

Director's Protest Resolution Report

**Alta East Wind Project
Plan Amendment**

California Desert Conservation Area Plan

May 17, 2013



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Reader's Guide

How do I read the Report?

The Director's Protest Resolution Report is divided into sections, each with a topic heading, excerpts from individual protest letters, a summary statement (as necessary), and the Bureau of Land Management's (BLM) response to the summary statement.

Report Snapshot

Issue Topics and Responses
NEPA

Topic heading

Submission number

Issue Number: PP-CA-ESD-08-0020-10
Protest issue number

Organization: The Forest Initiative
Protesting organization

Protester: John Smith
Protester's name

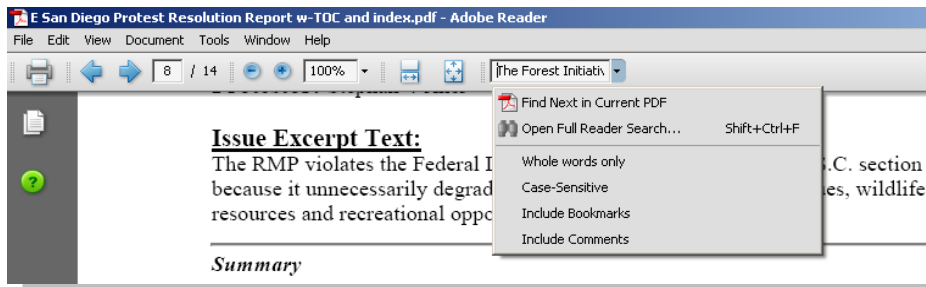
Issue Excerpt Text:
Rather than analyze these potential impacts, as required by NEPA, BLM postpones analysis of renewable energy development projects to a future case-by-case analysis.
Direct quote taken from the submission

Summary
General statement summarizing the issue excerpts (optional).
There is inadequate NEPA analysis in the PRMP/FEIS for renewable energy projects.

Response
BLM's response to the summary statement or issue excerpt if there is no summary.
Specific renewable energy projects are implementation-level decisions rather than RMP-level decisions. Upon receipt of an application for a renewable energy project, the BLM would require a

How do I find my Protest Issues and Responses?

1. Find your submission number on the protesting party index which is organized alphabetically by protester's last name.
2. In Adobe Reader search the report for your name, organization or submission number (do not include the protest issue number). Key word or topic searches may also be useful.



List of Commonly Used Acronyms

ACEC	Area of Critical Environmental Concern		
AEWP	Alta East Wind Project	FO	Field Office (BLM)
BA	Biological Assessment	FWS	U.S. Fish and Wildlife Service
BLM	Bureau of Land Management	GIS	Geographic Information Systems
BMP	Best Management Practice	IB	Information Bulletin
BO	Biological Opinion	IM	Instruction Memorandum
CAA	Clean Air Act	KOP	Key Observation Points
CEQ	Council on Environmental Quality	MOU	Memorandum of Understanding
CFR	Code of Federal Regulations	MUC	Multiple Use Class
COA	Condition of Approval	NEPA	National Environmental Policy Act of 1969
CSP	Concentrated Solar Power	NHPA	National Historic Preservation Act of 1966, as amended
CSU	Controlled Surface Use	NOA	Notice of Availability
CWA	Clean Water Act	NOI	Notice of Intent
DEIS/DRMPA	Draft Environmental Impact Statement /Draft Resource Management Plan Amendment	NRHP	National Register of Historic Places
DM	Departmental Manual (Department of the Interior)	NSO	No Surface Occupancy
DOI	Department of the Interior	OHV	Off-Highway Vehicle (has also been referred to as ORV, Off Road Vehicles)
EA	Environmental Assessment	PA	Plan Amendment
EIR	Environmental Impact Report	PPA	Power Purchase Agreement
EIS	Environmental Impact Statement	RFDS	Reasonably Foreseeable Development Scenario
EO	Executive Order	RMP	Resource Management Plan
EPA	Environmental Protection Agency	ROD	Record of Decision
ESA	Endangered Species Act	ROW	Right-of-Way
FEIS	Final Environmental Impact Statement	SO	State Office (BLM)
FEIS/PRMPA	Final Environmental Impact Statement /Proposed Resource Management Plan Amendment	T&E	Threatened and Endangered
FLPMA	Federal Land Policy and Management Act of 1976	USC	United States Code
		USGS	U.S. Geological Survey
		VRM	Visual Resource Management
		WA	Wilderness Area
		WSA	Wilderness Study Area
		WSR	Wild and Scenic River(s)

