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October 10, 2023

Via Electronic Mail

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Re: Response to Comments on Renewal Energy Permit Nos. 2022-01/2022-02

Dear Ms. Draper,

This law firm represents Robbie Barker and Valley Wide Engineering & Construction, Inc. (collectively, the "applicant") regarding applications for two renewable energy permits, Nos. 2022-01 and 2022-02, (the "Projects") set to be heard by the Inyo County Planning Commission on October 25, 2023. This letter responds to an August 24, 2023 comment letter submitted by the Soluri Meserve law firm on behalf of its client, John Mays.

By way of overview, the comment letter fails to demonstrate any procedural or substantive defect in the County's decision to prepare Mitigated Negative Declarations (MNDs). These are small solar energy facilities, to be installed on a total of 20 acres in a sparsely populated area located north of the Trona community, within a Solar Energy Development Area ("SEDA") designated by the Board of Supervisors in 2015. The single-axis tracker panels will be placed on flat land without special scenic or habitat value, using accepted best management practices for dust control. No significant adverse environmental impacts whatsoever are expected.

Of particular note, the Projects have a combined generating output of only 4.2 megawatts ("MW"). This makes these Projects far smaller than the "utility-scale" solar projects (i.e., more than 20 MW) that were the main focus of the Renewable Energy General Plan Amendment ("REGPA") adopted by the Board of Supervisors in 2015. We raise this because the Board also certified a Programmatic EIR ("PEIR") for the REGPA, and the PEIR contained several mitigation measures which the comment letter demands to be applied to these Projects. As we explain below, however, most of the PEIR's mitigation measures apply to utility-scale projects, not to small projects like this. Thus, the County did not err by deciding that many of those mitigations were inappropriate for these Projects.

Below, we have set forth each of the August 24, 2023 comments in italics, then provided the applicant's response. As our responses show, the County's treatment of the Projects, and the County's decision to adopt MNDs, is correct and well supported by the record.

RESPONSES TO COMMENTS

A. Failure to Include Mitigation Monitoring and Reporting Plan

Although clearly identifying each document as an "Mitigated Negative Declaration," and checking the box plainly stating, "A Mitigated Negative Declaration will be prepared," and further repeatedly checking the Initial Study boxes finding Project impacts to be "Less Than Significant With Mitigation Incorporation," the County fails to prepare Mitigation Monitoring and Reporting Program(s) ("MMRP"(s)). This violates CEQA (CEQA Guidelines, § 15097) and also the Inyo County Code. (County Code, Ch. 15.44.) To wit:

> *15.44.005 General.*
> *The county shall establish monitoring or reporting procedures for mitigation measures adopted as a condition of project approval to mitigate or avoid significant effects on the environment. Monitoring of such mitigation measures may extend through project permitting, construction and operations, as necessary. (Ord. 957 § 1 (part), 1995.)*
>
> *15.44.010 Application.*
> *A mitigation monitoring program shall be prepared for any private or public, nonexempt, discretionary project approved by the county that is subject to either a negative declaration or an EIR and that includes mitigation measures. (Ord. 957 § 1 (part), 1995.)*
>
> *15.44.020 Timing.*
> ***Draft mitigation monitoring plans shall be included in proposed mitigated negative declarations and draft EIRs. The draft monitoring plan shall be subject to public review and comment.***
> *The mitigation monitoring program shall be adopted at the time the negative declaration is adopted or the CEQA findings are made on the EIR. (Ord. 957 § 1 (part), 1995.)*
>
> *15.44.030 Contents.*
> *The monitoring plan shall contain, at a minimum, the following:*
> *A. A listing of every mitigation measure contained in the mitigated negative declaration or final EIR;*
> *B. Identification of the phase (or date) when each mitigation measure shall be initially implemented (e.g., prior to tentative map application, final map application, issuance of grading permit, issuance of building permit, certificate of occupancy);*

> *C. For mitigation measures that require detailed monitoring, such as wetlands replacement or landscaping, the frequency and duration of required monitoring and the performance criteria for determining the success of the mitigation measure, if appropriate, shall be identified;*
> *D. Identification of the person or entity responsible for monitoring and verification;*
> *E. The method of reporting monitoring results to the county. (Ord. 957 § 1 (part), 1995.)*
>
> *15.44.040 Enforcement.*
> *Mitigation measure implementation shall be made a condition of project approval and shall be enforced under the county's police powers. Violation of a mitigation requirement, where a mitigation measure is to be implemented during construction, may result in the issuance of a stop-work order by the appropriate county permit-issuing authority until the matter is resolved by the planning commission. (Ord. 957 § 1 (part), 1995.)*

Setting aside the RMND's practice of not identifying mitigation measures required to reduce Project impacts, the RMND's expressly identify mitigation measures in Sections IV(a), XIII(a) and XXI(a). Thus, the RMND's require a draft MMRP that is circulated for public comment. The RMND's are therefore procedurally invalid. A new RMND or EIR must be recirculated for public review along with the required MMRP.

Response:

The commenter contends that it was error for the County not to circulate a Mitigation, Monitoring and Reporting Plan (MMRP) along with the MND. The commenter appears, however, to have misread the applicable requirements. The County's ordinances permit a MMRP to be adopted by the County at the time of project approval and adoption of a MND, which has not yet occurred. Section 15.44.020 requires that a draft MMRP "be subject to public review and comment," but does not require that it be circulated (or recirculated) with a MND. Similarly, nothing in the CEQA Guidelines requires that a MMRP be circulated with an MND. (See CEQA Guidelines, §§ 15073 [public review of MNDs], 15073.5 [recirculation of MNDs], 15097 [rules for MMRPs].) To the contrary, section 15097 indicates that a MMRP is formulated after the public review process, not before. Here, therefore, the County may comply with its ordinances and CEQA by ensuring that the MMRP is made available for public review before it adopts a MND.

B. Project Piecemealing

CEQA's conception of the term "project" is broad to maximize protection of the environment. (Friends of the Sierra Railroad v. Tuolumne Park & Recreation Dist. (2007) 147 Cal.App.4th 643, 653; San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus (1994) 27

Cal.App.4th 713, 730. "This big picture approach to the definition of a project (i.e., including "the whole of an action") prevents a proponent or a public agency from avoiding CEQA requirements by dividing a project into smaller components which, when considered separately, may not have a significant environmental effect." (Nelson v. County of Kern (2010) 190 Cal.App.4th 252, 270-271.)

The County is dividing a project into smaller components. The Project consists of two REPs for photovoltaic solar power generation on adjacent parcels owned by the same person, Robbie Barker. The RMNDs explain, "This Initial Study studies the impacts of both applications as one Project because both facilities have a common applicant, are in proximity to each other, and would have similar impacts." (RMND, p. 3.)

