



Wild Tree Foundation

September 13, 2019

Billie Blanchard
California Public Utilities Commission
c/o Aspen Environmental Group
235 Montgomery Street, Suite 640
San Francisco, CA 94104

RE: A.18-05-007 Eldorado-Lugo-Mohave Series Capacitor Project, California Public Utilities Commission A.18-06-007 Draft Mitigated Negative Declaration

SENT VIA ELECTRONIC MAIL TO ELM@ASPENEG.COM

Dear Billie Blanchard:

These comments are submitted on behalf of the Wild Tree Foundation regarding the Draft Mitigated Negative Declaration (“DMND”) for the Eldorado-Lugo-Mohave Series Capacitor Project, California Public Utilities Commission (“Commission”) A.18-06-007 (“Project”).

Wild Tree Foundation (“Wild Tree”) is a 501(c)(3) non-profit organization dedicated to protection of our environment, climate, and wildlife. Wild Tree advocates that our future is dependent upon a transition away from fossil fueled and utility-scale electricity generation reliant upon lengthy transmission from for-profit, investor owned utilities to a system based upon local, distributed, publicly and cooperatively owned renewable resources. Wild Tree intervenes in Commission proceedings to further the interests of our environment, climate, wildlife, and ratepayers that are concerned about their protection. In furtherance of these interests, Wild Tree advocates for transparency, public participation, and compliance with the Rule of Law in government decision-making and against corruption by government agencies and officials and regulated entities.

Wild Tree is concerned about the significant impacts to sensitive and protected wildlife and habitat, sensitive and protected plant species and communities, desert pavement, and air

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quality of the Project. In particular, this project would result in the take of federally and state endangered desert tortoises (*Gopherus agassizii*) as construction would occur where tortoises live and mate and would disturb large areas of desert tortoise designated critical habitat including parts of the Mojave National Preserve. Wild Tree is especially concerned about the harm this project will cause to the designated critical, in particular the Western Mojave population where the tortoises face extreme pressures and population losses. The Project will adversely modify and destroy federally designated critical habitat for the desert tortoise, a species listed as threatened under federal Endangered Species Act (“ESA”), and is thus adverse to the ESA.

This is a project which is not needed and should not be approved. The DMND provides no alternatives analysis. Such an analysis would show that a non-project alternatives is the preferable alternative because the project objectives are flawed and do not support a need for the Project. Nonetheless, at the very least, the project must comply with the clear directive of California Environmental Quality Act (“CEQA”), Public Resources Code section 21000 et seq. that an Environmental Impact Review (“EIR”) be prepared for this Project because it will have potential significant impacts which are not mitigated by the DMND’s woefully inadequate proposed “mitigation” measures that do not actually serve to alter the project in any way or to mitigate significant impacts. The DMND also fails to address cumulative impacts and growth-inducing impact.

The DMND fails to account for significant impact as a result of cumulative impacts and the growth inducing aspect of the Project. An EIR is needed to provide the required analysis of these significant impacts.

A. The Project Objectives Do Not Support a Need

The DMND claims that the Project would meet an objective of “Meet the target in-service date of June 2021 in an effort to support the requirements as outlined and required by the California Renewables Portfolio Standard (RPS)¹ including 33% by 2020 and the increased requirement of 60% by 2030.” (DMND at p 1-1.) The claim that this project is needed to meet RPS 2020 requirements ignores the fact that SCE has already exceeded its 2020 RPS requirement and that the Commission has determined in the current Long Term Procurement Proceeding that SCE requires no procurement through 2030 and that no out of state resources need be procured through

2030. The project objective that relies upon “the entire California Independent System Operator (CAISO) grid, which is defined as the Electrical Needs Area (ENA)” is outrageous. There is no precedent for defining the ENA as the entire state and for good reason; almost any project based upon a statewide ENA could argue a need based upon some far flung local reliability need. The claimed need to address any flow into LADWP has already been addressed by LADWP upgrades and SCE has no grounds under which it can justify un-realized “flow overloads under abnormal system conditions” especially where those abnormal system conditions can be addressed by load shedding. The project objective to “continue to provide safe and reliable electrical service” is so general as to be meaningless. There is no evidence put forth in the DMND that safety and reliability will in any way be enhanced by this Project or that a no project alternative would not also be safe and reliable.

