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FRESNO COUNTY
DEPT. OF
PUBLIC WORKS & PLANNING

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COUNTY OF FRESNO

DEC 03 2018

DEPARTMENT OF PUBLIC WORKS
AND PLANNING
DEVELOPMENT SERVICES DIVISION

EIR 7225

November 27, 2018

Via Regular Mail

Christina Monfette
Fresno County Department of Public Works and Planning
Development Services and Capital Projects Division
2220 Tulare Street, Sixth Floor
Fresno, CA 93721

Re: Protest re Final Impact Report for the proposed Little Bear Solar Project
EIR No. 7225, CUP Nos. 3550, 3551, 3552, 3553, 3577

Dear Ms. Monfette:

This law firm represents Save Our Mojave, a 501(c)(3) non-profit organization working to raise public awareness about some of the most pressing issues facing California's deserts, including unchecked damage to the environment and wildlife.

We are writing in response to the Final Environmental Impact Report ("EIR") for the proposed Little Bear Project (the "Little Bear Project"), for the construction and operation of a 180 megawatt alternating current power plant in Fresno County, State of California. Our comment letter regarding the project, sent October 8, 2018, was included in the EIR, as well as responses to our specific concerns.

We would like to further respond and reiterate the necessity of a new Little Bear EIR that fully explores the cumulative impact of the Little Bear Project and the nearby North Star Project. According to First Solar's website, it is the developer/part-owner of a 61 megawatt solar project, located just across the street from the proposed Little Bear site, called the North Star Solar Facility. A press release dated May 1, 2015, found on Savannah CEO's website states

First Solar will build, operate and maintain the North Star Solar Facility. Construction began in July 2014, and the plant is expected to enter commercial operation this June. The facility is expected to be capable of generating enough electricity to help meet the energy needs of more than 21,000 average homes.

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In comment A2, you write

Contrary to the assertion in the comment, the North Star Solar Facility is owned by Southern Power and 8point31 – not First Solar.

This statement is part and parcel of an ongoing attempt by the County to falsely and misleadingly conceal and obfuscate the common ownership and operation of North Star and Little Bear. The suggestion that the facility is not “owned” by First Solar is categorically false and known to be false by both the County and First Solar.

While it is true that a majority of the North Star Solar Facility is owned by Southern Power and 8point31, not all of the project is so owned. As noted in the Fresno Bee, April 30, 2015, Exhibit A, “A minority interest in the 60 megawatt solar photovoltaic project will continue to be owned by an affiliate of First Solar Inc. . .”

Indeed, the County is knowingly false by suggesting that ownership of 8point31 is not “ownership” by First Solar. First Solar is a partner in 8point31. The IPO specifically listed on the NASDAQ website for 8point31 states: “We are a growth-oriented limited partnership **formed by First Solar and SunPower to own, operate and acquire solar energy generation projects.** Upon completion of this offering, our Initial Portfolio, which we will acquire from our Sponsors, will have interests in 432 MW of solar energy projects . . .”

The suggestion of completely separate “ownership” is a ruse by the County to attempt to mislead the public and create separation between North Star and Little Bear when they are but a single operating site. As noted in the Project Description February 2017, page 5.

The Project will be **immediately adjacent to the North Star Solar Power Project** and approximately one-half mile south of the Mendota Federal Correction Institute

The more relevant inquiry is not ownership, but operation. The operation of North Star has always been by First Solar. Thus, the operator, purpose and output of the two facilities, which border, are the same. “First Solar will build, operate and maintain the North Star Facility.” Exhibit D. Press Release, May 1, 2015 from Southern Power.

In comment A2 you write:

The commenter’s assertion that North Star “will likely be operated as a single project” with Little Bear does not appear to be based on any factual evidence.

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The factual evidence is that First Solar operates both facilities. Both facilities are adjacent. The assertion that there is no "factual evidence" of cooperation between the two projects is simply inaccurate. Indeed, the County failed to demand full records showing all of the contractual and operating agreements binding the two projects together.

The projects are designed for the same purpose and are located adjacent to one another. To expect that two such similar projects within such close proximity of one another would never work in tandem is unreasonable. The current EIR does not appropriately analyze the cumulative impact of Little Bear and North Star. The projects' impact on the surrounding environment should be considered together.

Moreover, the EIR details that Little Bear and North Star will share facilities and infrastructure:

The Project would share, where feasible, the existing 2 mile-long 115 kV gen-tie line and underground communication lines between the North Star Substation and PG&E's Mendota Substation; may share a portion of the North Star Solar Project site for construction worker parking, temporary construction offices, and temporary water storage tanks; and may use water from the North Star Solar Project well.

You add in your response, "The Draft EIR elsewhere is clear that energy to be generated by the Project, if approved, would tie into or be carried on North Star Solar Project interconnection infrastructure."

