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8 HILDEBERTO SANCHEZ, RALPH FIGUEROA,
9 and LABORERS INTERNATIONAL UNION OF
10 NORTH AMERICA, LOCAL UNION 1184

10 BEFORE THE STATE WATER RESOURCES CONTROL BOARD

11 IN RE: PETITION OF GARY CRUZ,) PETITION TO REVIEW STATE
12 HILDEBERTO SANCHEZ, RALPH FIGUEROA,) WATER RESOURCES CONTROL
13 and LABORERS INTERNATIONAL UNION OF) BOARD EXECUTIVE DIRECTOR’S
14 NORTH AMERICA, LOCAL UNION 1184 FOR) ISSUANCE OF WATER QUALITY
15 REVIEW OF ACTIONS BY THE STATE WATER) CERTIFICATION AND APPROVAL
16 RESOURCES CONTROL BOARD’S EXECUTIVE) OF ENVIRONMENTAL IMPACT
17 DIRECTOR ISSUING A 401 WATER QUALITY) REPORT
18 CERTIFICATION AND NOTICE OF)
19 DETERMINATION APPROVING THE)
20 ENVIRONMENTAL IMPACT REPORT,)
21 FINDINGS, STATEMENT OF OVERRIDING)
22 CONSIDERATIONS, AND MITIGATION AND)
23 MONITORING PLAN FOR THE EAGLE)
24 MOUNTAIN PUMPED STORAGE PROJECT,)
25 FEDERAL ENERGY REGULATORY)
26 COMMISSION PROJECT NO. 13123, RIVERSIDE)
27 COUNTY.)

22 Pursuant to 23 California Code of Regulations (“CCR”) § 3867, Gary Cruz, Hildeberto
23 Sanchez, Ralph Figueroa, and Laborers International Union of North America, Local Union
24 1184 (collectively “Petitioners”) hereby petition the State Water Resources Control Board
25 (“State Board”) to review the State Board Executive Director’s July 15, 2013 issuance of a water
26 quality certification (“certification”) pursuant to section 401 of the Federal Water Pollution
27 Control Act (“Clean Water Act”) for the Eagle Mountain Pumped Storage Project, Federal
28 Energy Regulatory Commission Project No. 13123 (“Eagle Mountain Project” or “Project”).

1 Petitioners additionally petition the State Board to review the Executive Director’s July 15, 2013
2 Notice of Determination approving the Project, the Final Environmental Impact Report
3 (“FEIR”), Findings, the Mitigation and Monitoring Plan, and the Statement of Overriding
4 Considerations for the Project.

5 23 CCR § 3867(c) mandates that a “petition for reconsideration shall be submitted in
6 writing to and received by the state board within 30 days of any action or failure to act taken by
7 the executive director...” Accordingly, this petition is timely submitted.

8 As pointed out in Petitioners’ comments to the State Board staff on the Project, numerous
9 aspects of the project are inconsistent with the requirements of the California Environmental
10 Quality Act (“CEQA”), Pub. Resources Code § 21000 *et seq.* See Petitioners’ April 10, 2013
11 Comment Letter and accompanying exhibits Re: Eagle Mountain Pumped Storage Water Project,
12 EIR (SCH #2009011010) and Section 401 Certification (FERC Project No. 13123). Moreover,
13 the State Board’s process improperly delegates the final approval of the Section 401 certification
14 and the certification of the FEIR to its staff. *Id.*¹

15 Petitioners request that the State Board issue an order (1) vacating the Section 401
16 certification for the Project; (2) vacating the certification of the FEIR for the Project, as well as
17 the accompanying Findings, Mitigation Monitoring and Reporting Plan, and the Statement of
18 Overriding Considerations; (3) vacating the July 15, 2013 Notice of Determination regarding the
19 certification of the Project’s EIR, and (4) order staff to amend the EIR in order to address each of
20 Petitioners’ concerns set forth or incorporated by reference in this Petition for Review and
21 present a revised EIR and to present to the full State Board a new decision to either grant or deny
22 the Section 401 certification.

23
24
25 ¹ Should the State Board render a decision on the merits of this petition for review, Petitioners
26 would expect some parties may argue that this issue arguably becomes moot. Petitioners,
27 however, believe the issue is not moot as it will be repeated in the future given the presence of
28 the State Board’s delegation regulation (23 CCR § 3838(a)) and the fact that interested parties
should not be required to have to incur the costs and time associated with a second petition for
review procedure necessitated by the State Board’s improper delegation of final decision-making
authority to the Executive Director.

1 **I. NAME AND CONTACT INFORMATION OF PETITIONERS.**

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25 **II. SPECIFIC ACTION THE STATE BOARD IS REQUESTED TO RECONSIDER.**

26 This petition seeks review of the State Board's Executive Director's issuance of a water
27 quality certification pursuant to section 401 of the Clean Water Act for the Eagle Mountain
28 Project. This petition also seeks review of the Executive Director's approval of the FEIR,
Findings, the Mitigation Monitoring and Reporting Plan, the Statement of Overriding
Considerations for the Project and any other approvals for the Project.

III. THE DATE ON WHICH THE CERTIFICATION ACTION OCCURRED.

Both the certification and NOD were issued on July 15, 2013.

1 **IV. STATEMENT OF REASONS WHY THE ACTION WAS IMPROPER.**

2 The EIR, as certified by the Executive Director, is deficient as matter of law in its
3 discussions of the Project’s impacts and mitigations for greenhouse gas emissions, biological
4 resources, and other impacts of the Project by applying improper baselines, analyzing impacts in
5 a manner inconsistent with law, and failing to rely upon substantial evidence in its analysis of
6 impacts. In addition, the Executive Director has no authority pursuant to the Water Code and
7 the Public Resources Code to issue a certification pursuant to Section 401 of the Clean Water
8 Act, certify a final EIR under CEQA, and adopt the accompanying findings, mitigation and
9 monitoring requirements, and a statement of overriding considerations.

10 **A. Legal Standards**

11 **1. EIR**

12 CEQA requires that an agency analyze the potential environmental impacts of its
13 proposed actions in an EIR (except in certain limited circumstances). (See, e.g., Pub. Resources
14 Code, § 21100.) The EIR is the very heart of CEQA. (*Dunn-Edwards v. BAAQMD* (1992) 9
15 Cal.App.4th 644, 652.) “The ‘foremost principle’ in interpreting CEQA is that the Legislature
16 intended the act to be read so as to afford the fullest possible protection to the environment
17 within the reasonable scope of the statutory language.” (*Communities for a Better Environment*
18 *v. Cal. Resources Agency* (2002) 103 Cal.App.4th 98, 109 (“*CBE v. CRA*”).)

19 CEQA has two primary purposes. First, CEQA is designed to inform decision makers
20 and the public about the potential, significant environmental effects of a project. (14 Cal. Code
21 Regs. (“CEQA Guidelines”) § 15002(a)(1).) “Its purpose is to inform the public and its
22 responsible officials of the environmental consequences of their decisions before they are made.
23 Thus, the EIR ‘protects not only the environment but also informed self-government.’” (*Citizens*
24 *of Goleta Valley v. Board of Supervisors* (1990) 52 Cal. 3d 553, 564.) The EIR has been
25 described as “an environmental ‘alarm bell’ whose purpose it is to alert the public and its
26 responsible officials to environmental changes before they have reached ecological points of no
27 return.” (*Berkeley Keep Jets Over the Bay v. Bd. of Port Comm’rs.* (2001) 91 Cal. App. 4th
28 1344, 1354 (“*Berkeley Jets*”); *County of Inyo v. Yorty* (1973) 32 Cal.App.3d 795, 810.)

1 Second, CEQA requires public agencies to avoid or reduce environmental damage when
2 “feasible” by requiring “environmentally superior” alternatives and all feasible mitigation
3 measures. (CEQA Guidelines, § 15002(a)(2) and (3); See also, *Berkeley Jets, supra*, 91 Cal.
4 App. 4th at p. 1354; *Citizens of Goleta Valley, supra*, 52 Cal.3d at p. 564.) The EIR serves to
5 provide agencies and the public with information about the environmental impacts of a proposed
6 project and to “identify ways that environmental damage can be avoided or significantly
7 reduced.” (CEQA Guidelines, §15002(a)(2).) If the project will have a significant effect on the
8 environment, the agency may approve the project only if it finds that it has “eliminated or
9 substantially lessened all significant effects on the environment where feasible” and that any
10 unavoidable significant effects on the environment are “acceptable due to overriding concerns.”
11 (Pub. Resources Code, § 21081; CEQA Guidelines, § 15092(b)(2)(A) & (B).)

12 While the courts review an EIR using an “abuse of discretion” standard, “the reviewing
13 court is not to ‘uncritically rely on every study or analysis presented by a project proponent in
14 support of its position. A ‘clearly inadequate or unsupported study is entitled to no judicial
15 deference.’” (*Berkeley Jets*, 91 Cal. App. 4th at p. 1355 (emphasis added), quoting, *Laurel
16 Heights Improvement Assn. v. Regents of University of California*, 47 Cal. 3d 376, 391 409, fn.
17 12 (1988).) As the court stated in *Berkeley Jets*, 91 Cal. App. 4th at p. 1355:

18 A prejudicial abuse of discretion occurs “if the failure to include relevant
19 information precludes informed decisionmaking and informed public
20 participation, thereby thwarting the statutory goals of the EIR process.” (*San
21 Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27
22 Cal.App.4th 713, 722; *Galante Vineyards v. Monterey Peninsula Water
23 Management Dist.* (1997) 60 Cal. App. 4th 1109, 1117; *County of Amador v. El
24 Dorado County Water Agency* (1999) 76 Cal. App. 4th 931, 946.)