B. There are Significant Impacts Identified in the DMND and An EIR Is Thus Required

1. An EIR Is Required Where There Is Substantial Evidence In The Whole Record Supporting A Fair Argument That A Project May Have A Significant Effect On The Environment

This Project requires the preparation of an Environmental Impact Review (“EIR”) because there are significant impacts; a mitigated negative declaration is insufficient under the California Environmental Quality Act (“CEQA”), Public Resources Code section 21000 et seq. “The foremost principle under CEQA is that the Legislature intended the act ‘to be interpreted in such manner as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language.’” (*The Pocket Protectors v. City of Sacramento* (2004) 21 Cal. Rptr. 3d 791, 926 quoting *Friends of Mammoth v. Board of Supervisors* (1972) 8 Cal.3d 247, 259.) The California Courts have long adhered to the proposition that, “‘It is, of course, too late to argue for a grudging, miserly reading of CEQA.’” (*Bozung v. Local Agency Formation Com.* (1975) 13 Cal.3d 263, 274.)” (*Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 390.)

The California Courts “have repeatedly recognized that the EIR is the ‘heart of CEQA.’” (*Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564; *Laurel Heights Improvement Assn. v. Regents of University of California, supra*, 47 Cal.3d at p. 392; see also

Guidelines, § 15003, subd. (a)¹.) The purpose of an EIR is to inform the public and decision-makers of the environmental consequences of their decisions *before* they are made. “Thus, the EIR ‘protects not only the environment but also informed self-government.’” (*Laurel Heights Improvement Assn. v. Regents of University of California*, *supra*, 47 Cal.3d at p. 392; *Citizens of Goleta Valley v. Board of Supervisors*, *supra*, 52 Cal.3d at p. 564.)

“With certain limited exceptions, a public agency must prepare an EIR whenever substantial evidence supports a fair argument that a proposed project ‘may have a significant effect on the environment.’ (*The Pocket Protectors v. City of Sacramento*, *supra*, 21 Cal. Rptr. 3d at 926-28 citing Pub. Resources Code, §§ 21100, 21151, 21080, 21082.2; Guidelines, §§ 15002, subd. (f)(1), (2), 15063; *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 75.) “CEQA requires a governmental agency [to] prepare an environmental impact report (EIR) whenever it considers approval of a proposed project that ‘*may* have a *significant* effect on the environment.’ (§ 21100, italics added.) (*Quail Botanical Gardens v. City of Encinitas* (1994) 35 Cal. Rptr. 2d 470, 1601.) “‘May’ means a reasonable possibility. (*League for Protection of Oakland's etc. Historic Resources v. City of Oakland* (1997) 52 Cal.App.4th 896, 904-905 citing (Pub. Resources Code, §§ 21082.2, subd. (a), 21100, 21151, subd. (a).)

A negative declaration may be used if there is no substantial evidence a project may have a significant effect on the environment or the initial study identifies potential significant effects, but provides for mitigation revisions which make such effects insignificant. (Pub. Resources Code, §§ 21080, subd. (c), 21064.) “However, the Supreme Court has recognized that CEQA requires the preparation of an EIR ‘whenever it can be fairly argued on the basis of substantial evidence that the project may have significant environmental impact.’” (*No Oil, Inc. v. City of Los Angeles*, *supra* 13 Cal.3d at p. 75; see also *Laurel Heights Improvement Assn. v. Regents of University of California* (1993) 6 Cal.4th 1112, 1123.) “Thus, if substantial evidence in the record supports a ‘fair argument’ significant impacts or effects may occur, an EIR is required and a negative declaration cannot be certified.” (*Quail Botanical Gardens v. City of Encinita*, *supra*, 35 Cal. Rptr. 2d at p. 1601-2; See also *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1996) 49 Cal. Rptr. 2d 494, 616-17.)

¹ All references to Guidelines are to the state CEQA Guidelines, which implement the provisions of CEQA. (Cal. Code Regs., tit. 14, § 15000 et seq.) The Guidelines state: "These Guidelines are binding on all public agencies in California." (Guidelines, § 15000.)

Where there is substantial evidence in the whole record supporting a fair argument that a project may have a significant effect on the environment, the lead agency shall prepare an EIR, “even though it may also be presented with other substantial evidence that the project will not have a significant effect.” (Pub. Resources Code, § 21151, subd. (a); Guidelines, § 15064, subd. (f)(1), (2); *No Oil, supra*, 13 Cal.3d at p. 75; *Architectural Heritage Assn. v. County of Monterey* (2004) 122 Cal.App.4th 1095, 1109; *Communities for a Better Environment v. California Resources Agency* (2002) 103 Cal.App.4th 98, 111-112.) “Substantial evidence” means “enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached.” (Guidelines, § 15384, subd. (a).) Substantial evidence “shall include facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts.” (Guidelines, § 15384, subd. (b).)

