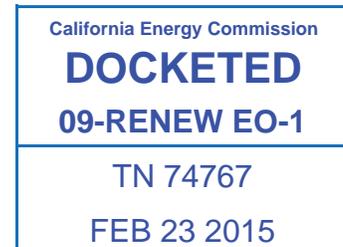


February 23, 2015

VIA U.S. MAIL AND E-MAIL

California Energy Commission
Dockets Office, MS-4
Docket No. 09-RENEW EO-01
1516 Ninth Street
Sacramento, California 95814-5512
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Re: DRECP NEPA/CEQA – Comments of Desert Wind Energy Association

Dear Renewable Energy Action Team (REAT) agencies:

On behalf of the Desert Wind Energy Association and the undersigned entities (collectively “DWEA”), this letter presents comments on the Desert Renewable Energy Conservation Plan (“DRECP” or “Plan”), and the September 2014 Draft Environmental Impact Report/Environmental Impact Statement (“EIR/EIS”) prepared in support of the Plan. DWEA is disappointed in the DRECP planning effort and in particular the DRECP’s severe restrictions on wind energy development in California’s desert region.

DWEA is a non-profit mutual benefit association composed of wind energy operators and landowners whose land is improved with wind and solar projects. All of DWEA’s members represent land located in the San Gorgonio Pass area of the County of Riverside, both in the City of Palm Springs and within unincorporated Riverside County. Several DWEA member properties are generally located within 12 miles of the intersection of Interstate 10 and Highway 62, in the Whitewater area of unincorporated Riverside County. All of DWEA’s members are located within the Area of Edge Effects, as depicted on **Exhibit 1**, attached hereto.

The Area of Edge Effects is improved with more than \$4 billion of privately funded wind, solar and utility facilities including the Devers Substation (which delivers 25% more or less of the imported power for Los Angeles and Orange Counties). The Area of Edge Effects is generally considered to be one of the three best areas in the world for wind energy. It is developed with wind, solar, industrial and commercial uses. Both the Riverside County and Palm Springs General Plans allow for these uses and the policies of both jurisdictions encourage robust renewable development, including the repowering of the several pioneer wind farms which are to be repowered within the next two years.

As outlined in the comments below, we are concerned with the following deficiencies of the DRECP: (1) undue restrictions on wind energy development jeopardizing California's clean energy targets; (2) the lack of evidentiary support for the EIR/EIS's impact findings with respect to Golden Eagle, as well as other species; (3) the effective moratorium imposed on wind energy development due to the DRECP's proposed pre-project and pre-construction survey requirements; (4) the improper use of a General Conservation Plan ("GCP") for such a massive geographic area, large number of species, and activities with very different impacts; (5) the failure of the GCP to comply with the Endangered Species Act; (6) the failure of the Natural Communities Conservation Plan to comply with the Natural Communities Conservation Planning Act; (7) the DRECP's potential negative effects on areas that are *outside of* the Plan Area; (8) the DRECP's potential conflicts with county zoning and land use plans; (9) the EIR/EIS's inaccurate assumptions concerning wind energy technology and resulting exaggeration of associated impacts; and (10) the overall failure of the DRECP to demonstrate how permitting for renewable energy projects will be streamlined.

DWEA members are particularly concerned with the DRECP's potential to negatively impact those portions of Riverside County within the Area of Edge Effects (Exhibit 1). Early on, the DRECP's original boundaries were specifically moved to avoid these and other portions of Riverside County in response to protest by DWEA members, the Coachella Valley Association of Governments, and others, that the DRECP should not cover any areas already covered by the existing Multi Species Habitat Conservation Plan (MSHCP) in Riverside County. Any additional permitting delays or restrictions imposed on the Area of Edge Effects as a result of the DRECP (whether practical or legal) would effectively move the DRECP boundaries south to the original proposal, and would amount to a remarkable exercise of bad faith in the eyes of DWEA and its members. DWEA understands that the County of Riverside and the Coachella Valley Association of Governments share this concern.

A. DRECP Unduly Restricts Wind Energy Development Jeopardizing California's Clean Energy Targets

During his fourth inaugural address on January 5, 2015, California Governor Jerry Brown announced the State's intent to increase from one-third to 50 percent the amount of electricity derived from renewable sources by 2030, a target that exceeds the existing Renewable Portfolio Standard and keeps the State on track to achieve the stated target in Executive Order S-3-05—80% below 1990 levels by 2050. Wind and solar energy development in the desert region of California is essential to achieving these targets. Yet, while State climate and energy policies unequivocally call for increased renewable energy production, the DRECP would unduly restrict the amount of acreage available for renewable energy development, in particular wind energy.

In deciding how much renewable energy to plan for under the DRECP, the CEC developed a "renewable energy acreage calculator" to determine how much renewable energy capacity might be needed to meet the state's long-term greenhouse gas reduction policies and climate change and renewable energy mandates. In 2012, the CEC estimated a capacity of between 17,163 MW and 19,491 MW for the Plan Area through 2040. (EIR/EIS, Exec. Summ., p. 16.) Based on this calculation, a total of 20,000 MW of new generation and transmission is assumed under the

DRECP, and from this figure a total amount of acreage needed to supply 20,000 MW of solar, geothermal, and wind capacity was determined. The DRECP acknowledges that this calculation “is highly speculative” and that “the consequences of underestimating the need for renewable energy in the Plan Area may be greater than the consequences of overestimating it.” (*Ibid.*)

To highlight the inadequacy of the DRECP’s planning horizon and its energy capacity assumptions, CalWEA recommended that the DRECP plan for development of at least 25,000 MW of wind energy capacity alone through 2050 (EIR/EIS, p. II.8-15), or alternatively 12,500 MW through 2040. The REAT agencies are not only planning for a small fraction of that goal, but continue to misrepresent the amount of acreage that is actually developable under the alternatives for wind energy.

Not only does the DRECP allot a mere 2,024,000 acres (9%) of the 22.5 million-acre plan area for Development Focus Areas under the Preferred Alternative for *all covered activities*, but the DRECP estimates that 70% of that acreage would not be feasible for wind development. (EIR/EIS, p. II.3-165—166.) Thus, as estimated under the Draft Plan, only 611,440 acres will be suitable for wind development under the Preferred Alternative—a mere 2.7% of the entire plan area acreage. (*Ibid.*) However, the entire 611,440 acres would not actually be available for wind development for a number of reasons. First, much of these wind-DFA lands will prove undevelopable due to a lack of sufficient wind resource quality and various other conflicts, while other portions of the Plan Area that do have greater wind energy resources are excluded from DFAs.¹ Second, the avoidance and minimization measures in the DRECP may, as a practical matter, further restrict this acreage on the basis of setback requirements and other restrictions. Third, a large percentage of the DFA acreage is on private land, yet there are absolutely no assurances that these private lands can actually be utilized for renewable energy development, or that local jurisdictions—such as counties—will allow these private lands to be developed for renewable energy development. Indeed, many counties have stated in comment letters that they seek to focus large scale renewable energy development on federal lands, not private lands. (San Bernardino County Position Paper, Feb. 3, 2015, p. 4.) Taken together, the available acreage for wind energy development is both undefined and entirely insufficient.

