 431

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[10]The FEIR states that "safety aspects of the turbine system shall be evaluated, including . . . (1) [operation procedures,] (2) provisions to prevent dangerous operation in high wind[,] (3) methods available to slow or stop the turbine[s] . . . (4) adequacy of maintenance . . . provisions[, and] (5) susceptibility to harmful reduction in control function". AR4506-4507.

(quoting *Santa Clarita Organization for Planning the Environment v. County of Los Angeles* ("*Santa Clarita*") (2003) 106 Cal.App.4th 715, 723. Doing so puts the approval cart before the analysis horse.

Furthermore, these standards only apply to *small* wind turbines and therefore *entirely fail* to analyze the much more significant *large* wind turbine safety issues. AR4506-4518. Without this analysis the FEIR is insufficient. Guidelines §§15126(a), 15126.2(a), 15144, 15151, 15382; *Vineyard*, 40 Cal.4th at 429 (EIR must address all impacts of project being approved).

There have been past incidents apprising the Board of these foreseeable impacts. AR1247-1248, 5848-5851, 5876-5903, 6882-6886, 6913-6914, 6924, 9355-9356, 17303. Many jurisdictions already require large setbacks of up to 2220 feet around turbines to prevent death, injury and severe property damage from blade toss, underscoring the foreseeability of this direct Project impact. SAR20-23, 43-46, 56-58. Despite these foreseeable public safety concerns, the Board completely failed to discuss blade throw and only mentioned turbine collapse in one brief comment response. AR4491-4546, 6599.

In summary, CEQA requires that the EIR include a discussion of blade throw and turbine collapse because these impacts are *foreseeable*, and

pose the risk of death, injury and severe property damage. The CEQA Guidelines specifically include as project impacts all effects that are "reasonably foreseeable." Guidelines §15358(a)(2). And, CEQA mandates agency analysis of "all" of a project's potentially significant environmental impacts. Pub.Res.Code §§21002.1, 21100(b)(1); Guidelines §§15002(a), 15128, 15144, 15151, 15358; *Vineyard*, 40 Cal.4th at 428-429; *Laurel Heights I*, 47 Cal.3d at 398-99; *Ojai*, 176 Cal.App.3d at 431. Because the EIR fails to do so, it violates CEQA. SAR20-23, 43-46, 56-58; AR1247-1248, 4491-5646, 5848-5851, 5876-5903, 6599, 6882-6886, 6913-6914, 6924, 9355-9356, 17303.

b. The EIR Fails to Respond Adequately to Public Comments

An EIR is "fatally defective" when, like here, it fails to "'set forth in detail the reasons why . . . particular comments and objections were rejected and why the [agency] considered the development of the project to be of overriding importance.'" *Environmental Protection Information Center, Inc. v. Johnson* (1985) 170 Cal.App.3d 604, 628 (quoting *People v. County of Kern* (1974) 39 Cal.App.3d 830, 841 ("*County of Kern*")); *Cleary v. County of Stanislaus* (1981) 118 Cal.App.3d 348, 355-360; *Santa Clarita*, 106 Cal.App.4th at 732; Guidelines §15088(c); AR4491-4546, 5271-5272, 6599, 6683, 6914, 6924. CEQA requires agencies to provide detailed

responses to comments based on reasoned analysis. Guidelines §15088(c). "Conclusory statements unsupported by factual information will not suffice." *Id.* An agency's "failure to respond with specificity in the final EIR to the comments and objections to the draft EIR" violates CEQA. *County of Kern*, 39 Cal.App.3d at 842; *Santa Clarita,*106 Cal.App.4th at 732.

Here the FEIR failed to "particularly set forth in detail" the reasons why the Board rejected the public safety concerns regarding blade throw and turbine collapse. *County of Kern*, 39 Cal.App.3d at 842. Appellants cited specific incidents of blade throw, turbine collapse, and other dangerous mechanical failures, provided photographic and testimonial evidence of the same, and detailed their concerns regarding the insufficiency of the proposed setbacks. AR1247-1267 (photos), 5848-5851, 5876-5903, 6882-6886, 6913-6914, 6924, 9355-9356, 17303. Their comments were sufficiently detailed to apprise the Board of those concerns and to require "'detail[ed]reasons why the particular comments and objections were rejected.'" *Id.*

In response to appellants' concerns about "blade breakage," the FEIR states merely that "specific safety measures will be required for all future large wind turbine projects," and refers readers to the Hazards and

Hazardous Materials discussion, which *does not discuss blade throw at all*. AR6683, 4491-4546. The Board's responses to concerns of turbine collapse, tossed blades, and turbines scattering sharp fiberglass shards in high winds (1) refuse to provide the requested analysis – citing presumed project compliance "with the building code and safety standards like all structures permitted by the County" – even though there are no standards specific to these facilities, let alone any demonstration that these phantom standards would prevent all potential for harm (AR6914), (2) assert that "no evidence has been provided to indicate that the revised regulations and setbacks will be unsafe" and (3) defer all future evaluation of safety to the Major Use Permit process. AR6924 (comment), 5271-5272 (referenced response).

As noted, the Board's response to retired CalFire Battalion Chief Ostrander's concerns regarding turbine collapse relies solely on a buffer equal to 1.1 times large turbine height to "keep the fall-area of a turbine on the project site" in the event of a collapse. AR6599. Yet it is obvious that a ridge-top turbine can, with or without a tail wind, be cast, tumbled or rolled downslope far beyond this minimal setback. AR1198-1199, 2291-2292, 3083-3084, 19423; SAR20-23, 43-46, 56-58. And its blades can be cast up to *8 times* the tower height. AR1198 (1650-2220 feet).

None of these responses addresses the likelihood of these incidents, the risks they pose to the neighboring environment – even as the Project increases the ease with which both small and large wind turbines can be built near residences and businesses – or the specific ways that future compliance with the building code, safety standards, or the Project's limited setbacks will allegedly address these risks. AR5271-5272, 6599, 6683, 6863-6937. Without this information, it is impossible for the decisionmakers and the public to engage in "informed decisionmaking and informed public participation, thereby thwarting the statutory goals of the EIR process." *Kings County*, 221 Cal.App.3d at 712.

The Board's failure to address these safety impacts with *specific facts and analysis* rather than wishful thinking about vague future safety reviews renders the FEIR defective. *County of Kern*, 39 Cal.App.3d at 842; *Kings County*, 221 Cal.App.3d at 712; *Santa Clarita*, 106 Cal.App.4th at 732; Guidelines §15088(c). This omission must be rectified.

2. Water Supply

The EIR ignores the Project's impacts to the County's water supplies. The groundwater supply in much of the Project area is precarious, yet the EIR fails to address the Project's obvious risks of creating or exacerbating groundwater overdrafts. AR4675-4676, 18103, 18416, 18436-

18437, 18484, 18489, 18493, 18605, 18627. The Project removes significant groundwater protections, allows construction of small turbine projects without further groundwater analysis, and improperly defers groundwater impact analysis for large turbine projects. AR4675-4676. Further, the FEIR acknowledges that the Project may significantly impact imported water supply, but fails to consider those impacts, improperly assuming that other agencies will prevent them. AR4727-4730. The Board violated CEQA by removing environmental restrictions on small turbine development and then improperly deferring any water impact analysis to future approvals, as discussed below.

a. The EIR Fails to Adequately Analyze Impacts to Groundwater Supply

i. Large Turbines

CEQA requires that, when discussing a project's water supply impacts, an EIR must "adequately address[] the reasonably foreseeable *impacts* of supplying water to the project." *Vineyard*, 40 Cal.4th at 434 (emphasis in original). An EIR must "acknowledge[] the degree of uncertainty involved, discuss[] the reasonably foreseeable alternatives – including alternative water sources and the option of curtailing development if sufficient water is not available for later phases – and disclose[] the significant foreseeable environmental effects of each alternative, as well as

mitigation measures to minimize each adverse impact." *Id.* Instead of providing this required analysis, the Project's EIR declares that *all* water supply analysis will occur later. AR4676.