Protesting Party Index

Protester	Organization	Submission Number	Determination
Drury, Richard T.	Lozeau Drury LLP / Tony Guerra, Jose Rocha, Ranny Taylor, and Laborers' International Union of North America, Local Union No. 220	PP-CA-Alta East Wind-13-01	Denied

Issue Topics and Responses

NEPA

Issue Number: PP-CA-Alta East Wind-13-01-85

Organization: Lozeau Drury LLP

Protestor: Richard Drury

Issue Excerpt Text:

In particular, LIUNA notes that the following documents were not available on either BLM or the County's website for the Alta East Project during the PA/FEIS comment and protest period, or otherwise provided via web link:

- December 2006 Master Power Purchase and Wind Project Development Agreement (MDA) between Southern California Edison (SCE) and Alta East Project Proponent. (See FEIS, p. ES-2)
- AMC (American Cancer Society). 1996. "Electromagnetic Field Exposure and Cancer: A Review of Epidemiologic Evidence." *A Cancer Journal for Clinicians*. January/February.
- Baerwald, E.F., G.H. D'Amours, B.J. Klug and R.M.R. Barclay. 2008. "Barotrauma is a significant cause of bat fatalities at wind turbines." *Current Biology*. 18(16): R695-R696.
- Boyle (Boyle Engineering Corporation). 2004. Urban Water Management Plan, Mojave Public Utility District.
- Caltrans (California Department of Transportation), 1998. Technical Noise Supplement.
- Erickson, W.P., J. Jeffrey, K. Kronner, and K. Bay. 2004. Stateline Wind Project Wildlife Monitoring.

Commenters note that this is an exemplary list only, and is not a comprehensive list of all referenced scientific studies or other reports referenced in the PA/FEIS but not made available to the public. Commenters refer to Chapter 9.0 for further exemplary documents.

BLM has admitted in correspondence with Commenters that it is not even in possession of this document [the Power Purchase Agreement (PPA)], relied upon as a basis for the Project's purpose, need, and objectives. See Exhibit 10; FEIS, p. ES-2.

- Final Report, July 2001 – December 2003. Technical report peer-reviewed by and submitted to FPL Energy, the Oregon Energy Facility Siting Council, and the Stateline Technical Advisory Committee.

Issue Number: PP-CA-Alta East Wind-13-01-86

Organization: Lozeau Drury LLP

Protestor: Richard Drury

Issue Excerpt Text:

Additionally, the following exemplary documents are not accessible via the web links provided by BLM:

- EKAPCD (Eastern Kern Air Pollution Control District). 2005. Annual California Clean Air Act Ozone Air Quality Attainment Plan Implementation Progress Report. <http://www.kernair.org/Documents/Reports/CCAANo9%20Rpt.pd>. December 15, 2005.
- FEMA (Federal Emergency Management Agency). 2008a. Flood Insurance Rate Map Number 06029C3280E. Effective Date September 26. [online]: <http://www.msc.fema.gov/webapp/wcs/store/servlet/CategoryDisplay>. Accessed September 14, 2011.

Summary:

The BLM did not provide reference documents on their website or on the county (cooperating agency) website.

The BLM stated it did not have in its possession the Power Purchase Agreement (PPA) relied upon as a basis for the Project's purpose, need, and objectives.