The fair argument standard is a “low threshold” test for requiring the preparation of an EIR. (*No Oil, Inc. v. City of Los Angeles, supra*, 13 Cal.3d at p. 84; *League for Protection of Oakland's etc. Historic Resources v. City of Oakland, supra*, 12 Cal.App.4th at p. 905; *Sierra Club v. County of Sonoma* (1992) 6 Cal.App.4th 1307, 1316-1317; *Oro Fino Gold Mining Corp. v. County of El Dorado* (1990) 225 Cal.App.3d 872, 881.) “It is a question of law, not fact, whether a fair argument exists, and the courts owe no deference to the lead agency's determination. Review is de novo, *with a preference for resolving doubts in favor of environmental review.*” (*The Pocket Protectors v. City of Sacramento, supra*, 21 Cal. Rptr. 3d at p. 928 citing *Architectural Heritage Assn. v. County of Monterey, supra*, 122 Cal.App.4th at p. 1110; *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus, supra*, 42 Cal.App.4th at pp. 617-618; *Stanislaus Audubon Society, Inc. v. County of Stanislaus* (1995) 33 Cal.App.4th 144, 151; *Quail Botanical Gardens Foundation, Inc. v. City of Encinitas, supra* 29 Cal.App.4th at pp. 1602-1603.)

Under the fair argument standard, “deference to the agency’s determination is not appropriate and its decision not to require an EIR can be upheld only when there is no credible evidence to the contrary.” (*Sierra Club v. County of Sonoma* (1992) 6 Cal App 4th 1307, 1318; Evidence supporting a fair argument need not be overwhelming, overpowering or uncontradicted. (*Friends of the Old Trees v. Department of Forestry and Fire Protection* (1997) 52 Cal.App.4th 1383, 1402.)

2. An EIR is Required Where There is a Potential Impact on Endangered, Rare, or Threatened Species

The California Supreme Court has made it clear that a “potential substantial impact on endangered, rare or threatened species is per se significant.” (*Cit. for Resp. Growth v. City* (2007) 40 Cal. 4th 412, 449 *citing* CEQA Guidelines, § 15065, subd. (a)(1).) Pursuant to Guidelines section 15380 and the California Department of Fish and Wildlife, Special Animals List, Species of Special Concern are considered rare and must be considered during CEQA review (California Department of Fish and Wildlife, Natural Diversity Database Special Animals List (August 2019), available at: <https://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=109406&inline> .)

The Department explains:

SSCs should be considered during the environmental review process. The California Environmental Quality Act (CEQA; California Public Resources Code §§ 21000-21177) requires State agencies, local governments, and special districts to evaluate and disclose impacts from "projects" in the State. Section 15380 of the CEQA Guidelines clearly indicates that species of special concern should be included in an analysis of project impacts if they can be shown to meet the criteria of sensitivity outlined therein.

Sections 15063 and 15065 of the CEQA Guidelines, which address how an impact is identified as significant, are particularly relevant to SSCs. Project-level impacts to listed (rare, threatened, or endangered species) species are generally considered significant thus requiring lead agencies to prepare an Environmental Impact Report to fully analyze and evaluate the impacts. In assigning "impact significance" to populations of non-listed species, analysts usually consider factors such as population-level effects, proportion of the taxon's range affected by a project, regional effects, and impacts to habitat features.

(California Department of Fish and Wildlife, *Species of Special Concern*, <https://www.wildlife.ca.gov/Conservation/SSC#394871319-how-are-sscs-addressed-under-the-california-environmental-quality-act>, accessed September 13, 2019.)

Species that are listed as BLM Sensitive Species also meet the Guidelines Section 15380 definition of rare as either “although not presently threatened with extinction, the species is existing in such small numbers throughout all or a significant portion of its range that it may become endangered if its environment worsens; or the species is likely to become endangered within the foreseeable future throughout all or a significant portion of its range and may be considered “threatened” as that term is used in the Federal Endangered Species Act.” (Guidelines section 15380, subd. (b)(2), *see also* subd. (d) (“A species not included in any listing identified in subdivision (c) shall nevertheless be considered to be endangered, rare or threatened, if the

species can be shown to meet the criteria in subdivision (b).”) Species are designated as BLM Sensitive Species using the following criteria, which precisely correlate with the section 15380 definition of rare:

1. There is information that a species has recently undergone, is undergoing, or is predicted to undergo a downward trend such that the viability of the species or a distinct population segment of the species is at risk across all or a significant portion of the species range, or
2. The species depends on ecological refugia or specialized or unique habitats on BLM-administered lands, and there is evidence that such areas are threatened with alteration such that the continued viability of the species in that area would be at risk.

(United States Bureau of Land Management, Manual 6840, the Special Status Species Management Manual for the Bureau of Land Management, Rel.6-125 (2008). subd. (2)(a).)