Notwithstanding this, the County has prepared two separate RMNDs for the Project. These RMNDs include:

- *"RECIRCULATED INITIAL STUDY with MITIGATED NEGATIVE DECLARATION / ENVIRONMENTAL CHECKLIST FORM / Renewable Energy Permit 2022-01/Barker- Trona 7" (See Exhibit 1.)*

- *"RECIRCULATED INITIAL STUDY with MITIGATED NEGATIVE DECLARATION / ENVIRONMENTAL CHECKLIST FORM / Renewable Energy Permit 2022-02/Barker- Trona 4" (See Exhibit 2.)*

Dividing a single project into two CEQA documents violates CEQA. The relevant test is whether the activities have "substantial independent utility." (Del Mar Terrace Conservancy, Inc. v. City Council (1992) 10 Cal.App.4th 712, 736.) It is difficult to see how exactly the same commercial activities on adjacent properties by the same operator have independent utility from each other. The County violates CEQA by preparing two separate RMNDs for what it concedes is a single project under CEQA. A reviewing court would exercise its independent judgment on this issue with no deference to the agency. (Communities for a Better Environment v. City of Richmond (2010) 184 Cal.App.4th 70, 98 ["question of which acts constitute the 'whole of an action' for purposes of CEQA is one of law, which we review de novo based on the undisputed facts in the record"].)

We previously commented on this issue, and the RMNDs provided make the case for piecemealed review even stronger. Both RMND's technical reports analyze the two REPs as a single project. The air quality report explains, "Valley Wide Engineering & Construction Services (the "Applicant") is proposing to develop the PV solar facilities on two separate parcels of land, specifically a 15-acre property referred to as the Trona 4 site, and a 5-acre property referred to as the Trona 7 site

> *(collectively referred to herein as the 'Project').'' Similarly, the biological resources report states, "Biological Resource Evaluation – Trona 4 and 7 Solar Project." The RMNDs themselves explain, "This Initial Study studies the impacts of both applications as one Project because both facilities have a common applicant, are in proximity to each other, and would have similar impacts." (RMND, p. 3.)*
>
> *It appears that the County now recognizes the two REPs constitute a single CEQA project. If so, the County must prepare a single CEQA document for that single project. The County's continued reliance on two separate CEQA documents for a single CEQA project violates CEQA.*

Response:

The commenter asserts that the County analyzed the Projects in a "piecemeal" manner that is generally prohibited by CEQA. Precisely the opposite took place.

Piecemealing occurs if a lead agency "split[s] one large project into smaller ones, resulting in piecemeal environmental review that obscures the project's full environmental consequences." (*Make UC a Good Neighbor v. Regents of Univ. of California* (2023) 88 Cal.App.5th 656, 683, citing *Banning Ranch Conservancy v. City of Newport Beach* (2012) 211 Cal.App.4th 1209, 1222; see also CEQA Guidelines § 15378 ["project" means "the whole of the action…"].)

No piecemealing occurred here. Mr. Barker filed two separate solar applications with the County, one for each of the connections that Mr. Barker needs to make to the utility grid. Rather than analyze the applications separately, the County analyzed both as a single project in the Initial Study and throughout all of the supporting documents (photographs, biological evaluation, air emissions analysis). Thus, there was no piecemealing at all, because the County analyzed both applications together as a single project.

The commenter's confusion appears to stem from the fact that the County has prepared two separate MNDs. The commenter has not shown that this was error. The County organized its MNDs in this way for the obvious reason that the applicant submitted two separate applications for approval. The County thus prepared two separate approvals to fulfill the County's procedural need to render a decision on each application. The commenter offers no legal authority prohibiting a lead agency from preparing multiple approvals, each supported by a separate MND, for multiple applications supported by a single, combined environmental review.

Finally, the commenter appears to believe that the County's treatment of the applications requires consideration of the issue of "independent utility." (See *Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70, 108; *Planning & Conserv. League v. Castaic Lake Wat. Agency* (2009) 180 Cal.App.4th 210, 235.) The question of "independent utility" arises if a lead agency performs separate environmental reviews for related projects. Here, in contrast, the County analyzed the applications together, as a single project, in a single environmental review. Thus, the independent utility doctrine has no application here.

C. Failure to Adequately Analyze Cumulative Impacts

A lead agency must assess "whether a cumulative effect" of the project will result in a significant environmental impact, and thus require an environmental impact report ("EIR"). (CEQA Guidelines, § 15064, subd. (h)(1).) CEQA requires analysis of "[t]he cumulative impact from several projects" which "can result from individually minor but collectively significant projects taking place over a period of time." (CEQA Guidelines, §§ 15355, 15130.) "Proper cumulative impact analysis is vital 'because the full environmental impact of a proposed project cannot be gauged in a vacuum. One of the most important environmental lessons that has been learned is that environmental damage often occurs incrementally from a variety of small sources. These sources appear insignificant when considered individually, but assume threatening dimensions when considered collectively with other sources with which they interact.' [Citations.]" (Bakersfield Citizens for Local Control v. City of Bakersfield (2004) 124 Cal.App.4th 1184, 1214.)

Despite this mandate, the two RMNDs' cumulative impacts analyses continue to be impermissibly cursory. Each RMND's cumulative impact analysis provide in full:

> *No. The proposed Project does not have impacts that are individually limited, but cumulatively considerable. The only existing and potentially future projects of note* ***in the vicinity are PV solar projects within the Trona SEDA****, but the overall number and size of these projects are* ***likely to be less than analyzed in the PEIR****. The Project is the second PV solar project in the SEDA as stated in the Project Description. Future solar projects in the Trona SEDA beyond those existing, proposed or planned, appear to be unlikely without significant improvements to offsite SCE transmission infrastructure.*

(RMND, § XXI(b), emphasis added.)

This is impermissibly cursory and inadequate. The first step in a cumulative impact analysis is identifying cumulative projects. (CEQA Guidelines, § 15130, subd. (b)(1).) Here, the RMNDs appear to limit the scope of cumulative projects to those "within the Trona SEDA." The RMNDs fail to explain this limitation, which violates CEQA. (CEQA Guidelines, § 15130, subd. (b)(3) ["Lead agencies should define the geographic scope of the area affected by the cumulative effect and provide a reasonable explanation for the geographic limitation used"].) The EIR for the Inyo County Renewable General Plan Amendment ("REGPA") provided a reasonably expansive list of cumulative projects. (REGPA EIR, Table 5-1.) The County could have relied on that list of projects so long as

> *it complied with CEQA's requirements for tiering/incorporation by refence as well as updating a cumulative project list, but the County did not follow that procedure. (CEQA Guidelines, § 15130, subd. (b)(1); § 15150, subd. (c); § 15152.)*
>
> *Similarly, the RMNDs appear to limit the scope of cumulative projects by stating that PV solar projects are the only projects "of note." The RMNDs fails to explain what is meant by limiting cumulative projects to only those "of note." CEQA includes no such limitation, and instead requires a CEQA document to set forth "[a] list of past, present, and probably future projects producing related or cumulative impacts." (CEQA Guidelines, § 15130, subd. (b)(1)(A).) For example, the Project will unquestionably result in dust generation. Projects other than PV solar projects may also generate dust and therefore must be identified as cumulative projects.*

Response:

The comment letter fails to recognize the difference between the "cumulative" analysis that CEQA requires for an EIR versus that required for an initial study supporting a negative declaration. As one court observed:

> Substantial confusion exists about the scope of analysis of cumulative impacts required in an initial study. Many practitioners treat the question of whether impacts are "cumulatively considerable" under 14 Cal Code Regs § 15065(c) as equivalent to "significant cumulative effects" under 14 Cal Code Regs § 15130 and 15355, which govern the cumulative impacts analysis in an EIR… There appears to be a difference between the "cumulative impacts" analysis required in an EIR and the question of whether a project's impacts are "cumulatively considerable" for purposes of determining whether an EIR must be prepared at all.