23 2. Supplemental EIR

24 Recirculation of an EIR prior to certification is required “when the new information
25 added to an EIR discloses: (1) a new substantial environmental impact resulting from the project
26 or from a new mitigation measure proposed to be implemented (cf. CEQA Guidelines, § 15162,
27 subd. (a)(1), (3)(B)(1)); (2) a substantial increase in the severity of an environmental impact
28 unless mitigation measures are adopted that reduce the impact to a level of insignificance (cf.
CEQA Guidelines, § 15162, subd. (a)(3)(B)(2)); (3) a feasible project alternative or mitigation

1 measure that clearly would lessen the environmental impacts of the project, but which the
2 project's proponents decline to adopt (cf. CEQA Guidelines, § 15162, subd. (a)(3)(B)(3), (4)); or
3 (4) that the draft EIR was so fundamentally and basically inadequate and conclusory in nature
4 that public comment on the draft was in effect meaningless.” (*Laurel Heights Improvement*
5 *Assn. v. Regents of University of California* (1993) 6 Cal. 4th 1112, 1130, citing *Mountain Lion*
6 *Coalition v. Fish & Game Comm’n* (1989) 214 Cal.App.3d 1043.)

7 Significant new information requiring recirculation can include:

8 (1) A new significant environmental impact would result from the project or from
9 a new mitigation measure proposed to be implemented.

10 (2) A substantial increase in the severity of an environmental impact would result
11 unless mitigation measures are adopted that reduce the impact to a level of
12 insignificance.

13 (3) A feasible project alternative or mitigation measure considerably different
14 from others previously analyzed would clearly lessen the significant
15 environmental impacts of the project, but the project's proponents decline to adopt
16 it.

17 (4) The draft EIR was so fundamentally and basically inadequate and conclusory
18 in nature that meaningful public review and comment were precluded.

19 (CEQA Guidelines, § 15088.5(a).)

20 The FEIR failed to analyze significant environmental impacts pertaining to the Project
21 and to fully consider available mitigation measures to address those impacts. A revised EIR was
22 required to be prepared and recirculated to address these deficiencies.

23 **B. The DEIR Fails to Accurately Establish the Project’s Environmental
24 Settings or “Baseline.”**

25 **1. CEQA Baseline Standard**

26 To facilitate its informational goals, an EIR must contain an accurate description of the
27 project’s environmental setting, or “baseline.” The CEQA “baseline” is the set of environmental
28 conditions against which to compare a project’s anticipated impacts. (*Communities for a Better
Environment v. So Coast Air Qual. Mgmt. Dist.* (“*CBE v. SCAQMD*”) (2010) 48 Cal. 4th 310,
321.) CEQA Guidelines section 15125(a) states, in pertinent part, that a lead agency’s
environmental review under CEQA:

1 ...must include a description of the physical environmental conditions in the
2 vicinity of the project, as they exist at the time [environmental analysis] is
3 commenced, from both a local and regional perspective. This environmental
4 setting will normally constitute the baseline physical conditions by which a Lead
Agency determines whether an impact is significant.

5 (See, *Save Our Peninsula Committee v. County of Monterey* (2001) 87 Cal.App.4th 99, 124-125
6 (“*Save Our Peninsula*”).) As the court of appeal has explained, “the impacts of the project must
7 be measured against the ‘real conditions on the ground,’” and not against hypothetical permitted
8 levels. (*Id.* at 121-123.) The Supreme Court has also ruled:

9 An approach using hypothetical allowable conditions as the baseline results in
10 “illusory” comparisons that “can only mislead the public as to the reality of the
impacts and subvert full consideration of the actual environmental impacts,” a
result at direct odds with CEQA’s intent.

11 (*CBE v. SCAQMD*, 48 Cal.4th at p. 322.)

12 Using a skewed baseline “mislead(s) the public” and “draws a red herring across the path
13 of public input.” (*San Joaquin Raptor Rescue Center v. County of Merced* (2007) 149
14 Cal.App.4th 645, 656; *Woodward Park Homeowners v. City of Fresno* (2007) 150 Cal.App.4th
15 683, 708-711.)

16 **2. The EIR Applies a Hypothetical and Illusory Baseline In Its GHG**
17 **Emissions Analysis.**

18 The FEIR admits that the Project will require 1.25 kWh for every 1 kWh of power the
19 Project will generate. (FEIR, p. 2.1.) Thus, in order to generate the Project’s capacity of 1,300
20 MW of power, the Project will need to use 1,600 MW of power to pump water from the lower to
21 the upper reservoir. (*Id.* at p. 2.2.) Thus, the Project’s use of 1,600 MW of power required to
22 pump water to the upper reservoir would result in significant new GHG emissions.

23 **a. The FEIR Improperly Assumes Displacement of Peaker Plants**
24 **that Do Not Currently Exist in its GHG Impacts Analysis.**

25 The FEIR concludes that that the Project would have a beneficial impact on GHG
26 production by offsetting CO₂Ee production. (FEIR, p. 3.15-16.) The FEIR rationalizes that the
27 vast majority of the power purchased at night from the grid to operate the Project’s pumps will
28 be generated by natural gas-fired combined-cycle power plants. (FEIR, p. 3.15-14.) The energy
stored in the project would then be used, in large part, as a very large peaker plant that

1 “displaces” power currently produced in large part by simple cycle natural gas generating plants
2 (also known as “peaker plants”). (FEIR, p. 3.15-10.) During peak hours, the FEIR assumes that
3 the Project would not emit directly or indirectly any GHGs, whereas simple cycle natural gas
4 peaker plants of an equivalent size would emit about 1,115,000 metric tons/year of CO₂e during
5 those peak hours. (FEIR, pp. 3.15-10~11.)

6 The FEIR’s analysis ignores the undisputed fact that the Project would nonetheless
7 generate 1,066,156 metric tons of CO₂ per year (or, based on the maximum 4,308 GWh per year
8 to be generated by the facility, 2,122,812 metric tons of CO₂ per year) by using power generated
9 by combined-cycle gas-fired plants to pump water to the upper reservoir during off-peak hours.
10 (FEIR, p. 3.15-15, Table 3.15-2.) However, because simple cycle natural gas peaker plants emit
11 more GHGs and more CO₂ than the combined-cycle gas-fired plants that the Project would rely
12 upon at off-peak hours to pump water pack up to the upper reservoir, the project claims an
13 overall net reduction of about 50,000 metric tons of CO₂, assuming all of the pump-back power
14 is from combined cycle gas plants. (FEIR, p. 3.15-15.) As a result, the FEIR concludes that the
15 Project’s emission of 1,066,156 tons per year of CO₂ during evenings and other off-peak hours
16 has no GHG implications because of the peak hour “displacement” that will occur.

17 Petitioners are concerned with this analysis because it does not disclose whether the
18 simple cycle peaker plants that it anticipates will be “displaced” by the project currently exist. It
19 would appear from various statements found in the FEIR that the displaced peaker plants do not
20 yet exist and, if the Project comes on-line, will not exist in the future. Thus, the FEIR states that
21 “the proposed Project would eliminate the need for the regional transmission operator (California
22 ISO) to dispatch up to 1,300 MW of fossil-fueled peaking plants ... during peak periods....”
23 (FEIR, p. 3.13-14.) Citing the Project’s compatibility with the goals of AB 2514, the EIR states
24 that “[t]he proposed Project would provide the energy storage benefits described in AB 2514,
25 Including: ... *avoiding or deferring the need for new* fossil fuel-powered peaking power plants
26 and expansion of the transmission grid....” (FEIR, p. 2-2 [emphasis added].)

1 Likewise, the Final Environmental Impact Statement (“FEIS”) prepared by the Federal
2 Energy Regulatory Commission for the Project confirms that the peaker plants that will be
3 displaced have yet to come on line:

4 However, the variable output of wind and solar facilities can create an imbalance
5 in the stability of the electric grid if sufficient facilities are not available to
6 balance the system. The two primary alternatives *being considered* in the region
7 to address these imbalances are pumped storage facilities and gas-fired
8 combustion turbines.

9 (FEIS, p. 4 [emphasis added].) Additionally, the FEIS describes one of the benefits of the
10 Project as offsetting peak-period pollution generated by future peaker plants:

11 In addition to pumped storage facilities, California is seeing an increase in the
12 number of applications to construct “peakers,” which are typically natural gas-
13 fired units that are not installed to act as base load units but to function solely as
14 standby units until circumstances arise when their capacity and output is
15 immediately needed to provide power during peak periods or to provide ancillary
16 services. Obviously, natural gas-fired units have their own environmental effects
17 and produce greater greenhouse gas emissions than those associated with a
18 pumped storage facility, such as the Eagle Mountain Project.

