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7 THE PROTECT OUR COMMUNITIES FOUNDATION,
BACKCOUNTRY AGAINST DUMPS, EAST COUNTY
8 COMMUNITY ACTION COALITION, and DONNA TISDALE

9 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

10 IN AND FOR THE COUNTY OF IMPERIAL

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

13 Petitioners/Plaintiffs,

14 vs.

15 IMPERIAL COUNTY BOARD OF SUPERVISORS,
16 and DOES I -X,

17 Respondents/Defendants,

18 PATTERN ENERGY GROUP LP, OCOTILLO
EXPRESS LLC and DOES XI-XX,

19 Real Parties in Interest.

) Civ. No.

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

20
21 Petitioners and plaintiffs THE PROTECT OUR COMMUNITIES FOUNDATION,
22 BACKCOUNTRY AGAINST DUMPS, and DONNA TISDALE (hereinafter “petitioners”) hereby
23 petition the Court for a writ of mandate and for preliminary and permanent injunctions and declaratory
24 relief against respondents IMPERIAL COUNTY BOARD OF SUPERVISORS, *et al.* (hereinafter the
25 “Board” or the “County”), and real parties in interest PATTERN ENERGY GROUP LP, *et al.*, and by
26 this Verified Petition allege as follows:

27 **INTRODUCTION**

28 1. The Board’s April 25, 2012, approval of the Ocotillo Wind Energy Facility (the “Project”)

1 violates the California Environmental Quality Act (“CEQA”, Public Resources Code section 21000 *et*
2 *seq.*, in substantial respects, depriving the public of a fair opportunity to evaluate the Project’s significant
3 environmental impacts. The Project allows the construction of 112 wind turbines along with a substation
4 and switchyard, service roads, an administration building, and associated transmission facilities in a
5 sensitive desert environment that provides essential habitat for several endangered species including the
6 Peninsular Bighorn Sheep, outstanding scenery, irreplaceable cultural resources, and unique opportunities
7 for remote recreation and solitude. The Project will fundamentally alter over 12,000 acres of largely
8 untrammelled desert and destroy many of the site’s natural and cultural resources. The Project also
9 threatens the health and welfare of local inhabitants and will significantly diminish desert vistas from
10 many key viewing areas, including adjacent Anza-Borrego Desert State Park.

11 2. Because the Board’s Final Environmental Impact Report (“EIR”) for this Project is
12 deficient in numerous prejudicial respects, the Board’s issuance of a Conditional Use Permit and
13 Variance for the Project are unlawful and this Court must set them aside.

14 **JURISDICTION AND VENUE**

15 3. This Court has jurisdiction over this action pursuant to Code of Civil Procedure (“CCP”)
16 sections 526 (injunctive relief), 1060 (declaratory relief), 1085 (traditional mandate), and 1094.5
17 (administrative mandate); Public Resources Code (“PRC”) sections 21168 and 21168.5 (judicial review
18 under CEQA); and Article VI, section 10, of the California Constitution.

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

21 5. This petition is timely filed within all applicable statutes of limitations. This action is
22 timely under CEQA because it is filed within 30 days of the Board’s April 25, 2012, Notice of
23 Determination (“NOD”). PRC §21167(c).

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

27 **PARTIES**

28 7. Petitioner THE PROTECT OUR COMMUNITIES FOUNDATION (“POC”) is a

1 community organization formed in 2009 as the successor to The Protect Our Communities Fund, which
2 had been formed in 2006. POC's members are numerous individuals and families residing in eastern San
3 Diego County and in Imperial County who are directly affected by the Board's approval of the Project.
4 POC's purpose is the promotion of a safe, reliable, economical, renewable and environmentally
5 responsible energy future. POC's members use the lands affected by the Project for aesthetic, scientific,
6 historic, cultural, recreational, and spiritual enjoyment. Construction and operation of the Project would
7 harm the use and enjoyment of these public resources by POC's members as well as the public at large.
8 POC therefore seeks judicial review of the Board's approval of the Project and its FEIR.

9 8. Petitioner BACKCOUNTRY AGAINST DUMPS ("Backcountry") is a community
10 organization comprising numerous individuals and families residing in Imperial County and eastern San
11 Diego County who will be directly effected by the construction and operation of the Project. Backcountry
12 and its members are vitally interested in proper land use planning and management and in maintaining
13 and enhancing the ecological integrity, scenic beauty, wildlife, recreational amenities, and resources of
14 the area, including the Project site. Some members of Backcountry rely for their entire domestic,
15 municipal and agricultural water supply on the vulnerable aquifers of eastern San Diego County that are
16 threatened with contamination and overdrafting by ongoing and proposed land use development including
17 this Project. Backcountry's members use the lands affected by the Project for aesthetic, scientific,
18 historic, cultural, recreational and spiritual enjoyment. Construction and operation of the Project would
19 harm use and enjoyment of these public resources by Backcountry's members as well as the public at
20 large. Backcountry therefore seeks judicial review of the Board's approval of the Project and its FEIR.