(*San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1996) 42 Cal.App.4th 608, 623 [citations and some internal quotations omitted].)

The comment letter exhibits this confusion. The letter relies on CEQA Guidelines sections 15130 and 15355, which govern the cumulative impacts analysis in an EIR. Similarly, its reliance upon *Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184 is misplaced because the case involved an EIR, not an initial study. For the same reason, the commenter mistakenly relies on the discussion of cumulative impacts in the PEIR as a template for the Initial Study.

The correct method for assessing – in an initial study – whether impacts are cumulatively considerable is described in Section 15065(a)(3) of the CEQA Guidelines, as interpreted and applied by *San Joaquin Raptor/Wildlife Rescue Center* and related cases. The question is whether the "incremental effects" of a project are "considerable" when evaluated against the backdrop of environmental effects of other projects. (*San Joaquin Raptor*, 42 Cal.App.4th at pp. 623-624.) Where the initial study concludes

that these effects are absent, a challenger must point to some substantial evidence that a cumulatively considerable incremental effect exists.

Here, the comment letter attacks the Initial Study's conclusions with respect to potential dust generation. The letter does not, however, provide evidence of any existing cumulative impact involving dust, or that an incremental effect of the Projects on that impact is considerable. Without such evidence, the challenge fails. (See *San Joaquin Raptor*, 42 Cal.App.4th at pp. 624-625 [rejecting unsubstantiated claim of cumulatively considerable effects]; *Leonoff v. Monterey County Bd. of Supervisors* (1990) 222 Cal.App.3d 1337, 1358 [no evidence that projects would have cumulative effects or that any such effects would be considerable]; see also Kostka & Zischke, *Practice Under The California Environmental Quality Act* (C.E.B. 2023) § 6.34, p. 6-33.)

The comment letter also fails to acknowledge that the Initial Study and its attachments affirmatively provide evidence that no cumulatively considerable dust effect will occur. As explained in the Initial Study, the Trona area is in "attainment" for PM-10 and only one other small project is planned for the area. The Appendix C air quality memorandum stated that particular matter (PM-10 and PM-2.5) will be orders of magnitude below significance thresholds, and in addition, the projects would be subject to dust control mitigation measures. (See IS, pp. 2-3, Sec. III, Exhibit C, p. 9.) In sum, the Initial Study is supported by substantial evidence showing that the Projects will have no considerable incremental dust effects requiring study in an EIR.

D. RMNDs Failed to Adequately Analyze And Mitigate Project Impacts

> *The RMNDs failed to include relevant information and fully disclose Project impacts as required by CEQA. In particular, several potentially significant impacts are associated with the Project, necessitating preparation and circulation of an EIR prior to any further proceedings by the County regarding the Project. Under CEQA, an EIR is required whenever substantial evidence supports a "fair argument" that a proposed project may have a significant effect on the environment, even when other evidence supports a contrary conclusion. (See, e.g., No Oil, Inc. v. City of Los Angeles (1974) 13 Cal.3d 68, 74 (No Oil I).) This "fair argument" standard creates a "low threshold" for requiring the preparation of an EIR. (Citizens Action to Serve All Students v. Thornley (1990) 222 Cal.App.3d 748, 754.) Thus, a project need not have an "important or momentous effect of semi-permanent duration" to require an EIR. (No Oil I, supra, 13 Cal.3d at 87.) Rather, an agency must prepare an EIR "whenever it perceives some substantial evidence that a project may have a significant effect environmentally." (Id. At p. 85.) An EIR is required even if a different conclusion may also be supported by evidence.*
>
> *In order to lawfully carry out a project based on an MND, a CEQA lead agency must approve mitigation measures sufficient to reduce potentially significant impacts "to a point where clearly no significant effects would occur." (CEQA Guidelines, § 15070, subd. (b)(1) (emphasis added).) This*

> *is assured by incorporation into an MMRP. (Pub. Resources Code, § 21081.6, subd (a)(1).) "The purpose of these requirements is to ensure that feasible mitigation measures will actually be implemented as a condition of development, and not merely adopted and then neglected or disregarded." (Federation of Hillside & Canyon v. City of Los Angeles (2000) 83 Cal.App.4th 1252, 1261 (Federation).) An MND is appropriate only when all potentially significant impacts of a project are mitigated to less than significant levels. (CEQA Guidelines, § 15070, subd. (d); Pub. Resources Code, § 21064.5.) An MND is not appropriate when the success of mitigation is uncertain, as that creates a fair argument that an impact will not be mitigated to less-than-significant levels. (See San Bernardino Valley Audubon Society v. Metropolitan Water District (1999) 71 Cal.App.4th 382, 392.)*
>
> *Furthermore, an agency will not be allowed to hide behind its own failure to gather relevant data. Specifically, "deficiencies in the record [such as a deficient initial study] may actually enlarge the scope of fair argument by lending a logical plausibility to a wider range of inferences." (Sundstrom v. County of Mendocino (1988) 202 Cal.App.3d 296, 311 (Sundstrom).) For example, in Sundstrom the court held that the absence of information explaining why no alternative sludge disposal site is available "permits the reasonable inference that sludge disposal presents a material environmental impact." (Ibid.) Potentially significant impacts overlooked by the MND include, but are not limited to, impacts associated with aesthetics, air quality (including impacts to human health), biological resources, cultural resources, and noise. Moreover, the "mitigation measures" included are not legally adequate and do not sufficiently address the potential impacts. Therefore, an EIR is necessary in order to adequately analyze, disclose and mitigate the Project's potentially significant environmental impacts.*

Response:

This commenter recites various legal principles to conclude that an EIR is necessary, but does not offer facts to explain why. In this regard, "substantial evidence" is "facts, reasonable assumptions predicated upon facts, expert opinion supported by facts..." (CEQA Guidelines, § 15384.) It does not include "argument, speculation, [or] unsubstantiated opinion or narrative…" (Id.) As the comment is nothing more than argument and unsubstantiated opinion, it fails to show any error in the County's treatment of the Projects.