Response:

The BLM strives to ensure that all cited material is reasonably available to interested individuals in accord with 40 CFR 1502.21. If not posted or linked to a BLM project website, cited material is reasonably available through other repositories. For example, a number of the documents cited by protestors above are published in journals of general circulation and/or are made available on agency websites, and therefore are reasonably available to interested parties.

Where the BLM cites information that is unavailable, the BLM will make clear that such information is lacking, in accordance with 40 CFR 1502.22. Where relevant information cannot be obtained and the means to obtain it are not known, the BLM will include a statement of the relevance of the unavailable information (40 CFR 1502.22). Other remedial action based upon generally accepted theoretical approaches or research methods is necessary where the reference document in question pertains to reasonably foreseeable significant adverse impacts. However, those circumstances are not applicable here. The project's PPA is a proprietary document and its existence is not in question, nor is it the foundation for the Purpose and Need. Furthermore, the PPA, and other such documents, do not pertain to reasonably foreseeable significant adverse impacts; therefore, no remedial action is warranted.

Cumulative Impacts/Segmentation of Analysis

Issue Number: PP-CA-Alta East Wind-13-01-3

Organization: Lozeau Drury LLP

Protestor: Richard Drury

Issue Excerpt Text:

Rather than analyze the Wind Center Project in a single programmatic Environmental Impact Report ("EIR") / Environmental Impact Statement ("EIS"), the Bureau of Land Management ("BLM") has proceeded with separate CEQA and NEPA documents for each sub-project of the Wind Center Project, as with Alta East, and, as a result, has failed to properly analyze and mitigate the massive cumulative impacts of the Alta East Project when considered in conjunction with all related and interdependent sub-

projects that comprise the Wind Center Project, and all reasonably foreseeable wind projects in the Tehachapi Wind Resource Area (TWRA).

Issue Number: PP-CA-Alta East Wind-13-01-5

Organization: Lozeau Drury LLP

Protestor: Richard Drury

Issue Excerpt Text:

The PA/FEIS improperly segments environmental review under NEPA by failing to analyze the Alta East Project in conjunction with the other interconnected wind farm projects that form the overall Alta East Wind Center Project.

Issue Number: PP-CA-Alta East Wind-13-01-72

Organization: Lozeau Drury LLP

Protestor: Richard Drury

Issue Excerpt Text:

The development policies analyzed in the Wind PEIS were not specific to individual wind farm projects, and thus did not analyze the cumulative impacts of multiple wind farms within the TWRA. The Wind Center Project has not been analyzed in any single NEPA or CEQA document. As part of the Wind Center, the Alta East Project must be analyzed in a single EIS along with the other Wind Center wind farm sub-projects.

B. The Wind Center Sub-Projects are Similar Actions. Even if the various Wind Center Project components are not “connected,” they are indisputably “similar.” Therefore, BLM should analyze all Wind Center sub-projects in a single EIS.

Issue Number: PP-CA-Alta East Wind-13-01-74

Organization: Lozeau Drury LLP

Protestor: Richard Drury

Issue Excerpt Text:

Here, the Alta East Project is just one component of the massive Alta East Wind Center Project, projected to become the world’s largest wind farm when fully constructed. See Exhibits 3 & 4. The components of Wind Center Project are geographically contiguous, and will consist of around 300 turbines installed in up to nine

sub-projects over more than 9,000 acres within the discrete TWRA, in the Tehachapi Pass of the Tehachapi Mountains, in Kern County. Id.; FEIS, p. ES-2. The timing for construction and commencement of operation of all Wind Center Project components is also identical. The PPA sets a 5-year period, from 2010 to 2015, in which all Wind Center wind farms are to be constructed and begin operations so that Terra-Gen can deliver up to 1,550 MW of wind energy from the sub-projects beginning in 2015. FEIS, p. ES-2. Power purchase agreements have been executed under the PPA for the Alta East Wind Project to facilitate construction of this Wind Center component. FEIS, p. ES-2.

There can be no reasonable dispute that the Alta East Project is a similar project to all other planned or contemplated projects for the Wind Center under the PPA. Therefore, Alta East should be analyzed along with the other Wind Center sub-projects in a single EIS.