Little Bear and North Star will share important infrastructure, and Little Bear will make use of North Star facilities where feasible, yet their cumulative environmental impact has not been addressed, and the argument is made that they are "separate and discrete" projects. An EIR must analyze cumulative impacts whenever a proposed project's individual impacts have the potential to combine with related impacts from other projects to compound environmental harm. The Guidelines define "cumulative impacts" as "two or more individual effects which, when considered together, are considerable or ... compound or increase other environmental impacts." Guidelines § 15355J.

If even an insignificant portion of the cumulative impact is caused by the proposed project, the EIR must analyze it. The ultimate goal of this analysis is to determine whether the proposed project's incremental contribution is "cumulatively considerable" and thus significant. [See Guidelines § 15130(a). A project's incremental impact may be individually limited but cumulatively considerable when viewed in connection with the environmental impacts from past, present, and probable future projects. Guidelines § 15130(a).

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In your response, you write, "Who coordinates proposed activities and whether there are legal agreements between entities are irrelevant under CEQA, which is concerned only with the potential direct, indirect, and cumulative impacts of the proposed activities." This is inaccurate. The developer has failed to show the full nature of the agreements to operate the project jointly, which could include multiple areas and effectively mean joint operation of a single plant. More fundamentally, two projects could create the same environmental impact in the exactly the same area. In light of this, the likely coordination between North Star and Little Bear is certainly not "irrelevant."

Your response also fails to acknowledge that a proposed project's incremental effects may be "cumulatively considerable" even if its individual effects are limited. Guidelines §§ 15064(h)(1), 15065(a)(3), 15355(b). CEQA does not excuse an EIR from evaluating cumulative impacts simply because the project-specific analysis determined its impacts would be "less than significant." Similarly, a "less than significant" impact conclusion at the project level does not guarantee the project's contribution to a significant cumulative impact will be less than "cumulatively considerable."

Here, the analysis failed to even address the immediately neighboring project. The analysis cannot withstand scrutiny, because here the lead agency and developer made no attempt to accurately describe cumulative conditions despite the existence of relevant data. The failure is particularly pronounced because it is not possible to determine the significance of an impact without actual data.

The case law is in accord. In *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 729, 270 Cal.Rptr. 650, the Court of Appeal found the analysis of cumulative project impacts on water resources inadequate where it provided no information regarding the expected groundwater impacts of nearby energy projects except to say they "would impact regional water sources, but these impacts would be lessened by numerous programs and [conservation measures]."

The absence of data was fatal. The court held that "[a]bsent some data indicating the volume of ground water used by all such projects, it is impossible to evaluate whether the impacts associated with their use of ground water are significant and whether such impacts will indeed be mitigated by the water conservation efforts upon which the EIR relies." 221 Cal.App.3d at 729-730.

Also relevant is *Communities for a Better Environment v. California Resources Agency* [(2002) 103 Cal.App.4th 98, 126 Cal.Rptr.2d 441]. The Court invalidated certain CEQA

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provisions and clarified Kings County Farm Bureau v. City of Hanford [(1990) 221 Cal.App.3d 692, 270 Cal.Rptr. 650].

In Kings County, the Court rejected the cumulative analysis prepared for a proposed coal-fired cogeneration plant in which the lead agency determined the project's impact on air quality was not cumulatively considerable because it would contribute less than one percent of area emissions for all criteria pollutants. [221 Cal.App.3d at 718-719.] The court criticized the focus on the ratio between the project's impacts and the overall environmental problem, rather than on the combined effect of the project in addition to already adverse conditions.

Under this (impermissible) approach, which the court dubbed the "ratio theory," "the greater the overall problem, the less significance a project has in a cumulative impact analysis." [221 Cal.App.3d at 721.] Instead of trivializing a project's impacts by comparing them to the impacts of other past, present, and probable future projects, CEQA requires the lead agency to first combine the impacts. When this is done properly, the EIR may find that the scope of the environmental problem is so severe that even a minuscule incremental change would be cumulatively considerable and thus significant.

An adequate discussion of cumulative impacts must use one of the following methods, known respectively as the "list" approach and the "summary of projections" (or "plan") approach: (1) A list of past, present, and probable future projects producing related or cumulative impacts, including, if necessary, those projects outside the control of the agency, or (2) A summary of projections contained in an adopted local, regional or statewide plan, or related planning document, that describes or evaluates conditions contributing to the cumulative effect . . . [Guidelines § 15130(b)(1).] These represent two distinct ways of identifying the "other projects" that add to the proposed project's incremental impacts.