3. The Project May have a significant effect on the environment and thus requires an EIR

By the DMND’s own words, there are significant impacts from this Project. As the DMND states:

The Proposed Project has the potential to temporarily and permanently affect sensitive natural communities, special-status plant and wildlife species, wildlife population and movement patterns, and jurisdictional waters. The project would temporarily disturb approximately 375 acres that would be restored and permanently occupy approximately 7 acres spread over 5 locations (2 series capacitor sites; 3 repeater sites). Cumulative impacts to biological resources could occur as a result of increased ground-disturbing activities by multiple cumulative scenario projects. These cumulative activities could increase the disruption of normal animal breeding, foraging, and migration behavior, the removal of suitable habitat for multiple special-status plant and wildlife species, and the degradation of jurisdictional water features.

(DMND at p. 5-412)

The proposed mitigations in regards to biological resources do not fully mitigate these impacts and are not proposed as project revisions. “A Mitigated Negative Declaration (MND) is a Negative Declaration prepared for a project when the initial study has identified potentially significant effects on the environment but the effects now pose no significant effect on the environment because the project was revised. The revisions to the project plans must mitigate the harmful effects to the environment and there must be no substantial evidence supporting that the revised project will have a negative effect on the environment.” (Public Resources Code, §21064.5.)

There have been no revisions to the project plans in the DMND. The proposed biological resources mitigation measures were all effectively proposed by the applicant. The measures in regards to wildlife are especially ill-conceived as these consist of vague instructions to conduct surveys and avoidance. Conducting surveys is not mitigation – this is work that should be done to inform the EIS. Surveying does not serve in any way to protect special status species, it serves to provide information upon which actual mitigation or project denial should be based. The proposed mitigation measures regarding avoidance are so lacking in detail for most species that the feasibility, enforceability, and effectiveness cannot be ensured. For example, as discussed further below the entire mitigation proposed for the Mojave fringe-toed lizard is survey and monitoring and the mitigation proposed for desert tortoise is not enforceable by the Commission.

a. The Desert Tortoise (*Gopherus Agassizi*), A State And Federally Protected Endangered Species Will Suffer Significant Impacts

Desert Tortoise Ecology

The desert tortoise, until recently thought to be a single species, is a large, herbivorous reptile occurring in the deserts of California, Arizona, Nevada, Utah, and Sonora and Sinaloa, Mexico. Recent research has identified three distinct species - the Agassiz's desert tortoise (*Gopherus agassizi*) that lives in California, southern Nevada and southwestern Utah, Morafka's desert tortoise (*G. morafkai*) that lives in Arizona and Sonora, Mexico and most recently, Evgood's desert tortoise (*G. evgoodei*) that resides in Sinaloa, Mexico. Agassiz's desert tortoise is the listed population and the affected species by the Project. Ideal habitat for Agassiz's desert tortoise includes areas of creosote bush scrub with high perennial plant diversity, high ephemeral plant production, annual precipitation levels of two to eight inches, and soils that support burrows. The species is most active in spring and early summer when annual plants are available for forage. Although desert tortoises are also active during the warm fall months and sporadically after summer rain storms, they spend most of the remainder of the year in burrows, protected from predators and excessive heat and cold.

Desert tortoises are long-lived and do not reach sexual maturity until they are 15 to 20 years old. Once they reach sexual maturity, females produce only one to three clutches of eggs per year and only in years when adequate food and water are available. Most clutches contain

three to seven eggs. Although young desert tortoise survival rate estimates vary, research indicates that, at most, approximately twenty percent survive their first three years of life and only two percent of desert tortoises survive to sexual maturity.

While desert tortoises will eat a variety of plants, climatic factors associated with desert environments often limit food availability. Non-native plants that have invaded their habitat do not provide adequate nutrition to tortoises which rely on protein-rich plants like wildflowers. Because of their diminutive size and high energy requirements, young tortoises are particularly reliant on small, protein-rich native plants. Relative to young desert tortoises, adults require less protein and may access larger plants, thereby increasing the range of acceptable forage species available to adults.

Due to a precipitous decline in desert tortoise populations throughout the species' range, FWS published an emergency rule listing the desert tortoise as endangered in 1989. (54 Fed. Reg. 32326.) The desert tortoise was also listed in 1989 under the California Endangered Species Act. The Mojave Desert distinct population segment ("DPS") of the desert tortoise, including all Agassiz's desert tortoises in California as well as southern Nevada and southwestern Utah, was listed as "threatened" in 1990. (55 Fed. Reg. 12178.) Critical habitat was designated in 1994. (59 Fed. Reg. 5820.)

A study published in 2007 shows significant divergence between various populations within the listed DPS of the desert tortoise. (*See* Murphy, Robert W., Berry, Kristin H., Edwards, Taylor, and McLuckie, Ann M., "A Genetic Assessment of the Recovery Units for the Mojave Population of the Desert Tortoise, *Gopherus agassizii*," *Chelonian Conservation and Biology* 2007, 6(2): 229-251.) Although scientists and FWS have in the past recognized some level of distinctness between desert tortoise populations based on habitat use, behavior, and other factors, this new information provides specific evidence of genetic divergence between these populations.