Issue Number: PP-CA-Alta East Wind-13-01a-10

Organization: Lozeau Drury LLP

Protestor: Richard Drury

Issue Excerpt Text:

- The PA/FEIS improperly segments environmental review under NEPA by failing to analyze the Alta East Project in conjunction with the other interconnected wind farm projects that form the overall Alta East Wind Center Project.

Summary:

The BLM failed to analyze and mitigate the cumulative impacts when considered in conjunction with interdependent sub-projects of the Wind Center Project. The BLM therefore improperly segmented environmental review under NEPA.

Response:

This Final Environmental Impact Statement/Environmental Impact Report (EIS/EIR) analyzes the cumulative impact of the construction, operation and maintenance, closure and decommissioning of the elements of the Alta East Wind Energy Project (AEWP) and alternatives, taking into account the effects in common with other past, present, and reasonably foreseeable future actions. The cumulative effects analysis highlights past actions that are closely related either in time or space (i.e., temporally or in geographic proximity) to the AEWP; present actions that are ongoing at the same time this Final EIS/EIR was being prepared; and reasonably foreseeable future actions, including those for which there are existing decisions, funding, formal proposals, or which are highly probable, based on known opportunities or trends. Cumulative impact analysis includes, where appropriate, the Projects identified by the protester including reasonably foreseeable projects within the Tehachapi Wind Resource Area (TWRA).

The geographic scope of cumulative effects often extends beyond the scope of the direct effects, but not beyond the scope of the direct and indirect effects of the Proposed Action and alternatives. Each project in a region will have its own implementation schedule, which may not coincide with the AEWP's schedule. This is a consideration for short-term impacts from the AEWP. However, to be conservative, the cumulative analysis assumes that all projects in the cumulative scenario are built and operating during the operating lifetime of the AEWP.

Each resource or BLM program area analysis includes the appropriate cumulative analysis impact area (which is the geographic extent for each cumulative effects resource/issue), elements to consider, and which renewable projects, other BLM-authorized actions, and other known and reasonably foreseeable actions or activities that are located or would occur within the cumulative analysis impacts area, referred to by the Protester as the Wind Center Project area, but also known as the TWRA. The TWRA comprises an area defined by Kern County, reflecting where the County prefers to site wind projects. Although Kern County has not made a planning decision via a General Plan designation, Kern County uses this mapping as a guide for wind power developers.

For impacts identified in the resource sections, mitigation measures have been developed that would be implemented during all appropriate phases of the project from initial ground breaking to operations, and through closure and decommissioning.

Table 4.1-1 provides a comprehensive listing of all foreseeable projects (the TWRA) that could contribute to a cumulative impact on the environment. Projects listed include renewable energy projects located on BLM-administered and private lands, other BLM actions, and projects identified by local governments including Kern County and Los Angeles County. The table presents the project name and owner, location, type, status, total acres, and a brief description of each project, to the extent available. Projects listed in Table 4.1-1 have undergone (or will undergo) their own independent environmental review under NEPA and CEQA, as applicable.

Deferral of Mitigation Plans

Issue Number: PP-CA-Alta East Wind-13-01a-15

Organization: Lozeau Drury LLP

Protestor: Richard Drury

Issue Excerpt Text:

- The PA/FEIS improperly defers selection of mitigation plans to protect biological resources.

Summary:

The FEIS improperly defers the selection of mitigation plans to protect biological resources until after public participation is completed.

Response:

The intent in analyzing mitigation measures in the FEIS is to identify the mitigation that would be needed to manage the resources (biological and cultural) so as to avoid significant impact. NEPA policy does not require identified mitigation plans to be finalized prior to the conclusion of the NEPA process. Rather, NEPA requires sufficient detail about the potential content of such plans such that the effects of the measures can be disclosed and analyzed in the NEPA document. Similarly, while NEPA requires an agency to discuss possible mitigation measures, 42 U.S.C. § 4332(C)(ii), it does not require specific types of mitigation to be analyzed or adopted; those decisions are left to the discretion of the Agency. Moreover, so long as there is a plan described and in place prior to the milestones set forth in the mitigation measures discussed in the FEIS, mitigation is not deferred. Thus, the analysis of the identified mitigation plans in the FEIS satisfies these obligations.