19 (FEIS, p. A-18.) The Project applicant also indicates that the “displaced” peaker plants would
20 otherwise be built in the future.² If the “displaced” peaker plants do not currently exist, then the
21 Project is not displacing any emissions from the current GHG baseline. It is only adding
22 1,066,156 tons per year of CO₂ or, applying FERC’s maximum 4,308 GWh per year to be
23 generated (and displaced) by the facility, 2,122,812 tons of CO₂ per year, levels of GHG
24 emissions well above the State Board’s preferred threshold of significance of 25,000 tons per
25 year or any of the lower significance thresholds proposed by several air districts around the
26 State.

27 Petitioners’ consultant, Mr. Matt Hagemann, agrees that the FEIR fails to provide details
28 on the sources of power that it assumed in estimating the GHG emissions offsets. According to
29 Mr. Hagemann,

30 ² See <http://www.eaglemountainenergy.net/index2.html> (“Eagle Mountain Pumped Storage will
31 reduce the need for less efficient, fossil-fueled alternatives”); *Id.* (“Statewide peak demand is
32 expected to grow by 890 MW per year for the next 10 years and beyond, according to the
33 California Energy Commission”).

1 The FEIR concludes that Project operation would reduce or offset greenhouse gas
2 emissions and have a less than significant impact. The FEIR assumes that power
3 generation from the Project would displace simple cycle plant emissions plant
4 during peak demands and utilize cleaner power sources including renewables for
5 pump-back power during periods of low electricity demand. Through such a
6 scheme, the FEIR estimates the Project will displace 49,955 Co2e metric tons
7 when using combined cycle power plants and 1,115,751 Co2e metric tons if
8 renewable sources are used for pump-back power.

9 The FEIR provides no details on sources of the power that are assumed in
10 estimating GHG emissions offsets. The FEIR bases offsets on the assumption
11 that Project power needs are met with renewable and combined cycle sources that
12 would displace simple cycle power generation. No documentation is provided in
13 the FEIR to support the contention that power needs for pumping would displace
14 energy supplied only by simple cycle plants. A revised FEIR should be prepared
15 to identify what sources of power will be used by the Project and at what time,
16 including renewable, combined cycle and simple cycle sources.

17 A more appropriate estimate of GHG emissions should be developed based on
18 power consumption needed for Project operation. The Project has an efficiency
19 of 79 percent (FEIR, p. 2-1). Therefore, to generate power at the Project's stated
20 capacity of 1,300 MW, 1,600 MW of energy will be required to pump water to the
21 upper reservoir. A more appropriate baseline that should be considered in a
22 revised FEIR would focus on the power consumed by the Project and determine
23 the amount of greenhouse gasses that would be emitted by current sources of
24 power available to the Project. A revised FEIR should incorporate published
25 default CO2 emissions factors for the power consumed by the Project from
26 currently available sources. The California Energy Commission specifies the use
27 of a default CO2 emissions factor of 1000 lbs/MWh for "in-state unspecified
28 sources."³

(Petitioners April 10, 2013 Comment, Exhibit 1, pp. 5-6.)

Therefore, the FEIR's GHG baseline is "hypothetical" and "illusory" and plainly contravenes
CEQA. CEQA's baseline must reflect "real conditions on the ground," and not hypothetical
levels. (*Save Our Peninsula*, 87 Cal.App.4th at pp. 121-123; See *CBE v. SCAQMD*, 48 Cal.4th
at p. 322.) The EIR's GHG analysis is based on an unlawful and hypothetical baseline – the
DEIR compares the Project's GHG emissions to a hypothetical that the Project will displace
future GHG emissions from speculative, yet-to-exist peaker plants.

³ http://www.arb.ca.gov/cc/ccei/presentations/OOS_EmissionFactors.pdf -- also see EPA's
default emissions factor at <http://www.epa.gov/cpd/pdf/brochure.pdf>

1 Thus, because the peaker plants that the EIR states will be displaced by the Project do not
2 yet exist, those plants cannot be part of the environmental baseline for the EIR's GHG or air
3 quality analysis. The analysis of the Project's 1,066,156 tons per year of CO₂ and GHG
4 emissions cannot be based on a recalculated net emissions subtracting out future peaker plants'
5 emissions. Indeed, if the Project is constructed and operated, those displaced peaker plants will
6 presumably never be built.

7 On the other hand, if the EIR has failed to adequately describe this aspect of the Project
8 and the "displaced" peaker plants already exist, then the EIR's inadequate description and
9 analysis must be cured so the public fully understands the significant impacts of the Project. For
10 example, if that is the case, then the EIR would have to describe how many such plants would be
11 decommissioned and contain some level of discussion of the environmental impacts that would
12 ensue from "displacing," *i.e.* decommissioning many no longer needed peaker plants. No
13 information about where such plants currently are located or their likely fate if rendered obsolete
14 by the Project is provided by the EIR.

15 Further compounding the confusion, the EIR assumes that 100% of the energy
16 "displaced" during the daytime would be from peaker plants. (FEIR, p. 3.15-14.) Given this
17 extreme assumption, the EIR concludes that the Project would have a slight net positive GHG
18 impact, despite the fact that the Eagle Mountain project will use 605 GWh/year more electricity
19 than directly producing the same amount of energy. In fact, these assumptions are likely
20 erroneous. It is likely that during the daytime, much of the "displaced" energy would otherwise
21 be produced by a mixture of combined cycle plants, peaker plants, and renewable facilities
22 (solar, wind, hydro) that produce no GHGs. Altering this mix from the worst-case scenario
23 assumed in the EIR to a realistic scenario would likely result in a net negative GHG impact from
24 the Eagle Mountain project. A revised EIR is required to accurately assess the Project's GHG
25 impacts.

26 The confusion found in this critical component of the FEIR, at a minimum, has obscured
27 a critical part of the State Board's impact analysis and stunted the public's ability to understand
28 the potential impacts of the Project. The FEIR's use of a skewed baseline "mislead(s) the

1 public” and “draws a red herring across the path of public input.” (*San Joaquin Raptor Rescue*
2 *Center*, 149 Cal.App.4th at 656; *Woodward Park Homeowners*,150 Cal.App.4th at pp. 708-711.)
3 Because of this fundamental shortcoming in the EIR, the State Board must clarify this critical
4 component in order to assure that the EIR’s GHG and air quality baselines and resulting analyses
5 are accurate and to assure that the public has an opportunity to understand and comment upon
6 the true GHG and air quality impacts of the Project.

7 **b. The EIR’s GHG Emissions Calculation Underestimate the**
8 **Project’s Annual Generating Capacity**

9 Even if the FEIR’s reliance on speculative displaced peaker plants in establishing its
10 baseline were justified, the FEIR’s GHG emissions calculations are nonetheless incorrect.

11 The FEIR acknowledges that the Project would have an installed capacity of 1,300
12 megawatts (MW) and generate a maximum of 4,308 gigawatt hours (GWh) per year. (FEIR, p.
13 2-2.) FERC also notes that while generating the 4,308 GWh annually, the Project will consume
14 5,744 GWh annually to pump water back up to the upper reservoir. (FEIR, Vol. V, pdf p. 1114.)
15 However, the FEIR uses arbitrary numbers to calculate GHG emissions in Table 3.15-2 (2,883
16 GWh instead of 5,744 GWh and 2,278 GWh instead of 4,308.) (FEIR, p. 3.15-15, Table 3.15-2.)
17 It is unclear from the FEIR and the appendices why the much lower numbers were used to
18 calculate the GHG emissions. The FEIR then concludes that the Project would not contribute to
19 an increase in GHG emissions. (FEIR, p. 3.15-17.)

20 The FEIR’s use of lower GWh figures not only grossly underestimates the Project’s GHG
21 emissions, but also led to an erroneous conclusion. If the FEIR had used the actual figures of the
22 Project’s expected use of 5,744 GWh to generate 4,308 GWh for its calculations in Table 3.15-2,
23 the Project would emit 2,122,812 metric tons of CO₂ per year⁴ and displace 2,109,205 metric
24
25
26

27 ⁴ Calculated using the figures in Table 3.15-2 for Pump-back Power Used, using Combined
28 Cycle: 5,744 GWh/Year x Emission Factor of 815,000 lbs/GWh +360 SF₆ Emissions from
Substation = 4.68 x 10⁹ lbs/GWh. 4.68 x 10⁹ lbs/GWh converted to metric tons equals 2,122,812
metric tons.

1 tons of CO2 per year.⁵ Thus, contrary to the FEIR’s conclusion, the Project would contribute to
2 an increase in GHG emissions of 13,607 metric tons of CO2 per year, even assuming that the
3 FEIR can subtract displaced peaker power emissions from the GHG baseline. (See FEIR, p. 2-2;
4 Vol. V, pdf p. 1114; p. 3.15-15, Table 3.15-2.) The Project’s GHG emissions of 13,026 metric
5 tons⁶ would constitute a significant impact – it clearly exceeds both the interim 10,000
6 MTCO₂e/year threshold set by the SCAQMD⁷ and the California Air Pollution Control Officers
7 Association threshold of 900 MTCO₂e/year.

8 Therefore, the FEIR must be revised by using the actual generation and consumption
9 numbers to establish an accurate baseline, rather than using arbitrary, lower figures.