In addition, the DRECP’s proscription of wind development in areas outside of the DFAs lacks support. Many of these exclusion areas—such as the Areas of Critical Environmental Concern (“ACECs”) and Natural Landscape Conservation System Lands (“NLCS Lands”) contain active projects that are compatible with management prescriptions, or have been shown through site-specific investigations to be promising for near-term development. Further, the EIR/EIS improperly presumes incompatibility between wind development and certain species and/or habitats. For example, the DRECP assumes incompatibility between wind projects and desert

¹ According to the California Wind Energy Association (“CalWEA”), 69% of the DRECP area contains commercially viable wind resources, however 3% of that area is unavailable due to physical or hydrologic constraints and 43% is unavailable due to existing protected areas (e.g. state and national parks, wilderness areas, etc.). (See http://www.drecp.org/documents/docs/comments_prelim_conservation_strategy/CalWEA_comments.pdf [page 7].)

tortoise,² ground squirrels, and golden eagles,³ despite a lack of scientific evidence that such a conflict exists.

Lastly, the EIR/EIS fails to analyze in any meaningful way the impact that the DRECP—and its severe limits on renewable energy development—will have on the State’s abilities to comply with the California Global Warming Solutions Act of 2006 (AB 32) and the Governor’s Executive Order S-3-05. The Executive Order established a greenhouse gas emissions reduction target of 80 percent below 1990 levels by 2050. The Legislature, in enacting AB 32, “effectively endorsed the Executive Order and its overarching goal of ongoing greenhouse gas emissions reductions as state climate policy.” (*Cleveland National Forest Foundation v. San Diego Association of Governments* (2014) 231 Cal.App.4th 1056, 1069-1070, citing *Professional Engineers in California Government v. Schwarzenegger* (2010) 50 Cal.4th 989, 1000, 1043-1044, 1051.)

Chapter 4.3 of the EIR/EIS summarily dismisses any potential climate impacts of the DRECP by presuming (falsely) that the solar and wind development contemplated under the plan will simply displace other sources of energy. The magnitude of the DRECP and its indirect effects, however, are much broader. The EIR/EIS provides no analysis (much less evidence) that rendering thousands of acres that are currently available for solar and wind development completely off limits would have no significant adverse impacts on the State’s ability to achieve the goals set forth to implement AB 32 and the EO S-3-05. Indeed, the EIR/EIS is silent about whether the State’s climate goals can be achieved through 2050 with the severe restrictions on wind and solar development in the DRECP area.

The EIR/EIS’s approach—of omitting analysis and evidence concerning the impact that the DRECP will have on the State’s ability to achieve its climate goals through 2050—is directly at odds with the recent appellate decision in *Cleveland National Forest Ass’n v. San Diego Association of Governments*. There, SANDAG had adopted a sustainable communities strategy that was meant to implement state policies relating to global climate change. Like the DRECP, the SANDAG EIR did not analyze the strategy’s consistency with EO S-3-05:

In this case, SANDAG’s decision to omit an analysis of the transportation plan’s consistency with the Executive Order did not reflect a reasonable, good faith effort at full disclosure and is not supported by substantial evidence because SANDAG’s decision ignored the Executive Order’s role in shaping state climate policy. The Executive Order underpins all of the state’s current efforts to reduce greenhouse gas emissions. . . . As evidence in the record indicates the transportation plan would actually be inconsistent with state climate policy over the long term, the omission deprived the public and decision makers of relevant information about the transportation plan’s environmental consequences. The

² Lovich, et al. 2011. Effects of wind energy production on growth, demography, and survivorship of a desert tortoise (*Gopherus agassizii*) population in Southern California with comparisons to natural populations. *Herpetological Conservation and Biology* 6(2): 161-174.

³ See **Exhibit 2**, USFWS Service letter dated August 20, 2014.

omission was prejudicial because it precluded informed decisionmaking and public participation.

(*Id.*, at 1072.) Likewise here, the DRECP and its accompanying EIR/EIS do not reflect a reasonable, good faith effort at full disclosure, particularly since the severe limits on wind and solar development will directly impede the State's ability to meet its greenhouse gas emissions reductions goals through 2050 and beyond.

In addition, the EIR/EIS fails to acknowledge all of the economic and environmental impacts that will result as a consequence of the DRECP's severe restrictions on wind energy development, including:

- Replacement Energy Needed to Offset the Loss of Wind Resource Areas: Additional coal, oil, and/or natural gas plant energy may be needed to offset the loss of wind energy on the grid, resulting in greater environmental impacts, in particular air pollution.
- Increased Costs: Utility companies may need to purchase higher priced renewable energy from other renewable energy resources to offset the loss of wind energy production in DRECP area. Any higher costs attributable to less efficient and less productive wind sites or more costly alternative energy will be passed on to the rate-payers. In addition, wind energy offsets natural gas usage in power generation at natural gas 'peaker' plants. The loss of wind energy resources would yield an increase in natural gas prices causing gas bills to be higher.
- Loss of Jobs: Wind energy development produces 4.9 jobs per MW of wind power generated. Many companies rely on the wind industry for their jobs, demand for goods and services, and economic activity created by commercial power plants. The DRECP's undue restrictions on wind energy development will result in lost jobs.

B. The DRECP EIR/EIS Lacks Evidentiary Support for DFAs and Impact Findings

To comply with the National Environmental Policy Act ("NEPA"), the REAT agencies are required to take a "hard look" at the environmental consequences of the DRECP. (See, e.g., *Kleppe v. Sierra Club*, 427 U.S. 390 (1976); *Blue Mtns. Biodiversity Project v. Blackwood*, 161 F.3d 1208 (9th Cir. 1998).) To comply with CEQA, the conclusions of the Draft EIS/EIR must be supported by substantial evidence in the administrative record. (*Jones v. Regents of Univ. of Calif.* (2010) 183 Cal.App.4th 818, 829.) Here, the DFAs identified in the Alternatives document would fail to meet either test, as they are not reasonably related to the environmental impacts of wind energy development. Furthermore, the alternatives presented in the Draft EIR/EIS do not allow for viable wind energy development in the plan area, and thus violates CEQA's and NEPA's requirement to consider a reasonable range of alternatives. (See 40 C.F.R. § 1502.14; 14 Cal. Code Regs. § 15126.6.)