21 9. Petitioner DONNA TISDALE lives on Morningstar Ranch near Boulevard in eastern San
22 Diego County, and owns property in Imperial County. She is a member of Backcountry and POC, and
23 Chairwoman of the County of San Diego's Boulevard Planning Group. Mrs. Tisdale uses the lands that
24 will be harmed by the Project for activities such as hiking, family outings, recreation, wildlife and
25 wildflower viewing, sightseeing, photography, star gazing, quiet meditation, and camping. Construction
26 and operation of the Project will harm Ms. Tisdale's use and enjoyment of these public resources. Mrs.
27 Tisdale therefore seeks judicial review of the Board's approval of the Project and its FEIR.

28 10. Petitioners' environmental injuries cannot be adequately remedied by money damages.

1 Petitioners have no plain, speedy, or adequate remedy at law. Accordingly, petitioners seek injunctive,
2 mandamus, and declaratory relief from this Court to remedy the Board's unlawful acts and thereby
3 redress petitioners' injuries.

4 11. Petitioners exhausted all available administrative remedies by timely submitting comments
5 to and appearing before the Imperial County Planning Commission and Board of Supervisors in
6 opposition to the Project.

7 12. Respondent IMPERIAL COUNTY BOARD OF SUPERVISORS is the governing
8 legislative body of Imperial County and is authorized by the California Constitution to regulate land use
9 within all unincorporated areas of the County. The Board is the lead agency for the Project under CEQA.
10 The Board certified the FEIR and issued Project approvals and its CEQA Notice of Determination for the
11 Project on April 25, 2012.

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

16 14. Real party in interest Ocotillo Express LLC ("Ocotillo Express") is the Project proponent
17 and the applicant for the Conditional Use Permit and Variance for the Project. Ocotillo Express LLC is a
18 wholly owned subsidiary of real party in interest Pattern Energy Group LP.

19 15. Real party in interest Pattern Energy Group LP ("Pattern Energy") is the parent
20 corporation of Ocotillo Express LLC.

21 16. Petitioners are unaware of the true names and capacities of real parties in interest DOES
22 XI-XX, inclusive, and therefore sue such real parties in interest herein by fictitious names. Petitioners are
23 informed and believe, and based upon such information and belief allege, that the fictitiously named real
24 parties are entities or individuals who have a direct and substantial economic interest in, or are the
25 recipients of, the Board's approval of the Project. When the true identities and capacities of these real
26 parties have been ascertained, petitioners will, with leave of the Court if necessary, amend this petition to
27 insert such identities and capacities.

28 ///

1 **BACKGROUND**

2 16. Ocotillo Express proposes to construct the Project in the Yuha Desert, within the Colorado
3 Desert portion of the larger Sonoran Desert. The Project would convert approximately 12,484 acres of
4 desert wildlands into a 336-megawatt (MW) wind energy facility.

5 17. The Project includes: 112 wind turbine generators and transformers; an electrical
6 collection system and substation; administration, operations and maintenance facilities; transmission
7 lines; meteorological towers; a temporary asphalt batch plant; parking; temporary construction lay down
8 areas; and switchyard, loop in, and associated connection facilities for transmitting electricity to San
9 Diego Gas and Electric Company's ("SDG&E's") Sunrise Powerlink Transmission Line ("Powerlink").
10 The Project also includes approximately 42 miles of access roads, which would be completely cleared of
11 vegetation and graded. During the construction phase, these roads would be 36 feet wide to
12 accommodate access to the site for the large-tracked cranes necessary for turbine erection. The wind
13 turbine generators would be approximately 448 feet in height. The three proposed meteorological towers
14 would be 262.5 feet in height.

15 18. These industrial facilities will be sited on two separate parcels of federally administered
16 lands surrounding on three sides the unincorporated community of Ocotillo. Many residences are located
17 near the sites for the new turbines, including one residence that is approximately 2,640 feet (0.5 miles)
18 from the closest proposed turbine. The Project is located on the Ocotillo-Coyote Wells Aquifer, which
19 was Federally designated as a sole source aquifer on September 10, 1996. 61 Fed. Reg. 47752-53. The
20 aquifer "serves as the 'sole source' of drinking water for the residents of Ocotillo, Coyote Wells, Yuha
21 Estates and Nomirage" and therefore should be protected because "[t]here is no economically feasible
22 alternative drinking water source near the designated area." Id. at 47753.

23 19. The Project site is surrounded on all sides by sensitive, specially protected land use areas
24 of extraordinary scenic, cultural, wildlife and recreational value to the public. Specifically, the site is
25 immediately north of the Jacumba Wilderness Area, approximately two miles west of the Yuha Basin
26 Area of Critical Environmental Concern, approximately 1.5 miles southwest of the Plaster City Off-
27 Highway Vehicle Open Area, approximately one mile south of the Coyote Mountains Wilderness, and
28 immediately adjacent to Anza-Borrego Desert State Park on its western border. The Project would be

1 visible and audible from, and harm the scenic, recreational and wilderness resources of, these special land
2 use areas.