Most importantly, Murphy *et al.* found that tortoise populations in the West Mojave Desert are significantly distinct from other populations, including those in closest proximity, such as the Eastern Mojave, the Northeastern Mojave, and Eastern Colorado populations. They also found that the West Mojave population could be further distinguished into three subgroups. Given the extent of this genetic distinctness within the West Mojave population, genetic distinctness must be kept intact in order to maintain local adaptations to environmental

conditions.

U.S Fish and Wildlife Service published a Recovery Plan in 1994 for the Mojave population of the desert tortoise, and revised that Recovery Plan in 2011. (*See* U.S. Fish and Wildlife Service 2011. Revised Recovery Plan for the Mojave Population of the Desert Tortoise (*Gopherus agassazii*). Pgs 246. Available at http://www.fws.gov/Nevada/desert_tortoise/documents/recovery_plan/RRP_Mojave_Desert_TortoiseMay2011.pdf.) Both the original and updated Recovery Plan recognize a distinct West Mojave Recovery Unit. One goal of the Revised Recovery Plan includes “Maintain self-sustaining populations of desert tortoises within each recovery unit into the future.” The unabated ongoing declines in the West Mojave recovery unit clearly are not meeting the Recovery plan goal, despite recovery actions being identified for over twenty years.

The research paper that initially established two different tortoise species - Agassiz’s desert tortoise and Morafka’s desert tortoise - effectively collapsed the range of the Agassiz’s desert tortoise to only 30% of its original range, with 70% inhabited by the more widespread Morafka’s desert tortoise. That same paper suggests that with the now limited range and drastic declines in the population, the Agassiz’s desert tortoise might be endangered instead of threatened. (*See* Robert W. Murphy, Kristin H. Berry, Taylor Edwards, Alan E. Leviton, Amy Lathrop, and J. Daren Riedle 2011. The dazed and confused identity of Agassiz’s land tortoise, *Gopherus agassizii* (Testudines, Testudinidae) with the description of a new species, and its consequences for conservation. ZooKeys 113: 39–71 available at <http://zookeys.pensoft.net/articles.php?id=2586>.)

Extreme Pressures on the Western Mojave Desert Tortoises

Unfortunately, the species’ plight has only worsened since listing. Studies show that tortoise populations in the Mojave Desert are facing a near total collapse. One study plot showed an 84% decline between 1992 and 1999. In another study, surveys including 1,200 transects over a large area of the Western Mojave Desert, including the area where the translocations are proposed, failed to detect desert tortoises in areas where desert tortoises were previously considered to be common. The most recent data from the U.S. Fish and Wildlife Service’s Desert Tortoise Recovery Office monitoring documents over a 50% decline in the western Mojave

Desert population between 2004 and 2014 – one of the worst declines in the species range. Within the western Mojave Desert population, the Ord-Rodman Tortoise Conservation Area Unit, the decline over the last 10 years alone has been estimated to be 57%. (See U.S. Fish and Wildlife Service, 2015. Range-wide Monitoring of the Mojave Desert Tortoise (*Gopherus agassizii*): 2013 and 2014 Annual Reporting. Pgs 46 available at http://www.fws.gov/Nevada/desert_tortoise/documents/reports/2013/201314_rangewide_mojave_desert_tortoise_monitoring.pdf.)

The desert tortoises in the western Mojave Desert are already facing extreme pressures. The California Department of Fish and Wildlife explains that “the desert tortoise is severely threatened by population losses due” and “the loss of habitat, mortality from increased traffic, reduced quality of habitat altered by human presence and activity, and fragmentation of populations pose a significant and increasing problem for the viability of tortoise populations within the Western Mojave Plan Area.” California Department of Fish and Wildlife, California Rare & Endangered Reptiles Species Accounts, available at: <https://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=84014&inline>.)

This population has been especially hit hard by a fatal upper respiratory tract disease where long-term study plots have found population declines of up to 90 percent. (*Ibid.*) Additional threats to this already strained population include illegal shooting and collecting, lack of genetic diversity, roads, raven predation, and invasive plants. “Many tortoises fall victim to road kills One survey found 115 tortoise carcasses along 18 miles of highway in the west Mojave Desert.” (*Ibid.*) This figure represented a conservative estimate of tortoise mortality per mile per year and could not be applied to all roads and highways due to variation in traffic volume, speed, and sizes of tortoise populations near roads. An increase in the number of roads exposes a larger portion of the desert tortoise population to routine traffic and illegal OHV activity.