As acknowledged in the EIR/EIS, ground disturbance associated with wind energy development is far less intense than those of solar energy development. Research shows that wind energy can

be developed without negatively affecting sensitive terrestrial species like the desert tortoise. Thus, the DRECP should not place limitations on the locations of wind energy developments on account of impacts that are predominately, if not solely associated with solar energy developments. Instead, the impacts analysis and mitigation requirements should be tailored to the impacts that are actually attributable to wind development.

Similarly, the DFAs are not reasonably related to the potential avian impacts of wind energy development. The EIR/EIS discusses impacts to species in general terms with respect to all types of covered activities, and does not specify impacts attributable to specific project types—i.e., solar, wind, geothermal, transmission. (See, e.g., EIR/EIS, p. IV.7-234 [Cadiz Valley and Chocolate Mountains Ecoregion subarea].) Very little discussion is provided of impacts as they relate to specific covered activities, with the exception of the acreage estimates for impacts to Golden Eagle foraging and nesting. (See Table IV.7-47.) Instead, the EIR/EIS analysis of impacts to nesting and foraging habitat of Golden Eagles is based solely on a territory-based analysis. (EIR/EIS, p. IV.7-241.) Moreover, the EIR/EIS admits that “additional research is needed, the approach outlined [] is an interim structure, pending additional research and study and development of the broader scale conservation strategy.” (EIR/EIS, Appx. H, p. H-20.) As a result, the avian-related constraints on DFA location are, at best, ad hoc and appear to be primarily based on incomplete data.

The presence of golden eagles, for example, does not translate directly to risk of impact. In the absence of better data, avoidance of avian high-risk areas is best achieved through site-specific studies, as has been outlined in the tiered structure of the USFWS Wind Energy Guidelines and the 2012 Eagle Conservation Plan Technical Appendices. Once project-specific data are collected, anticipated fatality rates are then calculated based on eagle use of the area, as well as avoidance and minimization. Excluding future wind energy development for the life of the plan based on incomplete data does little to ensure avian impacts will be minimized and would put the Draft EIS/EIR at risk under both CEQA and NEPA. Such expensive and time consuming studies are unnecessary and onerous, however, in areas developed with wind projects for many years and which have operated without causing eagle injuries or fatalities. DWEA members should not be required to prove a negative, especially given the absence of evidence that a problem exists in the Area of Edge Effects.

In addition, the current lack of scientific knowledge regarding the golden eagle population in the DRECP Plan Area is widely acknowledged. Yet, the DRECP assumes impacts even where no existing data concerning such impacts is available. For example, the EIR/EIS states that “[f]or existing projects with no eagle mortality data on record, [the REAT agencies] estimated annual mortality based on information from other wind facilities or utility lines in similar habitat types.” (EIR/EIS, Appx. H, p. H-27.) But the EIR/EIS does not provide any underlying data whatsoever concerning the assumptions of eagle mortality at existing and approved wind energy projects. (See, e.g., EIR/EIS, Appx. H, p. H-27 [Table H-1].) It should be noted that the desert habitat within the Edge Effects area, which is essentially devoid of raptor prey, is vastly different than the habitat studied in the Altamont Pass and other areas of California. At that location raptors live and hunt in the nearby mountains where prey is abundant. As is discussed below, in the edge effect area DRECP has crafted a draconian remedy for a problem that does not exist.

Wind projects have been developed in the San Gorgonio Pass area, just south of the DRECP Plan Area, for thirty years and have experienced no golden eagle fatalities resulting from wind farm operations. In addition, Iberdrola Renewables has been monitoring and has not found any eagle deaths at its Mountain View III Wind Facility since it began operating in Riverside County in 2003.⁴ Further, just this past summer, USFWS retracted its previous reports of eagle deaths in the Palm Springs/San Gorgonio Pass area, admitting that it had inappropriately assigned 13 of 15 eagle deaths to the San Gorgonio Pass. Since 1994, there have only been two reported deaths of golden eagles in the San Gorgonio Wind Resource Area, and the cause of death for these birds was never established. Because each eagle had a severed wing it is impossible to attribute these deaths to wind turbines; turbine blades are wide and blunt, and do not have the ability to sever avian wings.⁵ These birds were likely killed by collision with power lines. Wind project power lines are, however, entirely underground. Despite the dearth of data, USFWS officials have nevertheless stood by their “earlier estimate that about 20 golden eagles are likely killed each year among the wind turbines in the San Gorgonio Pass area, out of an estimated 120 golden eagle deaths annually at California wind farms.”⁶

The USFWS’s unsubstantiated assumptions on eagle mortality call into question how eagle take estimates will be calculated, what data will be used to estimate a project’s potential take, and whether any new projects will even get take authority. Under the DRECP, “no more than 15 golden eagles per year [] would be allowed to be taken within the Plan Area, which would be reassessed annually.” (EIR/EIS, p. IV.7-241 [emphasis added].) The annual cap applies to “all new projects within the DRECP area, including, but not limited to, those covered under DRECP.” (EIR/EIS, Appx. H, p. H-28.) The EIR/EIS then provides that for “projects where ongoing take is anticipated (e.g., wind), take will be authorized for multiple years and will be subtracted from the available annual balance for the anticipated life of the project or permit (DRECP) term.” (*Ibid.*) If USFWS continues to drastically over-estimate eagle mortality at wind projects, it means that the annual cap could be exhausted by a very small number of projects for several decades. Thus, the DRECP may serve as a relatively permanent moratorium on wind development. Moreover, take attributable to existing projects inside and outside the plan area—not just new projects—may count toward the annual cap “[i]n the event [USFWS] underestimated the amount of ongoing take associated with the project” in the LAP cumulative effects analysis. (*Ibid.*) This uncertainty will more than likely make any new wind project unfinanceable. Those who would applaud such a result might wish to consider that the replacement power will most likely be purchased from coal plants in Utah.

Another severe restriction is the effective 2-year moratorium on all projects seeking incidental take permits for golden eagle, as *all permit applicants* will be required to conduct two years of pre-project golden eagle surveys, and *all wind project applicants* will be required to conduct an *additional* two years of pre-construction risk assessment surveys. (EIR/EIS, Appx. H, p. H-43.)

⁴ See http://www.rivcocob.org/agenda/2007/2007_07_17/03.79.pdf

⁵ See <http://www.desertsun.com/story/news/environment/2014/08/18/agency-corrects-number-eagle-deaths-wind-farms/14266669/>

⁶ *Ibid.*

Thus, as a practical matter for wind projects, a total of *four years* of surveys must be conducted before a project applicant can even start construction. This directly conflicts with the DRECP's goal to streamline and hasten project permitting so that the State can achieve its renewable energy targets in a timely manner.