10 **3. The DEIR Fails to Establish an Accurate Baseline for Biological** 11 **Resources**

12 The FEIR also fails to establish an accurate baseline to adequately analyze the Project’s
13 impacts to biological resources. The fundamental flaw in the FEIR’s entire biological resources
14 analysis is that the FEIR has not conducted the necessary studies, evaluations and surveys of the
15 Project site. The Project site is currently owned and controlled by a private entity who has not
16 allowed access to anyone, including the State Board, project proponent, or any other consultants.
17 (FEIR, Vol. IV, pdf p. 364-365.) Instead of relying on recent data, the FEIR relies on biological
18 assessments from the proposed Landfill project which are over 20 years old. (FEIR, Vol. IV, pdf
19 p. 13-14.) Without any recent data, the FEIR’s current baseline for biological resources fails to
20 reflect “real conditions on the ground” at the Project site. (See *Save Our Peninsula*, 87
21 Cal.App.4th at 121-123.)

22 Even the United States Fish and Wildlife Service (USFWS), the very agency which
23 issued the 1992 biological assessment, commented on the lack of sufficient data from the Central
24

25
26 ⁵ Calculated using the figures in Table 3.15-2 for Generation Displaced, using Simple Cycle:
27 4,308 GWh/Year x Emission Factor of 1,080,000 lbs/GWh + 360 SF₆ Emissions from Substation
28 = 4.65 x 10 lbs/GWh. 4.65 x 10 lbs/GWh converted to metric tons equals 2,109,205 metric tons.

⁶ Subtracting 2,109,205 (emissions from Generation Displaced) from 2,122,812 metric tons
(emissions from Pump-back Power Used) equals 13,026 metric tons.

⁷ <http://www.aqmd.gov/ceqa/handbook/signthres.pdf>

1 Project Area and the need to defer project approval until such data could be obtained and
2 analyzed. (FEIR, Vol. IV, pdf p. 13.)

3 The FEIR's biological resources baseline is merely hypothetical without the data from
4 surveys covering the Project site. Therefore, the FEIR cannot adequately analyze and mitigate
5 the Project's potentially significant impacts on biological resources.

6 Additionally, Petitioners' expert biologist, Mr. Scott Cashen provides detailed reasons
7 why the FEIR's baseline for biological resources is inaccurate. (Petitioners' April 10, 2013
8 Comments, Exhibit 2.) Some of the baseline issues Mr. Cashen highlights include, but are not
9 limited to, the following:

10 (1) While admitting that several rare species of special-status bats are known to occur
11 in the Project area which may be affected by the Project, the FEIR fails to adequately survey
12 such bats to establish an accurate baseline.

13 (2) While acknowledging the abundance of perching, roosting, and nesting sites for
14 ravens on the Project site, the FEIR fails to adequately survey the occurrence of raven population
15 at the Project site.

16 (3) The FEIR failed to conduct late-season annual plant surveys to establish an
17 accurate baseline for special-status plant species.

18 (4) The FEIR improperly dismisses the potential for Coachella Valley milkvetch to
19 occur in the Project area, which was detected during a previous survey of the Project area.

20 (5) The FEIR fails to disclose the presence of all special-status plants detected during
21 previous surveys, including federally endangered and rare plants. As such, the Project's
22 biological resources baseline does not account for such species. (Petitioners' April 10, 2013
23 Comments, Exhibit 2.) Mr. Cashen's comments are hereby incorporated in their entirety and the
24 SWRCB should respond to his comments separately.

25 **C. The DEIR Fails to Analyze and Mitigate All Potentially Significant Impacts.**

26 An EIR must disclose all potentially significant adverse environmental impacts of a
27 project. (Pub. Resources Code, § 21100(b)(1); CEQA Guidelines, § 15126(a); *Berkeley Jets*, 91
28 Cal. App. 4th 1344, 1354.) CEQA requires that an EIR must not only identify the impacts, but

1 must also provide “information about how adverse the impacts will be.” (*Santiago County*
2 *Water Dist. v. County of Orange* (1981) 118 Cal.App.3d 818, 831). The lead agency may deem
3 a particular impact to be insignificant only if it produces rigorous analysis and concrete
4 substantial evidence justifying the finding. (*Kings County Farm Bureau v. City of Hanford*
5 (1990) 221 Cal.App.3d 692 (“*Kings County*”).)

6 CEQA requires public agencies to avoid or reduce environmental damage when
7 “feasible” by requiring mitigation measures. (CEQA Guidelines, § 15002(a)(2) and (3); See
8 also, *Berkeley Jets, supra*, 91 Cal. App. 4th at p. 1354; *Citizens of Goleta Valley, supra*, 52
9 Cal.3d at p. 564.) The EIR serves to provide agencies and the public with information about the
10 environmental impacts of a proposed project and to “identify ways that environmental damage
11 can be avoided or significantly reduced.” (CEQA Guidelines, §15002(a)(2).) If the project will
12 have a significant effect on the environment, the agency may approve the project only if it finds
13 that it has “eliminated or substantially lessened all significant effects on the environment where
14 feasible” and that any unavoidable significant effects on the environment are “acceptable due to
15 overriding concerns.” (Pub. Resources Code, § 21081; CEQA Guidelines, § 15092(b)(2)(A) &
16 (B).)

17 In general, mitigation measures must be designed to minimize, reduce, or avoid an
18 identified environmental impact or to rectify or compensate for that impact. (CEQA Guidelines,
19 § 15370.) Where several mitigation measures are available to mitigate an impact, each should be
20 discussed and the basis for selecting a particular measure should be identified. (*Id.*, at §
21 15126.4(a)(1)(B).) A lead agency may not make the required CEQA findings unless the
22 administrative record clearly shows that all uncertainties regarding the mitigation of significant
23 environmental impacts have been resolved.

24 CEQA requires the lead agency to adopt feasible mitigation measures that will
25 substantially lessen or avoid the Project’s potentially significant environmental impacts (Pub.
26 Resources Code, §§ 21002, 21081(a)), and describe those mitigation measures in the CEQA
27 document. (Pub. Resources Code, § 21100(b)(3); CEQA Guidelines, § 15126.4.) A public
28 agency may not rely on mitigation measures of uncertain efficacy or feasibility. (*Kings County,*

1 *supra*, 221 Cal.App.3d at p. 727 (finding groundwater purchase agreement inadequate mitigation
2 measure because no record evidence existed that replacement water was available.) “Feasible”
3 means capable of being accomplished in a successful manner within a reasonable period of time,
4 taking into account economic, environmental, legal, social and technological factors. (CEQA
5 Guidelines, § 15364.) To demonstrate economic infeasibility, “evidence must show that the
6 additional costs or lost profitability are sufficiently severe as to render it impractical to proceed
7 with the project.” (*Citizens of Goleta Valley v. Board of Supervisors* (1988) 197 Cal.App.3d
8 1167, 1181.) The EIR must provide evidence and analysis to show a project alternative cannot
9 be economically implemented. (*Kings County, supra*, 221 Cal.App.3d at pp. 734-737.) This
10 requires not just cost data, but also data showing insufficient income and profitability. (*See*
11 *Burger v. County of Mendocino* (1975) 45 Cal.App.3d 322, 327 (infeasibility claim unfounded
12 absent data on income and expenditures showing project unprofitable); *San Franciscans*
13 *Upholding the Downtown Plan v. City and County of San Francisco* (2002) 102 Cal.App.4th
14 656, 694 (upholding infeasibility finding based on analysis of costs, projected revenues, and
15 investment requirements).) Mitigation measures must be fully enforceable through permit
16 conditions, agreements, or other legally binding instruments. (CEQA Guidelines, § 15126.4,
17 subd. (a)(2).)

18 A lead agency may not conclude that an impact is significant and unavoidable without
19 requiring the implementation of all feasible mitigation measures to reduce the impacts of a
20 project to less than significant levels. (CEQA Guidelines, §§ 15126.4, 15091.)

21 **1. The FEIR Fails to Adequately Analyze and/or Mitigate the Project’s**
22 **Impacts to Groundwater.**

23 **a. Impacts to Groundwater Supply May be Underestimated.**

24 One of the vital elements of the Project is groundwater. A significant amount of
25 groundwater is needed to (1) fill the Upper and Lower Reservoirs and be reused for power
26 generation and (2) replace losses to evaporation and seepage. (FEIR, p. 3.2-6.) However, the
27 FEIR fails to adequately analyze the extent of the Project’s impacts to the groundwater supply by
28 potentially underestimating the recharge rate of Chuckwalla Valley Groundwater Basin.

According to Mr. Hagemann:

1 Groundwater is the source of the water that will be used to fill the Project
2 reservoirs. Groundwater will be pumped from alluvial sediments that fill the
3 Chuckwalla Valley Groundwater Basin to initially fill the reservoirs and to supply
4 water lost to evaporation.