But essential water supply analysis must occur before, not after, project approval. *Vineyard*, 40 Cal.4th at 434-435. This is not a situation where a preliminary plan leaves all discretionary decisions about the location, size and number of projects that will require water to the future, so that meaningful environmental analysis can still occur in a timely manner later when those discretionary approvals occur. To the contrary, approval of this Project strips away vital protections from existing plans that would otherwise continue to protect Eastern San Diego County's highly vulnerable groundwater supplies. The Boulevard Community Plan currently states that Boulevard "is totally dependent on groundwater resources and importation of water is not a viable option," and Boulevard's "sole source aquifer . . . should be protected, as there are no alternate water supplies available." AR18605, 18627.

But the Project amends the Boulevard Community Plan "to increase opportunities for large turbine projects through the Major Use Permit process" by *removing* Boulevard's: (1) prohibition of energy developments, and (2) requirements that projects "protect the quality and

quantity of groundwater," and (3) provide adequate buffers and setbacks between residential and wind uses. AR22, 27, 35. Contrary to CEQA, the FEIR fails to address how these amendments allowing massive wind-energy expansion would impact groundwater resources in the Boulevard area. AR4675.

The Board's approval here is similar to those set aside in *Vineyard* and *Stanislaus Natural Heritage Project v. County of Stanislaus* (1996) 48 Cal.App.4th 182, 195 ("*Stanislaus*"). In *Vineyard*, like here, the county amended its general plan and zoning ordinance to allow development that would impact both short- and long-term water supplies. 40 Cal.4th at 422, 436-447. But because the county had failed to adequately assess the project's impacts on long-term water supplies, the Supreme Court overturned its approval. 40 Cal.4th at 438-447. In doing so, the court specifically rejected the county's reliance on *future* water supply plans and analyses, holding that it is "legally improper" to "tier from a future environmental document." 40 Cal.4th at 440. Yet here the County does exactly that, by assuming that future analysis will prevent all significant impacts from occurring. AR4676.

Similarly in *Stanislaus,* as here, the county approved a general plan amendment that increased potential development without determining the

impacts of providing water for the contemplated development or whether there was a firm water supply for the project. 48 Cal.App.4th at 195. Instead, the county relied upon future CEQA review of individual projects, and a requirement that those projects prove an adequate source of water. *Id.* The court found that "the County's approval of the project under these circumstances defeated a fundamental purpose of CEQA: to 'inform the public and responsible officials of the environmental consequences of their decisions *before* they are made.'" *Id.* (quoting *Laurel Heights Improvement Association v. Regents of the University of California* (1993) 6 Cal.4th 1112, 1123 ("*Laurel Heights II*") (emphasis added).

Here the Board declared that there would be no significant impacts to groundwater resources *without* first undertaking this required review. AR4676. The Board's improper reliance upon future environmental review to "preclude these types of projects from causing significant impacts" fails to adequately consider the impacts of the approval *before it is made*. AR8784; *Vineyard*, 40 Cal.4th at 441. This violates CEQA. *Id.* at 438-442; *Stanislaus*, 48 Cal.App.4th at 205-206; *Californians for Alternatives to Toxics v. Department of Food & Agriculture* (2005) 136 Cal.App.4th 1, 17 ("*CATS*") (future "compliance with the law is not enough to support a finding of no significant impact").

ii. Small Turbines

The very same CEQA violation occurred with the Project's approval of small turbines, posing particularly significant impacts to the sensitive Borrego Springs area.[11] The Project's allowance of these turbines constitutes the *final* discretionary review of water supply impacts caused by small turbines. AR7721. It removes specific prohibitions on small turbines in Borrego Springs, allowing ministerial approval for small turbine installation throughout the Borrego Springs area. AR7, 58-60, 4240, 9316. Yet the FEIR fails to specifically address how the Project's relaxations of the Borrego Springs Community Plan's protections would impact water supplies in this already overdrawn community. AR865-866, 4675.

Beyond Borrego Springs, the Project also expands the number of small turbines allowed on each property throughout the County, such as in the Boulevard area. AR57-60. Yet the FEIR ignores the serious risk to groundwater resources in these areas as well. AR4675.

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[11]The Borrego Springs Community Plan emphasizes that the community's reliance on a "sole supply of rapidly-depleting groundwater," and the local "aquifer's overdraft and long-term drought," threaten "the economic viability of the community." AR18436-18437. That overdraft is currently 15,000 acre-feet per year. AR18484. Accordingly, the General Plan stresses the need to *curtail* – rather than exacerbate – that growing overdraft problem. AR18103.

In dismissing these water supply impacts, the FEIR erroneously assumes that the amount of water required to maintain small turbines – *i.e.*, those that will produce up to 50 kW – is equivalent to the amount required for a 250-kW turbine running at 1/4 capacity, as used in the American Wind Energy Association's estimate of "0.001 gallons per kilowatt hour usage." AR4675-4676. The FEIR's assumption that the water usage for *large* turbines scales down proportionately for *small* turbines is contradicted by the record. Small turbines have different specifications, designs, and siting requirements. AR57-60, 4270, 4301, 4303, 4305. They are configured differently and are much *lower* in height – and thus receive less wind – than the large scale turbines on which the estimate is based. *Compare* AR4301, 4303, 4305 *with* AR4307. It is undisputed that wind speeds are *greater* for *large* turbines than for small turbines because *winds increase with turbine height*. AR4270, 15380. And the smaller turbines may be installed anywhere, regardless of wind resource quality. AR4268. Consequently, small turbines produce *less* power per blade surface area than tall, industrial turbines. AR59, 15380. Thus, absent other facts never identified by the FEIR, the water required to maintain small turbines will be *greater per kilowatt hour usage* than for large turbines. *Id.*

Yet the FEIR mistakenly assumed that the rate of water usage for both large and small turbines would be exactly the same. The Board relies on this erroneous premise to conclude that the Project's expansion of small turbine installations will have no impact on water usage, even in areas with limited groundwater supply. AR4675-4676. The FEIR's failure to accurately determine water usage for small turbines violates CEQA's mandate that the Board "use its best efforts to find out and disclose all that it reasonably can." Guidelines §15144; *Stanislaus*, 48 Cal.App.4th at 206; *Vineyard*, 40 Cal.4th at 428. Its cavalier assumption that small turbines will have no impact thus violates CEQA.

b. The EIR Ignores Impacts to Imported Water Supply

The Board improperly deferred discussion of the Project's impact on imported water supplies instead of addressing these impacts in the FEIR. The FEIR admits that "[a] significant impact *would* result if sufficient water supplies are not available to serve the project from existing entitlements and resources, or if new or expanded entitlements are needed." AR4728 (emphasis added). Yet the FEIR does not study or address whether this is a reasonably foreseeable outcome of the Project. Instead, it *assumes* that future analysis will prevent such an impact from occurring. AR4727-4730.