3 20. In December 2010, Pattern Energy through its subsidiary, Ocotillo Express, submitted an
4 application to Imperial County for a Conditional Use Permit for the operation of the Project and for a
5 Variance from the County's 100-foot height limit for the Project's 448-foot high turbines and 262.5-foot
6 high MET towers. At the same time, Ocotillo Express also submitted an application to the United States
7 Bureau of Land Management ("BLM") for a right-of-way grant and an amendment to the California
8 Desert Conservation Area ("CDCA") Plan to allow it to construct the Project on sensitive BLM-managed
9 lands of extraordinary public value.

10 21. In response to Ocotillo Express' applications, BLM and Imperial County prepared and
11 issued a joint Draft Environmental Impact Statement/Draft Environmental Impact Report (hereinafter
12 "DEIR") in June 2011. The agencies then received numerous public and agency comments, including
13 petitioners' extensive comments, on the Project.

14 22. In March 2012, Imperial County and BLM issued a Final Environmental Impact
15 Statement/Final Environmental Impact Report (hereinafter "FEIR") for the Project. The FEIR addressed
16 the impacts of six alternatives:

17 The Proposed Action - 155 Wind Turbine Generators/Approval of a land use plan
18 amendment to make site available for wind energy development (Alternative 1);

19 137 Wind Turbine Generators Alternative/Approval of a land use plan amendment to
20 make site available for wind energy development (Alternative 2);

21 105 Wind Turbine Generators Alternative/Approval of a land use plan amendment to
22 make site available for wind energy development (Alternative 3);

23 No issuance of a ROW Grant or County approval/No Land Use Plan (LUP) Amendment
24 (Alternative 4, or the "No Action Alternative");

25 No issuance of a ROW Grant or County approval/Approval of a land use plan amendment
26 to exclude wind energy development on the site of the Proposed Action (Alternative 5);
27 and

28 No issuance of ROW Grant or County approval/Approval of a land use plan amendment to
make site available for future wind energy development (Alternative 6).

1 The FEIR did not analyze any offsite alternatives or distributed generation alternatives.¹ Because the
2 FEIR's analysis only focused on project alternatives that would occupy the same location, it did not
3 compare the environmental and cultural impacts of the Project with less impactful alternatives.

4 23. The FEIR identified multiple adverse and unavoidable impacts, including harm to air
5 quality, cultural resources, noise, paleontological resources, public health and safety, vegetation
6 resources, aquatic resources, visual resources, and wildlife resources.

7 24. Prior to final consideration of the Project by the County and BLM, Ocotillo Express
8 proposed a new Project configuration that includes 112 wind turbines. Imperial County approved the
9 Project, in this new 112-turbine configuration, by certifying the FEIR and issuing a Conditional Use
10 Permit and Variance for the Project on April 25, 2012.

11 25. On May 11, 2012, BLM approved Ocotillo's right-of-way application, clearing the way for
12 Project construction.

13 26. Petitioners ask this Court to set aside the Board's Project approvals because its
14 environmental review was deficient as alleged below.

15 **FIRST CAUSE OF ACTION**

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

18 27. The paragraphs set forth above are realleged and incorporated herein by reference.

19 28. Petitioners bring this First Cause of Action pursuant to PRC section 21168 on the grounds
20 that the Board failed to act in accordance with the law, and committed a prejudicial abuse of discretion, in
21 that the Board certified an EIR that does not comply with CEQA.

22 29. The Project FEIR does not comply with CEQA because it (1) defines the Project purpose
23 too narrowly, (2) fails to analyze a reasonable range of alternatives, (3) fails to analyze all parts of the
24

25 ¹ Distributed – or decentralized – generation calls for the construction of smaller energy sources near
26 urban energy demand centers, rather than utility-scale electrical generation facilities, which are often
27 located in remote sites far from those urban demand centers. Distributed generation has many
28 advantages over traditional utility-scale energy production, including reductions in transmission line
loss of electricity, increased reliability, reduced wildfire risk, and a significant decrease in scenic and
other environmental damage.

1 Project, (4) fails to adequately analyze the Project’s environmental impacts, (5) improperly defers
2 analysis of mitigation measures, and (6) fails to adequately respond to public comments.