5 The Chuckwalla Valley Groundwater Basin is recharged by percolation of runoff
6 from surrounding mountains, from precipitation, and by subsurface inflow from
7 the Pinto Valley Groundwater Basin to the north and from Orocopia Valley
8 Groundwater Basin to the west. The FEIR acknowledges that recharge to desert
9 groundwater basins is difficult to estimate and that estimates of recharge to the
10 Chuckwalla Valley Groundwater Basin vary widely, from 10,000 to 20,000 AFY
11 (3.3-12). With input from the Metropolitan Water District, the FEIR estimated
12 recharge of 12,700 AFY to the Chuckwalla Valley Groundwater Basin (FEIR, p.
13 3.3-14). The estimate of 12,700 AFY was adopted in the FEIR as the average of
14 estimates that ranged from 6,600 AFY to 17,700 AFY. Other, lower estimates of
15 recharge are presented in the FEIR, the lowest being 9,800 AF (Table 3.3-3).

16 The FEIR uses an estimate for groundwater recharge that is not as conservative as
17 estimates made by other researchers and is not the most conservative of estimates
18 made by the MWD. Use of a less-conservative estimate in the FEIR results in an
19 underestimation of actual groundwater drawdown. As a result, impacts from
20 groundwater drawdown from Project operation may be underestimated.

21 Local pumping impacts from Project operation are predicted to result in
22 drawdown of groundwater by about four feet below the maximum historic
23 drawdown in the Upper Chuckwalla Valley and Orocopia Valley Groundwater
24 Basins and by about five feet at the mouth of the Pinto Valley Groundwater Basin
25 (p. 3.3-28 and 3.3-29). Cumulative impacts on groundwater drawdown -- to
26 include water use for the proposed landfill, water use for multiple proposed solar
27 projects, and water use for prisons -- is estimated to be nine feet (p. 3.3-29).

28 The value used for estimating recharge is critical. If more conservative recharge
estimates are used (i.e. lower amounts of recharge to the groundwater basin),
predicted decreases in water levels will be greater than those estimated in the
FEIR. If estimates of recharge to the Chuckwalla Valley Groundwater Basin is
too high, drawdown of the aquifer for filling and maintenance of water levels in
the reservoirs will be underestimated.

The FEIR concludes that Project groundwater pumping, in combination with
cumulative pumping for other projects, could cause overdraft and declines in
groundwater levels of nine feet and would contribute to a significant adverse
cumulative effect (3.3-32). It is my opinion that impacts could be even more
significant if actual groundwater recharge is not as high as predicted in the FEIR.
Therefore, the FEIR should be revised to include consideration of additional more
conservative estimates of groundwater recharge. The additional estimates should
be developed by an independent agency, like the U.S. Geological Survey, with

1 extensive experience in modeling recharge in the area. Results of the recharge
2 estimates should be incorporated into the groundwater models to predict
3 additional drawdown scenarios.

4 (Petitioners' April 10, 2013 Comments, Exhibit 1, p. 2.)

5 Additionally, the FEIR fails to set enforceable drawdown limits to mitigate potentially
6 significant impacts to groundwater levels. According to Mr. Hagemann,

7 The FEIR includes mitigation for monitoring groundwater levels (MM GW-1)
8 during Project operation and during the initial filling of the reservoirs by installing
9 a well network. If groundwater drawdowns exceed "maximum allowable
10 changes" (Table 3-9), pumping rates will be reduced. Reference is also made to
11 an "accounting surface" that would be established through "future legislation,
12 rule-making or applicable judicial determination" (MM GW-1).

13 The inclusion of "maximum allowable changes" and an "accounting surface" in
14 MM GW-1 is a good first step, however these are not enforceable limits as
15 proposed in the FEIR. The FEIR should be revised to include enforceable
16 maximum drawdown limits. One such mechanism would be to enter into an
17 agreement with Riverside County to establish a "floor" for the maximum amount
18 of drawdown that would be acceptable. If the levels of the floor were exceeded,
19 automatic management measures would be triggered such as a reduction in
20 pumping until groundwater levels reached agreed-upon levels. Such management
21 techniques were adopted and incorporated into a memorandum of understanding
22 with San Bernardino County for the Cadiz Valley Water Conservation, Recovery,
23 and Storage project located 40 miles to the north of the Project.

24 (Petitioners' April 10, 2013 Comments, Exhibit 1, pp. 3.)

25 **b. The FEIR Fails to Adequately Disclose the Potential Impacts of**
26 **Seepage on Groundwater Quality.**

27 The FEIR admits that seepage from the Project may cause potentially significant impacts
28 on groundwater quality. (FEIR, p. 3.3-31.) The metals in the bedrock beneath or near the Upper
and Lower Reservoirs contain metal ore that could be mobilized by water seepage, migrate into
the sediments of the Chuckwalla Valley Groundwater Basin, and eventually degrade the water in
that Basin. (*Id.*) Especially because the estimated seepage from the reservoirs is expected to be
considerable, 1,800 AFY, the FEIR should have analyzed and disclosed the true extent of
impacts of contaminated seepage on groundwater quality.

Mr. Hagemann agrees:

1 The reservoirs are to be completed in former mining pits which were blasted and
2 excavated into highly fractured bedrock. When filled, the reservoirs are estimated
3 to lose up to 1,800 AFY of water through seepage (p. 3.3-31). The water that
4 seeps from the reservoirs water will flow downgradient through fractured bedrock
5 to mix with groundwater in the Chuckwalla Valley Groundwater Basin. Pumping
6 wells are proposed to combat a rise of up to 12 feet in groundwater levels beneath
7 the reservoir and up to 6 in the valley (p. 3.3-34). Seepage may also occur from
8 the brine ponds that will contain wastes from the reverse osmosis system.

9 The bedrock and tailing piles that forms the base of the reservoirs, contain metals
10 that may be mobilized and transported by water seepage. Material excavated
11 from bedrock during tunnel excavation may be placed at the base of the reservoirs
12 (p. 2-19) and may impact water quality, especially when considering that
13 increased surface area of the excavated rock will increased potential for acid
14 generation.

15 The FEIR acknowledges that seepage could affect water quality and that metals in
16 seepage water could be transported into the Chuckwalla Valley Groundwater
17 basin. The FEIR goes on to state that geochemical analyses indicate that metals
18 present in the underlying rock are not likely to become mobile or produce acid
19 leachate, however, "it is possible" (p. 3.3-31).

20 As mitigation, the FEIR proposes PDF GW-1 which would identify methods to
21 control seepage that include grouting, seepage blankets, soil cement treatment.
22 Additionally, MM GW-6 would establish a groundwater monitoring program that
23 will include sampling within the reservoirs, production wells, and in wells up
24 gradient and downgradient of the reservoirs and brine disposal lagoon.

25 No direct tests of the potential for water in the reservoir to generate acid was
26 conducted in the preparation of the FEIR, presumably because of access
27 restrictions to central areas of the Project site. No tests for the potential of the
28 reservoir water to contain metals at high concentrations were conducted for
inclusion in the FEIR. Failure to conduct these tests constitutes inadequate
disclosure. Access to the pits to obtain samples of water and rock should be
obtained and analyses of the samples should be included in a revised FEIR along
with a complete analysis of the potential for seepage to affect water quality in the
Chuckwalla Valley Groundwater Basin.

(Petitioners' April 10, 2013 Comments, Exhibit 1, pp. 3-4.)

Pursuant to Mr. Hagemann's recommendations, the FEIR must conduct tests to analyze
the potential of the reservoir water to contain metals. Using such test results, the FEIR should be
revised to update the Project's potentially significant impacts to groundwater quality and to
mitigate such impacts to the extent feasible.

1 Without considering and disclosing the details specified by Mr. Hagemann, it is unclear
2 whether and how the brine ponds could successfully mitigate the significant impacts of seepage
3 containing metals and total dissolved solids to water quality. Pursuant to Mr. Hagemann's
4 recommendations, the FEIR must be revised to analyze and disclose details on how to
5 successfully implement Mitigation Measure GW-2.

6 **2. The FEIR Fails to Adequately Analyze and/or Mitigate the Project's**
7 **Biological Resources Impacts.**

8 As discussed in detail in Mr. Cashen's letter, the FEIR fails to adequately assess the
9 Project's impacts to wildlife, especially sensitive species and native plants. As a result, the FEIR
10 did not adequately mitigate the potential impacts to the extent feasible. (Petitioners' April 10,
11 2013 Comments, Exhibit 2.) Mr. Cashen's comments include, but are not limited to, the
12 following issues:

13 (1) Due to lack of access, the FEIR failed to adequately survey the entire Project area
14 to establish an accurate baseline for biological resources. Thus, the FEIR used an inaccurate
15 biological resources baseline and the resulting analysis of impacts and mitigation measures are
16 inadequate.

17 (2) The FEIR fails to adequately analyze and mitigate the Project's impacts to
18 crucifixion thorn, Coachella Valley milkvetch, ravens and gulls, coyotes and feral dogs.

19 (3) The FEIR's proposed habitat compensation (MM BIO-22) is inconsistent with the
20 CDFW's guidelines.

21 (4) The FEIR's Revegetation Plan, Weed Plan, and Predator Monitoring and Control
22 Plan are insufficient to mitigate the significant impacts to biological resources. (Petitioners'
23 April 10, 2013 Comments, Exhibit 2.)

24 Based on Mr. Cashen's comments, the FEIR must be revised to analyze and evaluate all
25 potential impacts to biological resources and, where appropriate, propose adequate mitigation
26 measures with definite terms and verifiable performance standards.