For small turbine and MET facilities, the Board relied upon future

"water district approval," stating that each "district must assure that there are adequate water resources and entitlements available to serve the requested water resources before any permit approval is granted." AR4729. But these ministerial projects may not require any further water district approvals, as such approval is only required for *new connections*. *Id.* Where no such approvals would be required, the FEIR provides no basis for its sanguine assumption that the local supplies would be adequate to serve this additional demand. The FEIR's reliance on non-existent future environmental review to "preclude these types of projects from causing significant impacts" fails to consider the impacts of the Project's approval *before* it is made. *Vineyard*, 40 Cal.4th at 441. This violates CEQA. *Id.*

For large turbine facilities, again the Board assumed that any future CEQA review would "minimize impacts to utilities" and, through some undisclosed but magically efficacious process, thereby prevent any imported water supply impacts. AR4729. But CEQA does not allow agencies to "assume[] a solution to the problem of supplying water to a proposed land use project." *Vineyard*, 40 Cal.4th at 431. Instead, there must be good faith analysis based on actual, not presumed, data that are presented in the EIR to enable the decisionmakers and the public to engage in "informed decisionmaking and informed public participation." *Kings County*, 221

Cal.App.3d at 712. The FEIR's failure to provide that essential data and analysis here violates CEQA.

The FEIR fails for a third reason. Just as with groundwater, the Board relied upon the unsupported usage rate of 0.001 gallon per kW hour for small turbines to conclude that the Project's impacts on imported water supply would not be significant. AR4729. The Board's failure to "use its best efforts to find out and disclose all it reasonably can" regarding the Project's impacts to imported water supply violates CEQA. Guidelines §15144; *Stanislaus*, 48 Cal.App.4th at 206; *Vineyard*, 40 Cal.4th at 428.

c. The FEIR Ignores Cumulative Water Supply Impacts

CEQA directs that "[a]n EIR shall discuss cumulative impacts of a project when the project's incremental effect is cumulatively considerable, as defined in [Guidelines] section 15065(a)(3)." Guidelines §15130(a). Section 15065(a) directs that

> "[a] lead agency shall find that a project may have a significant effect on the environment and thereby require an EIR to be prepared for the project where there is substantial evidence, in light of the whole record, that any of the following conditions may occur:
>
> (1) the project has the potential to substantially degrade the quality of the environment . . . .
>
> (3) the project has possible environmental effects that are individually limited but cumulatively considerable.

> 'Cumulatively considerable' means that the incremental effects of an individual project are significant when viewed in connection with the effects of *past projects*, the effects of other *current projects*, and the effects of *probable future projects* . . . ."

Id. (emphasis added).

CEQA Guidelines section 15355 defines "cumulative impacts." "The cumulative impact from several projects is the change in the environment which results from the incremental impact of the project when added to other closely related past, present, and reasonably foreseeable future projects. Cumulative impacts can result from individually minor but collectively significant projects taking place over a period of time." *Id.* at subd. (b).

Many commenters pointed out that the widespread wind energy development that the Project allows in rural areas will have a significant adverse cumulative effect on groundwater supply. AR6903, 6914, 19815-19818. Numerous studies have documented the vulnerability of the very limited groundwater supplies in East County, and pointed out the potentially significant cumulative impact of water usage by wind energy projects. *See*, *e.g.*, the Tule Wind FEIR/FEIS, which determined that reasonably foreseeable wind projects near Boulevard and elsewhere might deplete the local groundwater, and therefore found a *significant* cumulative impact to

the local groundwater supply. AR10026, 10030, 10032-10033, 12469-12470, 12492-12493; *see also*, AR8468-8521 (Dr. Victor Ponce, *Cumulative Impacts on Water Resources of Large-Scale Energy Projects in Boulevard and Surrounding Communities, San Diego, California* (April 2013)).

The Board cannot claim it was unaware of the Tule Wind FEIR/FEIS, because the Board considered that review when it approved General Plan amendments for that project, and has agreed that that review is part of the Administrative Record in this proceeding. AR16978. Nor can the Board claim that review is not pertinent to the water supply issues here. The Tule Wind FEIR/FEIS analyzed several reasonably foreseeable wind projects near Boulevard, as well as other projects that could deplete the local groundwater, and found *a significant and unmitigable cumulative impact to the local groundwater supply* from their operation. AR10026, 10030, 10032-10033, 12469-12470, 12492-12493. It also found that construction of every one of those wind projects would create temporary but significant water demands whose impacts can be made less than significant only through mitigation. AR12491-12492. Taken together, the construction and operation of these wind energy facilities create a

potentially significant demand on the already precarious groundwater resources in this desert region. AR18605, 18627, 19815-19818.

The Board cannot ignore these facts. Under CEQA, its FEIR and findings regarding the significance of the Project's impacts must be based on substantial evidence. Pub.Res.Code §§21002, 21002.1, 21081(a)(3), 21081.5; Guidelines §§15091, 15092, 15384; *Vineyard*, 40 Cal.4th at 426 (in reviewing legislative action for CEQA compliance, an abuse of discretion "is established 'if the agency has not proceeded in a manner required by law or if the determination or decision is not supported by substantial evidence'"). It is undisputed that the Project allows substantially increased wind energy development because it repeals the existing requirement that any such development "protect the quality and quantity of [groundwater]." AR27. It is undisputed that wind energy projects use water, both in construction and for operation. AR2299, 2334, 3800-3802, 11994-11995, 12024. And, as the Tule Wind environmental review shows, wind energy projects pose a significant cumulative impact on the local groundwater supply. AR10026, 10030, 10032-10033, 12469-12470, 12491-12493.

Consequently, it is reasonably foreseeable that, just like Tule Wind, the wind energy development allowed by this Project will have a

cumulative impact on water resources. The FEIR's claim that the Project will have no potentially significant cumulative water supply impacts is thus not supported by substantial evidence, and therefore violates CEQA.

Notwithstanding the undisputed evidence that the wind energy facilities that the Project would allow in East County would have significant cumulative impacts on its groundwater supplies, the FEIR claims that the Project would have no such impacts. AR4689, 4731. To reach this conclusion, the FEIR assumes that future compliance with the Groundwater Ordinance will prevent any water supply impact from large turbines, and that small turbines will have no impacts. AR4689. As shown, these assumptions are not based on "'a sufficient degree of analysis to provide decisionmakers with information which enables them to make a decision which intelligently takes account of environmental consequences.'" *Kings County*, 221 Cal.App.3d at 712 (quoting Guidelines §15151). The FEIR's brief and conclusory discussion of cumulative impacts on imported water supply repeats these errors. AR4731.

Based on these unwarranted assumptions, the FEIR defers all analysis of large wind turbines, including their potentially significant construction impacts, to potential future reviews. AR4675-4676, 4728-1730, 4786-4799, 6904. The FEIR's attempt to tier to future studies is

"legally improper." *Vineyard*, 40 Cal.4th at 440. Guidelines § 15130; *CATS,* 136 Cal.App.4th at 17. Therefore this Court must set it aside.

3. Barotrauma Impacts to Bats

One of the most significant environmental impacts of wind energy facilities is barotrauma. As the U.S. Fish and Wildlife Service's ("FWS") Draft Land-Based Wind Energy Guidelines explain, barotrauma "[i]nvolves tissue damage to air-containing structures caused by rapid or excessive pressure change; pulmonary barotrauma is lung damage due to expansion of air in the lungs that is not accommodated by exhalation (Baerwald *et al* 2009)." AR6264, 3499, 18843. Because moving wind turbine blades create abrupt waves of low pressure, passing bats can suffer grave barotrauma impacts including pulmonary hemorrhage, lung collapse, and edema. *Id.*; AR16235, 19492 (report entitled "Barotrauma is a significant cause of bat fatalities at wind turbines").