The REAT agencies have yet to identify a workable path for golden eagle permitting. At this point, it is not clear that any golden eagle permits will be available, and it appears that no state eagle permits will be available outside of DFAs. It is also unclear whether incidental take permits issued for projects within the DRECP will be tied to the project facility's operational life where that period extends beyond 2040. (See EIR/EIS, Appx. H, p. H-28 [stating that permit term will be *either* the project's operational life or the DRECP permit term].) The DRECP's unnecessarily conservative approach to golden eagle permitting removes the largest incentive the DRECP could offer wind energy developers, and puts unreasonable constraints on the potential benefits of mitigation, research, and conservation to the desert eagle population. The other incentive—streamlined permitting and scientific review—appears to have been abandoned. With the amount of acreage set aside for conservation, applicants should be able to avoid the sort of detailed scientific, multi-year studies that plague many new projects. Instead, the DRECP appears to contemplate pre-project studies that are more rigorous than under the existing guidelines and technical appendices.

C. The GCP Does Not Comply with the Endangered Species Act

One of the three core components of the DRECP is the preparation of a General Conservation Plan (“GCP”) covering nearly 5.5 million acres of nonfederal lands. According to USFWS's own guidance, however, it is inappropriate for a GCP to cover such a massive geographic area for such a diverse set of activities. Furthermore, we do not believe that the GCP satisfies the requirements of Section 10(a)(1)(b) of the federal Endangered Species Act (“ESA”).

1. Use of a GCP Under the DRECP Is Inappropriate According to USFWS's Own Guidance

“A GCP is not suitable for a County- or State-wide regional [Habitat Conservation Plan (“HCP”)] which would cover many activities differing in scope and type of impact.”⁷ GCP's are useful for “a smaller subset of activities, such as building single family homes, a specific type of agricultural practice, or similar activities of limited scope.”⁸ For example, a GCP was used in Florida to address a *very narrow* type of activity, on a *single species*, for projects on *very small lots*—the impacts of building single-family homes on suburban infill lots of one acre or less on the scrub jay.⁹ Yet, the DRECP proposes use of a GCP to cover impacts from wind, geothermal, solar, transmission, and other related activities that require large pieces of property, on 37

⁷ U.S. Fish & Wildlife Service, Memo. to Asst. Regional Directors, Oct. 5, 2007, p. 5, <http://www.fws.gov/policy/m0369.pdf>

⁸ *Id.* at p. 4.

⁹ *Ibid.*

Covered Species, across seven counties. USFWS’s own guidance discourages the use of a GCP in this circumstance since “[t]he Service does not have the personnel or expertise to adequately analyze all activities that would be addressed in planning efforts of this scale.”¹⁰ Here, none of the REAT agencies have demonstrated that they have the personnel or expertise to adequately analyze all Covered Activities and their attendant impacts on the 37 Covered Species over the 5.5 million acres covered by the GCP.

Moreover, USFWS guidance concerning the use of GCPs repeatedly highlights the fact that they are useful for *small landowners*.¹¹ Yet, the purpose of the DRECP is to guide the siting of renewable energy projects in the southwest desert regions of California—projects which are by no means undertaken by small landowners. The typical negotiation process between USFWS and a developer when preparing an HCP—a process which is advantageous both for applicant and the Service—is not available with use of a GCP. Instead, with a GCP the applicant has no role until after the essential framework is adopted. Furthermore, “[b]ecause there is no applicant to assist with an analysis of the effects of covered activities and with drafting the NEPA documents, the scope of a GCP will be limited to what Service personnel can effectively analyze.”¹² Thus, not only does a GCP appear to be legally inappropriate in this circumstance, but the benefits of using a GCP over an HCP for renewable energy developers remain to be seen.

2. Funding for the GCP Is Speculative, In Violation of the Federal ESA

“The only difference between the GCP and a traditional HCP is that the Service develops the GCP under which individual ITPs can then be issued to landowners, instead of an applicant doing so.”¹³ A GCP must meet the same issuance criteria as an HCP under Section 10 of the federal Endangered Species Act. Thus, a GCP will only be approved where “the applicant will ensure that adequate funding for the plan will be provided.” (16 U.S.C. § 1539(a)(2)(B) [ESA Section 10(a)(2)(B)].) The funding source may not be speculative in nature. (*National Wildlife Federation v. Babbitt* (E.D. Cal. 2000) 128 F.Supp.2d 1274.) The DRECP does not meet this threshold requirement.

The DRECP only specifies two agencies that are expected to participate in the GCP— the CEC (as to thermal power plants of 50 MW or more) and the California State Lands Commission (as landowner over small portions of non-federal lands). (EIR/EIS, App. M, p. M-1.) There is no certainty, however, regarding what other agencies, developers, or property owners, will participate in the GCP. Indeed, at least some of counties within the DRECP Plan Area have suggested they will not permit renewable energy development on large portions of private lands

¹⁰ *Id.* at p. 5.

¹¹ *Id.* at pp. 1-2.

¹² *Id.* at p. 5.

¹³ *Id.* at p. 4.

categorized under the DRECP as Development Focus Areas.¹⁴ The GCP, however, assumes that these private lands will all be available for development, which development will in turn fund the GCP. Because there is no guarantee that the private DFA lands will be developed—and there is no guarantee that local agencies identified will participate in development to the extent relied upon by the GCP—the funding source for the GCP is speculative.

Further, non-development related funding sources identified in the GCP are speculative. These include federal grants for which the DRECP is “expected to be competitive;” federal legislation that has been proposed but not enacted; a state tax credit that expires in June of 2015; and a state funding source for which DRECP “appears to be eligible” but actual funding “depends on allocations, cost effectiveness and nexus with GHG reductions.” (EIR/EIS, p. II.3-297.) No concrete funding sources are identified; each remains speculative.

Additionally, the cost of funded activities—primarily the acquisition of mitigation lands—is speculative. Priorities for purchasing mitigation lands are categorized as high, medium and low based a variety of factors. The methodology outlined in the GCP excludes the cost impact of “accelerate[d] renewable development” that is expected to occur between 2020 and 2040. (EIR/EIS, Appx. I, p. I.3.) There is no analysis of the impact of accelerated development on funding the purchase of mitigation lands over the long period identified in the GCP. (*Id.*) The GCP does not take into account increased demand for agricultural and open land that would be expected to occur as development on these types of lands, and therefore demand and price, accelerates. The GCP improperly utilizes a straight line funding estimate while acknowledging there will be phased and accelerated development of, and demand for, the lands at issue. (*Id.*) The GCP cost estimates for mitigation lands are thus speculative.