Multiple Use Class (MUC)-L

Issue Number: PP-CA-Alta East Wind-13-01a-58

Organization: Lozeau Drury LLP

Protestor: Richard Drury

Issue Excerpt Text:

Second, the Project fails to provide for protection of the public lands within the CDCA and is inconsistent with criterion #4 (i.e., “[a]void sensitive resources wherever possible”), because the Project proposes to amend the CDCA to permit industrial wind uses in Class L and Unclassified CDCA

lands, thereby increasing the adverse environmental impacts to these sensitive areas, rather than protecting them. Class L lands are to be managed to protect sensitive, natural, scenic, ecological, and cultural resource values, and provide for generally lower-intensity, carefully controlled multiple uses that do not significantly diminish resource values. FEIS, p. 1-4. The Project and Plan Amendment are proposed within habitat that should be protected to achieve the goals of the federal bioregional plans as a whole, and also as habitat that is essential

to the recovery of the endangered California condor, bald and golden eagles, and threatened desert tortoise. As proposed, the

Project fails to comply with Class L use criteria.

Summary:

The Project fails to provide for protection of the public lands within the California Desert Conservation Area (CDCA) Plan and is inconsistent with criterion number 4 (i.e., “[a]void sensitive resources wherever possible”), because the Project proposes to amend the CDCA Plan to permit industrial wind uses in Class L and Unclassified CDCA lands, thereby increasing the adverse environmental impacts to these sensitive areas, rather than protecting them. As proposed, the Project fails to comply with Class L use criteria.

Response:

As noted on FEIS page 4.6-2:

“The majority of the AEW P site is within the boundaries of the BLM’s MUC designations under the CDCA Plan. The MUC designations applicable to the AEW P site include Class M, Class L, and Unclassified lands (refer to Table 3.6-1 in Section 3.6 and Figure 2-4 in Appendix A). The MUC designations guide the type and degree of land use allowed within the classification area. Class M allows for a wide variety of present and future uses such as mining, livestock grazing, recreation, energy, and utility development. Class L allows for low to moderate recreation activities, including non-competitive vehicle touring and events on approved routes of travel. Wind energy development is also an allowable use of Class L lands after NEPA requirements are met; and the Unclassified designation consist of scattered and isolated parcels of public land in the CDCA that have not been placed within multiple-use classes. This Proposed PA, Final EIS/EIR will act as the mechanism for complying with these MUC requirements.

"All land use actions and resource management activities on BLM-administered lands within a MUC designation must meet the guidelines for that class. These guidelines are listed on Table 1, MUC Guide-lines, of the CDCA Plan (page 15). Both Class M and Class L allow wind energy generation facilities after NEPA requirements are met.”

As explained in the AEW P EIS, the project area had encompassed land under the jurisdiction of the BLM or Kern County, including MUC Class L, Class M, and Unclassified Lands. However, subsequent to the publication of the FEIS, the project footprint has been further refined based on a revised Plan of Development submitted by the Applicant. Under this refined footprint, the project site now comprises MUC Class M and Unclassified lands; there are no Multiple-Use Class L (Limited Use) lands as designated by the CDCA Plan in the project area. As result, the protester’s comments above as to compliance with Class L lands requirements no longer apply and cannot form the basis for a valid plan amendment protest.

