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COUNTY OF KERN

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WILDLIFE

## SUPERIOR COURT OF THE STATE OF CALIFORNIA

## FOR THE COUNTY OF KERN

SIERRA CLUB, CENTER FOR  
BIOLOGICAL DIVERSITY and  
DEFENDERS OF WILDLIFE

Plaintiffs/Petitioners,  
vs.

COUNTY OF KERN and KERN  
COUNTY BOARD OF SUPERVISORS,  
and DOES 1-25, inclusive,

Defendants/Respondents,

NORTH SKY RIVER ENERGY, LLC;  
NORTH SKY RIVER  
LANDHOLDINGS LLC; JAWBONE  
WIND ENERGY, LLC, PHILIP

CASE NUMBER **S-1500-CV-275036** *VCT*

**PETITION FOR PEREMPTORY WRIT  
OF MANDATE AND COMPLAINT  
FOR DECLARATORY AND  
INJUNCTIVE RELIEF**

C.C.P. §§1085, 1094.5 & §1021.5; Pub.  
Res. Code §§ 21000 et seq.

Fax Filed

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1 RUDNIK, LEROY CASS, SOLOMON  
2 GOLTCHÉ; STEVEN HANNA and  
DOES 26-50, inclusive,

3 Real Parties in Interest.

4 Petitioners hereby allege as follows:

5 **I. INTRODUCTION**

6 1. SIERRA CLUB, CENTER FOR BIOLOGICAL DIVERSITY and DEFENDERS  
7 OF WILDLIFE (Petitioners and Plaintiffs will collectively be referred to as "Petitioners") petition  
8 this Court for a Writ of Mandate and Order under Code of Civil Procedure §1094.5 and §1085  
9 and Public Resources Code §21168.5, directed to Respondents, COUNTY OF KERN and KERN  
10 COUNTY BOARD OF SUPERVISORS, (collectively "Respondent" or "County"), setting aside  
11 Respondents' certification of a Final Environmental Impact Report ("EIR") that was prepared in  
12 conjunction with various actions and ultimate approval of North Sky River and Jawbone Wind  
13 Energy Projects ("Project"). Petitioners also seek an order directing the County to set aside all  
14 project approvals, resolutions, ordinances and findings and not to reconsider the project until and  
15 unless a legally adequate EIR is prepared and certified consistent with the mandates of the  
16 California Environmental Quality Act, otherwise referred to as CEQA. Through this action,  
17 Petitioners also seek a judicial declaration indicating that the County's certification of the EIR  
18 and approval of the Project was unlawful.

21 2. In general, Petitioners support the development of wind and solar energy as a  
22 critical component of efforts to curtail the production of greenhouse gases (GHG). Such efforts  
23 are vitally needed in order to avoid the most catastrophic impacts of climate change and to assist  
24 California in meeting its GHG emission reduction goals.

25 3. Petitioners are collectively opposed to this particular wind energy project,  
26 however, because of its unacceptable and inadequately mitigated impact on an important avian  
27 migratory corridor, and sensitive and protected bat and avian species, including the majestic  
28

1 Golden eagle and the extremely rare California condor.

2 **II. THE PARTIES**

3 4. Petitioner and Plaintiff SIERRA CLUB is a California non-profit membership  
4 organization that is concerned with protection of the environment and preservation of farmlands.  
5 Some members of SIERRA CLUB work and/or reside in Kern County, in the vicinity of the  
6 projects. SIERRA CLUB brings this action on its own behalf, for its members, and in the public  
7 interest.  
8