Consequently, the U.S. Environmental Protection Agency ("EPA") recommends that final impact statements for wind projects "should discuss any information available regarding differences in pressure change for various turbine sizes that could affect barotrauma and other impacts on bats." AR19421. Bats are extremely helpful because they keep undesirable insects (such as West Nile-carrying mosquitoes and gnats) under control."

AR16235, 16322. The Project's 300-400 foot setback from bat roosting sites is ineffectual because bats, like birds, feed wherever *insects* occur. AR8118 (Board reliance on setback), 2672-2674 ("significant correlation . . . between . . . insect abundance and bat passes").

Notwithstanding barotrauma's significant impacts on wildlife, the EIR fails to discuss any aspect of wind turbine-induced barotrauma – especially as it poses significant impacts to bats – despite timely requests from appellants. AR4411-4459 (FEIR Biological Resources section), 18843 (comments), 9663 (comments).

The Board did not address barotrauma at all until May 13, 2013, a mere *two days* before final approval, in a document *outside* the EIR. AR8187, 8793 (reprinted, May 15, 2013).[12] There, a County biologist wrongly claimed that appellants had failed to cite studies proving the risks of barotrauma, and erroneously asserted that "no evidence has been presented to substantiate this alleged effect." AR8188, 8793. Yet FWS Guidelines in the record define barotrauma, other wind energy EIRs in the record recognize barotrauma as a cause of bat mortality, and commenters included barotrauma research in their comments to the Board. AR6264

[12]The FEIR's limited discussion of bats only considers impacts from collision. AR4437-4441, 4446-4447, 4450.

(FWS), 10516-10517 (Tule Wind FEIR/FEIS recognition of barotrauma), 19450 (comment referencing recent studies), 19485-19491 (study on wildlife impacts), 19492 (study entitled "Barotrauma is a significant cause of bat fatalities at wind turbines"). Thus, all three of the Board's post-EIR rationalizations for omitting barotrauma from the EIR were incorrect.

The Board may argue that it adequately considered barotrauma by responding to the requests for analysis of this impact two days before Project approval, albeit long after the FEIR was published. AR8188, 8793. But that is not the law. A project's potential impacts – such as barotrauma – must be disclosed and analyzed *in the EIR*, so that decisionmakers and the public can make an informed judgment of the project's merits. *Vineyard*, 40 Cal.4th at 430-431 ("CEQA's informational purposes are not satisfied by an EIR that simply ignores . . . the problem").

CEQA does not permit an agency to usurp public review by belatedly examining an issue outside the EIR and unilaterally proclaiming that, *had* it been discussed in the EIR, the outcome would have been the same. Pub.Res.Code §21005(a) ("noncompliance with the information disclosure provisions of [CEQA] which precludes relevant information from being presented. . . may constitute a prejudicial abuse of discretion . . . , regardless

of whether a different outcome would have resulted if the public agency had complied"); *County of Amador*, 76 Cal.App.4th at 946.

The Board's discussion of barotrauma had to be included in the EIR because "[p]ublic participation is an essential part of the CEQA process" (Guidelines §15201), and "[e]nvironmental review derives its vitality from public participation." *Ocean View Estates Homeowners Association, Inc. v. Montecito Water District* (2004) 116 Cal.App.4th 396, 400; *Laurel Heights II*, 6 Cal.4th at 1123. Failing to disclose the issue of barotrauma deprived the public of vital information and thus "precluded informed decision making and informed public participation," rendering the EIR inadequate as a matter of law. *Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1198; *Association of Irritated Residents v. County of Madera* (2003) 107 Cal.App.4th 1383, 1392 ("the existence of substantial evidence supporting the agency's ultimate decision on a disputed issue is not relevant when one is assessing a violation of the information disclosure provisions of CEQA"); *Kings County*, 221 Cal.App.3d at 712.

B. The EIR Fails to Analyze a Reasonable Range of Alternatives

CEQA requires EIRs to "describe a range of reasonable alternatives to the project . . . which would feasibly attain most of the basic objectives of

the project but would avoid or substantially lessen any of the significant effects of the project, and evaluate the comparative merits of the alternatives." Guidelines §15126.6(a); *Goleta Valley,* 52 Cal.3d at 566. "An EIR's discussion of alternatives must contain analysis sufficient to allow informed decision making." *Laurel Heights I,* 47 Cal.3d at 404. An alternative may "not be eliminated from consideration solely because it would impede to some extent the attainment of the project's objectives." *Habitat and Watershed Caretakers v. City of Santa Cruz* (2013) 213 Cal.App.4th 1277, 1304 ("*HAWC*"); Guidelines §15126.6(b). "The EIR is required to make an in-depth discussion of those alternatives identified as at least potentially feasible." *HAWC,* 213 Cal.App.4th at 1303 (emphasis and quotation omitted).

Here, the range of alternatives considered in the EIR was exceptionally narrow. Rather than adhere to CEQA's mandate that it consider a broad menu of alternative ways of achieving its goal of generating renewable energy, the EIR considers only the proposed Project and two action alternatives, both of which would lead to *more* industrial-scale wind energy installations. AR4737-4759. The Board did not study any alternative that would reduce *any* of the Project's 24 significant impacts to a less than significant level. AR4761 (key to summary table shows that

all reduced impacts under all alternatives "would still be significant and unavoidable"); 4753-4754 (Limited Large Wind Alternative would have significant noise impacts), 4751-4752 (same for biological resources), 4740-4742 (Limited Small Wind Turbine Alternative would have significant biological resource impacts).

That omission violates CEQA. *HAWC*, 213 Cal.App.4th at 1303-1305 (EIR's "fail[ure] to discuss *any* feasible alternative . . . that could avoid or lessen the significant environmental impact of the project on the City's water supply" violated CEQA); *Center for Biological Diversity v. County of San Bernardino* (2010) 185 Cal.App.4th 866, 884-885 ("*CBD*") (failure to consider alternative of enclosed facility that would mitigate air quality impacts violated CEQA).

Numerous such alternatives were proposed, but the Board improperly rejected them without the "meaningful" study CEQA requires. "Even though the agency ultimately finds mitigation measures adequate or proposed alternatives infeasible, the EIR must still contain a *meaningful* discussion of both alternatives and mitigation measures." *Kings County*, 221 Cal.App.3d at 731 (citing *Laurel Heights I*, 47 Cal.3d at 403-404) (emphasis added). Appellants and the public proposed increased setbacks between inhabited areas and wind turbines and the EIR acknowledges that

"[e]nvironmental impacts would be *substantially* avoided or reduced if these restrictions were evaluated as a project alternative." AR4735 (emphasis added). But the Board refused to study this alternative. *Id.*

Similarly, the public proposed studying a distributed generation alternative that would generate both wind and solar energy through small installations on existing structures – such as roof-top solar – in urban areas. AR4736. The EIR does not dispute that "distributed generation in urbanized areas would have fewer environmental impacts" and acknowledges that "[s]olar projects are a viable alternative to wind projects and would likely have fewer significant impacts related to Aesthetics, Agriculture, Biological Resources, Noise, and Land Use." AR4736-4737. But the Board again refused to consider the alternative. AR4736.