3. Mitigation under the GCP Is Not Rationally Related to the Level of Allowable Take

The level of mitigation outlined in the GCP must be rationally related to level of proposed take. (*National Wildlife Federation v. Norton* (E.D. Cal. 2004) 306 F.Supp.2d 920, 927-928.) The level of proposed take for gold eagles is restricted to 15 eagles for Plan Area plus its 140-mile buffer. This “number is to be calculated annually and will go up *or down* depending on factors such as implementation of projects that take golden eagles inside or *outside* the DRECP area and the population status of golden eagles.” (EIR/EIS, Appx. H, p. H-20.) Acquisition costs of mitigation land ranges from \$267 million to \$1.4 billion for open space, and from \$24 million to \$268 million for agricultural land. (EIR/EIS, Appx. I, p. I.40.) Total mitigation costs range from \$1.2 to \$2.6 billion. (*Id.*) No showing has been made that the level of mitigation required in the GCP is rationally related to the minimal level of proposed take. Moreover, the acquisition costs for mitigation will remain fixed even if the level of allowable take *declines* in future years. The level of mitigation appears to be in fact entirely removed from the level of allowable take. For example, under the GCP’s formula for determining the allowable take of golden eagles, a

¹⁴ For example, the County of San Bernardino’s stated priority is “for the minimal amount of private lands available in the County to be retained for development.” (County of San Bernardino Position Paper on the Draft Desert Renewable Energy Conservation Plan, Feb. 3, 2015, p. 10.)

reduction in the number of species found outside of the Plan Area (or an increase in take by already permitted projects) will lower the level of allowable take for projects developed pursuant to the DRECP. Yet, the level of mitigation remains constant. Thus, the level of take is not rationally related to the required mitigation; it is instead wholly unconnected.

D. The NCCP Does Not Comply with the Natural Communities Conservation Planning Act

A natural communities conservation plan (“NCCP”) must contain certain findings, including, *inter alia*: (1) an estimated timeframe for implementation, including obligations of landowners and plan signatories; (2) mechanisms to ensure adequate funding to carry out the conservation actions identified; (3) provisions to ensure proportionality between impacts on habitat or species and mitigation and conservation measures; and (4) long term assurances regarding conservation, taking into account the adequacy of impacts analysis, the use of best available science, and the sufficiency of long term funding. (Gov. Code § 2820.) The DRECP’s NCCP fails to meet these requirements.

First, the EIR/EIS does not readily identify timelines for obligations of specific landowners and plan signatories. (See EIR/EIS Appx. N1, Table N1-1.)

Second, NCCP funding requirements are purportedly met by EIS/EIR Section II.3.1.8. (*Id.*) This section, however, is deficient because actual funding sources are not identified, much less ensured. (See Section C.2, *supra.*) Moreover, the NCCP does not demonstrate sufficient mechanisms exist for long-term funding of all components of the plan and its contingencies. (*Cf.* Fish & G. Code § 2820(f)(1)(E) and EIR/EIS Appx. N1, Table N1-1.) Thus, funding sources are inadequately identified and inadequately assured.

Third, the EIR/EIS fails to ensure proportionality between impacts on habitat or species and mitigation and conservation measures. Indeed, the mitigation and conservation measures prescribed in the NCCP are decoupled from the level of allowable take of covered species. (Section C.3, *supra.*) Proportionality is thus nonexistent, in violation of NCCP requirements.

Fourth, in the EIS/EIR, regulatory assurances are not given. Instead, the document merely recites that “CDFW will determine whether to provide regulatory assurances and, if so, the proper scope and duration of such assurances.” (EIR/EIS, II.3-265.) Regulatory assurances are crucial to long-term development of wind and solar resources in this region and indispensable to the legal sufficiency of the plan. (Govt. Code § 2820(f).)

E. The CEC Lacks Jurisdiction to Issue Take Authorization to Wind Energy or Solar PV Projects

The REAT agencies have failed to identify an entity with authority to issue federal or state take authorization to wind energy or solar photovoltaic (PV) projects in the DRECP Plan Area. The Document states that the CEC would be an applicant for a federal incidental take permit and would also provide state incidental take authorization for projects within its jurisdiction. The

CEC, however, has no jurisdiction over wind energy or solar PV projects and, as a result, cannot issue incidental take authorization to either. The CEC's jurisdiction is limited to electric transmission lines and thermal power plants with a generating capacity of 50 MW or more. (See Pub. Res. Code §§ 25110, 25120.) Wind energy and solar PV projects are specifically exempted from the Act's definition of a thermal power plant. (Pub. Res. Code § 25120.) As such, there is no legal pathway through which the CEC may issue take authorization to wind and solar PV projects in the DRECP area, and the REAT agencies must identify a permitting pathway that does not include the CEC and that will meet USFWS's purpose and need of providing a streamlined permitting process. This major oversight in the Document exemplifies the rushed and incomplete nature of DRECP planning thus far and emphasizes the need for a more deliberate process. It also underscores the need for participation by counties in the DRECP Plan Area, since without them any permit streamlining benefits will not be realized.

F. Impacts of DRECP on Lands Outside of Plan Area

There is a great deal of uncertainty concerning how the DRECP will impact projects that are located just outside of the Plan Area, but directly adjacent to DRECP Reserve Design Lands. For example, in northern Riverside County near Highway 62, the DRECP Plan Area ends along the border of Riverside and San Bernardino County. Those portions of the DRECP Plan Area along the northern border of Riverside County include large areas designated as Conservation Planning Areas (CPAs), which are adjacent to existing Legislatively and Legally Protected Areas (LLPAs).

In addition, there are several portions of the DRECP Plan Area within eastern Riverside County that would be designated National Landscape Conservation System (NLCS) lands by the BLM, and which abut portions of Riverside County that are *not within* the DRECP Plan Area. Any potential project that is sited in the vicinity of either the CPA or NLCS lands (especially if on BLM lands) would likely be subject to more rigorous permitting requirements and restrictions on account of alleged "edge effects." (See e.g. EIS/EIR, IV.07-268, -339, -426.) These projects will not have the opportunity to take advantage of any supposed project streamlining afforded to projects within DFA zones of the DRECP, and instead would likely be burdened with much greater permitting requirements than those currently applied—to the extent they are permitted at all.

As highlighted in Section B above, the DRECP will also further complicate the Incidental Take Permit process for Golden Eagle outside of the DRECP Plan Area because the DRECP's EIS/EIR utilizes a 140-mile geographic area for calculating the amount of take that may occur within the Plan Area. The annual eagle cap of 15 is based on the assumption that approximately 91 eagles are being "taken" outside of the Plan Area but within the 140-mile buffer. (EIS/EIR, Appx. H, p. H-27.) The supporting evidence for this figure does not appear to be included in the EIS/EIR or its appendices. And based on the USFWS's previous misstatements about eagle take, there are serious questions about the accuracy and justification for this figure. Regardless, the DRECP has effectively placed a cap on eagle take for the entire 140-mile buffer area—not just the DRECP Area—to 91. As a result, it is unclear: (1) how or if projects outside the DRECP will be able to get ITPs for take of Golden Eagles; (2) how the 140-mile buffer will play a part of

that ITP permitting process outside the DRECP; and (3) how the cap on eagle take will be taken into consideration for projects outside the Plan Area.