9 5. Petitioner and Plaintiff CENTER FOR BIOLOGICAL DIVERSITY ("CBD") is a  
10 non-profit, public interest corporation with over 42,000 members with offices in San Francisco,  
11 Los Angeles, and Joshua Tree, California, as well as offices in Arizona, New Mexico, Oregon,  
12 Vermont, and Washington, D.C. CBD and its members are dedicated to protecting diverse native  
13 species and habitats through science, policy, education, and environmental law. CBD members  
14 reside in and own property throughout California as well as Kern County. CBD and its members  
15 would be directly, adversely and irreparably harmed by the Projects and its components, as  
16 described herein, until and unless this Court provides the relief prayed for in this petition. CBD  
17 brings this action on its own behalf, for its members, and in the public interest.  
18

19 6. Petitioner and Plaintiff DEFENDERS OF WILDLIFE ("Defenders") is a national  
20 non-profit organization with a field office in Sacramento, California. Defenders is dedicated to  
21 the protection of all native wild animals and plants in their natural communities. Defenders has  
22 approximately 426,000 members nationwide and more than 69,000 in California. Defenders  
23 advocates new approaches to wildlife conservation that will help keep species from becoming  
24 endangered, and employs education, litigation, research, legislation and advocacy to defend  
25 wildlife and their habitat. Defenders and its members would be directly, adversely and irreparably  
26 harmed by the Projects and its components, as described herein, until and unless this Court  
27 provides the relief prayed for in this petition. Defenders brings this action on its own behalf, for  
28

1 its members, and in the public interest.

2 7. Respondent and Defendant, County of Kern, is a local government agency and  
3 subdivision of the State of California charged with authority to regulate and administer land use  
4 and development within its territory, but only in compliance with the duly adopted provisions of  
5 its zoning ordinances, General Plan, and all applicable provisions of state law, including the  
6 California Environmental Quality Act, the Planning and Zoning law, and the Subdivision Map  
7 Act.

8  
9 8. Respondent and Defendant Kern County Board of Supervisors is the legislative  
10 body and highest administrative body of the County. The Board has the authority to approve and  
11 is responsible for, amendments to the County General Plan and the Zoning Maps. The County  
12 Department of Planning and Community Development is the lead agency within the meaning of  
13 CEQA, but the County Board of Supervisors is responsible for the certification of the EIR and the  
14 approval of the tentative tract map and the related approvals.

15 9. Petitioners are informed and believe and on that basis allege that North Sky River  
16 Energy, LLC; North Sky River Landholdings LLC; Jawbone Wind Energy, LLC, Phil Rudnik,  
17 Leroy Cass, Solomon Goltche; Steven Hanna are real parties in interest in this case. Petitioners  
18 will amend the Petition as required to specifically identify each such person as a real party in  
19 interest as the identity, interest and capacity of such party, if any, becomes known.  
20

#### 21 JURISDICTION AND VENUE

22 10. This Court has jurisdiction over this action pursuant to California Code of Civil  
23 Procedure sections 1085 and 1094.5, and Public Resources Code sections 21168 and 21168.5.  
24 This Court has the authority to issue a writ of mandate directing Respondents to vacate and set  
25 aside its approval of the Project and certification of the EIR for the Project under the Code of  
26 Civil Procedure sections 1085 and 1094.5.

27 11. Venue for this action properly lies in the Kern County Superior Court because  
28 Respondents and the Project are located in Kern County.

1 **III. PROCEDURAL ALLEGATIONS**

2 12. Petitioners have performed any and all conditions precedent to filing the instant  
3 action and have exhausted any and all administrative remedies to the extent required by law, by  
4 *inter alia*, submitting extensive written and oral comments on the Project and the County's  
5 environmental review at every step of the administrative review process.

6 13. Petitioners have requested that the County not approve this Project as proposed  
7 and not to certify the legally inadequate Final EIR, therefore any further attempts to pursue  
8 administrative remedies would be futile.

9 14. Petitioners have complied with the requirements of Public Resources Code section  
10 21167.5 by mailing a written notice of the commencement of this action to Respondent prior to  
11 filing this petition and complaint. A true and correct copy of this notice is attached hereto.

12 15. Petitioners have complied with the requirements of Public Resources Code section  
13 21167.7 and Code of Civil Procedure section 388 by mailing a copy of the Petition/Complaint to  
14 the state Attorney General.