Alternatives may only be eliminated from "detailed consideration" when substantial evidence in the record shows that they either (1) "fail[] to meet most of the basic project objectives," (2) are "infeasibl[e]," or (3) do not "avoid significant environmental impacts." Guidelines §15126.6(c). As discussed below, no such grounds for eliminating these alternatives from study were provided by the Board, for either of the two rejected alternatives. Because the EIR fails to study any alternatives that would avoid the Project's significant impacts, and because it improperly dismisses

from consideration alternatives that could feasibly do so, it fails to analyze a reasonable range of alternatives. *HAWC*, 213 Cal.App.4th at 1305; *CBD*, 185 Cal.App.4th at 884-885; *Kings County*, 221 Cal.App.3d at 733 (noting that the Guidelines stress that ERs "must 'focus on alternatives capable of eliminating any significant adverse environmental effects or reducing them to . . . insignificance.'").

1. Distributed Generation

The record is replete with evidence that distributed generation projects – such as small wind and solar electricity facilities atop existing structures in urban areas – provide an effective alternative to industrial-scale energy projects that has fewer environmental impacts. AR4736-4737, 5039. As former California Public Utilities Commission ("CPUC") Commissioner John Bohn explained in addressing development of renewable energy in San Diego County, distributed generation "projects are extremely benign from an environmental standpoint, with neither land use, water, or air emission impacts." *Id.* Indeed, the EIR does not dispute that "distributed generation in urbanized areas would have fewer environmental impacts." AR4736. The EIR further concedes that "[s]olar projects are a viable alternative to wind projects and would likely have fewer significant impacts related to Aesthetics, Agriculture, Biological Resources, Noise, and

Land Use." AR4737. Distributed generation solar projects are viable because the County has 5,000 megawatts ("MW") of unused and available solar capacity "on existing structures and already disturbed lands." AR5038.

Despite the fact that a distributed generation policy would avoid the majority of the Project's significant impacts, the Board refused to study it. The FEIR attempts to excuse this omission on the ground that the CPUC "would be the appropriate authority to implement a distributed generation policy since it has the global oversight to rank and incentivize renewable energy projects." AR4736. It also asserts that "[i]ncentivizing distributed generation in urbanized areas would discourage wind projects away from the areas of the County with the greatest wind potential." AR4736. But as discussed below, the first ground is incorrect, and the second is not a sufficient ground for refusing to study an alternative under CEQA.

The EIR's dismissal of the distributed generation alternative on the first ground is plain error. The EIR states that the CPUC "would be the appropriate authority to implement a distributed generation policy" because "while the County regulates land uses and development within its jurisdiction, it does not regulate energy distribution on a global level" or have "global oversight to rank and incentivize renewable energy projects."

But "global oversight" has nothing to do with the County's authority to permit and encourage distributed energy as a land use. The County has broad authority to plan for land uses such as distributed energy projects under Article XI, section 7 of the California Constitution and the Planning and Zoning Law (Government Code sections 65000 *et seq.*). Moreover, California law provides the Board with *express authority* to create financing programs to incentivize local "distributed generation renewable energy sources." Streets & Highways Code §§5898.20 *et seq.* The Board's claim that it has no authority to create, encourage, or facilitate such a program is incorrect.

Even assuming contrary to law that the Board currently lacked authority to facilitate distributed generation, the mere fact that an alternative is outside an agency's current authority is not a sufficient ground for dismissing it under CEQA. In *Save Round Valley Alliance v. County of Inyo* (2007) 157 Cal.App.4th 1437 ("*Save Round Valley*"), the court held that "even if . . . an act of Congress is required to effect an" alternative, "this does not necessarily render the alternative infeasible." *Id.* at 1464.

Allowing agencies to dismiss alternatives because they require the participation of another governmental body would undermine CEQA's core goal of "foster[ing] informed decisionmaking." Guidelines §15126.6(a).

Due to California's complex web of overlapping regulatory jurisdictions, review and approval of a proposed land use often involves multiple local, regional, state and even federal agencies. CEQA recognizes this reality. It defines "project" to "refer[] to the activity which is being approved and which may be subject to several discretionary approvals by governmental agencies." Guidelines §15378(c). It acknowledges the substantial role that "responsible agencies" perform in reviewing projects, and assigns them important CEQA tasks. Pub.Res.Code §21069; Guidelines §§15050(b), 15096. And, it recognizes that there may be many other agencies "having jurisdiction over a natural resource affected by the project." Pub.Res.Code §21167.6.5(b); Guidelines §15087(h).

If an agency confined its analysis to alternatives that are wholly within its sole jurisdiction, decisionmakers and the public would be faced with a falsely limited set of choices, and would therefore be unable to make a fully informed decision about how best to address an issue. That is precisely what happened here. While the need for renewable energy is real, citizens were faced with a Project that addressed that need only by allowing more and bigger wind energy facilities, without comparing such projects to *other* ways of producing the same renewable energy, such as distributed

generation. This precluded an informed decision, in violation of CEQA. Guidelines §15126.6(a).

Cases interpreting the National Environmental Policy Act ("NEPA") – which are persuasive authority[13] – are in accord. *Sierra Club v. Lynn,* 502 F.2d 43, 62 (5th Cir. 1974) (an "agency must consider appropriate alternatives which may be outside its jurisdiction or control, and not limit its attention to just those it can provide"); *Natural Resources Defense Council v. Morton*, 458 F.2d 827, 837 (D.C. Cir. 1972) ("The mere fact that an alternative requires legislative implementation does not automatically establish it as beyond the domain of what is required for discussion, particularly since NEPA was intended to provide a basis for consideration and choice by the decisionmakers in the legislative as well as the executive branch").

The EIR's second reason for dismissing the distributed generation alternative is likewise inadequate. The EIR posited that because "incentivizing distributed generation in urbanized areas would discourage wind projects away from the areas of the County with the greatest wind

[13]Because NEPA is the statute on which CEQA was modeled, cases thereunder are considered persuasive authority under CEQA. *Friends of Mammoth*, 8 Cal.3d at 260-261; *Western Placer Citizens for an Agricultural & Rural Environment v. County of Placer* (2006) 144 Cal.App.4th 890, 903.

potential," this alternative "is not conducive to achieving the project objectives." AR4736. But the only reason for this is that the County needlessly drew the Project's objectives so narrowly that only wind energy could be chosen. Seven of the eight objectives *require* wind turbines rather than other means of generating renewable energy. But absent their generation of renewable energy, wind turbines serve no independent purpose. To the contrary, as the FEIR concedes, they cause 24 *significant* environmental harms. AR4246-4259, 4631-4633. Thus, if the turbines' sole purpose – renewable energy – can be achieved by *alternate* means with fewer impacts, under CEQA the County may not ignore those means. Instead, it must study them. Guidelines §15126.6(a), (c), (d).

Put simply, an agency may not frame its objectives so narrowly as to preclude study of a reasonable range of alternatives that would achieve the project's basic objectives. *City of Santee v. County of San Diego* (1989) 214 Cal.App.3d 1438, 1455 (alternatives analysis inadequate because agency wrongly limited the scope of the project to a temporary facility). The same rule applies under CEQA's forebear, NEPA. In *National Parks & Conservation Ass'n v. Babbitt*, 606 F.3d 1058, 1070-1072 (9th Cir. 2009), for example, the court rejected an agency's unduly narrow scope of alternatives, noting that "an agency may not define the objectives of its

action in terms so unreasonably narrow that only one alternative from among the environmentally benign ones in the agency's power would accomplish the goals of the agency's action, and the EIS would become a foreordained formality"). That is precisely what the Board did here.