The California Supreme Court has explained that the requirement to assess past projects "signifies an obligation to consider the present project in the context of a realistic historical account of relevant prior activities that have had significant environmental impacts." [Environmental Protection Information Center v. California Dept. of Forestry & Fire Protection [(2008) 44 Cal.4th 459,524, 118 Cal.Rptr.3d 352].] To do this effectively, an EIR "must reasonably include information about past projects to the extent such information is relevant to the understanding of the environmental impacts of the present project considered cumulatively with other pending and possible future projects." [44 Cal.4th at 525.]

Bakersfield Citizens for Local Control v. City of Bakersfield, 124 Cal.App.4th 1184, 1216 (2004) found that, in the case of two separately owned and operated shopping centers,

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separate ownership did not exempt the City and developers from considering cumulative impact of the two centers, which were geographically close:

There is no merit to the position of City and developers that cumulative impacts analysis does not require consideration of both shopping centers because, in each case, the other shopping center is outside the radius of the “project area” as defined in EIR's. HN25 An EIR is required to discuss significant impacts that the proposed project will cause in the area that is affected by the project. (CEQA Guidelines, § 15126.2, subd. (a).) This area cannot be so narrowly defined that it necessarily eliminates a portion of the affected environmental setting.

The argument of separate “ownership” is irrelevant to the issue of cumulative effects. “The significance of a comprehensive cumulative impacts evaluation is stressed in CEQA.” (Schoen v. Department of Forestry & Fire Prevention (1997) 58 Cal.App.4th 556, 572 [68 Cal.Rptr.2d 343].) Proper cumulative impact analysis is vital “because the full environmental impact of a proposed project cannot be gauged in a vacuum. One of the most important environmental lessons that has been learned is that environmental damage often occurs incrementally from a variety of small sources. These sources appear insignificant when considered individually, but assume threatening dimensions when considered collectively with other sources with which they interact.

You claim:

Once a project has been approved, the lead agency's role in project approval is completed unless further discretionary approval on that project is required.” Third, the County did prepare an EIR (the most detailed form of CEQA documentation) for the Little Bear Solar Project. For these reasons, the existing North Star Solar Project and proposed Little Bear Solar Project are separate and discrete.

The fact that past projects have created environmental damage does not lessen the need for cumulative impact analysis. Precisely such an argument was rejected in *AquAlliance v. United States Bureau of Reclamation*, 287 F. Supp. 3d 969, 1036 (E.D. Cal 2018)

The CBE court found these two provisions inconsistent with controlling CEQA law because they “turn[ed] cumulative impact analysis on its head by diminishing the need to do a cumulative impact analysis as the cumulative impact problem worsens.” *Id.* at 118. The court's reasoning is instructive.

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The seminal decision is Kings County [Farm Bureau v. City of Hanford, 221 Cal.App.3d 692, 718, 270 Cal.Rptr.650 (1990)], in which the Court concluded that an EIR inadequately considered an air pollution (ozone) cumulative impact:

The [EIR concludes the project's contributions to ozone levels in the area would be immeasurable and, therefore, insignificant because the [cogeneration] plant would emit relatively minor amounts of [ozone] precursors compared to the total volume of [ozone] precursors emitted in Kings County. The EIR's analysis uses the magnitude of the current ozone problem in the air basin in order to trivialize the project's impact." The court concluded: "The relevant question to be addressed in the EIR is not the relative amount of precursors emitted by the project when compared with preexisting emissions, but whether any additional amount of precursor emissions should be considered significant in light of the serious nature of the ozone problems in this air basin.

Los Angeles Unified [Sch. Dist. v. City of Los Angeles, 58 Cal.App.4th 1019, 68 Cal.Rptr.2d 367 (1997)] followed the Kings County approach. It found an EIR inadequate for concluding that a project's additional increase in noise level of another 2.8 to 3.3 dBA was insignificant given that the existing noise level of 72 dBA already exceeded the regulatory recommended maximum of 70 dBA. The Court concluded that this "ratio theory" trivialized the project's noise impact by focusing on individual inputs rather than their collective significance. The relevant issue was not the relative amount of traffic noise resulting from the project when compared to existing traffic noise, but whether any additional amount of traffic noise should be considered significant given the nature of the existing traffic noise problem.

From Kings County and Los Angeles Unified, the guiding criterion on the subject of cumulative impact is whether any additional effect caused by the proposed project should be considered significant given the existing cumulative effect.

The Eastern District of California concluded,

In the end, the greater the existing environmental problems are, the lower the threshold should be for treating a project's contribution to cumulative impacts as significant. *Id.* at 120.

Given the underlying case law, we respectfully disagree with your conclusion that a new EIR is not necessary for the proposed Little Bear Solar Project. Considering that Little Bear and North Star share the same developer and operate for the same purpose, and given their immediate

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proximity to one another, the case law supports the need for a significant investigation into the cumulative environmental impact of the two projects.

Sincerely,

A handwritten signature in cursive script that reads "John A. Belcher". The signature is written in black ink and is positioned above the printed name.

John A. Belcher

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