15 16. Petitioners have no plain, speedy or adequate remedy in the ordinary course of law  
16 unless this Court grants the requested writ of mandate to require Respondents to comply with  
17 their duties and set aside the approval of the Project until they have prepared a legally sufficient  
18 EIR. In the absence of such remedies, Respondent's approvals will remain in effect in violation  
19 of CEQA.

20 17. If Respondents are not enjoined from approving the Project, and from undertaking  
21 acts in furtherance thereof, Petitioners will suffer irreparable harm from which there is no  
22 adequate remedy at law in that the Project area and surrounding areas would be irrevocably  
23 altered and significant adverse impacts on the environment would result. Petitioners and the  
24 general public have also been harmed by Respondents' failure to provide an environmental  
25 document that accurately and fully informs interested persons of the Project's impacts.  
26  
27  
28

18. In pursuing this action, which involves enforcement of important rights affecting the public interest, Petitioners will confer a substantial benefit on the general public, citizens of Kern County and the State of California, and therefore will be entitled to attorneys' fees and costs pursuant to, *inter alia*, Code of Civil Procedure §1021.5.

19. Petitioners bring this action in part pursuant to Public Resources Code §21168.5 and Code of Civil Procedure §1085 or §1094.5, which require that an agency's approval of a Project be set aside if the agency has prejudicially abused its discretion. Prejudicial abuse of discretion occurs either where an agency has failed to proceed in a manner required by law or where its determination or decision is not supported by substantial evidence. Respondents have prejudicially abused their discretion because Respondents have failed to proceed according to the law, and their decision is not supported by substantial evidence.

#### IV. STATEMENT OF FACTS

20. The Project consists of two separate but contiguous wind energy projects, proposed by two separate project proponents. The first site consists of 12,781 acres proposed for the North Sky River Wind Energy Project. The second site consists of 754 acres for the proposed Jawbone Wind Energy Project. Collectively, the two projects propose to construct and operate 116 wind turbine generators. In addition, the project applicants propose to construct and operate a temporary mobile concrete batch plant to provide concrete and material for the construction of the turbine generators, substation, and operation and maintenance building foundations. The Project will also require extensive construction of access roads and underground transmissions lines.

21. The Project site is located at the base of the Tehachapi and Piute mountain ranges within the southern Sierra Nevada mountains, west of the Fremont Valley in the Western Mojave Desert. The site is within the unincorporated area of Kern County, about thirteen miles north of the intersection of Highway 58 and Highway 14, directly south and east of the intersection of Kelso Valley Road and Jawbone Canyon Road, 6.5 miles east of the unincorporated community

1 of Twin Oaks, and eight miles west of Cantil in eastern Kern County. The Project is within the  
2 unofficial boundaries of the Tehachapi Wind Resource area.

3 22. The General Plan land use designation for the site (prior to Project approval) was  
4 8.3 (Extensive Agriculture), 8.3/2.4 ( Extensive Agriculture-Steep Slope) and 8.3/2.5 (Extensive  
5 Agriculture-Flood Hazard).

6 23. The Project requires a change in the zoning designation to incorporate the WE  
7 (Wind Energy Combining) District to the Agricultural designation on 2,442 acres of the overall  
8 13, 535-acre project site, and a conditional use permit ("CUP")  
9

10 24. The County initiated the CEQA review process by releasing a Notice of  
11 Preparation/Initial Study for public review and comment on December 16, 2010. The 30 day  
12 comment period ended on January 14, 2011. Thereafter, the County prepared and circulated a  
13 Draft Environmental Impact Report (EIR) for a 45-day public review period, which ended on  
14 June 20, 2011.