The Board also claimed that it need not analyze distributed generation on the ground it could not produce sufficient energy. AR4736. But an agency may not reject an alternative on infeasibility grounds without first *studying* the alternative. "Even though the agency ultimately finds . . . proposed alternatives infeasible, the EIR must still contain a meaningful discussion of both alternatives and mitigation measures." *Kings County*, 221 Cal.App.3d at 731; *Laurel Heights I*, 47 Cal.3d at 403-404, *HAWC*, 213 Cal.App.4th at 1305; *Save Round Valley*, 157 Cal.App.4th at 1462. The entire point of conducting CEQA review is to enable to Board to made an informed decision about whether alternatives to industrial-scale wind generation – such as distributed generation – would produce sufficient energy so that their undeniable environmental benefits could be realized. The Board's facile assumption that distributed generation is infeasible is conclusory and bereft of the analysis CEQA requires. AR4736. Consequently, it is inadequate.

Several courts have addressed this precise issue, and all of them ruled for petitioner. In *HAWC*, the court overturned the city's refusal to evaluate a reduced water use alternative, holding that "CEQA does not permit a lead agency to omit any discussion, analysis, or even mention of any alternatives that feasibly might reduce the environmental impact of a project *on the unanalyzed theory* that such an alternative might not prove to be environmentally superior to the project. The purpose of an EIR is to provide the facts and analysis that would support such a conclusion so that the decision maker can evaluate whether it is correct." 213 Cal.App.4th at 1305 (emphasis added).

In *Save Round Valley*, 157 Cal.App.4th at 1462, the court ruled the county's failure to conduct a detailed study of a less impactful land exchange alternative illegal because "even if the County's statement could be construed as a finding of economic infeasibility under the proper test, there is no evidence or analysis whatsoever of the comparative costs or profitability of developing the two parcels."

In *Laurel Heights I,* 47 Cal.3d at 404, the court set aside a university's failure to provide a detailed analysis of the "no project" alternative – i.e., use of existing on-campus facilities rather than relocation – because it was based on a "cursory" rejection of that alternative as

insufficient to meet the agency's objectives. The court reasoned that "[t]o facilitate CEQA's informational role, the EIR must contain facts and analysis, not just the agency's bare conclusions or opinions."

In *Kings County,* 221 Cal.App.3d at 734-737, the court overturned the county's refusal to evaluate use of alternative fuels to reduce air emissions, explaining that the EIR's failure to include detailed information about the relative environmental impacts of using alternative fuels "subverted the purposes of CEQA."

Likewise here, the Board's refusal to evaluate the eminently feasible and environmentally preferable distributed energy alternative on the facile but unstudied ground it would not produce sufficient energy violates CEQA. The Board had a duty to provide "a meaningful discussion" of this alternative and its ability to generate sufficient energy instead of summarily rejecting it. *Kings County*, 221 Cal.App.3d at 731; *Save Round Valley*, 157 Cal.App.4th at 1462; *Laurel Heights I*, 47 Cal.3d at 403-404; *HAWC*, 213 Cal.App.4th at 1303.

2. Increased Setbacks

The EIR acknowledges that the Project's "[e]nvironmental impacts would be substantially avoided or reduced if" increasing the setbacks between wind turbines and areas used by humans or wildlife was "evaluated

as a project alternative." AR4735.[14] But it rejects detailed study of the increased setback alternative on the grounds that it would be contrary to three of the Project's eight objectives. AR4735.

That is not enough under CEQA. "A potential alternative should not be excluded from consideration merely because it 'would impede to some degree the attainment of the project objectives.'" *Save Round Valley,* 157 Cal.App.4th at 1354 (citing *Preservation Action Council v. City of San Jose* (2006) 141 Cal.App.4th 1336, 1354); *HAWC*, 213 Cal.App.4th at 1277 (same); *Kings County*, 221 Cal.App.3d at 737 ("[e]nvironmentally superior alternatives must be examined whether or not they would impede to some degree the attainment of project objectives.").

Only if "the lead agency has reasonably determined" an alternative "cannot achieve the project's underlying fundamental purpose" can the alternative be dismissed from detailed study. *HAWC*, 213 Cal.App.4th at 1303. The EIR makes no pretense at such a showing and impliedly concedes that the increased setback alternative is consistent with most –

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[14]It is unclear why the FEIR combines increased setbacks and reduced height into one alternative – which is then summarily rejected – especially since the EIR includes the reduced height suggestion in the "Limited Small Wind Turbine Alternative," which it *did* study. AR4737. Since the FEIR studied the suggestion of reduced height, appellants confine their discussion to the *unstudied* increased-setback prong of this alternative.

five – of the eight project objectives. AR4735. Therefore, it should have been studied and the Board's failure to do so violates CEQA.

C. The Board Failed to Provide an Adequate Statement of Overriding Considerations Supported by Substantial Evidence

CEQA directs that "[n]o public agency shall approve . . . a project for which an EIR . . . identifies one or more significant environmental effects . . . unless the public agency makes one or more written findings for each of those significant effects, accompanied by a brief explanation of the rationale for each finding." Guidelines §15091(a); Pub.Res.Code §21081(a). Only three findings are permissible: (1) that the project has been altered to "avoid or substantially lessen the significant environmental effect;" (2), that such "alterations are within the responsibility and jurisdiction of another public agency" and either "have been adopted by such other agency or can and should be adopted by such other agency;" and (3), that "[s]pecific economic, legal, social, technological, or other considerations . . . make infeasible the mitigation measures or project alternatives identified in the final EIR." *Id.*

If the agency made the third finding, then the agency must also find "that specific overriding economic, legal, social, technological or other benefits of the project outweigh the significant effects on the environment."

Pub.Res.Code §21081(b)); Guidelines §§15092(b)(2)(B), 15093. In making this last finding, the agency must "state in writing the specific reasons to support its action based on the final EIR and/or other information in the record. The statement of overriding considerations shall be supported by substantial evidence in the record." Guidelines §15093(b); Pub.Res.Code §21081.5; *Sierra Club v. Contra Costa County* (1992) 10 Cal.App.4th 1212, 1223 ("*Contra Costa*"), disapproved on other grounds in *Voices of the Wetlands v. State Water Resources Control Board* (2011) 52 Cal.4th 499. Thus, only if less-impactful alternatives or mitigation are infeasible *and* the project's benefits outweigh its impacts do those impacts become "acceptable." *Id*.

Here, the Board failed to produce a statement of overriding considerations ("Statement") that demonstrates, based on substantial evidence in the record, that the less-impactful distributed energy and increased setback alternatives proposed by appellants were infeasible. To the contrary, as shown above, these less-impactful alternatives were feasible and should have been studied.

Nor did the Board demonstrate that each of the purported benefits of the Project outweighed its impacts. The Board claims that each of the nine purported benefits in its Statement "is a separate and independent basis that

justifies approval of the [Project]." AR172. However, many of the supposed benefits would also be provided by the alternatives appellants proposed, several are not benefits at all, and none outweigh the Project's significant environmental impacts, as shown below.

In enforcing CEQA's mandate that agencies carefully weigh a project's environmental costs against its benefits, courts have held that if assertions central to *some* of the reasons advanced in an agency's statement of overriding considerations "are lacking evidentiary support," then the *entire* statement is "substantively infirm." *Contra Costa,* 10 Cal.App.4th at 1224 (statement invalid because "assertions central to at least three of the twelve areas addressed by the statement" lacked evidentiary support).