3 **The EIR Defines the Project Purpose Too Narrowly**

4 30. CEQA requires that EIRs contain a “statement of objectives” that includes the “underlying
5 purpose of the project.” 14 Cal. Code Regs. (“Guidelines”) § 15124(b). The primary goal of defining the
6 project purpose is to “help the Lead Agency develop a reasonable range of alternatives.” *Id.*; *id.* §
7 15126.6(c) (“[t]he range of potential alternatives to the proposed project shall include those that could
8 feasibly accomplish most of the basic objectives of the project”). To ensure that an adequate range of
9 alternatives is considered, “a lead agency may not give a project’s purpose an artificially narrow
10 definition.” *In re Bay-Delta Programmatic Environmental Impact Report Coordinated Proceedings*
11 (2008) 43 Cal.4th 1143, 1166.

12 31. Here, the FEIR identifies the second Project objective as “[d]evelop[ing] a wind energy
13 project on the windiest sites available to maximize energy production and provide the lowest-cost
14 renewable, non-polluting electricity.” FEIR 1-5. However, the FEIR fails to justify constraining the
15 Project objectives and alternatives to wind-based electrical generation as opposed to renewable energy
16 generation in general. While the wind power criterion may be beneficial to the Project proponents,
17 Ocotillo Express and Pattern Energy, it is by no means necessary to achieving the primary Project goal of
18 “[p]rovid[ing] energy . . . to help meet California’s Renewable Portfolio Standard (RPS) requirement for
19 renewable energy.” *Id.* It thus constitutes an arbitrary and unduly narrow restriction on the identification
20 and analysis of Project alternatives. This violates CEQA.

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

22 32. CEQA requires agencies to consider a “reasonable range of alternatives that will foster
23 informed decisionmaking and public participation.” Guidelines § 15126.6(a). The “discussion of
24 alternatives shall focus on alternatives to the project or its location which are capable of avoiding or
25 substantially lessening any significant effects of the project, even if these alternatives would impede to
26 some degree the attainment of the project objectives, or would be more costly.” *Id.* § 15126.6(b). It is
27 imperative that the “EIR . . . include sufficient information about each alternative to allow meaningful
28 evaluation, analysis, and comparison with the proposed project.” *Id.* § 15126.6(d). A project *cannot* be

1 approved if its significant impacts can be feasibly reduced to insignificance through project alternatives or
2 mitigation measures. PRC §§ 21002, 21081.

3 33. Agencies can eliminate alternatives from detailed consideration in an EIR if they are
4 infeasible, fail to meet “*most*” of the basic project objectives or do not avoid significant environmental
5 impacts. Guidelines § 15126.6(c) (emphasis added). However, the EIR must discuss the selection and
6 rejection of alternatives “in a manner to foster meaningful public participation and informed
7 decisionmaking.” *Id.* § 15126.6(f). An agency’s rejection of an alternative as “infeasible” or otherwise
8 “unworthy of more in-depth consideration” must be supported by “substantial evidence.” *Center for*
9 *Biological Diversity v. County of San Bernardino* (2010) 185 Cal.App.4th 866, 885.

10 34. Here, the FEIR’s alternatives analysis violates CEQA for three reasons. First, it
11 improperly dismisses the feasible and less environmentally damaging Distributed Solar Generation
12 alternative. The FEIR dismisses the Distributed Solar Generation alternative on the grounds that it would
13 (1) not meet technical or economic feasibility criteria, (2) only partially meet the objectives of achieving
14 California’s RPS through wind power generation, and (3) not meet the objective of developing wind
15 power generation. FEIR 2-48, 2-50. These rationales fail. As extensively documented in petitioners’
16 comments on the DEIR and FEIR, and as demonstrated elsewhere in the record before the Board,
17 distributed generation *is* feasible, *would* meet the primary Project objective of achieving California’s RPS
18 and would *also* provide additional environmental and economic benefits. Furthermore, the fact that the
19 Distributed Solar Generation alternative would not develop *wind* power generation is an impermissible
20 rationale for eliminating the alternative. As noted, the wind power generation objective is an arbitrary
21 and unduly narrow restriction on the identification and analysis of Project alternatives that violates
22 CEQA.

23 35. Second, the EIR *entirely* fails to mention, let alone analyze, a distributed generation
24 alternative that includes more than just solar generation, such as small-scale wind generation and
25 combined heat and power generation. As extensively documented in petitioners’ comments on the DEIR
26 and FEIR, and as demonstrated elsewhere in the record before the Board, distributed generation apart
27 from rooftop solar is feasible, would help achieve California’s RPS and would reduce the Project’s
28 environmental impacts. By failing to even *mention*, let alone analyze, this alternative, the EIR violates

1 CEQA.

2 36. Third, the FEIR improperly dismisses and fails to consider an adequate range of off-site
3 energy generation alternatives. The FEIR dismisses off-site alternatives within Imperial County on the
4 ground that *wind* projects of comparable electrical output would not be feasible elsewhere. This is an
5 impermissible rationale for eliminating off-site alternatives. As discussed above, the wind power
6 generation objective is an arbitrary and unduly narrow restriction on the identification and analysis of
7 Project alternatives that violates CEQA. Furthermore, the FEIR *entirely* fails to consider potential project
8 sites *outside* Imperial County. This violates CEQA.