15 25. Owing to the Project's potentially significant environmental impacts, over sixty-  
16 one written comments were submitted to the County during the 45-day review period alone. The  
17 Department of Fish and Game ("DFG") were among those submitting comments on the Draft  
18 EIR. DFG's comments noted that "Project implementation would result in substantially higher  
19 avian and bat fatality rates than estimated for most other wind power plants in the region" and that  
20 Project operation "would result in 'take' of Fully Protected bird species, California Species of  
21 Special Concern (CCSC) bats and birds, and birds listed under the California Endangered Species  
22 Act." With regard to impacts to the California Condor, DGF stated that "[t]he combination of the  
23 highly suitable habitat features on site, the known historic condor occurrences in the area, and the  
24 recent condor activity nearby lead the Department to conclude that Condors will utilize the  
25 Project area in the near future and be at risk from turbine strikes."  
26

27 26. In its comments to the County, Defenders likewise warned that the impact on avian  
28

1 and bat species would be much more significant than predicted by the EIR.

2       27. The United States Fish and Wildlife Service also submitted comments on the Draft  
3 EIR stating that "[t]he Service does not agree with the conclusion [in the Draft EIR] that the  
4 construction of the [Project] can be considered a low risk to condors." The Fish and Wildlife  
5 Service also noted that "California condor use of the project area is likely to increase as the  
6 population expands, as the area has been shown to support California condor movement and has  
7 suitable foraging and roosting habitat."  
8

9       28. The County's response to comments was publicly released on August 11, 2011,  
10 only two weeks before the Planning Commission hearing on the Project.

11       29. Prior to Project approval, the Sierra Club and Center for Biological Diversity  
12 submitted comments on the Project stating that the Final EIR failed to address the legitimate  
13 concerns raised by other commenters, failed to adequately analyze the Project's cumulative  
14 impacts, improperly deferred the analysis of Project impacts and the formulation of mitigation,  
15 and improperly segmented the Project by failing to analyze the impacts of needed access roads  
16 and gen-tie lines.  
17

18       30. The Board of Supervisors finally approved the Project at its September 13, 2011  
19 hearing. The Project approval included Resolutions 2011-267 and 2011-268, and Ordinance  
20 Numbers G-1895, G-1896, G-1897, G-1898 and G-8199.

21       31. The Notice of Determination, which was posted on September 21, 2011, describes  
22 the project as follows: (a) Amendment Zoning Map No. 110, Zone Change Case No. 2; (b)  
23 Amendment of Zoning Map No. 111, Zone Change Case No. 2; (c) Amendment Zoning Map No.  
24 131, Zone Change No. 8; (d) Amendment Zoning Map No. 131, Zone Change No. 9; (e)  
25 Amendment Zoning Map No. 132, Zone Change No. 5; (f) Conditional Use Permit Case No. 3,  
26 Map No. 131.  
27  
28



**Project Impacts on Special-Status Species**

32. The Project site is located in close proximity to three important regional bird sanctuaries: the Audobon Kern River Preserve; Kelso Valley, an avian corridor that connects the Preserve to natural areas in Southeast Kern County, and Butterbrecht Springs adjacent to the Project site, which is an important stopping point in the transcontinental migratory route. In addition, the Project site includes Cottonwood Creek, a rare perennial creek in the West Mojave which crosses both private lands and public lands managed by the Bureau of Land Management and supports riparian habitat critical to both resident and migratory birds and other species. In fact, the evidence shows that one or more significant migratory corridors traverses portions of the Project site.

33. Not surprisingly, the Project will result in extremely serious harm to special status avian species including federally and state endangered raptors and species protected by the Migratory Bird Treaty Act ("MBTA"). The DEIR admits that species that will likely be killed or otherwise harmed as a result of the Project include the southwestern willow flycatcher, which is listed as endangered pursuant to both the federal Endangered Species Act (ESA) and California Endangered Species Act (CESA). In addition, the Project will likely result in substantial harm and "take" of a number of State "fully protected species" for which no take can be authorized. These species include the golden eagle and the California condor.