The numbers of common raven, which prey on juvenile tortoises, have increased with expanding human development and the proliferation of roads in the region. According to the USGS, the common raven has increased in numbers by 1,500 percent in the western Mojave Desert over the last several decades. (*Ibid.*) Another threat related to human development in the desert is the proliferation of non-native grasses, such as red brome, cheatgrass, and Mediterranean grass. Grazing, OHV use, and other types of ground disturbance facilitate the spread of these grasses, which are adapted to disturbance and outcompete the native grasses and

forbs that constitute food plants of the desert tortoise. Non-native plants often do not provide the levels of protein and nutrients needed by the desert tortoise, thereby adversely affecting tortoise health and reproduction. The decrease in the availability of nutritionally-important and preferred foods for the tortoise has likely decreased its ability to combat diseases and, very possibly, its immune responses to disease pathogens. The increase in grass cover between desert shrubs has been linked to increased fire frequency and fire intensity in the desert. Fires cause direct mortality when tortoises are burned or inhale lethal amounts of smoke, which can occur both in and out of burrows. Fire changes the composition of vegetation by facilitating the establishment of non-native grasses and removing forage plants. Fires also fragment tortoise habitat by creating patches of unsuitable habitat. (*Ibid.*)

Desert tortoises are suffering habitat loss and degradation and increased predation as a result of activities such as urbanization, agricultural development, grazing, off-road vehicle use, military training, recreational use, energy development and mining, and are at risk from diseases and collisions with vehicles. The special pressures on the western Mojave desert tortoise population must be taken into account in the CEQA review of a project that will pose danger to the tortoises from vehicles kills, increased illegal OHV activity, invasive plants, raven predation, and direct take by the destruction of burrows and moving of individual tortoises.

Significant Impacts

The Project will have significant impacts on the desert tortoise, not mitigated by proposals in the DMND. “Approximately 67 acres of the project footprint area are located in designated critical habitat for desert tortoises.” (MND at p. 5-71.) This includes a large segment of the Mojave National Preserve and the Colorado Desert, Western Mojave, and Eastern Mojave Recovery Units. The DMND states:

The ELM Project would temporarily impact approximately 45.8 acres and permanently impact 0.2 acres of suitable critical habitat for desert tortoise. Other proposed projects within 5 miles would impact large quantities of desert tortoise habitat (i.e., greater than 400 acres). In addition, the LVRAS Project could impact 95.1 acres of occupied desert tortoise habitat, including 44.7 acres of critical habitat. However, the impacts would be spread across 84 miles of the alignment. Cumulatively, these projects could contribute to habitat fragmentation and degradation, removal of food and shelter resources, changing normal behavior patterns, and attracting predator species such as ravens (*Corvus corax*) and coyotes (*Canis latrans*). However, all of these projects would be subject to permitting

and mitigation requirements under the Federal Endangered Species Act and California Endangered Species Act, which are intended to minimize and mitigate for impacts to species, both at the project level and in a regional context. The ELM Project would implement mitigation measures, including pre-activity surveys, monitoring, under vehicle checks, and excavation of desert tortoise burrows, and would restore disturbed land and/or compensate for permanent impacts as required by the USFWS. Other projects would be required to implement similar measures. These measures would reduce the ELM Project's contribution to cumulative impacts. Therefore, cumulative impacts to desert tortoise and its critical habitat are expected to not be cumulatively considerable after the required avoidance, minimization, and compensatory mitigation measures are implemented.

The fact that the Project will destroy designated critical habitat for an endangered species and will require a take permit are evidence of a potential substantial impact which must be reviewed via an EIR, not evidence that there will be no cumulative impacts! The mitigation measures will not serve to mitigate harms especially as it permits excavation of burrows, moving of tortoises, and other activities that are take as defined by the ESA. The heart of the ESA is its prohibition of "take" of endangered species. Generally, a "person," which under the ESA includes individuals, private entities, and government agencies, may not take any listed species. 16 U.S.C. § 1538(a)(1). Unless specifically exempted, the take prohibition applies to threatened species. 50 C.F.R. § 17.31. "Take" is broadly defined as harming, harassing, trapping, capturing, wounding, or killing a listed species either directly or by habitat degradation. 16 U.S.C. § 1532(19). The prohibition also applies to the acts of third parties whose acts bring about the taking. 16 U.S.C. § 1538(g). Additionally, the adverse modification and destruction of critical habitat, as is proposed here, is prohibited by the Endangered Species Act. (See 16 U.S.C. § 1536(a)(2).)