9 **The EIR Fails to Analyze All Parts of the Project**

10 37. The FEIR fails to analyze the impacts of the “collection line” that runs between Site 1 and
11 Site 2 of the Project. FEIR, Figure 2.1-2. In fact, the line is repeatedly depicted as outside of the Project
12 boundaries. *Id.*; FEIR, Figure 3. The EIR’s failure to address this portion of the Project violates CEQA’s
13 mandate that “[a]ll phases [and components] of a project must be considered when evaluating its impact
14 on the environment.” Guidelines § 15126.

15 38. In addition, the FEIR fails to analyze the recent change to the utility switchyard that would
16 allow for the construction of additional 500-kV and 230-kV lines. This Project change requires analysis,
17 including but not limited to an analysis of the change’s growth inducing impacts. The County, however,
18 failed to undertake this analysis.

19 **The EIR Fails to Adequately Analyze the Project’s Environmental Impacts**

20 39. An EIR must provide a discussion of the significant environmental impacts of the
21 proposed project, including both direct and indirect impacts. Guidelines §§ 15126(a), 15126.2(a). A
22 “significant effect” occurs when a project causes a “substantial, or potentially substantial, adverse change
23 in any of the physical conditions within the area affected by the project.” Guidelines § 15382. “An EIR
24 should be prepared with a sufficient degree of analysis to provide decisionmakers with information which
25 enables them to make a decision which intelligently takes account of environmental consequences.”
26 Guidelines § 15151; *Watsonville Pilots Association v. City of Watsonville* (2010) 183 Cal.App.4th 1059,
27 1080. Further, a lead agency must “use its best efforts to find out and disclose all that it reasonably can,”
28 to demonstrate it has fully “considered the environmental consequences of [its] action.” Guidelines §

1 15144; *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40
2 Cal.4th 412, 428; *Berkeley Keep Jets Over the Bay Commission v. Board of Port Commissioners* (2001)
3 91 Cal.App.4th 1344, 1355-56. Here, the FEIR fails to adequately analyze the Project’s significant noise,
4 electrical and magnetic field, visual, biological, cultural resource, lands and realty, wilderness access and
5 soil resources impacts.

6 **Noise Impacts**

7 40. The FEIR fails to adequately assess the impacts of infra- and low-frequency noise
8 (“ILFN”). The FEIR not only fails to properly analyze the impacts of ILFN, it fails to even calculate or
9 discuss how much ILFN the Project would produce. The Project is likely to produce enough ILFN to
10 cause a significant adverse environmental impact. The County’s failure to identify, let alone analyze and
11 mitigate, this impact violates CEQA. Contrary to the FEIR’s conclusion, the County’s failure to analyze,
12 quantify or qualify the Project’s ILFN impacts is not excused by the lack of “recognized regulatory
13 guidance or thresholds related to [Wind Turbine Syndrome].” FEIR 4.11-13. To paraphrase the court of
14 appeal’s holding in an analogous case involving air pollution from an airport expansion, “[t]he fact that a
15 single methodology does not currently exist that would provide [the County] with a precise, or
16 ‘universally accepted,’ quantification of the human health risk from [ILFN] exposure does not excuse the
17 preparation of a health risk assessment – it requires [the County] to do the necessary work to educate
18 itself about the different methodologies that *are* available.” *Berkeley Keep Jets Over the Bay*
19 *Commission, supra*, 91 Cal.App.4th at 1370.

20 41. The County also violated CEQA by failing to accurately calculate and present the Project’s
21 audible noise impacts. The FEIR’s analysis omits or ignores essential information regarding the project’s
22 operational noise impacts. For example, the FEIR fails to normalize the estimated Project sound levels to
23 account for land use compatibility, thereby understating the Project’s noise impacts. As a consequence,
24 the County’s environmental review of the Project’s noise impacts violates CEQA.

25 **Failure to Adequately Analyze Mitigation Measures for Noise Impacts**

26 42. Dozens of residences are located within 1.25 miles of the proposed turbines on the Project
27 site, including those in the communities of Ocotillo and Coyote Wells (*see* FEIR 3.2-5 to 3.2-6; FEIR
28 figures 3.6-3b, 4.18-9B). To avoid the negative health impacts from wind turbines, experts recommend

1 setbacks from large wind projects of at least *1.25 miles*. The County ignored evidence submitted by
2 petitioners and their experts pertaining to the need to provide an adequate setback as mitigation for noise
3 impacts and therefore violated CEQA.