34. Although not adequately discussed in the EIR, the evidence in the record demonstrates that there is a substantial likelihood that the Project will result in take of the fully-protected and federally endangered California condor. Evidence adduced subsequent to the publication of the DEIR but before the release of the Final EIR (Pine Mountain Mortality Report) demonstrates that much of the overall Project site is within the range of the California condor.

34. The DEIR's discussion of Project impacts on special status birds and bats is inadequate and equivocal. Despite admitting that "because of the presence of nearby known

1 migratory bird stopovers, and the project's location within a known migratory corridor, the  
2 conclusion can be drawn that bird use within the project area could be relatively high during  
3 spring and autumn" (4.4-63), the DEIR undermines its own observation and misinforms the  
4 reader by claiming that "several regional and project-specific studies have been conducted in the  
5 [Tehachapi Wind Resource Area] that indicate overall avian use of the region is relatively low  
6 compared to wind resource areas in the United States." (*Ibid.*) The DEIR is also forced to admit  
7 that the new data indicates a "funnel effect" during the fall migration. The funnel effect, which  
8 the FEIR still refers to as a "hypothetical" (4.4-64 and 65), is associated with high avian mortality  
9 rates.

11 35. The FEIR admits that the Project could result in take of migratory birds because  
12 "migrants descending toward or ascending from Butterbrecht Springs may fly through that  
13 elevation range, greatly increasing the risk for collision."

14 36. Following a discussion of various studies conducted in the region, the DEIR  
15 concluded that "this region likely poses relatively low risk to birds compared to other wind  
16 energy facilities in the US (Appendix F1 of CH2MHill, 2010). However existing studies are  
17 limited and data are not always collected in a manner that allows for direct comparison with wind  
18 projects in others areas of the US." (4.4-64.). Although the DEIR admits that site-specific avian  
19 and bat studies are needed to accurately assess the Project's potential impacts, the DEIR was  
20 drafted and released before any adequate site-specific avian and bat studies had been completed.  
21 The EIR's analysis of Project impacts on avian species and bats were thus based, not on adequate  
22 site-specific studies, but incomplete surveys, general observations, and studies conducted at other  
23 wind energy sites with little relevance to the Project's unique topographic and geographic  
24 characteristics.

26 37. In some instances, adequate surveys were never completed. For example, bat  
27 roosting studies were never completed for the Project site, and the Avian Report was not finalized  
28

1 before the release of the DEIR, which instead, relies on a preliminary report.

2       38. Avian and bat mortality data from the nearby Pine Tree Wind Energy Project  
3 demonstrated and contradicted the DEIR's assumption that the Project's avian mortality rates  
4 would be relatively low compared to other national wind energy projects. For example, in the  
5 face of the fact that newly released data which showed that the Pine Tree mortality to golden  
6 eagles ( five known fatalities since 2009) ranked among the highest in the state and the highest  
7 mortality of all projects per turbine, the FEIR simply changed the finding of avian mortality  
8 impacts of the project from "low" to "high" without adequate analysis of these potential impacts,  
9 consideration of feasible avoidance alternatives, or providing additional measures to minimize  
10 and mitigate likely impacts of the proposed project to golden eagles or other sensitive species.  
11 Nevertheless, the County refused to adequately consider and analyze the newly available data by  
12 updating the DEIR's analysis of impacts on avian and bat species and recirculating the DEIR, as  
13 was required by CEQA.  
14

15       39. The EIR does not include adequate bat surveys. Instead, the DEIR relies on  
16 preliminary, incomplete studies: "[w]hile preliminary results of acoustic monitoring in the project  
17 area show an increase in bat activity during the spring and fall migration periods, there is  
18 insufficient data available to determine whether or not a focused bat migration corridor exists in  
19 the project area. Although bat use in the vicinity of the proposed WTGs is likely to be lower than  
20 that recorded near water sources, actual rates of use are currently unknown for all proposed  
21 WTG locations. Therefore, potential impacts to bats from turbine collisions and/or barotrauma  
22 are considered significant." 4.4-68." This discussion clearly demonstrates that the EIR was not  
23 based on adequate studies and the conclusion that impacts to bats would be significant was  
24 perfunctory and not based on thoughtful and complete study of the impact on bats. The EIR,  
25 moreover, does not include any surveys of roosting bats despite the presence of appropriate  
26 habitat features, including numerous rock outcrops, large trees and mine adits (entrances), as well  
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1 as substantial water sources.