With respect to CDCA Plan requirements generally, the CDCA Plan contemplates industrial uses analogous to the use analyzed by the proposed plan amendment, including utility rights of way outside of existing corridors, power plants, and renewable energy development and transmission (CDCA Plan, page 95). As noted above, the CDCA Plan allows for wind energy development in MUC Class L, Class M and Unclassified areas “after NEPA requirements are met” (CDCA Plan, page 15). The EIS that accompanies the proposed plan amendment acts as the mechanism for

complying with those requirements (FEIS at 4.6.3). The CDCA Plan also requires that newly proposed power sites that are not already included within the plan be added to the plan through the plan amendment process. Because the proposed project site is not currently included in the CDCA Plan, a plan amendment is required to include the site as a recognized element in the CDCA Plan. Finally, the CDCA Plan provides guidance concerning the management and use of BLM lands in the California Desert while protecting resources and balancing other public needs. The CDCA Plan specifically cites energy development and transmission as a “paramount national priority” to consider in balancing use and protection of resources (CDCA Plan, page 13). The proposed plan amendment identifies and analyzes sensitive resources and values, and the BLM has ensured that the plan amendment will not significantly diminish sensitive values by way of appropriate design features, mitigation, and monitoring. Because wind power facilities are an allowable use of the public lands within the Project, the proposed action does not conflict with the CDCA Plan.

As explained in the CDCA Plan Record of Decision (ROD), the Assistant Secretary for Land and Water Resources (ASLW) discussed that one of the major issues was the allowance of wind, solar, and geothermal power plants (CDCA ROD, page 15). The ROD recognized that “these facilities are different from conventional power plants and must be located where the energy resource conditions are available”. The recommended decision, which was ultimately approved, noted: “Keep guidelines as they are to allow these power plants if environmentally acceptable. Appropriate environmental safeguards can be applied to individual project proposals which clearly must be situated where the particular energy resources are favorable” (CDCA ROD, page 10, *et seq.*).

The allowance of wind, solar, and geothermal power plants on designated Class L lands in the CDCA was approved by the ASLW and concurred with by the Secretary of the Interior on December 19, 1980. The BLM has met the NEPA requirements for the plan amendment through the analysis contained in the DEIS and FEIS. As stated in the FEIS, the reason for the amendment is to specifically allow a wind-energy generation project on the project site. This amendment and the overall amendment process are consistent with the implementation of the CDCA Plan. The CDCA Plan amendment will not result in sweeping changes to the Limited Use designation within the overall boundary of the CDCA. Furthermore, the proposed plan amendment identifies and analyzes sensitive resources and values. In addition, the BLM has ensured that the plan amendment will not significantly diminish sensitive values by way of design features, mitigation, and monitoring.

With respect to the protester’s general claims regarding wildlife species and habitat, it should be noted that the project area is located within the Middle Knob Motorized Access Zone, as identified in the West Mojave Plan (WMP) amendment to the CDCA Plan. The project area is also not within any Desert Wildlife Management Areas or Areas of Critical Environmental Concern (ACEC) established by the WMP or any U.S. Fish and Wildlife Service (FWS)-designated critical habitat. The Proposed Plan amendment and Project also comply with the applicable CDCA requirements. Table 1 of the CDCA Plan includes a variety of guidelines associated with wildlife, as follows:

“Rare, Threatened, and Endangered Species, State and Federal – In all MUC areas, all State and federally listed species and their critical habitat will be fully protected. In addition, actions which may jeopardize the continued existence of federally listed species will require consultation

with the U.S. Fish and Wildlife Service in accordance with Section 7 of the Endangered Species Act.”

As evaluated in FEIS Section 4.21, Wildlife Resources, the desert tortoise and California condor are the only federally listed species potentially affected by the AEW. Measures developed as part of the AEW and mitigation measures presented in Section 4.21 (Wildlife Resources) and included as part of the Biological Opinion issued by the FWS would avoid, minimize, and/or compensate for potential effects to the desert tortoise and California condor. As specified in the guideline, BLM has initiated formal consultation with the U.S. Fish and Wildlife Service in accordance with Section 7 of the Endangered Species Act. Desert tortoise and California condor are also listed under the California Endangered Species Act, and the AEW has the potential to affect two (2) additional species listed at the state level: Mohave ground squirrel and Swainson’s hawk. Measures developed as part of the AEW and mitigation measures presented in Section 4.21 (Wildlife Resources) would avoid, minimize, and/or compensate for potential effects to these state-listed species, and the Project Proponent would be required to consult with CDFG for 2081 take authorization for impacts to all state-listed species. Therefore, the AEW complies with the applicable CDCA Plan guidelines to provide full protection for wildlife species.