4 ***Public Health Impacts – Dirty Electricity***

5 43. The FEIR also fails to adequately analyze electrical and magnetic field (“EMF”) pollution,
6 which often comes in the form of stray voltage or “dirty electricity.” Stray voltage is electricity that is
7 dumped or otherwise escapes from wind turbine facilities and migrates through the ground or otherwise
8 to impact human and wildlife health. Dirty electricity is electromagnetic energy that flows along a
9 conductor and deviates from a pure 60-Hz sine wave. As numerous electrical pollution measurements
10 have shown, wind turbines can produce significant electrical pollution in the form of stray voltage and
11 dirty electricity. And if not adequately filtered, stray voltage and dirty electricity can be propagated
12 through the substations and onto transmission and distribution lines. By traveling both along power lines
13 and through the ground, stray voltage and dirty electricity can impact people and structures more than 0.5
14 miles from the wind turbine source. As numerous recent studies cited by petitioners in their DEIR and
15 FEIR comments show, the health impacts of dirty electricity and stray voltage can be severe. These
16 studies have linked dirty electricity and stray voltage with an increase in ailments such as diabetes,
17 fibromyalgia, chronic fatigue syndrome and attention deficit disorder, among others. Yet the FEIR *never*
18 addresses the studies discussed by petitioners and others in their DEIR and FEIR comments and
19 elsewhere.

20 44. The FEIR’s selective analysis – and its conclusion based thereon that EMF and dirty
21 electricity impacts are not “expected to occur” due to the underground installation of the proposed
22 collection lines – stymies CEQA’s informational goals and violates CEQA’s mandate that EIRs “be
23 prepared with a sufficient degree of analysis to provide decisionmakers with information which enables
24 them to make a decision which intelligently takes account of environmental consequences.” Guidelines §
25 15151. At the *very least*, the County was required to “summarize the main points of disagreement among
26 the experts” instead of simply ignoring the studies demonstrating significant human health impacts from
27 EMF and dirty electricity. *Id.*

28 ***Visual Impacts – Wind Turbine Shadow Flicker***

1 45. Shadow flicker is caused by the sun rising or setting behind the rotating blades of a
2 turbine. The shadow created by the rotating blades can cause alternating light and dark shadows to be cast
3 on roads or nearby premises resulting in distraction and annoyance to drivers and residents. Shadow
4 flicker can present substantial hazards to cars passing on nearby roads because it often distracts drivers.
5 Indeed, these impacts are substantial enough that some jurisdictions have imposed minimum roadway
6 setbacks for wind turbines. Here, two major highways – Imperial Highway S2 and Interstate 8 – run
7 through portions of the Project site, yet the FEIR fails to examine, let alone mitigate, the substantial
8 hazard that shadow flicker poses to passing drivers. The FEIR response to comments acknowledges that
9 some of the turbines could “cause shadow flicker visible from the road,” yet fails to analyze the impacts
10 this would have on passing drivers. The FEIR’s failure to analyze this potentially significant impact
11 violates CEQA.

12 ***Visual Impacts – Substation; Administration, Operations, and Maintenance Facilities; Parking***

13 46. The Project includes a substation, administration, operations and maintenance facilities,
14 and a parking lot. Yet the FEIR failed to analyze the visual impacts of these components of the Project
15 both in the text of its impacts analysis and in the visual simulations of the Project’s impacts. This
16 violates CEQA’s mandate that “[a]ll phases [and components] of a project must be considered when
17 evaluating its impact on the environment.” Guidelines § 15126.

18 ***Biological Impacts – Avian Species***

19 47. The FEIR failed to adequately analyze numerous biological impacts of the Project
20 including, most prominently, the Project’s impacts to birds and bats.

21 48. First, the FEIR failed to properly analyze the Project’s contribution to total cumulative
22 golden eagle mortality in California. It is likely that California’s golden eagle population will be driven
23 close to extinction if many more wind farms and other anthropogenic sources of eagle mortality are
24 developed in the state. Yet the FEIR fails to address this looming cumulative impact. The FEIR also
25 fails to adequately address the Project’s cumulative construction impacts on golden eagles in light of the
26 many adverse impacts on eagles resulting from continuing construction of the nearby Powerlink.

27 49. Second, the FEIR failed to properly analyze the Project’s noise impact on birds.
28 Particularly sensitive species in – or potentially in – the Project area include the loggerhead shrike,

1 burrowing owl, and Le Conte's thrasher. FEIR 4.21-6 to 7. The FEIR did not address the Project's noise
2 impacts on these and other bird species in the area.

3 50. Third, the FEIR largely ignores the impacts of the Project on the many local bat species,
4 claiming that the site is not frequented by many bats. This claim is based on the FEIR's assessment that
5 there is not adequate standing water on site to foster the invertebrate prey that would attract bats to the
6 site. FEIR, p. 4.21-7. Yet the Project proponent will be required to construct water basins on the site that
7 will provide the very invertebrate habitat the FEIR claims does not exist. FEIR, p. 4.19-11; p. 4.19-64.
8 The FEIR fails to address the Project's potential to attract bats to the site and the consequent hazards to
9 those bats. Further, bats are not only killed by wind turbines through direct collision; they are also
10 harmed by barotrauma, a condition in which the air pressure differential caused by the wind turbines
11 injures bats' lungs causing them to collapse or bleed. This impact to bats was not adequately addressed in
12 the FEIR.