D.1. RMNDs Impermissibly Conflate Analysis of Impacts and Mitigation

> *For every resource area, the RMNDs violate CEQA by failing to analyze whether the Project may significantly impact the environment and then perform a separate analysis of whether feasible mitigation exists to ameliorate the impact. (Lotus v. Department of Transportation (2014) 223*

> *Cal.App.4th 645, 658 (Lotus) ["The failure of the EIR to separately identify and analyze the significance of the impacts to the root zones of old growth redwood trees before proposing mitigation measures . . . precludes both identification of potential environmental consequences arising from the project and also thoughtful analysis of the sufficiency of measures to mitigate those consequences"]; San Joaquin Raptor Rescue Center v. County of Merced (2007) 149 Cal.App.4th 645, 663 ["A mitigation measure cannot be used as a device to avoid disclosing project impacts"].) Substituting mitigation for an impact analysis violates CEQA.*
>
> *For example, with respect to whether the Project would "conflict with or obstruct implementation of the applicable air quality plan," the RMNDs assert, "No . . . The predominant air quality concern is windblown dust. The applicant will control dust during construction by standard techniques that include use of a water truck to wet down disturbed areas, the use of limestone to stabilize the ground surface, and application of dust suppressants including EarthGlue, which will ensure there are no significant impacts." (RMND, § III(a).) CEQA requires the RMNDs to disclose the significance of the impact without regard for mitigation, separately identify all feasible mitigation measures and assess their effectiveness at reducing the impact. (Lotus, supra, 223 Cal.App.4th at 655-656 ["Caltrans compounds this omission by incorporating the proposed mitigation measures into its description of the project and then concluding that any potential impacts from the project will be less than significant. . . . By compressing the analysis of impacts and mitigation measures into a single issue, the EIR disregards the requirements of CEQA"].) The RMNDs follow this structure for all resource areas including with particularity aesthetic impacts, air quality, biological resources, cultural resources, hazards/hazardous materials, hydrology/water quality, noise, and transportation.*

Response:

The commenter errs in two basic ways.

First, the commenter attempts to apply EIR-level standards to an initial study. The commenter cites *Lotus v. Department of Transp.* (2014) 223 Cal.App.4th 645, where an EIR failed to consider the impact of placing a roadway in proximity to the roots of old growth trees. The commenter also cites *San Joaquin Raptor Rescue Center v. Cnty. of Merced* (2007) 149 Cal.App.4th 645, 663-664, where the EIR failed to adequately disclose certain groundwater impacts. Both courts applied the CEQA requirement that EIRs have a "detailed statement" of a project's significant effects. (CEQA, § 21100, subd. (b); CEQA Guidelines, § 15126(a).)

An initial study, in contrast, is subject to different standards. "[A]n initial study is neither intended nor required to include the level of detail included in an EIR." (CEQA Guidelines, § 15063(a)(3); *Lighthouse Field Beach Rescue v. City of Santa Cruz* (2005) 131 Cal.App.4th 1170, 1192-

1194 [an initial study should be "brief" and is not subject to EIR standards]; see also Kostka & Zischke, supra, § 6.18, p. 6-19 ("[a]n initial study need not be a mini EIR…"].) The commenter applies the wrong standards.

Second, and more importantly, the commenter fails to show that the Initial Study neglected to analyze any significant adverse effect. The only specific complaint raised by the letter is that the Initial Study did not analyze if the Projects would "[c]onflict with or obstruct implementation of the applicable air quality plan… (IS, § III.a.) The commenter's analysis, however, omitted critical language when it quoted the Initial Study. This language omitted by is in bold below:

> No. **There is no applicable air quality plan for the area in which the project is proposed. The Project is in an area considered to be in attainment for PM-10 in reference to National Ambient Air Quality Standards**. The predominant air quality concern is windblown dust. The applicant will control dust during construction by standard techniques that include use of a water truck to wet down disturbed areas, the use of limestone to stabilize the ground surface, and application of dust suppressants including EarthGlue, which will ensure there are no significant impacts. **(See Appendix C, Air Quality and Greenhouse Gas Memorandum.) The applicant will be conditioned to obtain any required permits, and follow best management practices, required by the GBUAPCD.**

(IS, III.a.)

In short, the commenter omitted that part of the passage which explained that the Projects will not obstruct the implementation of any applicable air quality plan because there is no applicable plan for the area. By only partially quoting the Initial Study, the comment obscured the impact analysis set forth within the Initial Study. In any event, the commenter does not challenge the conclusion that the Projects will not conflict with any applicable air quality plan. In sum, the comment does not demonstrate any error by the County.

D.2.a. Mitigation Measures are not Adequately Defined

> *CEQA imposes substantive requirements regarding the formulation of mitigation measures. (CEQA Guidelines, § 15126.4.) First, the mitigation measure must be demonstrably effective. (See Sierra Club v. County of San Diego (2014) 231 Cal.App.4th 1152, 1168 [no evidence that recommendations for reducing greenhouse gas emissions would be enforceable or effective]; Gray v. County of Madera (2008) 167 Cal.App.4th 1099, 1116 [impacts to adjoining groundwater users not avoided].) To be effective, mitigation measures must not be remote and speculative. (Federation, supra, 83 Cal.App.4th at 1260.) A court may find mitigation measures legally inadequate if they are so undefined that it is impossible to gauge their effectiveness. (Preserve Wild Santee v. City of Santee (2012) 210 Cal.App.4th 260, 281.) An agency may not defer the*

> *formulation of mitigation measures to a future time, but mitigation measures may specify performance standards that would mitigate the project's significant effects and may be accomplished in more than one specified way. Sacramento Old City Association v. City Council of Sacramento (1991) 229 Cal.App.3d 1011; CEQA Guidelines, § 15126.4(a)(1).) Examples of all of these deficiencies abound in the RMNDs. Just a few representative examples are provided.*

Response:

This comment cites various legal authorities, without offering any facts or analysis, to support the conclusory statement that the MNDs are defective. As such, the commenter does not provide any substantial evidence showing error. (CEQA Guidelines, § 15384.) Also, every case and regulation cited in this comment involves mitigation requirements for an EIR, not an initial study or mitigated negative declaration. As such, the comment is of questionable value.

D.2.b. Mitigation Measures are not Adequately Defined

> *The RMNDs claim that construction air quality will be less than significant because "[t]he applicant will control dust during construction by standard techniques that include use of a water truck to wet down disturbed areas, the use of limestone to stabilize the ground surface, and application of dust suppressants including EarthGlue, which will ensure there are no significant impacts." (RMND, § III(a).)." The RMNDs fail to adequately define these "standard techniques." Are the "standard techniques" limited to the three identified techniques? If so, why are the RMNDs excluding other techniques disclosed in mitigation measure AQ-2 of the REGPA EIR? Further, the RMNDs fail to adequately describe the mere three techniques mentioned that would allow an assessment of their effectiveness. For example, how frequently will water trucks be used? Is there a standard for when water trucks will be required during construction? How is limestone used effectively to reduce dust? How are dust suppressants used? Are there other possible dust suppressants other than EarthGlue? If so, are any of these other dust suppressants more effective than EarthGlue? What are the tests or triggers for application of limestone or dust suppressants?*

Response:

The comment is correct that the "standard techniques" that would be used for dust control include: (1) wetting down areas, (2) applying limestone to stabilize the ground surface and (3) applying dust suppressants such as EarthGlue. These three control measures are identified in the Initial Study in section III.a, and in the air quality memorandum in Appendix C, at pages 7-8.