2       40. In addition to harming avian and bat species; the evidence shows the Project will  
3 also likely harm and result in take of other rare or special status species, including the State  
4 Threatened Mohave ground squirrel, California endangered Mojave tarplant, and the fully  
5 protected Bakersfield cactus. The FEIR does not include adequate analysis of Project impacts on  
6 these species, particularly the Bakersfield cactus, which the DEIR assumed would be unlikely to  
7 occur at the Project site. Recent studies, which were provided to the County, demonstrate that the  
8 Bakersfield cactus can occur at much higher elevation than assumed by the DEIR, making it more  
9 likely that this extremely rare species could be present on the Project site. Though the FEIR  
10 admits that the DEIR's assumptions regarding the range of the cactus had been proven wrong by  
11 the recent studies on nearby sites, the County did not require any additional surveys to determine  
12 the presence or absence of the Bakersfield cactus on the Project site. 4.4-73 & 74, as revised.

14       41. Despite the likelihood of the presence of many rare and special status plant  
15 species, the certified FEIR does not include any adequate botanical surveys. In its comment letter  
16 to the County, the Department of Fish and Game ("DFG") convincingly demonstrated that the  
17 DEIR's analysis of North Sky River Project impacts on special-status plants was inadequate  
18 because the FEIR relies on surveys that were conducted too late in the year to detect many annual  
19 plant species which, on account of being late-winter and early-spring bloomers, were likely  
20 missed by the surveys conducted in late May. The surveys at the Jawbone Energy Project site  
21 were likewise inadequate because they were conducted on September 20 and October 18, 2006  
22 and therefore not reasonably calculated to detect myriad of late-winter and early-spring bloomers.  
23 The Mojave tarplant, which was found on the North Sky River portion of the site, is likely to  
24 occur on the Jawbone section as well, but was not identified in the inappropriately time surveys  
25 that were conducted prior to project approval.

27 ///  
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**Impact to Riparian habitat**

42. Cottonwood Creek, which bisect the Project site, supports three separate riparian communities: including Fremont cottonwood forest, southern willow scrub, and desert olive scrub along Cottonwood Creek, natural springs and intermittent and ephemeral washes. 4.4-114. The DEIR admits that Project will adversely impact Cottonwood Creek and dependent species because project construction will require creek crossing by heavy construction equipment and the Project calls for construction of wind turbines near the creek.

43. The DEIR admits that the Project road construction will necessitate crossing of many small ephemeral creeks and drainages, DEIR attempts to downplay the potential impact on creek dependent resources by stating that the riparian habitat has been degraded by years of cattle grazing. The DEIR admits, however, that the riparian corridor along Cottonwood Creek provides habitat for a number of aquatic and riparian dependent species. 4.4-23. The evidence in the record suggests that the riparian corridor along Cottonwood Creek may provide habitat for the federally endangered southwestern willow flycatcher. As explained more fully below, the DEIR fails to adequately analyze the Project's impact on the riparian habitat and riparian dependent species

44. The EIR claims that the water for the project will be provided from onsite wells, but does not include any meaningful analysis of the adequacy of the existing wells, or the capacity of the local aquifer to meet the project's substantial water demand. Rather, the EIR defers the analysis of the water supplies and instead, requires the applicant to conduct a post-approval groundwater study, as well as provide a post-approval plan to mitigate impacts on groundwater if it is later determined that the meeting the Project's water demand would result in overdraft of the aquifer.