Further, the regulations promulgated to implement Section 10(a) and the No Surprises rule conclude that so long as the applicant properly implements an approved HCP, the USFWS cannot impose further mitigation during the life of the plan even if the species declines. (50 C.F.R. §§ 17.32(b)(5), 17.22(b)(5).) The DRECP, as written, appears to conflict with the promise of the No Surprises rule in three respects. First, while the DRECP itself purports to provide assurances, such assurances are not available to federal agencies (who in this case are the only agencies other than the CEC or State Lands Commission contemplated for immediate coverage). Second, with the uncertainty concerning how the DRECP might be applied to specific development proposals, any assurances against future regulation or mitigation appear illusory. Third, if the DRECP results either directly or indirectly in further restrictions in areas outside the DRECP already covered by the No Surprises Policy under existing HCPs (e.g., Eastern Riverside MSHCP), such additional regulations would violate the spirit if not the letter of the No Surprises assurances extended to those other project areas.

Finally, increased uncertainty, excess costs of mitigation, delays in permitting, and restrictions on wind energy development in the San Geronio Pass area as a result of the DRECP may cause projects to become uncompetitive in the California Renewable Portfolio Standard market. Projects may not be built because the risks associated with development, in particular with take permits or fee increases, may cause investors, lenders, turbine suppliers, and developers to seek other cheaper, business friendly and unconstrained sites in other counties or states.

G. Conflicts with County Zoning

It is unclear to what extent there are existing conflicts between regional and local zoning/land use plans and the DRECP. For example in San Bernardino, the DRECP currently proposes 298,700 acres of DFA land and 200,700 acres of CPA land on a total of 600,000 acres of prime developable land identified by the County. That is more than 83% of the County's prime developable land. Many of the DFAs are inconsistent with regional and local land use designations. It is also unclear which lands are actually available for development within the DFAs or how non-DFA, non-reserve areas will be treated. The resulting miscalculation and lack of clarity makes it more difficult to understand whether and how the Plan will meet its stated energy goals.

H. Inaccurate Assumptions Concerning Wind Energy Technology

Chapter II.3 of the EIS/EIR sets forth the assumptions about wind energy technology based on existing facilities. (EIS/EIS, pp. II.3-178-186.) Several of the assumptions, however, are incorrect as outlined below.

- *“Features that are common to call wind projects include operation and maintenance (O&M) buildings, switchyards and substation and wind turbines.”* (EIS/EIR, p. II.3-178.)

Not all wind turbines require O&M buildings. As an example, Whitewater Energy Corporation has three separate existing projects covering thousands of acres, and they are supported by a single O&M building. O&M buildings are typically located away from the projects, near cities, and other facilities. As a second example, we understand that at one point EDF Renewables provided services for nearly half of the San Geronio Pass resource area of 2,700-4,000 turbines or 700 to 350 MWs respectively (due to repowering over time), out of one O&M building located in the City of Palm Springs in a zoned industrial park. Thus, this section of the EIR/EIS needs to be revised to accurately reflect the actual O&M needs of wind projects, as without that change the EIR/EIS overestimates wind project impacts.

- *“Access roads/spur roads (permanent & temporary) - Construction of a permanent road to each turbine is necessary for both construction and operations. The extent of road construction is dependent upon the site topography, condition, and extent of current roads. Access roads require a shallow gradient (typically less than 10%) to enable heavy lifting cranes to access the turbine sites. In steep or complex terrain, road width may be 40 feet or wider to accommodate the turning circle of vehicles delivering turbine components. Access roads for turbine construction may have to be temporarily widened to accommodate heavy vehicles that transport tower components and nacelles.”* (EIS/EIR, p. II.3-180 [Table II.3-23].)

Access roads do not require a gradient of less than 10%, and instead can have a gradient as steep as 18%. We understand that the Pine Tree Wind Project was built with 18% roads to *reduce* the amount of ground disturbance and associated impacts. The minimal slope is only required to be flat immediately at the turbine site, where the crane needs level ground to operate. We also understand that the 150 MW Sandstorm Wind Power Project, being permitted in Riverside County, has 15-18% roads to reduce the area of ground disturbance. Additional ground disturbance is necessary to create less sloped access roads in steep terrain, so grades are maximized to reduce cost and impact. The Sandstorm Project is estimated to have a little over five miles of road. This stands in stark comparison to the Tule Wind project of 23 miles for 201 MWs and the Ocotillo Wind Project with 42 miles for 350 MW which exaggerates impacts by over 300%.

In addition, crane access roads are very temporary in nature. A minimum of 34 feet in road width is needed solely for those areas where crane will travel from one location to the next location. If rows or groups of turbines are located a great distance from each other, the crane can be partially broken down and transported on a thinner road to the next group of turbines, without needing a 34-foot wide road in between. While the roads are temporarily wide, once the use of cranes has ceased, the roads are reduced down to 12-15 feet in width for use as service roads for technician vehicles after construction. The land no longer necessary for the wider roads is then reclaimed to a natural state, regaining its habitat value.

- *“Turbine erection - To enable the lifting and erection of each turbine, a cleared and graded temporary work area 400 feet in diameter is assumed. Ground disturbance*

during construction would lead to soil compaction and while the area may be revegetated it should be considered permanently disturbed. Therefore, each turbine would result in up to 2.885 acres of permanent disturbance.” (EIS/EIR, p. II.3-181 [Table II.3-23].)

Most wind projects “rip” the top layer of this disturbed soil after construction is complete. Riverside County requirements only require a 15-30 foot diameter clearance around each turbine for a fire break. Revegetation, either by natural means or by the developer with certified local seeds (as required by the BLM), restores the land to its previous habitat value. While the topography may be different, the habitat value is certainly not lost. This area *should not* be considered permanent disturbance and is certainly not 400 feet in diameter. The EIS/EIR is improperly assuming the entire rotor lay-down area to be disturbed. The center of gravity of the blades and hub are near the middle; that is where the work is performed and the cranes are located. The light ends of the turbines (towards the tips of the blade) typically stretch out over undisturbed soil and are propped up by hail bails or protection foam until the rotor is lifted into place. Those outer areas are typically not disturbed except for those small areas immediately surrounding the blade, which is usually only by foot traffic.

- *“Ancillary buildings and general facilities - Permanent operations and maintenance buildings would be constructed utilizing standard building and construction techniques. Ancillary facilities are assumed to include parking and equipment storage facilities and would typically occupy 5 acres.”* (EIS/EIR, p. II.3-181 [Table II.3-23].)