"A statement of overriding considerations . . . offers a proper basis for approving a project despite the existence of unmitigated environmental effects, only when the measures necessary to mitigate or avoid those effects have properly been found to be infeasible." *City of Marina v. Board of Trustees of California State University* (2006) 39 Cal.4th 341, 368 ("*City of Marina*"). Consequently, a significant flaw in the agency's rejection of less-impactful alternatives on feasibility grounds can invalidate a statement. For this reason, in *Uphold Our Heritage v. Town of Woodside* (2007) 147 Cal.App.4th 587, 603 ("*Uphold Our Heritage*") an agency's dismissal of

less-impactful alternatives as "infeasible" rendered the statement "necessarily invalid." *Id*. Similarly, in *City of Marina*, the Supreme Court held that because an agency erred in claiming that a project's significant effects could not feasibly be mitigated, it "necessarily follows" that the agency's "statement of overriding considerations is invalid." *City of Marina*, 39 Cal.4th at 368-369.

The sole contrary authority relied upon by the trial court, *San Diego Citizenry Group v. County of San Diego*, (2013) 219 Cal.App.4th 1, 25 ("*Citizenry*"), is readily distinguishable. *Citizenry* did not concern an agency's ill-considered rejection of less-impactful alternatives as infeasible, which is the issue presented in this case and decided in *City of Marina* and *Uphold Our Heritage*. Instead, *Citizenry* involved the sufficiency of the subject FEIR's impact analysis, which it found to be adequate to "apprise[] the decision maker of the severity of those impacts." AA145. Here, on the other hand, as in *Uphold Our Heritage* and *City of Marina*, the agency based its statement on the presumed absence of less-impactful alternatives without the required analysis of their feasibility and efficacy. Because an adequate statement of overriding considerations is an essential component of the CEQA review process, the County's failure to prepare an adequate

statement here is, as shown below, a prejudicial abuse of discretion. *Sierra Club,* 7 Cal.4th at 1237.

1. The Board's Insufficient Analysis of Alternatives Necessarily Renders Its Statement of Overriding Considerations Invalid

The Board advanced nine reasons for approving the Project in its Statement of Overriding Considerations. AR172-173. All fail because the FEIR never examined a reasonable range of alternatives, and refused to analyze the two less-impactful alternatives that appellants proposed. The Board's failure to consider these alternatives forecloses the Board's reliance on purported Project benefits that these alternatives would also provide. For example, the Board claims that the Project would increase energy reliability, assist the state in reducing air pollution, and provide less expensive energy while reducing demand. AR172 (reasons A.1 and .2), 173 (reason C.2). But all of these benefits are also provided by the less-impactful alternatives proposed by appellants but never studied by the Board, as discussed below.

This conclusion follows from CEQA's primary objective: compelling agencies to identify environmental impacts and reduce or avoid them by adopting alternatives or mitigation measures. To this end, CEQA directs that "if there are feasible alternatives . . . available which would

substantially lessen the significant environmental effects of proposed projects," then agencies "should not approve" the proposed projects. Pub.Res.Code §21002. It would subvert this core purpose of CEQA to allow an agency to approve a project even though feasible and less-impactful alternatives exist by merely proclaiming – without first studying the alternatives – the project to be preferable in a statement of overriding considerations.

Accordingly, the Board cannot unlawfully dismiss less-impactful alternatives such as distributed generation or increased setbacks, that would have *less* environmental impact, and then justify the Project based on benefits that the rejected alternatives would have provided at least as well. *Uphold Our Heritage*, 147 Cal.App.4th at 603 ("since the record does not support the Council's finding that all of the alternatives included in the EIR are infeasible, the Council's statement of overriding circumstances is *necessarily invalid*") (emphasis added); Guidelines §15093.

"CEQA does not authorize an agency to proceed with a project that will have significant, unmitigated effects on the environment, based simply on a weighing of those effects against the project's benefits, unless the measures necessary to mitigate those effects are *truly infeasible*." *City of Marina*, 39 Cal.4th at 368-369 (emphasis added). As noted, "[e]ven though

the agency ultimately finds . . . proposed alternatives infeasible, the EIR must still contain a meaningful discussion of [them]." *Kings County*, 221 Cal.App.3d at 731. Since the FEIR never studied either distributed energy or increased setbacks as necessary to support the Board's facile claim that these less-impactful alternatives were infeasible, the Board's Statement could not presume these alternatives were in fact infeasible. *Uphold Our Heritage*, 147 Cal.App.4th at 603. Moreover, since both of these alternatives would provide these same three benefits, the Board could not rely on these benefits to justify approving the Project. *Id.*

Because the Board's entire Statement, and particularly the three reasons discussed above, assume that there is no feasible and less-impactful alternative to the Project – a premise that lacks the evidentiary and analytical support CEQA requires – the Statement is "substantively infirm." *Contra Costa*, 10 Cal.App.4th at 1224. The Statement must be set aside for the additional reason that the other six reasons it advances for approving the Project are likewise substantively infirm, as discussed below.

2. There Is No Substantial Basis in the Record for the Claim That Temporary Construction Jobs and Leasing Revenue Confer an Economic Benefit Sufficient to Overcome the Project's Significant Environmental Costs

The Board next claims three "[e]conomic [b]enefits." AR172-173 at reasons C.1-C.3. First, it mentions possible jobs. AR173 at C.1. However, it concedes that "the Project is *not* expected to generate a significant number of new permanent jobs." *Id.* (emphasis added). Instead, the Board contends that the Project is justified because it will create "some" "temporary construction jobs." *Id.* But neither the FEIR nor the Statement provides any supporting analysis showing how "some" temporary construction jobs would confer an economic benefit sufficient to *outweigh* the Project's 24 *significant* environmental impacts.

Tacitly acknowledging this defect, the trial court rested its decision not on the Statement's deficient discussion, but instead on a one-sentence comment by Italy's largest wind company that "clean power improve[s] quality of life by reducing air pollution and creating green jobs" (AR1293), a similar comment by T. Boone Pickens that wind energy creates "new construction and maintenance jobs" (AR7129), and an analysis of the Tule Wind Project citing temporary employment but providing no guaranty of local hiring (AR10063, 17019-17020). AA145.

These reasons fail. First, distributed energy would also provide "new construction and maintenance jobs" – and the likelihood of *local* hiring for installation of *local* facilities such as roof-top solar would be virtually certain.

Second, none of the trial court's citations constitutes substantial evidence that the Project will produce significant employment of County residents. Under CEQA, "substantial evidence" includes "facts, reasonable assumptions predicated upon facts, and expert opinions supported by facts." Guidelines §15384(b). "Argument, speculation, [and] unsubstantiated opinion or narrative . . . does not constitute substantial evidence." *Id.* at subd. (a). Generalized puffery by a foreign wind turbine manufacturer (Enel), unsubstantiated opinion by T. Boone Pickins predicting a rosy future for wind energy development in general, and unsubstantiated narrative predicting temporary hiring of workers from somewhere – but not necessarily San Diego County – to construct the proposed Tule Wind project, do not constitute "substantial evidence" that the Project will employ substantial numbers of County residents.