45. The DEIR admits that implementation of the Project will require construction of access roads and underground transmission lines in lands owned and managed by the federal

1 Bureau of Land Management ("BLM"). The DEIR does not adequately describe the potential  
2 environmental impacts of these access roads and transmission roads.

3 46. As explained below, the FEIR and the County improperly defer the formulation of  
4 key mitigation measures that were intended to reduce the Project's impacts on sensitive and listed  
5 species, groundwater and water quality.

#### 6 CEQA Mandates

7 47. CEQA was enacted to require public agencies and decision-makers to document  
8 and consider the environmental implications of their actions before formal decisions are made.  
9 Public Resources Code ("Pub. Res. C.") §21000, and to "[e]nsure that the long-term protection of  
10 the environment shall be the guiding criterion in public decisions." Pub. Res. C §21001(d).  
11 "CEQA was intended to be interpreted in such a manner as to afford the fullest possible  
12 protection to the environment within the reasonable scope of the statutory authority." 14  
13 California Code of Regulations, (hereinafter cited as "CEQA Guidelines") §15003(f), citing  
14 Friends of Mammoth v. Board of Supervisors, (1972) 8 Cal. 3d 247. "[T]he overriding purpose  
15 of CEQA is to ensure that agencies regulating activities that may affect the quality of the  
16 environment give primary consideration to preventing environmental damage. CEQA is the  
17 Legislature's declaration of policy that all necessary action be taken 'to protect, rehabilitate and  
18 enhance the environmental quality of the state. Save our Peninsula v. Monterey County Board of  
19 Supervisors (2001) 87 Cal.App.4th 99, 117, citing Laurel Heights Improvement Assn. v. Regents  
20 of University of California, (1988) 47 Cal.3d 373, 392; and Pub. Res. C § 21000.

23 48. The lead agency must identify all potentially significant impacts of the Project, and  
24 must therefore consider all the evidence in the administrative record, not just its initial study.  
25 Pub. Res. C. §21080 (c), (d), §21082.2. CEQA Guidelines direct lead agencies to conduct an  
26 Initial Study to "determine if the Project may have a significant on the environment." §15063(a).  
27 "All phases of the Project planning, implementation, and operation must be considered in the  
28

1 Initial Study". CEQA Guidelines §15063(a)(1). Besides the direct impacts, the lead agency must  
2 also consider reasonably foreseeable indirect physical changes in the environment in the area in  
3 which significant effects would occur, directly or indirectly. See CEQA Guidelines §15064(d) &  
4 §15360, see, also, Laurel Heights Improvement Assn. supra, 47 Cal. Ed at 392.

5 49. An indirect impact is a physical change in the environment, not immediately  
6 related to the Project in time or distance, but caused indirectly by the Project and reasonably  
7 foreseeable. CEQA Guidelines §15064(d)(2) & §15358(a)(2). Indirect impacts to the  
8 environment caused by a Project's economic or social effects must be analyzed if they are  
9 "indirectly caused by the Project, are reasonably foreseeable, and are potentially significant."  
10 CEQA Guidelines §15064(d)-(e). A lead agency may not limit environmental disclosure by  
11 ignoring the development or *other activity* that will ultimately result from an initial approval. City  
12 of Antioch v. City Council (1986) 187 CA3d 1325 (emphasis added). Preparing a proposed  
13 negative declaration necessarily involves some degree of forecasting, and the lead agency "must  
14 use its best efforts to find out and disclose all that it reasonably can." See, CEQA Guidelines  
15 §15144. The guidelines specifically require that an Initial Study must consider "all phases of  
16 Project planning, implementation, and operation." CEQA Guidelines §15063(a)(1).