13 51. Fourth, despite EPA's requests that it do so, the County failed to undertake nocturnal avian
14 surveys that would shed light on the Project's nocturnal avian collision impacts and provide critical
15 information for mitigating those impacts. In fact, the FEIR admits that "[i]t is likely that nocturnal
16 species such as owls (Order *Strigiformes*), nightjars (Family *Caprimulgidae*), etc., and species that
17 migrate at night would be at a higher risk of collision as compared to diurnally active species, as the
18 WTGs [wind turbine generators] may not be visible to the species migrating at night." FEIR, p. 4.21-17.
19 The FEIR's failure to study the Project's nocturnal impacts violates CEQA.

20 52. Fifth, the FEIR failed to adequately address the color of the Project's wind turbines.
21 While lighter color turbines may be visually preferable for humans, white, light gray, and yellow turbines
22 may attract the most flying insects, and hence birds and bats that feed on those insects. The FEIR's failure
23 to analyze the impacts of turbine color selection on biological resources violates CEQA.

24 ***Biological Impacts – Peninsular Bighorn Sheep***

25 53. Nearly 3,700 acres of Essential Habitat designated by the U.S. Fish and Wildlife Service
26 for Peninsular Bighorn Sheep are situated within the Project site. FEIR 4.21-8. The Project also occupies
27 land previously designated Critical Habitat for Peninsular Bighorn Sheep. Pending litigation may force
28 restoration of this previous designation. *Center for Biological Diversity, et al. v. U.S. Fish and Wildlife*

1 *Service, et al.*, Ninth Circuit Docket No. 11-57057. The FEIR fails to consider whether restoration of this
2 designation would require revision of the FEIR’s analysis of the Project’s impacts on and mitigation
3 measures for Peninsular Bighorn Sheep.

4 54. Further, the FEIR admits that “[i]t is not known how [Peninsular Bighorn Sheep] would
5 respond when the WTG [wind turbine generator] blades are operating.” FEIR 4.21-22. It justifies this
6 gap in its analysis by stating that no “studies of [Peninsular Bighorn Sheep] use of wind energy project
7 sites are available.” *Id.* Under CEQA, an EIR must “be prepared with a sufficient degree of analysis to
8 provide decisionmakers with information which enables them to make a decision which intelligently
9 takes account of environmental consequences.” Guidelines § 15151. When an agency preparing an EIR
10 is required to examine future events that may be difficult to forecast, the agency “must use its best efforts
11 to find out and disclose all that it reasonably can.” Guidelines § 15144; *Planning and Conservation*
12 *League v. Castaic Lake Water Agency* (2009) 180 Cal.App.4th 210, 242. The Board’s refusal to conduct
13 a study of Peninsular Bighorn Sheep behaviors related to wind energy facilities violated this standard.

14 ***Cultural Resources***

15 55. The FEIR identifies the Project site and surrounding area as rich in archaeological and
16 cultural resources. FEIR, Section 3.4. A preliminary survey of the area found 287 archaeological sites
17 within the Project area, and many unknown sites are likely present within the Project’s boundaries. *Id.*,
18 3.4-22. The Project site remains an important location for cultural and religious purposes for local Native
19 American Tribes. Yet, the FEIR failed to analyze the impacts of Project construction and operation on
20 current ceremonial uses. FEIR, p. 4.4-21. This failure violates CEQA.

21 56. Additionally, the FEIR fails to adequately address the cumulative impacts of the Project on
22 cultural resources because it arbitrarily limits the scope of its analysis to the Project site plus lands within
23 a 10-mile radius. FEIR 4.4-31. Yet the majority of the projects that are considered to be cumulative in
24 the FEIR fall *outside* of the 10-mile radius. FEIR, Figure 4.1-1a. The FEIR’s illogically restricted
25 cumulative cultural impacts analysis ignores the cultural impacts of these other foreseeable projects and
26 thus violates CEQA.

27 ***Lands and Realty***

28 57. As noted, the Project site is surrounded by numerous special land use areas, including the

1 Jacumba Wilderness Area, the Yuha Basin Area of Critical Environmental Concern, the Plaster City Off-
2 Highway Vehicle Open Area, the Coyote Mountains Wilderness, and the Anza-Borrego Desert State
3 Park. The FEIR's lands and realty section fails to adequately discuss the impacts of the Project on these
4 lands.

5 ***Increased Access***

6 58. The FEIR fails to address the impacts of increased access to areas that are currently only
7 accessible by hikers. Increased access to the remote areas of the Project site will cause increases in: the
8 spread of invasive species, disruption of natural resources, the risk of wildfires, air pollution, and threats
9 to archaeological sites. The FEIR's failure to identify and mitigate these impacts violates CEQA.