The assumption that ancillary facilities would typically occupy 5 acres is a vast overestimate of the actual acreage needed for wind projects. As clarified above, each project does not require its own O&M building. Whitewater Maintenance Corp. in Riverside County services 159 turbines at *three projects*, which have a total O&M building foot print of *only 1.25 Acres*. We also understand that EDF Renewables, who services multiple projects (more than 3) and many hundreds of wind turbines, has an O&M building foot print of only 2.0 acres. Finally, we understand that AES Wind, who also services multiple projects and many hundreds of wind turbines, has an O&M building foot print of only 1.75 acres. All three are within the City limits of Palm Springs, two of which are in a zoned industrial project, miles away from the projects.

- *“Clearing, staging, parking, construction trailer, and equipment and material storage areas - Temporary construction areas, including laydown yards, on-site construction trailers, material storage, and on-site cement batch plants, would require clearing and grading and are assume to occupy 40-50 acres.”* (EIS/EIR, p. II.3-181 [Table II.3-23].)

The stated 40-50 acreage figure is significantly overestimated. These areas typically do not increase with the size of a project. Instead, they are relatively standard across all projects, regardless of size. Just enough area is required to sort incoming components and handle logistics of processing and delivering to the pad locations. The Dillon Wind Project, for example, which consists of 45 turbines at 45 MWs has two staging areas

totaling approximately 5.0 acres. The proposed Sandstorm Wind Power Project (150 MW) has two proposed staging areas of 400 x 400 feet, totaling only 7.34 acres. In many cases however, staging areas are areas that will house a wind turbine location, service road, or substation area. These are not additional acres of disturbance, but rather disturbance that is already included in road, pad, substation, and other disturbance calculations. If staging areas that contain wind turbines are “double-counted” in this way, it will result in an exaggeration of impacts. Storage areas solely used for the staging of a large project would ultimately be re-claimed entirely or reduced to a smaller footprint to handle minimal on-going maintenance.

- *“In addition to estimates of ground disturbance, the area likely to be impacted by the operation of the turbine rotors (airspace) was also estimated.”* (EIS/EIR, p. II.3-185 [paragraph 3].)

Is the air space analysis applied to any other industry within this EIS/EIR or generally? For comparison, a 2.5-acre circle that is one foot thick has a cubic volume of 108,900 cubic feet, which is the same as one small 70 x 70 x 22 foot building at a geothermal plant; 150 x 150 feet of solar panels that are 5 feet off of the ground; a small cooling tower at a peaker plant; or 1/10th the cubic volume of the Ivanpah solar tower assuming 50 x 50 x 469 foot volume, etc. The estimates in the DRECP do not appear accurate.

I. Additional Comments

The following issues have been raised by other commenters on the DRECP and are important to emphasize:

- The DRECP suffers from a pervasive lack of clarity that makes it difficult to provide meaningful comments.
- Development pathways and permitting requirements are unclear, making it impossible to determine whether the Plan would actually provide financial savings or streamlining for developers over the status quo.
- The level of funding and funding sources required to successfully implement the DRECP are not clearly identified, and the EIR/EIS appears to be vague and uncertain with regard to the method and rationale for allocating proportional costs to specific development projects.
- The DRECP does not currently identify either the amount or the location of areas required for transmission outside of the Plan Area, which is necessary for the evaluation of the feasibility of constructing the transmission lines with the added burden of securing mitigation without the benefit of the DRECP.

In sum, we believe the DRECP—which is meant to govern renewable energy development over a 25-plus year period and 22.5 million acres of the California desert—is neither legally nor

scientifically defensible in its present form. We urge the REAT agencies to address the issues raised in this letter, as well as those detailed in submissions by others and recirculate the draft EIR/EIS for public comment. DWEA is adamant that the DRECP disclaim any Edge Effects jurisdiction within the MSHCP borders and will pursue this issue by all means available.

We appreciate your consideration of our comments and look forward to your response. If you have any questions, please contact me at cmarsh@downeybrand.com or (415) 848-4800.

Sincerely,

DOWNEY BRAND LLP



Christian L. Marsh

Desert Wind Energy Association, on behalf of the following entities:

Cabazon Wind Energy, LLC
D & E Land Company, LLC
D & F Land Company, LLC
DifWind Farms Limited I
DifWind Farms Limited II, Inc.
DifWind Farms Limited V
Energy Development & Construction Corporation
San Gorgonio Farms, Inc.
San Gorgonio Wind Associates VII, LLC
San Gorgonio Wind Associates 8, LLC
San Jacinto Power Co.
TYJFE, LLC
VPI Enterprises Inc.
Whitewater Development Corporation
Whitewater Energy Corporation
Wind Energy Partnership, LP
Wintec Energy, Ltd.
Wintec Properties, LLC