Third, none of these citations overcome the Statement's own admission that the Project "would *not* result in substantial economic . . . growth" and "would have *little effect* on base employment within the San

Diego region." AR4276-4277 (emphasis added). The FEIR admits that "[a]lthough the anticipated growth of the renewable energy industry from the proposed ordinance amendments *may* create additional jobs, it *would not result in substantial economic . . . growth*." AR4276 (emphasis added). Furthermore, any "growth-inducing effect from . . . increased employment opportunities within the County would be *minimal*," and the "limited scale of wind turbine construction and operations *would have little effect on base employment* within the San Diego region." AR4277 (emphasis added). And finally, long after any temporary jobs and their ancillary benefits have disappeared, San Diego County residents will be left with the Project's 24 significant unavoidable environmental impacts conceded in the Statement. AR171.

In sum, there is no substantial evidence that the Project's admittedly "little effect" on employment and "minimal" ability to produce economic growth outweigh all of its two dozen undisputed "significant" adverse effects. By definition, "little" and "minimal" are *less than* "significant." It follows, as surely as "small" is less than "large," that "little" and "minimal" effect cannot outweigh the Project's "significant" impacts. And, the alternatives appellants proposed would produce employment more likely to be local.

The second economic benefit claimed by the Board is that small turbines would "provide residents with relief from high energy costs." AR173 at C.2. But the FEIR provides no analysis demonstrating that small turbines would in fact produce energy at less cost than roof-top solar and other forms of distributed energy. AR4736. Moreover, distributed energy would produce the same benefit of "reducing demand on utility systems that are currently primarily supplied by fossil fuels." *Id.* The Board cannot justify this Project based on benefits that the rejected alternative – distributed energy – would have provided at least as well. *Uphold Our Heritage*, 147 Cal.App.4th at 603.

The Board' third economic claim, that wind projects facilitated by the Project will benefit rural economies "by providing a steady income through lease or royalty payments to farmers and other landowners," likewise lacks record support. AR173 at C.3. Again, the Board did no economic analysis to support this claim. The trial court rested its decision on one insubstantial statement that some payments are, at undisclosed times and in undisclosed quantities, made to private land owners (AR4271). AA145. None of these vague allusions to possible sources of income constitutes "substantial evidence" under CEQA that the Project will produce significant, quantifiable economic benefits to the County.

Refuting this, the FEIR states to the contrary that the Project is expected to have minimal, if any, economic benefits. AR4276-4277. There is no substantial evidence that these "minimal" benefits would outweigh the Project's 24 significant environmental impacts. AR171.

3. Facilitating Wind Energy Development Is Not a Benefit of Facilitating Wind Energy Development.

The Board also claims that the Project provides four "technological" and "regulatory" benefits. AR172, reason B.1, AR173, reasons D.1-D.3. First, it asserts that the "Project streamlines and clarifies the approval process" for small turbines. *Id.* at D.1. However, it fails to explain how this is *beneficial*. The Board admits that facilitating wind energy development will have *adverse* environmental impacts. AR171. The statement of overriding considerations is supposed to explain how the benefits of facilitating wind energy *outweigh* those harms. Pub.Res.Code §21081(b); 14 C.C.R. §15093(a). Further, one needs only common sense to understand that "facilitating wind energy development" is not a benefit of "facilitating wind energy development." Repeating the Project's purpose as if it were an additional "benefit" of the Project is not substantial evidence. Therefore, this reason is invalid.

Second, the Board claims that new "siting criteria" for small wind turbines would ensure that turbines "avoid habitats and wetlands" to "help

to reduce potential environmental impacts from small turbines." AR173 at D.2. However, nowhere does the Board claim that *existing* small turbine development is currently causing these problems. If such siting criteria are only needed because the *Project* will allow increased development, then reducing those *Project-caused impacts* is a *mitigation* measure rather than a separate Project *benefit*.

Finally, the Board claims that the Project will "expand opportunities for large wind turbines by updating the currently outdated zoning regulations to accommodate current wind turbine technology." AR173 at D.3. In other words, the Project will expand large wind turbine development by allowing large wind turbine development. Again, the Board is double-counting the Project as its own benefit.

Furthermore, this supposed benefit comes at a steep environmental price. The Project expands the size and number of small turbines by allowing their proliferation *without* a discretionary permit. AR4239, 4242, 5219, 7721-7722. The FEIR admits that "there would be no means to ensure mitigation of significant effects since no discretionary permits would be required." AR4242.

Thus, the Project will *reduce* the review required to build small wind turbine projects, thereby *causing* – rather than eliminating – those projects'

impacts. As noted, some of the "significant unavoidable environmental impacts," such as scenic and avian impacts, are made *worse* by taller turbines.

Causing admitted impacts is not a benefit. It is an environmental cost. And again, the Board cannot circularly claim that allowing more turbines is a benefit of allowing more turbines. Tautology is not substantial evidence.

For these reasons, each of the Board's nine reasons for approving the Project notwithstanding its 24 significant environmental harms fails. Accordingly, the Board's Statement of Overriding Considerations is not supported by substantial evidence and must be set aside.

CONCLUSION

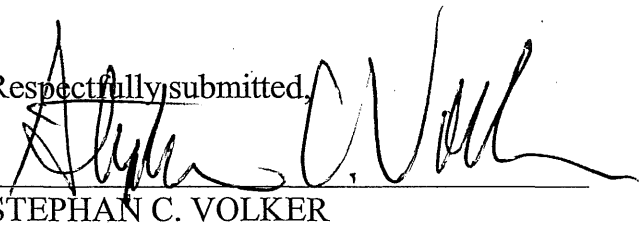
The Board's approval of the Project violates CEQA. The FEIR failed to adequately analyze the Project's numerous irreparable environmental impacts, including impacts to public safety, water resources, wildlife, and the affected rural areas' residents. The Board also failed to consider a reasonable range of alternatives, ignoring the less-impactful alternatives of distributed generation and increased setbacks. Lastly, the Board's Statement of Overriding Considerations is undermined by the

FEIR's failure to analyze the less-impactful alternatives proposed by appellants, and is not supported by substantial evidence.

Because the FEIR is inadequate under CEQA, the Board's approval of the Project must be set aside.

Dated: December 22, 2014

Respectfully submitted,



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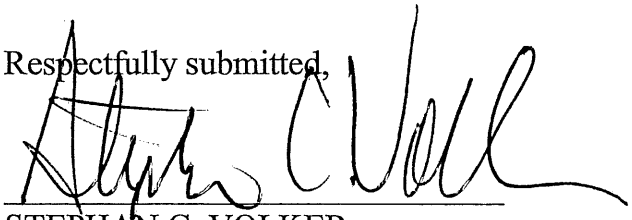
CERTIFICATE OF COMPLIANCE

Appellant's Opening Brief, pursuant to Rules 8.204(b)(4), (c)(1) and (4) of the California Rules of Court, is in at least 13-point proportional type and contains 13,992 words, as counted by WordPerfect 12, the word processing software used to prepare this brief.

Dated: December 22, 2014

Respectfully submitted,



STEPHAN C. VOLKER

PROOF OF SERVICE

I am a citizen of the United States of America; I am over the age of 18 years and not a party to the within entitled action; my business address is 436 14th Street, Suite 1300, Oakland, CA 94612.

On December 22, 2014, I served a true copy of the following documents entitled:

APPELLANTS' OPENING BRIEF

in the above-captioned matter on each of the persons listed below by mailing fully prepaid in the United States mail at Oakland, California, addressed as follows:

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California Supreme Court
(efiled via California Court of Appeal, Fourth District website)

I declare under penalty of perjury that the foregoing is true and correct. Executed on December 22, 2014 at Oakland, California.

Teddy Ann Fuss