The comment also questions why the MNDs have not incorporated all of the dust control techniques listed in Mitigation Measure AQ-2 of the PEIR. The answer is in the PEIR itself. The PEIR

states that AQ-2 was developed for "utility scale" solar projects (i.e., over 20 MW generating capacity). (PEIR, p. 4.3-17.) For smaller-scale projects like these, which total 4.2 MW of generating capacity, "the need for implementation of [MM AQ-2] shall be determined based on the professional judgment of a qualified County planner…" (PEIR, p. 4.3-17.) Thus, the County had the discretion to determine that "utility-scale" mitigation is unnecessary here due to the small scale of the Projects.

The commenter also questions whether the dust controls are sufficiently detailed and seeks additional data regarding their efficacy and alternatives. This depth of analysis is not necessary due to the scale of the impact. According to Appendix C, page 9, the daily emissions of fugitive dust from the Projects will be between 0.007 and 0.00001 percent of the thresholds of significance for PM-10 and PM-2.5 emissions. This is orders of magnitude below the threshold. Considering the miniscule impact, it is unnecessary to conduct a comparative analysis of dust control techniques to determine that MNDs are proper.

Finally, it should be noted that dust control measures are not, in practice, as specific as the commenter appears to desire. For example, MM AQ-2 from the PEIR is "[w]ater and/or coarse rock all active construction areas as necessary and as indicated by soil and air conditions." (PEIR, p. 4.3-18.) In addition, the PEIR refers to REAT Best Management Practices (2010), which includes the following provision for dust control:

> Use dust suppressant applications or other suppressant techniques to control dust emissions from onsite unpaved roads and unpaved parking areas, as well as to mitigate fugitive dust emissions from wind erosion on areas disturbed by construction activities. When considering the use of water or chemical dust suppressants take into account water supply and chemical dust suppressant issues.

(REAT, p. 29.) Such measures leave the details of implementation to the discretion of the approving agency. The dust control measures followed by the applicant here allow the same flexibility.

D.2.c. Mitigation Measures are not Adequately Defined

> *Addressing some or all of these questions is necessary for the RMNDs to adequately inform the public and decision-makers that mitigation is effective to reduce the impact to less than significant on sensitive receptors such as the adjacent residential properties. An MND cannot rely on a mitigation measure that does not actually avoid or substantially reduce a significant impact as a basis for finding the impact is reduced to less-than-significant. (King & Gardiner Farms, supra, 45 Cal.App.5th at 875.) When mitigation effectiveness is not apparent, the MND must include facts and analysis supporting the claim that the measure "will have a quantifiable 'substantial' impact on reducing the adverse effects." (Sierra Club v. County of Fresno (2018) 6 Cal.5th 502, 511.) The RMNDs have failed to provide evidence that its vague mitigation will be effective.*

Response:

As an initial matter, the cases cited in the comment (*King & Gardiner Farms* and *Sierra Club*) analyzed EIRs rather than initial studies or negative declarations, and therefore are of questionable value here.

In any event, the comment incorrectly assumes that the dust controls listed in the Initial Study are required to reduce dust impacts to a less-than-significant level. The record does not support such an assumption. As documented in the Appendix C memo, page 9, the daily emissions of fugitive dust from the Projects will be between 0.007 and 0.00001 percent of the typical thresholds of significance for PM-10 and PM-2.5 particulate emissions. This is before the application of dust controls. As such, the Initial Study did not need to rely upon these controls to find that fugitive dust impacts are less-than-significant. Such dust controls would only further reduce an already small and insignificant effect.

D.2.d. Mitigation Measures are not Adequately Defined

> *Further, the RMNDs also failed to address substantial evidence from neighbors establishing that these same or similar measures have been ineffective to mitigate dust resulting from the applicant's REP 2018-01 that was issued in 2018.*

Response:

Statements by non-expert members of the public may, in limited circumstances, constitute substantial evidence that merits consideration by a CEQA lead agency. Generally, these are limited to personal observations on non-technical subjects. (See *Pocket Protectors v. City of Sacramento* (2004) 124 Cal.App.4th 903, 928.) Neighbors' observations of noise and traffic conditions, in particular, are often accepted by courts as substantial evidence because no special expertise is needed to render those observations. (See, e.g., *Keep Our Mountains Quiet v. County of Santa Clara* (2015) 236 Cal.App.4th 714, 730 [noise]; *Protect Niles v. City of Fremont* (2018) 25 Cal.App.5th 1129, 1152 [traffic congestion].)

In contrast, when the subject matter requires technical expertise, neighbors' opinions or observations do not qualify as substantial evidence. For example, in *Jensen v. City of Santa Rosa* (2018) 23 Cal.App.5th 877, non-expert residents performed their own noise calculations and tried to submit them as substantial evidence of a noise impact. The court held: "[a]lthough they present their numbers as scientific fact, we find appellants' calculations are essentially opinions rendered by nonexperts, which do not amount to substantial evidence." (*Id.*, at p. 894.) Similarly, in *Bowman v. City of Berkeley* (2004) 122 Cal.App.4th 572, neighbors challenged the decision to adopt a mitigated negative declaration, arguing that data showing groundwater contamination raised a fair argument of a hazardous material impact that required study in an EIR. The court held:

> Statements of area residents who are not environmental experts may qualify as substantial evidence if they are based on relevant personal observations or involve "nontechnical" issues… However, a complex scientific issue such as the migration of chemicals through land calls for

> expert evaluation, and the Neighbors do not profess any expertise that would qualify them to opine on that subject… Accordingly, ACC's conclusion that there was a "low" potential for contamination from hazardous materials from the adjacent property stands unrefuted, and an EIR is not required to address the subject.

(Bowman, at p. 583.)

Here, the comment suffers from two problems. First, the question of air quality impacts is inherently technical in nature and the opinions of non-expert neighbors are not substantial evidence. The questions analyzed in the Initial Study – such as, would the project "violate any air quality standard," or "expose sensitive receptors to substantial pollutant concentrations" – are technical in nature. The Appendix C air quality memorandum, for instance, answered these questions through computer modeling prepared by expert consultants. In this setting, opinions by non-expert members of the public are not substantial evidence.

Second, the neighbors' reported concerns[1] involve a different project. Generalized concerns stemming from neighbors' observations of different projects are not substantial evidence relative to the specific project at issue. In *Lucas Valley Homeowners Assn. v. County of Marin* (1991) 233 Cal.App.3d 130, neighbors attacked a negative declaration a use permit granted to an orthodox Jewish congregation that applied to turn a house into a synagogue. The neighbors offered testimony of "generalized concerns and fears about traffic and parking impacts, or relate anecdotes of parking problems generated by [the applicant] at a different site." According to the court, such evidence "does not rise to the level of a fair argument" of a significant adverse impact. (*Id.*, at p. 163.) Similarly, the testimony of neighbors in this case regarding the applicant's purported actions in regard to a separate project are not substantial evidence here.