27 ///

28 ///

1 **3. The FEIR Fails to Adequately Analyze and/or Mitigate the Project's**
2 **GHG Emissions Impacts.**

3 **a. The FEIR's Finding of No Significant Impact for GHG**
4 **Emissions during Project Construction is Unsupported by**
5 **Substantial Evidence.**

6 The FEIR concludes that the Project would not contribute to an increase in GHG
7 emissions and that no mitigation would be required. (FEIR, p. 3.15-17.) However, the Project
8 proposes to construct multiple facilities and components: (1) Upper Reservoir, (2) Lower
9 Reservoir, (3) upper dams, (4) spillways at both Upper and Lower Reservoirs, (5) conduits, (6) a
10 powerhouse, (7) an access tunnel, (8) a switchyard, (9) water supply and conveyance pipelines,
11 (10) a reverse osmosis system, and (11) transmission lines. (FEIR, pp. 2-12~26.) Thus, the FEIR
12 overlooks the potentially significant GHG emissions during Project construction and fails to
13 analyze and mitigate such impacts.

14 The FEIR's error is twofold: (1) it fails to provide adequate analysis and substantial
15 evidence to support its finding that the GHG emissions during Project construction would be
16 8,467 MTCO_{2e} of CO_{2e} and (2) even the 8,467 MTCO_{2e} is considered significant under
17 California Air Pollution Control Officers Association's threshold of significance for GHG
18 emissions.

19 Mr. Hagemann agrees that the Project's extensive site preparation and construction
20 activities may emit significant amount of GHGs. According to Mr. Hagemann,

21 *Construction emissions*

22 Construction of the project will involve extensive site preparation activities over a
23 period of four years. Construction will involve:

- 24 • Building two dams which will involve preparation of the foundation to remove
25 waste materials from mining, overburden, and weathered rock;
- 26 • Construction of two spillways;
- 27 • Developing mining pits into reservoirs by preparing the base with grouting, a
28 seepage blanket made from fine tailings;
- Creation of tunnel and shaft system with total lengths greater than two miles; and
- Development of a 72-foot-wide, 150-foot-high, and 360-foot-long, underground
 powerhouse (DEIR, pp. 2.12 to 2.20).

1 Each of these activities will involve the use of heavy equipment that will emit
2 greenhouse gasses.

3 No estimate of construction GHG emissions was included in the FEIR other than
4 to say “Project construction GHG emissions during the maximum year would be
5 approximately 8,467 metric tons/year of CO₂e” (FEIR, p. 3.15-10). No support
6 for this statement is included in the FEIR or in the appendices. No documentation
7 that modeling was done in support of this estimate is included in the FEIR and no
8 quantification of the amount of GHGs produced by project construction
9 components (e.g., dam and spillway construction, tunnel construction).

10 The FEIR fails to adequately disclose Project GHG emissions over the four-year
11 span of Project construction. A revised FEIR should be prepared to estimate
12 construction GHG emissions using common models accepted by the SQAQMD,
13 including URBEMIS and the California Emission Estimator Model (CalEEMod).
14 The estimated construction GHG emission, based on the modeling efforts, should
15 be compared to the interim 10,000 MTCO₂e/year threshold set by the SCAQMD⁸
16 and the California Air Pollution Control Officers Association (CAPCOA)
17 threshold of 900 MTCO₂e/year.⁹

18 (Petitioners’ April 10, 2013 Comments, Exhibit 1, pp. 6-7.)

19 Based on Mr. Hagemann’s recommendations, the FEIR must be revised to (1) disclose an
20 adequate analysis of the Project’s GHG emissions during construction by using (2) both the
21 SCAQMD and CAPCOA thresholds of significance for GHG emissions.

22 **b. The FEIR Fails to Adequately Mitigate the Project’s GHG
23 Impacts During Construction**

24 As discussed above, the FEIR fails to adequately analyze the Project’s potentially
25 significant GHG impacts during Project construction. Mr. Hagemann suggests the following
26 ways to mitigate such impacts:

27 Considerations for mitigation for construction emissions in a revised FEIR should
28 quantify emissions reductions with use of available mitigation¹⁰ for construction
and off-road equipment, including

29 ⁸ <http://www.aqmd.gov/ceqa/handbook/signthres.pdf>

30 ⁹ California Air Pollution Control Officers Association. CEQA & Climate Change, Evaluating
31 and Addressing Greenhouse Gas Emissions from Projects Subject to the California
32 Environmental Quality Act. [http://www.capcoa.org/wp-
content/uploads/downloads/2010/05/CAPCOA-White-Paper.pdf](http://www.capcoa.org/wp-content/uploads/downloads/2010/05/CAPCOA-White-Paper.pdf), p. 49.

33 ¹⁰ [http://www.aqmd.gov/ceqa/handbook/mitigation/greenhouse_gases/CAPCOA-Quantification-
Report-Final1.pdf](http://www.aqmd.gov/ceqa/handbook/mitigation/greenhouse_gases/CAPCOA-Quantification-Report-Final1.pdf) – see CAPCOA fact sheet, Section 8

- 1 • Use Alternative Fuels for Construction Equipment
- 2 • Use Electric and Hybrid Construction Equipment
- 3 • Limit Construction Equipment Idling beyond Regulation Requirements
- 4 • Institute a Heavy-Duty Off-Road Vehicle Plan
- 5 • Implement a Vehicle Inventory Tracking System
- 6 • Exclusive use of latest diesel technology.

7 (Petitioners' April 10, 2013 Comments, Exhibit 1, p. 7.)

8 Without adequately disclosing the potential GHG emissions during Project construction,
9 it is impossible for the FEIR to mitigate potentially significant impacts to the extent feasible.
10 Thus, pursuant to Mr. Hagemann's recommendations, the FEIR should be revised to adequately
11 analyze and mitigate the potentially significant GHG emissions during Project construction.

12 **c. The FEIR Fails to Adequately Analyze and Mitigate GHG
13 Impacts During Project Operation**

14 By using an illegal baseline, discussed *supra*, the FEIR fails to adequately analyze the
15 potential GHG impacts from the Project's emission of 1,066,156 tons per year of CO₂, up to as
16 much as 2,122,812 tons per year from the Project's operation.

17 Additionally, the FEIR fails to adequately mitigate such potentially significant impacts.
18 Mr. Hagemann provides specific ways to mitigate the Project's operational GHG impacts:

19 Mitigation for operational emissions of GHGs in a revised FEIR should
20 contemplate a mechanism to eliminate use of currently existing peaker plants¹¹
21 which rely on simple cycle technology. If peaker plants were to be eliminated
22 though funding by the applicant, GHG impacts of the Project could truly be
23 considered to be displaced.

24 In accordance with draft SCAQMD policy¹² and widely referenced CAPCOA
25 guidance¹³, if emissions from a Project are significant after implementation of all
26 feasible mitigation, carbon offsets or emissions reduction credits should be
27 purchased for the amount of GHG emissions above thresholds. According to
28 CAPCOA, high quality credits are based on projects that have permanent,
29 verifiable, enforceable and demonstrated emission reductions and should be

11 http://www.energy.ca.gov/maps/powerplants/peaker_map.html

12 <http://www.aqmd.gov/ceqa/handbook/GHG/2008/oct22mtg/thresholdprop.pdf>

13 <http://www.capcoa.org/wp-content/uploads/downloads/2010/05/CAPCOA-White-Paper.pdf>

1 obtained after certification from reputable registries such as the American Carbon
2 Registry and the Climate Action Reserve.

3 (Petitioners' April 10, 2013 Comments, Exhibit 1, pp. 7-8.)

4 Pursuant to Mr. Hagemann's recommendations, the revised FEIR must adequately
5 analyze and mitigate the extent of GHG impacts during Project's operation by (1) actually
6 displacing the Project's GHG impacts by limiting with enforceable restrictions and/or
7 eliminating the use of currently existing peaker plants which rely on simple cycle technology,
8 and (2) purchasing carbon offsets for any remaining, undisplaced GHG emissions.

9 **4. The DEIR Fails to Adequately Analyze and/or Mitigate the Project's**
10 **Significant Impacts to Construction Workers of Unexploded**
11 **Ordnances.**

12 The FEIR admits that the Project site was historically used for military training. (FEIR, p.
13 3.16-5.) Because live-fire training occurred throughout the Project area, the FEIR acknowledges
14 "the potential for unexploded ordinance [sic] to be encountered during Project construction."
15 (*Id.*) The FEIR concludes that the potential impacts to construction workers from unexploded
16 ordnances (UXO) are significant. The FEIR then proposes Mitigation Measure HM-1, which
17 includes a UXO plan. Through the implementation of the mitigation measure, the FEIR
18 concludes that "risks to workers from UXO will be reduced to *less than* significant...." (FEIR,
19 p. 3.16-8.)

20 However, the FEIR fails to sufficiently analyze the severity of impacts from UXOs. The
21 FEIR did not analyze the precise types of military training activities that occurred on the Project
22 site. The FEIR thus fails to disclose how many UXOs are present at the Project site and which
23 portions of the Project site may contain them. Without fully assessing the extent of the Project's
24 impacts from disturbing UXOs during construction, the proposed Mitigation Measure HM-1 is
25 insufficient to support the conclusion of "less than significant" impact. According to Mr.
26 Hagemann,

27 The area of Desert Center was heavily used during WWII for training exercises
28 under the command of General George S. Patton. Desert Center was chosen as
the headquarters for the training area known as the California/Arizona Maneuver
Area, the largest such operation in the world. Over one million troops were
trained at the California/Arizona Maneuver Area, using live fire from tanks,

1 planes, artillery and firearms.¹⁴ Desert Center is located about 12 miles south of
2 where Project reservoirs are proposed and water and transmission lines are
3 proposed to cross just north of the community.