CDCA

Issue Number: PP-CA-Alta East Wind-13-01-7

Organization: Lozeau Drury LLP

Protestor: Richard Drury

Issue Excerpt Text:

The PA/FEIS erroneously concludes that the Project is in conformity with the CDCA

Area Plan’s Energy Production and Utility Corridors Element decision criteria. In particular, the Project fails to avoid sensitive resources wherever possible and does not conform to local plans (i.e., the Kern County General Plan) whenever possible.

Summary:

The Plan Amendment /Final Environmental Impact Assessment’s (PA/FEIS) conclusion that the Project is in conformity with the CDCA Plan’s Energy Production and Utility Corridors Element decision criteria is wrong; the Project fails to avoid sensitive resources and does not conform to other plans.

Response:

As explained in the PA/FEIS, the Project is in conformity with the CDCA Plan's Energy Production and Utility Corridors Element because it does avoid sensitive resources. It also conforms to local land use plan requirements as explained below.

The FEIS, pages 4.6 - 4/5, specifically address Sensitive Plant Species, stating "Identified sensitive plant species would be given protection in management decisions consistent with BLM's policy for sensitive species management, BLM Manual 6840. The objective of this policy is to conserve and/or recover listed species, and to initiate conservation measures to reduce or eliminate threats to BLM sensitive species to minimize the likelihood of and need for listing. The AEWP could result in impacts to individuals or populations of three (3) special-status plant species documented within the rare plant survey area: Bakersfield cactus, pale-yellow layia, and adobe yampah".

"Impacts and mitigation associated with these species were discussed in Section 4.17. Implementation of the avoidance, minimization, and mitigation measures described in Section 4.17.11 would mitigate the direct and indirect impacts to vegetation resources, including permanent and temporary impacts to vegetation communities, special-status plant species, and state jurisdictional areas on the AEWP site. Because these measures are intended to reduce threats to these species to minimize the likelihood of listing, these measures are in conformance with the MUC guidance in the CDCA Plan".

The FEIS also specifically addresses Sensitive Wildlife Species, stating "Identified species would be given protection in management decisions consistent with BLM's policy for sensitive species management, BLM Manual 6840. The objective of this policy is to conserve and/or recover listed species, and to initiate conservation measures to reduce or eliminate threats to BLM sensitive species to minimize the likelihood of and need for listing. Several BLM sensitive wildlife species present or likely to occur on habitat associated with the AEWP include, but are not limited to, coast horned lizard, burrowing owl, several mice, and a number of bat species. Those species that are likely to occur on the AEWP site would be protected under a number of mitigating measures meant to avoid, minimize, or compensate for impacts from the AEWP. Implementation of these measures would provide protection to sensitive species as required by BLM policies. The impacts and mitigation measures are discussed in detail in Section 4.21" (FEIS, page 4.6-6). The measures are in conformance with CDCA Plan requirements.

As explained in the FEIS, "Approval of the West Mojave Plan amended the CDCA Plan in 2006. The West Mojave Plan is a habitat conservation plan, and governs the AEWP site. Sections 4.17 (Vegetation Resources) and 4.21 (Wildlife Resources) provide analyses of the AEWP's compliance with this conservation plan, which state that with implementation of AEWP mitigation measures, the AEWP would conform with the West Mojave Plan. Refer to Section 4.17 and 4.21 for the applicable mitigation measures" (FEIS, page 4.6-7).

Finally, with respect to local plan conformance, the PA/FEIS explains that, "approval of the AEWP [by Kern County will]... include an amendment to the KCGP Circulation Element. An analysis of the AEWP's consistency with applicable KCGP policies and objectives is provided in Table 4.6-2 (Policy Consistency Analysis) of this Final EIS/EIR. Based on this analysis, after the contemplated amendment to the KCGP, the AEWP would be consistent with the KCGP" (FEIS pages 4.6-7/8).