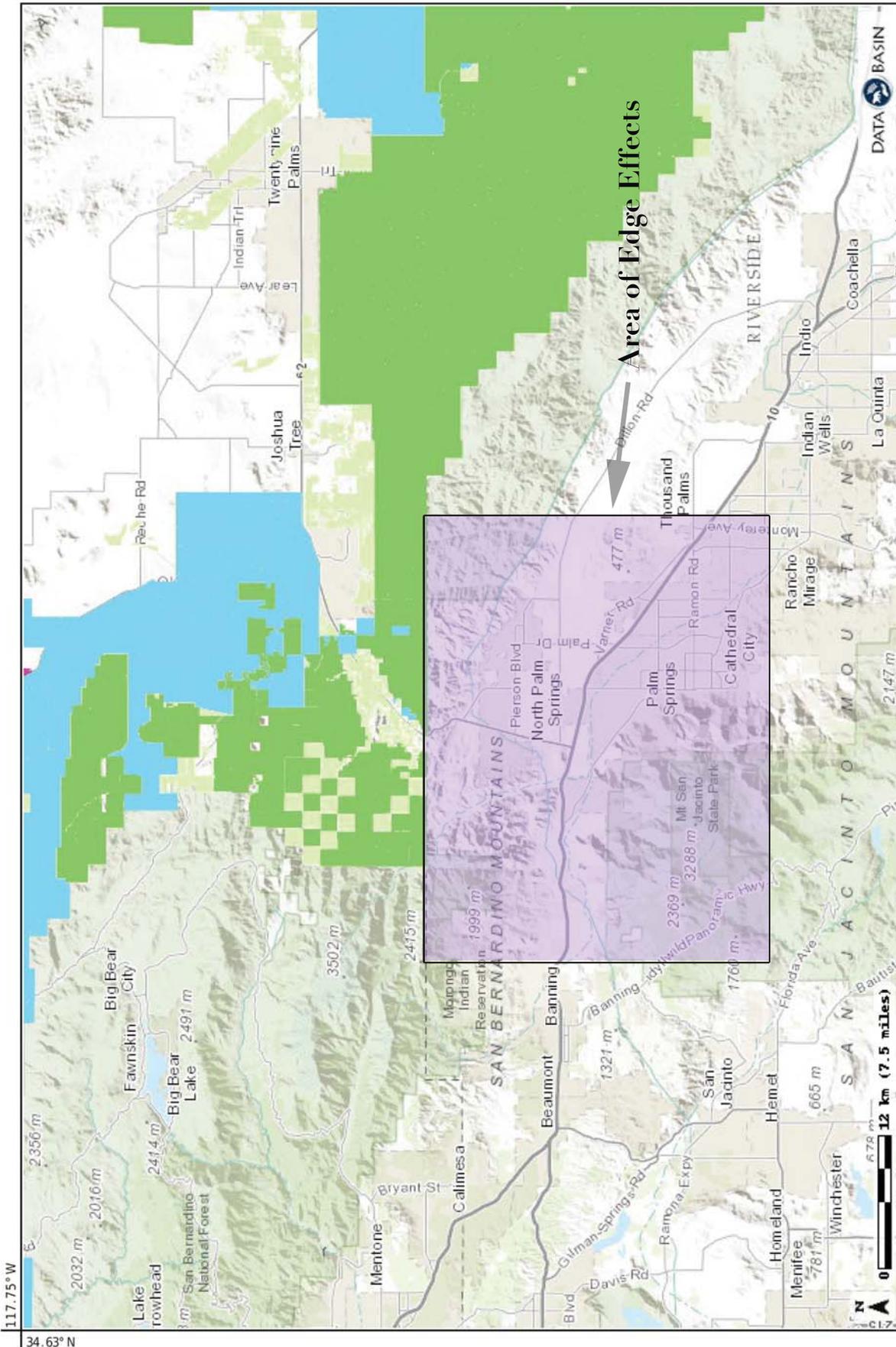
EXHIBIT 1

Legend

- Reserve Design Envelope (Existing Cons.), DRECP Conservation**
- Legislatively and Legally Protected Areas
 - Military Expansion Mitigation Lands

- Development Focus Areas, Preferred Alt.**
- Conservation Planning Areas, Preferred Alt.

- Reserve Design Envelope (ACECs & Wildlife Allotment), Preferred Alt.**
- Displaying: BLM Existing & Proposed Land Use Plan Amendment Designations
 - Areas of Critical Environmental Concern
 - Wildlife Allocation



33.37° N



115.29° W

DATA BASIN

117.75° W

34.63° N

EXHIBIT 2



In Response Reply To:
FWS/R8/MB&SP

United States Department of the Interior

FISH AND WILDLIFE SERVICE
Pacific Southwest Region
2800 Cottage Way, Suite W-2606
Sacramento, California 95825



AUG 20 2014

David L. Baron
Slovak Baron Empey Murphy & Pinkney LLP
1800 E Tahquitz Canyon Way
Palm Spring, CA 92262

Dear Mr. Baron,

This letter responds to your July 9, 2014 letter to Mr. Eric Davis and to your July 11, 2014 letter to Dr. Joel Pagel. Both letters regard the July 7, 2014 *Desert Sun* article concerning golden eagle, *Aquila chrysaetos*, deaths at wind facilities in the San Geronio Wind Resource Area (WRA) in Riverside County, California. The U.S. Fish and Wildlife Service (Service) also received your Freedom of Information Act (FOIA) request of July 11, 2014 and responded separately.

As part of our efforts to search for records responsive to your FOIA request, we reviewed the information in our databases in detail, and we encountered some inconsistencies. As we thoroughly researched the inconsistencies, we realized that we had incorrectly attributed some eagle mortalities to the San Geronio Wind Resource Area (WRA) that should have been attributed to the Altamont area. We have made this correction in our database and are implementing measures to ensure more accurate reporting in the future. We are also reviewing documents that may have used those data. We thank you for your FOIA because without it, we may not have discovered the inconsistencies. It is important to the Service that we use the best available information in our management decisions and in carrying out our agency mission.

We previously believed that approximately 15 eagle mortality records since the 1990s were attributed to the San Geronio WRA. Based on a detailed review of the data, we have corrected the records in our database, and now report two such records. These are the only recorded fatalities we can attribute to the San Geronio WRA. The first occurred during monitoring from 1997-1998, as reported in the 2005 Department of Energy's National Renewable Energy Laboratory (DOE-NREL) report entitled, "Avian Monitoring and Risk Assessment at the San Geronio Wind Resource Area." The second occurred in late 2012 or early 2013 when a dead golden eagle was found in the vicinity of the Dillon Wind facility. We sent that carcass to our laboratory; the cause of death was inconclusive. In summary, we have evidence of two golden eagle deaths since 1997 in the San Geronio WRA.

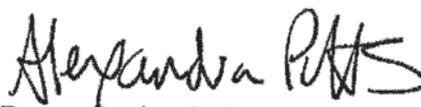
Because there is little avian monitoring at wind facilities in the San Geronio WRA, the Service must estimate ongoing impacts to eagles when we evaluate cumulative effects under the National Environmental Policy Act and Bald and Golden Eagle Protection Act permitting regulations. The only systematic monitoring plan designed to evaluate avian impacts that we are aware of is the DOE-NREL study mentioned previously. Therefore, we base our estimates of eagle mortality

rates at wind facilities in the San Geronio WRA on that data. Since eagle mortalities have been reported in most areas where systematic monitoring of wind energy facilities has been conducted, including within the San Geronio WRA, we do not believe it is reasonable to conclude that eagle deaths do not occur as a result of project operations without empirical data to support such conclusions. We are aware that the number and type of turbines vary within this WRA and that some projects have recently undergone repowering with larger turbines. The risk of eagle fatalities can vary based on a number of factors including rotor swept area, placement of turbines, local wind patterns, etc. We would prefer to use more robust eagle data gathered onsite to inform our estimates; however, in the absence of robust data, we must rely on the best scientific information available. We estimate that there are approximately 658 megawatts of wind energy in the San Geronio WRA, and on average, one eagle is killed per year for every 32 megawatts of installed wind facilities in this WRA. We base this ratio on data collected in the San Geronio WRA in the DOE-NREL study. Thus, we estimate approximately 20 eagle deaths per year at wind facilities in the San Geronio WRA. Our estimate was 21 before we discovered the database inconsistency; we told the *Desert Sun*, "approximately 20." If you are aware of systematic raptor surveys and/or avian mortality monitoring at wind facilities in the San Geronio WRA, we would greatly appreciate receiving the data so we can improve our scientific understanding and refine our estimate.

Because we made an error in reporting evidence of approximately 15 eagles in the San Geronio WRA since the 1990s to the *Desert Sun*, we are copying them on this letter. Additionally, we responded to their FOIA.

Please contact Mr. Eric Davis, Assistant Regional Director of Migratory Birds and State Permits at 916-978-6189 or eric_davis@fws.gov if you have any questions.

Sincerely,



Deputy Regional Director

cc: Ian James, *Desert Sun*, Palm Springs, CA
Mendel Stewart, FWS, Carlsbad, CA