4 The FEIR mentions the training activities associated with the California/Arizona
5 Maneuver Area only briefly, stating the routes of the transmission lines are close
6 to the training camps and that there is a potential for unexploded ordnance (UXO)
7 to pose hazards to workers (3.16-7). As mitigation, MM HM-1 states that a
8 Project contractor and an environmental coordinator will implement a program to
9 identify UXO and to prepare a UXO plan to properly train all site workers.

10 Disclosure of the potential for UXO in the FEIR is inadequate. The FEIR should
11 be revised to include as much information as is available about the types of
12 training activities that were conducted in the Project area and the potential for the
13 specific types of UXO that may be found in association with those activities. For
14 example, we obtained a map of the camp established at Desert Center from the
15 Internet and overlaid it atop a map of the Project area, including the water and
16 transmission lines (Attachment 1). The map shows that the route of the water and
17 the transmission lines runs within a few thousand feet of what is mapped as an
18 ammunition depot, near a maneuver area (where presumably live rounds were
19 used in training) and within 2000 feet of the Desert Center Army Air Field.

20 In addition to conducting a review of the specific military activities conducted
21 within Project boundaries, a survey of the Project site, using visual and
22 geophysical techniques should be conducted by trained personnel. To provide for
23 adequate disclosure and to best ensure worker safety, the results of the survey
24 should be included in revised FEIR. Results of the survey should be disclosed in
25 a FEIR to ensure adequate disclosure of the environmental setting at the Project
26 site. If UXO is found on the Project site during the survey, construction should be
27 delayed until all debris has been cleared.

28 Survey efforts should be undertaken with oversight by the BLM who manage
acreage that will be utilized for transmission lines and water lines, areas that may
be most likely to be underlain by UXO from WW II-era military operations (p 2-
26). The survey should follow guidelines published by the BLM for UXO to
reduce risks from explosive hazards.¹⁵

(Petitioners' April 10, 2013 Comments, Exhibit 1, p. 4.)

Pursuant to Mr. Hagemann's recommendations, the FEIR should be revised to require a
survey of the Project site to assess the occurrences of UXOs. Additionally, once the severity of

¹⁴ <http://www.blm.gov/ca/st/en/fo/needles/patton.html>

¹⁵ http://www.fws.gov/refuges/whm/pdfs/UXO_Handbook_8-9-06.pdf

1 the impacts is ascertained, the FEIR should adopt all feasible mitigation measures to address
2 such impacts.

3 **D. The State Board has No Authority to Delegate a Section 401 Certification or**
4 **a Certification of a FEIR to Its Staff.**

5 The State Board has no authority to delegate to the Executive Director or other staff the
6 Board’s duties to issue water quality certifications pursuant to Water Code § 13160 or certify
7 EIRs pursuant to CEQA Guidelines § 15090. This, 23 CCR § 3838(a), and any other State
8 Board actions to delegate Section 401 certification authority to the Executive Director are null
9 and void as applied.

10 **1. The Water Code Prohibits Delegation of a Section 401 Certification.**

11 The State Board has no authority to delegate to the Executive Director or other staff the
12 Board’s duties to issue water quality certifications pursuant to Water Code § 13160. Any
13 issuance of a 401 certification or certification of the EIR must be done by the State Board, not
14 the Executive Director.

15 Water Code § 186, subdivision (a), expressly provides that “[t]he board shall have any
16 powers, and may employ any legal counsel and other personnel and assistance, that may be
17 necessary or convenient for the exercise of its duties authorized by law.” Under the Water Code,
18 “‘Board,’ unless otherwise specified, means the State Water Resources Control Board.” (Water
19 Code § 25.) In the context of a water appropriation permit, the Court of Appeal has ruled that,
20 pursuant to Section 186’s grant of authority, “[a]lthough the Board may employ personnel to
21 assist it (§ 186), it may not delegate the authority to determine the merits of an application for a
22 permit to appropriate water, except as provided by statute.” (*Central Delta Water Agency v.*
23 *State Water Resources Control Bd.* (2004) 124 Cal.App.4th 245, 261-262.) The Court of Appeal
24 noted that, in the water appropriations context, the Water Code specifically provided for only one
25 category of decisions that the State Board was expressly authorized to delegate to the Board’s
26 staff, in that case the Division of Water Rights. (*Id.*)

27 Section 186 is the source of the State Board’s authority over water quality as well. There
28 is no logical reason why the same rule does not apply to the State Board’s authority to delegate
decisions relating to the Board’s water quality powers. Indeed, the Water Code is more explicit

1 about the sole role of the State Board in rendering water quality decisions. The State Board, not
2 its Executive Director or other staff, is expressly authorized to approve a Section 401
3 certification:

4 The state board is designated as the state water pollution control agency for all
5 purposes stated in the Federal Water Pollution Control Act and any other federal
6 act, heretofore or hereafter enacted, and is (a) authorized to give any certificate or
7 statement required by any federal agency pursuant to any such federal act that
8 there is reasonable assurance that an activity of any person subject to the
9 jurisdiction of the state board will not reduce water quality below applicable
standards, and (b) authorized to exercise any powers delegated to the state by the
Federal Water Pollution Control Act (33 U.S.C. 1251, et seq.) and acts
amendatory thereto.

10 (Water Code, § 13160.) Only the State Board “succeeds to and is vested with all of the powers,
11 duties, purposes, responsibilities, and jurisdiction vested in [various precursor agencies under the
12 Water Code], or any other law under which permits or licenses to appropriate water are issued,
13 denied, or revoked or under which the functions of water pollution and quality control are
14 exercised.” (Water Code, § 179.) The State Board consists solely of five members appointed by
15 the Governor. The Board does not include any de facto additional members selected by the
16 Board itself, even long-standing members of the Board’s staff. (Water Code, § 175(a) [“There is
17 in the California Environmental Protection Agency the State Water Resources Control Board
18 consisting of five members appointed by the Governor”].) The State Board may only act with a
19 quorum of at least three of the appointed Board members. (Water Code, § 181.) And “[a]ny
20 hearing or investigation by the board may be conducted by *any member upon authorization of*
21 *the board*, and he shall have the powers granted to the board by this section, but any final action
22 of the board shall be taken by a majority of all the members of the board, at a meeting duly
23 called and held.” (Water Code, § 183 [emphasis added].) Given these explicit directions in the
24 Water Code, there can be no implied authority by the State Board to delegate water quality
25 decisions with which it has been entrusted.

26 As was the case in *Central Delta Water Agency*, the Water Code expressly identifies
27 those few occasions where decisions may be delegated to the Executive Director. Thus, the
28 Water Code expressly provides that the Board’s Executive Director may issue a complaint to

1 initiate a proceeding to assess an administrative civil penalty. (Water Code, §§ 1055, 13323(c).)
2 But only the State Board may assess such a penalty. (*Id.*, at §§ 1055(c), 13323(c).) The only
3 other provisions allow the Board or “representatives authorized by the Board” to “call, conduct
4 or attend conferences or hearings, official or unofficial, within or without this state...” and to
5 attend meetings with the United States or its agencies. (Water Code, §§ 179.6, 179.7.)
6 Likewise, Section 13223 expressly provides for delegation of authority by the regional water
7 quality control boards and their unsalaried board members to each of their executive officers
8 with a number of broad exceptions but no similar authority is provided for the State Board and
9 its salaried members. (Water Code, § 13223.) By specifying only certain activities that the
10 Board’s Executive Director may conduct, and expressly identifying only the State Board as the
11 entity authorized to render water quality decisions in the State above the Regional Board levels,
12 the Water Code excludes any implication that the State Board’s staff may be elevated to
13 positions on the State Board by assigning them decisions earmarked for the State Board.

14 The delegation of authority to a deputy or authorized person provided at Section 7 of the
15 Water Code does not apply to the State Board. Section 7 states that “[w]henever a power is
16 granted to, or a duty is imposed upon, *a public officer*, the power may be exercised or the duty
17 may be performed by a deputy of the officer or by a person authorized, *pursuant to law*, by the
18 officer, unless this code expressly provides otherwise.” (Water Code, § 7 (emphasis).) This
19 provision applies “[u]nless the provision or the context otherwise requires....” (Water Code, §
20 5.) The Board and its five members cannot reasonably be construed as a “public officer.” If
21 anything, each Board member is a public officer. However, no Board member can act
22 unilaterally, a quorum of three Board members being necessary to conduct business. (Water
23 Code, § 181.) Nor can Section 7 be itself deemed the authority to delegate that meets Section 7’s
24 condition that any delegation be “pursuant to law.” Such a circular reading of the section would
25 in effect delete the condition that any delegation be pursuant to law. Nor is there a deputy to the
26 State Board provided by the Water Code. Thus, any duties delegated to the Board by the
27 Legislature are not duties of “a public officer” but of a board. Moreover, as explained above,
28 pursuant to the Water Code, there is no authorization for the Board to delegate its decision-

1 making functions and the context, as clarified by the Court of Appeal precludes reading any
2 implicit authority for the State Board to delegate decisions to its staff. (*Central Delta Water*
3 *Agency*, 124 Cal. App. 4th at pp. 261-262.)