D.2.e. Mitigation Measures are not Adequately Defined

> *The RMNDs also improperly assume, without adequate project-specific analysis, that regulatory compliance will mitigate impacts. Regarding whether the Project would "violate any air quality standard or contribute substantially to an existing or projected air quality violation," the RMNDs assert, "No . . . The applicant will be conditioned to obtain any required permits, and follow best management practices required by the GBUAPCD." (RMND, § III(a).) This is inadequate under CEQA because a determination that regulatory compliance is adequate must be based on project-specific analysis. (Californians for Alternatives to Toxics v. Dept. of Food and Agriculture (2005) 136 Cal.App.4th 1.) Here, the RMNDs do not even identify what is required by the Great Basin Unified Air Pollution Control District ("GBUAPCD"), much less provide a project-specific analysis of how those requirements would be effective here. While the County may be inclined to point to an Air Quality Memorandum as supplying that missing analysis, this effort fails for two reasons. First, the*

[1] The commenter does not identify exactly what the neighbors' opinions are, or where those opinions are expressed.

> *analysis does not provide the missing information, explaining only, "Project contractors and operators would be required to comply with regional air quality rules promulgated by the GBUAPCD, and participate in reducing air pollution emissions, including those required under their new source review requirements." (AQ Memorandum, p. 7.) Thus discussion fails to describe applicable requirements, much less how those requirements applied here would effectively mitigate impacts. Second, even if the Air Quality Memorandum did provide some additional information, CEQA caselaw explains that such information cannot be buried in an appendix. (Vineyard Area Citizens, supra, 40 Cal.4th at 442. [information "buried in an appendix is not a substitute for good faith reasoned analysis"].)*

Response:

The commenter takes issue with the County's proposed condition to require the applicant to obtain any required permits from the Great Basin Unified Air Pollution Control District (GBUAPDC) and to follow any of GBUAPDC's best management practices. This condition is entirely appropriate and typical and does not reflect any error by the County.

"A condition requiring compliance with environmental regulations is a common and reasonable mitigation measure." (*Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 308, citing *Perley v. Board of Supervisors* (1982) 137 Cal.App.3d 424, 430; see also *Gentry v. City of Murrieta* (1995) 36 Cal.App.3d 1359, 1396 [approval of habitat conservation plan]; *Clover Valley Foundation v. City of Rocklin* (2011) 197 Cal.App.4th 200, 236-237 [mitigation measure requiring applicant to secure wetlands permits from Army Corps and Cal. Department of Fish & Wildlife].)

The commenter correctly notes that problems can arise when a lead agency employs such a condition to defer the environmental review to another agency. (See *Sundstrom*, 202 Cal.App.3d at pp. 308-309 [rather than studying issue of sewage sludge disposal, county attempted to defer analysis to the water board permit process]; *Californians for Alternatives to Toxics v. Dept. of Food and Agric.* (2005) 136 Cal.App.4th 1 [Dept. Food & Agric. evaded duty to prepare a complete EIR for an pest-control proposal by deferring issue to a separate review by Dept. of Pesticide Regulation].)

It is apparent from the record that the County conducted (and did not defer) the air quality analysis. The Initial Study explained that these are small projects, involving low impact and short-term construction, in an "attainment" area with few residents and no nearby schools or hospitals. The Initial Study appended a technical analysis of the air emissions, which were all well below accepted thresholds of significance. (IS, Appendix C, p. 9.) In short, there is no evidence that the County deferred any part of its analysis to the GBUAPDC.

D.2.f. Mitigation Measures are not Adequately Defined

> *The RMNDs then attempts to cite to the REGPA programmatic EIR ("PEIR") and its MMRP in an attempt to dismiss significance of these*

> *impacts. (RMND, §III(a).) The plain language of the PEIR refutes this effort:*
>
> > *The GBUAPCD considers short-term construction equipment exhaust emissions to be less than significant. However, since the air basin is within the Owens Valley PM10 Planning Area,* ***fugitive dust emissions from construction must be mitigated****.*
>
> *(PEIR, p. 4.3-10, emphasis added.) Here, however, there is no such mitigation. For example, the AQ-2 includes such measures as "sweep streets daily (with water sweepers)," "cover all trucks hauling soil, sand and other loose materials," and "limit the speed of on-site vehicles to 15 mph." The RMNDs conspicuously fail to mention these additional mitigation measures, much less identify them as such in an enforceable MMRP for the Project.*

Response:

The commenter incorrectly states that the Projects are in the Owens Valley PM-10 Planning Area. As stated on page 3 of the Initial Study, and page 7 of the Appendix C memorandum, the Projects are in the Coso Junction PM-10 Planning Area which (unlike Owens Valley) is "in attainment" for PM-10. The comment also incorrectly assumes that, even if the Projects were located in the Owens Valley, dust controls in Mitigation Measure AQ-2 are mandatory. As noted above, the PEIR gave County staff discretion to determine whether the PEIR's mitigation measures should be applied to projects smaller than utility scale. (PEIR, p. 4.3-17.)

D.2.g. Mitigation Measures are not Adequately Defined

> *Finally, the RMNDs claim that PEIR mitigation measures AQ-1 through -3 "applied to utility-scale projects of greater than 20 MW and did not apply to smaller, commercial-scale projects unless determined to be needed on a case-by-case basis by a qualified County planner." This is inexcusably false. The plain language of AQ-1 though -3 as revised and approved does not include such limitations. (Exhibit 3, March 2015 MMRP.)*
>
> *PEIR AQ-1 states, "AQ-2 and AQ-3, as defined below, will be incorporated into the site-specific technical report." The RMNDs violate this mandate because the Air Quality report does not incorporate the specific requirements of AQ-2 and AQ-3. It merely states, "[T]he Project would comply with applicable goals and policies outlined in the REGPA that are meant to reduce air emissions during construction and operation." PEIR mitigation measures AQ-1, -2 and -3 are not "goals and policies" of the REGPA; they are mitigation measures under CEQA. The Air Quality report does not even identify these mitigation measures, much*

less "incorporate" them into its "site-specific technical report." At best, the Air Quality Memo states:

> *[F]ugitive dust due to ground disturbing activities and vehicles/equipment travelling on unpaved roadways were a1so quantified. Water trucks will be utilized as needed throughout the Project construction phase to control dust, and crushed limestone and/or non-toxic clay polymer compounds will be applied to exposed surfaces during construct ion and operations to further ensure fugitive dust is sufficiently controlled. Stabilized entrance and exits will be installed and maintained at driveways to reduce sediment trackout onto the adjacent public roadway. As stated above, the control of fugitive dust is critical to solar operations, as panels coated by dust do not function at full capacity. Therefore, dust controls will remain in place throughout the life of the Project, which will in turn ensure impacts remain less than significant.*

(Air Quality Memo, p. 12.0.)

While this provides a general discussion of some mitigation measures that could be used to address dust emissions, this discussion fails to comply with CEQA. This discussion fails to correlate the identified measures to the requirements of the GBUAPCD or the PEIR. Are these measures the only ones that will be used to satisfy the requirements of the PEIR and GBUAPCD? If so, why does this discussion omit any reference to "sweep streets daily (with water sweepers)," "cover all trucks hauling soil, sand and other loose materials," and "limit the speed of on-site vehicles to 15 mph" as set forth in AQ-2. Further, this discussion in the Air Quality Memo does not explain how this discussion is enforceable against the project. This is precisely the function of mitigation measures and an MMRP.