10 ***Soil Resources – Desert Pavement***

11 59. The FEIR fails to address the Project's impacts to "desert pavement," a unique and
12 sensitive geologic feature that protects underlying sands from wind and water erosion. FEIR 3.4-3.
13 Those impacts include extensive erosion of the soils underlying the Project site's desert pavement.
14 Despite the United States Environmental Protection Agency's numerous critiques of the EIR process for
15 not addressing desert pavement, the FEIR nonetheless failed to address the Project's impacts on this
16 natural resource or attempt to mitigate those impacts, in violation of CEQA.

17 **The EIR Improperly Defers Analysis of Mitigation Measures**

18 60. The FEIR improperly deferred specification of numerous mitigation measures until after
19 the completion of environmental review in violation of CEQA. "[M]itigation measure[s] [that do] no
20 more than require a report be prepared and followed" do not provide adequate information for informed
21 decisionmaking under CEQA. *Endangered Habitats League, Inc. v. County of Orange* (2005) 131
22 Cal.App.4th 777, 794; Guidelines § 15126.4(a)(1)(B).

23 61. The FEIR improperly deferred many mitigation measures, including, among others, the
24 Spill Prevention Containment and Countermeasure Plan, the Construction Waste Management Plan, the
25 Restoration Plan, the Noxious Weed Control Program, the Integrated Pest Management Program, the
26 Traffic Management Plan, the Transportation Plan, the Storm Water Pollution Prevention Plan, the
27 Cultural Resource Monitoring and Mitigation Plan, the Fugitive Dust Control Plan, the Dust Abatement
28

1 Plan, and the Eagle Conservation Plan.

2 62. In addition, the FEIR deferred analysis of the Project’s site specific geologic hazards until
3 after approval. FEIR 4.11-40. Mitigation Measure PHS-3 requires Ocotillo Express to prepare a “full
4 geotechnical study,” which will then be used to determine the final siting and design of the Project
5 facilities. Changing the design and location of the turbines to avoid geotechnical hazards, however, may
6 produce significant impacts on other categories of resources, such as cultural, scenic and biological
7 resources. A full geotechnical study and report should have been completed and presented in the DEIR
8 so that the public could comment on the adequacy of the study. Deferring this analysis until *after* the
9 County has completed the CEQA process and approved the Project poses impacts from the newly
10 relocated turbines that were never evaluated in the FEIR, and thus violates CEQA.

11 **The EIR’s Response to Comments Is Inadequate**

12 63. The FEIR must evaluate and respond to comments on the DEIR. PRC § 21091(d);
13 Guidelines § 15088. Responses must describe the agency’s disposition of the issues raised in the
14 comments. PRC § 21091(d)(2)(B); Guidelines § 15088. If the agency rejects a recommendation or
15 objection raised in the comments, it must provide its rationale in the FEIR. Guidelines § 15088(c).
16 Responses must contain good faith, reasoned responses, and not mere conclusory statements unsupported
17 by factual information. *Id.*; *Environmental Protection Information Center, Inc. v. Johnson* (1985) 170
18 Cal.App.3d 604, 628

19 64. The FEIR did not adequately address many of the comments on the DEIR, including, but
20 not limited to, critical information about ILFN, water resources, noise, and dirty electricity. The FEIR’s
21 failure to fully and adequately address the concerns raised in public comments violates CEQA.

22 **RELIEF REQUESTED**

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

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

1 aside and vacate its approval of the Conditional Use Permit issued for the Project;

2 5. For a peremptory writ of mandate and declaratory judgment directing the Board to
3 set aside and vacate its approval of the Variance issued for the Project;

4 6. For a peremptory writ of mandate and injunctive relief directing the Board and real parties
5 in interest to suspend all activity pursuant to the Project that could result in any change or alteration in the
6 physical environment until the Board has taken all actions necessary to bring its approval of the Project
7 into compliance with CEQA;

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

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

12
13 Dated: May 24, 2012

Respectfully submitted,

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15 _____
16 STEPHAN C. VOLKER
17 Attorney for Petitioners THE PROTECT OUR
18 COMMUNITIES FOUNDATION, BACKCOUNTRY
19 AGAINST DUMPS, and DONNA TISDALE
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1 VERIFICATION

2 I, Stephan C. Volker, am the attorney for petitioners in this action. I make this verification on
3 behalf of the petitioners because they are absent from the county in which my office is located. I have
4 read the foregoing Verified Petition for Writ of Mandate and Complaint for Declaratory and Injunctive
5 Relief and Attorney's Fees and know its contents. The facts therein alleged are true and correct to the
6 best of my knowledge and belief, and are based on documents within respondents' record underlying the
7 approvals challenged herein.

8 I declare under penalty of perjury under the laws of the State of California that the foregoing is
9 true and correct, and that this Verification was executed in Oakland, California, on May 24, 2012.

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12 STEPHAN C. VOLKER
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