As explained above, the western Mojave desert tortoise population segments are already facing extreme pressure from massive population losses and disease, predation, vehicle strikes and habitat fragmentation. This population is significantly distinct from other populations, including those in closest proximity, such as the Eastern Mojave, the Northeastern Mojave, and Eastern Colorado populations. Given the extent of this genetic distinctness within the West Mojave population, genetic distinctness must be kept intact in order to maintain local adaptations to environmental conditions. This is all the more important given the extreme pressures this population is already suffering. The proposed mitigation in the DMND that conservation land be purchased is not sufficient to address the significant impact to this population and is also

something that the Commission can legally enforce since this is within the purview of the United States Fish and Wildlife Service. An EIR is needed to address the significant impact for the desert tortoise, in particular the western Mojave population.

b. This Project Will Significantly Impact Many Other Special Status Species

The DMND identifies several rare species which will be significantly impacted including “135 special-status plants potentially present in the BRSA.” (DMND at p. 5-66.) The DMND provides insufficient factual basis on which it can base a finding that an EIR is not necessary because it has not conducted any study in regards to most of these species. It also provides no special mitigation or protection measures for these species. For plants, seasonal surveys were not performed, thus likely missing a majority of the highly seasonal special status desert plants.

The DMND states that desert bighorn sheep and desert tortoises were observed within or immediately adjacent to the BRSA during site visits for the Proposed Project and that the following “special-status species present or with a high potential to occur within or near the Project ROW or footprint include the following”

- Banded Gila monster (BLM Sensitive Species, CA Species of Special Concern, NV Protected Species)
- Desert rosy boa (NV Protected Species)
- Mojave fringe-toed lizard ([Not expected in NV] BLM Sensitive Species, CA Species of Special Concern)
- Golden eagle (Fully Protected, CA Fish and Game Code; federal Bald and Golden Eagle Protection Act)
- Swainson’s hawk – migratory flyover (CA Threatened)
- Gray vireo (BLM Sensitive Species, CA Species of Special Concern)
- Western burrowing owl (CA Species of Special Concern)
- American badger ([Low potential in NV] CA Species of Special Concern)
- Desert bighorn sheep (BLM Sensitive Species, Fully Protected, CA Fish and Game Code)
- Pallid bat ([Not expected in NV] BLM Sensitive Species, CA Species of Special Concern)
- Western mastiff bat (BLM Sensitive Species, CA Species of Special Concern)

The DMND identified special-status species with a moderate potential to occur within or adjacent to the Project ROW or footprint to include:

- Bald eagle (CA Endangered, Fully Protected; federal Bald and Golden Eagle Protection Act)
- Peregrine falcon (Fully Protected, CA Fish and Game Code)
- Bendire's thrasher ([Low potential in NV] BLM Sensitive Species, DRECP, CA Species of Special Concern)
- Pallid San Diego pocket mouse ([Not expected in NV] CA Species of Special Concern)

As explained above, all of these species meet the definition of endangered, rare or threatened species. The Project will have potential substantial impact on these species and EIR must, therefore, be prepared. The DMND provides no specific mitigation or protection measures for all of these species other than generally "conducting surveys and avoidance." Conducting surveys is not a mitigation measure and is work that should have been done as part of the initial study. The DMND is deficient in that it is not based on an initial study that actually studied the environmental conditions of the Project and cannot, therefore, "Provide documentation of the factual basis for the finding in a Negative Declaration that a project will not have a significant effect on the environment. (Guidelines section 15063.)

Stating that special status species must be avoided is woefully inadequate and does not serve to mitigate the substantial impacts that these species will suffer from the Project. For example, the Mojave Fringe-toed lizard is addressed only as follows: "Pre-activity Surveys: No more than seven days prior to the onset of ground-disturbing activities, an agency-approved biologist – with experience monitoring and handling desert tortoise – will conduct a pre-activity survey in all work areas within potential desert tortoise, banded Gila monster, desert rosy boa, or Mojave fringe-toed lizard habitat, plus an approximately 300-foot buffer. If potentially suitable burrows, sand fields, or rock piles are found, they shall be checked for occupancy. . . . Monitoring: The approved tortoise biologist shall be available on site to monitor any work areas for desert tortoise, banded Gila monster, desert rosy boa, and Mojave fringe-toed lizard as needed." (DMND at p. 1-24.) The rest of MM BR-9 addresses only desert tortoises.

This is despite the fact that "It has been documented in the CNDDDB within 0.25 miles of the BRSA in California. Suitable habitat for Mojave fringe-toed lizard is located within the Project area in California, including large dune or sandfield systems at the Kelso Dunes. Additionally, suitable habitat is found in smaller, scattered areas of windblown sand and adjacent

shrublands where sand accumulates. Mojave fringe-toed lizard may occur in or near any suitable windblown sand habitat within its geographic range along the ELM route.” (DMND at p. 5-69)