Response:

The commenter first asserts that the language of Mitigation Measures AQ-1 – AQ-3 does not provide County staff with the discretion to determine which, if any, of those mitigations are appropriate for projects smaller than utility scale. The comment overlooks language in the PEIR that does exactly that. Section 4.3.5 of the PEIR provides, in relevant part:

> Air quality mitigation measures have been developed for solar energy development projects producing more than 20 MW of electricity for off-site use (utility scale) and would be implemented to mitigate adverse impacts to air quality. As previously mentioned, small scale solar energy projects are considered to result in no impacts under CEQA; however, all individual solar energy facility projects applications (including small scale, community scale, and ~~distributed generation~~ commercial scale) shall

> be reviewed by the county **and the need for implementation of the following mitigation measures shall be determined based on the professional judgment of a qualified county planner**…
>
> If a proposed ~~distribution generation~~ commercial scale or community scale solar development project is determined by the county to have the potential to impact air quality, then the following mitigation measures shall be implemented **as determined necessary by the qualified county planner**…

(PEIR, p. 4.3-17 [underlines and strikethroughs in original; bold emphasis added].)

Plainly, the PEIR gave County staff the flexibility to determine whether the PEIR mitigation measures should be applied to solar projects generating less than 20 MW. Given that the output for the Projects is 4.2 MW, and the Projects will occupy far less land than a 20 MW solar array, the County is within its discretion to determine that some or all of the mitigation applicable to 20 MW+ projects are inappropriate here.

We suspect that the comment reflects some confusion between the relationship between a MMRP and an EIR. A MMRP is designed to: "ensure that the mitigation measures and project revisions identified in the negative declaration of are implemented." (CEQA Guidelines, § 15097; see also CEQA, § 21081.6(a)(1).) Said differently, a MMRP only implements measures contained in an EIR or negative declaration. If an MMRP does not do so faithfully, the EIR or negative declaration control. Here, to the extent that the 2015 MMRP did not fully capture the PEIR's mitigation, the language in the PEIR itself still controls.

D.2.h. Mitigation Measures are not Adequately Defined

> *Finally, regulatory compliance is only permissible when it is reasonable to assume that they will actually be complied with. "[C]ompliance with regulations is a common and reasonable mitigation measure, and may be proper **where it is reasonable to expect compliance**." (Oakland Heritage Alliance v. City of Oakland (2011) 195 Cal.App.4th 884, 906.) Here, the project applicant has repeatedly violated County and air district rules and permits with respect to this Project and earlier projects. These repeated violations have been documented by County staff and establish that it is not reasonable to simply assume that the project applicant will comply with such permit terms in the future.*

Response:

The commenter asserts, without supporting facts, that the applicant violated County and air district rules. However, unsubstantiated narrative is not substantial evidence. (See CEQA Guidelines, § 15384.) Further, CEQA requires a lead agency to accept existing "baseline" conditions when preparing a CEQA review, even if those conditions result from an alleged violation of law. (See *Communities for a Better Environmental v. South Coast Air Quality Management Dist.* (2010) 48 Cal.4th 310, 321, fn. 7;

Eureka Citizens for Responsible Gov. v. City of Eureka (2007) 147 Cal.App.4th 357, 370-371 [baseline for school playground project was existing playground, even though past construction may have violated city code]; *Fat v. Cnty. of Sacramento* (2002) 97 Cal.App.4th 1270, 1278-1281 [existing airport activity part of baseline, even if it occurred previously without permit]; *Riverwatch v. Cnty. of San Diego* (1999) 76 Cal.App.4th 1428, 1453 [improper to extend baseline into past to capture illegal mining activity]; see also *Bottini v. City of San Diego* (2018) 27 Cal.App.5th 281, 303 [noting caselaw].) Thus, the comment has not identified any flaw in the County's treatment of the Projects.

D.2.i. Mitigation Measures are not Adequately Defined

> *In short, the RMNDs improperly rely on mitigation to avoid analysis of project impacts and fail to provide adequate information in order to determine whether mitigation is effective and enforceable. Without this necessary information, the RMND's significance determinations are not supported by substantial evidence.*

Response:

For the reasons stated above, the commenter has not shown that the County erred in any way. The impacts of these small solar Projects are uniformly less than significant. The dust controls and other measures adopted here are in the nature of best management practices that are applied without regard to the scale or significance of impacts. The applicant should not be penalized for committing to do more than is strictly required to mitigate non-existent impacts.

D.3. RMNDs Inconsistently apply the PEIR's Mitigation Measures

> *Our prior comment letter explains that the original MNDs appeared to have ignored literally dozens of mitigation measures adopted pursuant to the PEIR. The RMNDs now appear to incorporate the PEIR's mitigation measures but have done so inconsistently and in violation of CEQA. For example, sections IV(a) (Biological Resources) and XIII(a) (Noise) appear to incorporate mitigation measures set forth in the PEIR in order to address the Project's potentially significant impacts in those resource areas. Setting aside the procedural deficiency of not circulating an MMRP including these mitigation measures, the RMNDs fail to explain why the same procedure was not followed in other resource areas [fn: Examples include air quality, agricultural impacts, transportation, water quality and visual resources] where the PEIR requires mitigation in order to support a less-than-significant determination. The leading CEQA treatise explains, "As activities within the program are approved, the agency must incorporate, if feasible, the mitigation measures and alternatives developed in the program EIR in its action approving the activity." (1 Kostka and Zischke, Practice Under the Cal. Environmental Quality Act (2nd ed. 2023) § 10.16, p. 10-20.)*

Response:

The commenter has not shown any inconsistency in application of the PEIR's mitigation measures. The comment fails to appreciate that the PEIR applied mainly to large solar projects (20 MW or greater generating capacity), and that the PEIR left it to County staff's discretion to apply the PEIR's mitigation measures to smaller-scale projects. The biological resources and noise analysis are examples in which the County exercised its discretion in appropriate ways.

With respect to biological resources, the PEIR provided County staff the discretion, for small-scale projects, whether to require a biological resource evaluation or implement the biological resource mitigation measures in the PEIR. (PEIR, p. 4.4-123.) Here, County staff examined the sites and found no species or habitat that would be affected. (IS, IV.a.) The record also contains a biological resource evaluation prepared on the applicant's behalf which corroborates staff's observations but also noted that certain species (desert kit fox, protected birds) could unexpectedly visit, and listed mitigation measures to ensure the risks to these species are less than significant. The Initial Study stated that these measures were "consistent with" the PEIR, but the Initial Study did not incorporate the PEIR's mitigation measures, which County staff had the discretion not to do.