4 To the extent 23 CCR §§3838(a) and 3859 and State Board Resolution No. 2012-0061
5 purport to delegate Section 401 certification or CEQA approvals to the Executive Director, given
6 the absence of authority for such a delegation, those regulations and resolution as applied to the
7 Eagle Mountain Project are void. (*See Ocean Park Associates v. Santa Monica Rent Control Bd.*
8 (2004) 114 Cal.App.4th 1050, 1062.)

9 **2. CEQA Likewise Prohibits Delegation of EIR Certification to Staff.**

10 Likewise, the Executive Director of the State Board may not certify the EIR. CEQA
11 itself emphasizes that an elected or appointed Board cannot delegate its CEQA responsibilities to
12 its staff. Similar to Water Code § 186, the staff functions identified by CEQA are limited to
13 assisting the Board in *administering* CEQA:

14 (a) A public agency may assign specific functions to its staff to assist in
15 administering CEQA. Functions which may be delegated include but are not
16 limited to:

- 17 (1) Determining whether a project is exempt.
18 (2) Conducting an initial study and deciding whether to prepare a draft EIR or
19 negative declaration.
20 (3) Preparing a negative declaration or EIR.
21 (4) Determining that a negative declaration has been completed within a period of
22 180 days.
23 (5) Preparing responses to comments on environmental documents.
24 (6) Filing of notices.

25 (b) ***The decisionmaking body of a public agency shall not delegate the following***
26 ***functions:***

- 27 (1) ***Reviewing and considering a final EIR or approving a negative declaration***
28 ***prior to approving a project.***
(2) The making of findings as required by Sections 15091 and 15093.

(14 CCR § 15025 [“Delegation of Responsibilities”] [emphasis added]; *See also* 14 CCR
15090(a)(2) [decisionmaking body must review and consider the information contained in the
final EIR prior to approving the project].)

Because only the State Board is the decisionmaking body pursuant to the Water Code, the
Board may not delegate certification of the Eagle Mountain Project EIR to its staff, or the

1 Executive Director. Final certification of the EIR and the Section 401 Certification should be
2 scheduled for consideration by the State Board at a duly noticed public meeting.

3 **V. PETITIONERS ARE AGGRIEVED.**

4 Petitioners LIUNA and its members have a direct interest in impacts that will result from
5 the Eagle Mountain Project. LIUNA's and its members actively participated in the Executive
6 Director's CEQA process. Despite their objections, the Executive Director proceeded to finalize
7 the EIR and issue the Section 401 certification. Hence, Petitioners are aggrieved pursuant to
8 CEQA. In addition, LIUNA's mission includes advocating for programs and policies that
9 promote not only good jobs but also a healthy natural environment and working environment for
10 workers and their families. LIUNA's advocacy involves participating in and where appropriate
11 challenging projects within Riverside County that would result in harmful environmental effects
12 or the violation of environmental laws. LIUNA has formed alliances with a number of
13 environmental groups to promote their common goals of good jobs and a clean, healthy and
14 sustainable environment. LIUNA's members rely upon LIUNA to raise environmental concerns
15 during projects' approval proceedings. LIUNA's members reside in the vicinity of the Eagle
16 Mountain project and engage in hiking, hunting, bird watching, and observing wildlife in the
17 vicinity of the Project. LIUNA and its members are concerned about the Project's impacts on
18 these activities and their use and enjoyment of areas in and around the Eagle Mountain project
19 site. LIUNA and its members also are concerned with global warming and the cumulative
20 impacts of GHG emissions, including those that will result from the proposed Project.

21 **VI. REQUESTED STATE BOARD ACTION.**

22 Petitioners request that the State Board issue an order (1) vacating the Section 401
23 certification for the Project; (2) vacating the certification of the FEIR for the Project, as well as
24 the accompanying Findings, Mitigation Monitoring and Reporting Plan, and the Statement of
25 Overriding Considerations; (3) vacating the July 15, 2013 Notice of Determination regarding the
26 certification of the Project's EIR, and (4) order staff to amend the EIR in order to address each of
27 Petitioners' concerns set forth or incorporated by reference in this Petition for Review and
28

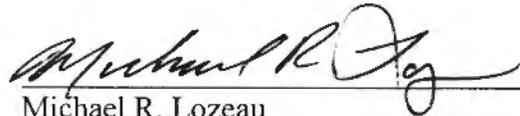
1 **X. SUMMARY OF THE MANNER IN WHICH AND TO WHAT EXTENT THE**
2 **PETITIONER PARTICIPATED IN ANY PROCESS.**

3 LIUNA presented the issues addressed in this petition to the Executive Director in its
4 comment letters submitted on March 27, 2013 and April 10, 2013.

5 Dated: August 14, 2013

6 Respectfully submitted,

LOZEAU DRURY LLP

7 

8 Michael R. Lozeau

9 Lozeau Drury LLP

10 Attorneys for Petitioners Gary Cruz,
11 Hildeberto Sanchez, Ralph Figueroa, and
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13 America, Local Union 1184
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EXHIBIT A



EDMUND G. BROWN JR.
GOVERNOR



MATTHEW RODRIGUEZ
SECRETARY FOR
ENVIRONMENTAL PROTECTION

State Water Resources Control Board

JUL 15 2013

Mr. Steven Lowe, President
Eagle Crest Energy Company
3000 Ocean Park Boulevard, Suite 1020
Santa Monica, CA 90405

Dear Mr. Lowe:

**ISSUANCE OF A 401 WATER QUALITY CERTIFICATION FOR THE EAGLE MOUNTAIN
PUMPED STORAGE PROJECT, FEDERAL ENERGY REGULATORY COMMISSION
PROJECT NO. 13123, RIVERSIDE COUNTY**

The State Water Resources Control Board's (State Water Board) Executive Director issued a water quality certification (certification) pursuant to section 401 of the Clean Water Act for the Eagle Mountain Pumped Storage Project (Project), Federal Energy Regulatory Commission Project No. 13123. A copy of the Project's certification and Notice of Determination are enclosed for your records. This information is also available on the Project's webpage at:
http://www.waterboards.ca.gov/waterrights/water_issues/programs/water_quality_cert/eaglemtn_ferc13123.shtml

The State Water Board will provide a copy of the certified Final Environmental Impact Report (EIR) to the Riverside County Planning Agency as well as retain a copy in our public Records Room. As the Project applicant, Eagle Crest Energy Company is required to provide a copy of the certified Final EIR to each responsible agency (CEQA Guidelines §15095.)

If you have questions regarding this letter, please contact me at (916) 323-9397 or by email at obiondi@waterboards.ca.gov. Written correspondence can be directed to: State Water Resources Control Board, Division of Water Rights, Attn: Oscar Biondi, P.O. Box 2000, Sacramento, CA 95812-2000.

Sincerely,

A handwritten signature in black ink, appearing to read "Oscar Biondi".

Oscar Biondi
Water Resource Control Engineer
Water Quality Certification Program
Division of Water Rights

Enclosures: Certification with Attachments
Notice of Determination

cc: See next page.

FELICIA MARCUS, CHAIR | THOMAS HOWARD, EXECUTIVE DIRECTOR

cc: (w/enclosures)

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(w/o enclosures)

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EXHIBIT B



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August 14, 2013

Via e-mail and First Class Mail

Tom Howard
Executive Director
State Water Resources Control Board
P.O. Box 100
Sacramento, CA 95812-0100
Tom.Howard@waterboards.ca.gov

Oscar Biondi
Water Resource Control Engineer
State Water Resources Control Board
Division of Water Rights
1001 "I" Street
P.O. Box 2000
Sacramento, CA 95812-2000
obiondi@waterboards.ca.gov

Re: Request to Prepare Administrative Record for Eagle Mountain Pumped Storage Water Project, EIR (SCH #2009011010) and Section 401 Certification (FERC Project No. 13123)

Dear Messrs. Howard and Biondi,

Concurrent with this correspondence, Gary Cruz, Hildeberto Sanchez, Ralph Figueroa, and Laborers International Union of North America, Local Union 1184 are filing a petition for review requesting the State Water Resources Control Board to review and reconsider the Executive Directors recent issuance of a Section 401 water quality certification and other approvals for the Eagle Mountain Pumped Storage Project, Federal Energy Regulatory Commission Project No. 13123 ("Eagle Mountain Project" or "Project"). Pursuant to 23 Cal. Code of Regulations § 3867, Petitioners hereby request the Executive Director to prepare the State Board staff record for the Project and its accompanying environmental impact report, including a tape recording or transcript of any pertinent staff hearing.

Sincerely,

A handwritten signature in blue ink, appearing to read "Michael R. Lozeau".

Michael R. Lozeau
Lozeau Drury LLP
Attorneys for Laborers International Union
of North America, Local Union 1184, Gary Cruz,
Hildeberto Sanchez, and Ralph Figueroa