Raptors and Other Birds

Issue Number: PP-CA-Alta East Wind-13-01-6

Organization: Lozeau Drury LLP

Protestor: Richard Drury

Issue Excerpt Text:

- The PA/FEIS and proposed ROW fail to discuss or include adequate measures to

ensure compliance with applicable state laws and to minimize damage to the environment, including in particular the need for curtailment of turbines to prevent the take of raptors, owls and other birds strictly protected under the California Fish & Game Code.

Summary:

The PA/FEIS lacks adequate measures to ensure compliance with applicable state laws and to minimize damage to raptors, owls and other birds strictly protected under the California Fish & Game Code.

Response:

As noted in the response to Section 7.1, in all MUC areas, all State and federally listed species and their critical habitat will be fully protected. In addition, actions which may jeopardize the continued existence of federally listed species will require consultation with the U.S. Fish and Wildlife Service in accordance with Section 7 of the Endangered Species Act.

As evaluated in FEIS Section 4.21, Chapter 4 in the FEIS addresses mitigation to avoid harm to raptors, owls and other birds in depth. Page 4.21-22 (Avian and Bat Collision Risk) states: "The VHF detection system will be installed in early 2013, and prior to project construction, to monitor a large area in all directions from the AEWP to maximize response times should a condor be detected. By design, the detection system will monitor for and report condor(s) if they are within 16 miles of the AEWP".

"The project proponent has been in ongoing discussions with the United States Fish and Wildlife Service (FWS) to demonstrate and determine the effectiveness of the Monitoring and Avoidance Plan. Field trials performed on July 9, 10, and 11, 2012, at Bitter Creek Wildlife Refuge where condors were present, indicated that the system had a 100 percent success rate for detecting condors. The objective of the test was to evaluate the detection system against a human observer. In every case the VHF detection system recorded a condor occurrence before the human observer could detect it and in many cases, detected the occurrence of a condor that a human observer did not detect. Because almost all free flying condors are fitted with VHF transmitters, this system and its protocol will help ensure that condor mortality can be avoided."

For other birds, "bird use by species was calculated as the mean number of birds per 30-minute survey." (FEIS 4.21-23) As noted on page 4.21-27, "Potential collision risk impacts to birds, including condors, would be minimized through implementation of Mitigation Measures 4.21-6 (Avian and Bat Protection Plan), 4.21-7 (Eagle Conservation Plan), 4.21-8 (Lighting Specifications to Minimize Bird and Bat Collisions), 4.21-9 (Minimize Avian and Bat Turbine Strikes), 4.21-10 (Post-Construction Breeding Monitoring), 4.21-11 (Post-Construction Avian

and Bat Mortality Monitoring), 4.21-12 (Supplemental Measures for Unanticipated Significant Impacts), and 4.21-14 (Post-Construction Condor Monitoring)." These mitigation measures, summarized on 4.21-27 and -28, will assure that raptors, owls, and other birds will be protected in compliance with Federal and State law and regulation.

Moreover, with respect to state law requirements, it should be noted that the BLM prepared the Draft PA/EIS jointly with Kern County, and that its efforts included working closely with the County and other Federal, State and local agencies that administer laws, regulations, and standards that were potentially applicable to the AEWP, including the California Department of Fish and Wildlife (CDFW) (formerly California Department of Fish and Game); the agency with exclusive jurisdiction over the statutes cited by protestors. Additionally, as explained in the PA/FEIS, some of the mitigation measures developed for the AEWP include requirements to consult with CDFW in the development of various plans and actions related to the Project.

Finally, with respect to protester's suggestion that specific mitigation must be implemented by the Project, as explained above, NEPA only requires an agency to discuss possible mitigation measures, 42 U.S.C. § 4332(C)(ii), it does not require specific types of mitigation to be analyzed or adopted; those decisions are left to the discretion of the Agency.