The DMND fail to address the fact that the sand habitat that the lizard depends upon will be significantly harmed by the Project, instead claiming that impacts to this habitat will be only temporary: “Note that most “temporary” habitat impacts would be long-term or permanent due to slow recovery of desert vegetation. One important exception to this generality is temporary impacts to active sandfield or dune habitat supporting Mojave fringetoed lizard, where returning windblown sand will naturally restore pre-disturbance conditions. The BLM, steward of this BLM special status species, explains why this analysis is wrong, “The loose wind-blown sand habitat, upon which the MFTL is dependent, is a fragile ecosystem requiring the protection against both direct and indirect disturbances (Weaver, 1981; Beatley, 1994; Barrows, 1996). Potential direct disturbances include habitat loss or damage from urban development, off-highway vehicles (OHV), and agriculture. Potential indirect disturbances are associated with the disruption of the dune ecosystem source sand, wind transport, and sand transport corridors.” (BLM, Mojave Fringe Toed Lizard species report, available at :

[https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=6&ved=2ahUKEwj7y9b36c7kAhVQ_J4KHfeNBUAQFjAFegQIAhAI&url=https%3A%2F%2Fwww.ca.blm.gov%2Fpdfs%2Fcdd_pdfs%2Ffringe1.PDF&usg=AOvVaw3ufcQyHbRfJ1T6ATXgrOcm.\)](https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=6&ved=2ahUKEwj7y9b36c7kAhVQ_J4KHfeNBUAQFjAFegQIAhAI&url=https%3A%2F%2Fwww.ca.blm.gov%2Fpdfs%2Fcdd_pdfs%2Ffringe1.PDF&usg=AOvVaw3ufcQyHbRfJ1T6ATXgrOcm.))

The DMND also includes no specific measures to protect the desert bighorn sheep. As a fully protected species under California Fish and Game Code, desert bighorn sheep “may not be taken or possessed at any time. No provision of this code or any other law shall be construed to authorize the issuance of a permit or license to take a fully protected mammal, and no permit or license previously issued shall have any force or effect for that purpose.” (Cal. Fish and Game Code, § 4700.) Fish and Game Code section 86 defines “take” as to “hunt, pursue, catch, capture, or kill, or attempt to hunt, pursue, catch, capture, or kill.” This definition governs construction of the Fish and Game Code generally unless particular provisions or context require otherwise. (*Id.*, § 2.) The DMND describes take of desert bighorn sheep, “Direct impacts could include mortality from vehicle strikes” yet provides no specific measures to protect the sheep.

C. The DMND Fails to Account for Cumulative Impacts

A conclusion that the cumulative impact is “less than significant” must be supported by substantial evidence (Guidelines § 15130(a)(2)), not argument, speculation, unsubstantiated opinion or narrative, [or] evidence that is clearly inaccurate or erroneous” (Cal. Pub. Res. Code § 21080, subd. (e)(2).) Merely stating that compliance with statutes will reduce significant impacts to the “less than” level is mere speculation. Here, the DMND makes such a statement: “One or more of the cumulative scenario projects within 5 miles of the Proposed Project, or other projects in the region (e.g., residential development or renewable energy projects) may affect these species, and may lead to a cumulatively significant impact. However, due to the limited extent of any potential ELM Project impacts to special-status wildlife, these impacts would not contribute considerably to regional cumulative impacts.” (DMND at p. 5-412)

The DMND thus concludes that the Project's contribution to cumulative impacts to biological resources would not be considerable and would be less than significant since the Project would implement mitigation measures. However, the mitigation measures are proposed to reduce or avoid Project impacts, and are not designed to alleviate *cumulative* impacts as they are required to under Section 15130(a)(3) of CEQA. A proposed project's incremental effects may be cumulatively considerable even when its individual effects are limited. (Guidelines §§ 15064(h)91), 15065(a)(3), 15355(b).) The critical question is whether any additional amount of effect is significant in the context of the existing cumulative effect. (*Communities for a Better Environment v. California Resources Agency*, 103 Cal.App.4th 98, 119 (2002).) The DMND does not answer this question and its cumulative impacts analysis is, therefore, inadequate and does not show that there will be no significant impacts.

D. The DMND Fails to Account for Growth Inducing Impacts

The DMND provides no discussion regarding growth-inducing impact of a project. (Guidelines §§ 21100(b)(5); 21156.) This project, by design, will be growth inducing to the detriment of the lands and wildlife throughout the Southwest as its stated purpose is to increase “the amount of power delivered from Californian's Ivanpah Valley, Nevada, and Arizona.” The growth inducing impacts will result in significant impacts to the environment especially biological resources and must be examined in an EIR.

Wild Tree looks forward to working to assure that the Project and environmental review conforms to the requirements of state and federal law and to assure that all significant impacts to the environment are fully analyzed, mitigated or avoided. In light of many significant, unavoidable environmental impacts that will result from the Project, we strongly urge the Project not be approved in its current form and absent the preparation of an EIR.

Sincerely,

A handwritten signature in cursive script that reads "April Rose Maurath Sommer".

April Rose Maurath Sommer
Executive & Legal Director
Wild Tree Foundation