With respect to noise, the PEIR gave County staff similar discretion to determine whether to impose the PEIR mitigation measures on projects less than utility-scale. (PEIR, p. 4.12-19.) However, the PEIR also noted that the General Plan Noise Element requires noise mitigation for construction that is within 500 feet of a residential receptor. (PEIR, p. 4.12-9.) Portions of the Projects are approximately 400 feet from two residential structures. (See IS, XIII.a.) Thus, the County reasonably imposed PEIR Mitigation Measure NOI-2 to mitigate construction noise within that 500-foot area. That decision gives effect to the General Plan and implements the PEIR mitigations to the extent needed, which the County has the discretion to do.

The County also had discretion to impose, or not to impose, the PEIR's mitigation for the other resource areas cited by the commenter (air quality, agricultural impacts, transportation, water quality and visual resources). (See PEIR, pp. 4.3-17 [air quality], 4.2-14 [agriculture], 4.17-12 [transportation]; 4.9-44-45 [water quality]; 4.1-25-26 [visual; resources].) The County was not obligated to incorporated any of them given the small size of the Projects. The commenter has not shown that the County's proposed exercise of discretion is contrary to the record.

E. The County Does Not Explain the Lack of Visual Simulations

The RMNDs acknowledge that the Project is subject to the mitigation measures set forth in the PEIR. AES-1 requires "site-specific visual studies . . . to assess potential visual impacts." "Visual simulations shall be prepared to conceptually depict-post development views from the identified key observation points." No such studies were prepared. Instead, Appendix A consists solely of low-quality "representative photographs" of apparently existing conditions.

The RMND states, "Here, the Project involves a small, commercial-scale facilities that, due to its size and location, have been determined by a

> *qualified planner to not have a potential to impact visual resources, including a scenic vista." The RMNDs conspicuously fails to provide any substantial evidence supporting this conclusion. The RMNDs fail to set forth any analysis, much less written report, supporting this conclusion. The RMNDs fail to identify the County planner purportedly making this determination, the date of the determination, the criteria followed by the County planner or any specific facts supporting this determination. There is no evidence, much less substantial evidence, supporting the MND's conclusory assertion that an unspecified "qualified County planner" determined that the Project would not have the potential to impact visual resources.*

Response:

The comment errs in a number of ways.

First, the commenter states, incorrectly, that "[t]he RMNDs acknowledge that the Project is subject to the mitigation measures set forth in the PEIR." The Initial Study stated only that the Projects were "consistent with" the PEIR which did not require site-specific visual studies for projects with less than 20 MW generating capacity. This comment thus mischaracterizes the Initial Study.

Second, the commenter asserts that no substantial evidence supports the conclusion that the Projects would not have a significant impact on a scenic vista. Such evidence is clear from the record. The Initial Study states that the Projects are not located near a scenic vista (IS, I.a.), and the comment provides no contrary evidence. Moreover, the Initial Study explains that the Projects are located on the valley floor, on a site without scenic resources, near junk and scrap yards, in an area removed from any scenic highways or recognized scenic resources. (IS, pp. 3-4, I.a.) These observations were buttressed by corroborative photographs. (IS, Appendix A.) Thus, the County had a factual basis for its determination and was clear in its rationale.

Third, the commenter states that the record fails to identify the planner making the visual resources determination. This also is not accurate. The Initial Study was signed by Cynthia Draper, an Assistant Planner with the Inyo County Planning Department, on July 19, 2023. The commenter must presume that this planner made the determinations in the initial study.

Fourth and finally, the comment incorrectly assumes that there is substantial evidence in the record giving rise to the need for a visual study. Such evidence does not exist, nor has the commenter offered any. (CEQA Guidelines, § 15384 [substantial evidence not include "argument, speculation, [or] unsubstantiated opinion or narrative…"].) Rather, the evidence shows that these are small projects, in a sparsely populated area and few residents, in an area without recognized scenic resources. There is no error in the County's analysis.

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F. The RMNDs Fail to Include a Traffic Control Plan:

PEIR mitigation measure TRA-1 provides:

> *Site-specific traffic control plans shall be prepared for all proposed solar energy projects within the individual SEDAs and the OVSA to ensure safe and efficient traffic flow in the area of the solar energy project and within the project site during construction activities. The traffic control plan shall, at minimum, contain project-specific measures to be implemented during construction including measures that address: (1) noticing; (2) signage; (3) temporary road or lane closures; (4) oversized deliveries; (5) construction times; and (6) emergency vehicle access.*

The RMNDs do not include the required traffic control plan, nor even mention mitigation measure TRA-1. While the RMNDs state that the Project "will add no more than a few vehicles per day to Trona Wildrose Road during the construction phase," there is no attempt to explain why these "few" construction vehicles do not require a traffic control plan to avoid conflicts with adjacent and nearby residents.

Response:

The commenter again overlooks language in the PEIR that makes the transportation mitigation measures (including TRA-1) applicable only to utility-scale solar projects, and which gives County staff discretion to determine whether the PEIR mitigation measures are appropriate for a smaller-scale project like this. (PEIR, p. 4.17-12.) Here, the Initial Study documented that the Projects would generate only a small amount of traffic on a lightly-used road:

> The connecting road, Trona Wildrose Road, is lightly traveled. The Project will add no more than a few vehicles per day to Trona Wildrose Road during the construction phase, and no regular vehicle traffic during operations. During operations, the solar facilities will be remotely monitored and visited only occasionally (weekly, on average) by a light vehicle for inspection or maintenance. The Project will not result in a significant increase in traffic that is substantial in relation to the existing traffic load or capacity of the existing road system. The Project will not conflict with any existing transit, roadway, bicycle, or pedestrian facilities.

(IS, XVII.a.) The Appendix C air memorandum, similarly, conservatively assumed that approximately ten contractors would visit per day for 25 days during construction, and almost no traffic (one daily trip) would occur in operations. (IS, Appendix C, p. 6.) These are small traffic volumes on a lightly-traveled road. The record does not suggest that a site-specific traffic control plan is necessary. The County's treatment of the Projects is supported by substantial evidence.

G. The MNDs Fail to Address Impacts Associated with Noxious Weeds:

Mitigation measure AG-3 provides, "To prevent the introduction and spread of noxious weeds, a project-specific integrated weed management plan shall be developed." In violation of this mitigation measure, no weed-abatement plan appears to have been prepared, and the RMNDs make no reference to such a plan.

Response:

Again, the commenter overlooks language in the PEIR that makes the agricultural mitigation measures (including AG-3) applicable only to utility-scale solar projects, and which gives County staff discretion to determine if they are appropriate for smaller-scale projects. (PEIR, p. 4.2-14.) As stated in the initial study, agriculture and farming are not significant land uses in the area, the Projects would not result in the conversion of agricultural land. (IS, pp. 3, II.) Thus, the Projects are not expected to have any impacts to agriculture that warrant a weed management program, and the County was within its discretion to determine that such a mitigation measure was unnecessary.

CONCLUSION

On behalf of Mr. Barker, we appreciate the County's work on the Projects, and the opportunity to respond to the comments. If you have any questions, please do not hesitate to contact me at (916) 501-2395 or shungerford@hthglaw.com.

Very truly yours,
HARRISON, TEMBLADOR, HUNGERFORD & GUERNSEY

By
Sean Hungerford

cc: Client