17 50. Where the CEQA environmental process was procedurally or substantively  
18 defective, reviewing courts may find prejudicial abuse of discretion even if proper adherence to  
19 CEQA mandates may not have resulted in a different outcome. Pub. Res. Code §21005(a). For  
20 example, the Court in Citizens to Preserve Ojai v. County of Ventura (1985) 176 Cal.App.3d 421,  
21 428 held that the certification of an EIR that had not adequately discussed the environmental  
22 impacts of the Project constituted a prejudicial abuse of discretion even if strict compliance with  
23 the mandates of CEQA would not have altered the outcome. Resource Defense Fund v. LAFCO  
24 (1987) 191 Cal.App.3d 886, 897-8, went so far as to declare that failure to comply with CEQA  
25 procedural requirements was *per se* prejudicial. Kings County Farm Bureau v. City of Hanford  
26  
27  
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1 (1990) 221 Cal.App.3d 692 explained that an agency commits prejudicial error if "the failure to  
2 include relevant information precludes informed decision making and informed public  
3 participation, thereby thwarting the statutory goals of the EIR process." *Id.*, at 712.

4 51. The environmental review process under CEQA is intended assure the public that  
5 "the agency has, in fact, analyzed and considered the ecological implications of its actions."  
6 Laurel Heights Improvement Ass. v. Regents of the University of California (1988) 47 Cal.3rd  
7 376, 392. The function of the environmental review is not merely to result in informed decision  
8 making on the part of the agencies, it is also to inform the public so they can respond to an action  
9 with which they disagree. *Id.*

#### 11 FIRST CAUSE OF ACTION

12 (Violation of CEQA, Inadequate analysis of Project Impacts)

13 52. Petitioners refer to and incorporate herein by this reference paragraphs 1-51,  
14 inclusive, of this Petition as though fully set forth herein.

15 53. The County violated CEQA because the Final EIR failed to adequately analyze the  
16 Project's impacts on biological resources. As we explained above, the County did not conduct  
17 adequate studies and surveys to identify and analyze the Project's potential impacts on rare or  
18 special status species.

19 54. The FEIR, moreover, failed to include any meaningful or adequate analysis of  
20 evidence that became available subsequent to the circulation of the DEIR but before the final  
21 certification of the Final EIR. In particular, the FEIR does not contain a meaningful and adequate  
22 analysis of the Pine Tree Mortality Study, which among other things, showed that the mortality  
23 rates of protected avian species such as Golden eagle were among the highest in the nation. This  
24 evidence refutes many of the DEIR's assumptions, including the assumption that "this region  
25 poses relatively risk to birds compared to other wind energy facilities in the US." (EIR 4-4-64).  
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1        55.     The FWS, moreover, pointed out that some of the assumptions that informed the  
2 DEIR's analysis of Project impacts on the California condor are demonstrably false. For  
3 example, the FEIR relies in part on a 2011 study which, based on the assumption that the condor  
4 is unlikely to use the Project site, concluded that the project posed a relatively low risk to the  
5 condor. (Johnson and Howlin 2011). The FEIR falsely reported that the Project site is located  
6 outside the historical range of the condor, which the FEIR claimed had not been observed on or  
7 near the site. The FWS demonstrated that the FEIR's assumptions regarding the condor was in  
8 error because the Project is within the condor's historical range and in fact, "condors have  
9 recently been documented flying both to the east and west of the project, and potentially directly  
10 over the project site." Based on the available evidence, the FWS concluded that contrary to the  
11 FEIR's assessment, the Project poses a significant risk to the condor, whose use of the Project site  
12 is likely to increase during the life of the Project. The FEIR was never revised to analyze the  
13 potential implications of these fundamental errors.

15        56.     The FWS likewise pointed out that the FEIR's discussion of the supplemental  
16 feeding program by the Condor Recovery Program incorrect. Contrary to the FEIR's contention,  
17 supplemental feeding of condors occurs in limited locations and not across the condor's entire  
18 range. Despite the limited availability of supplemental food, condors in fact forage across  
19 hundreds of miles throughout much of their historic range, which includes the Project site. The  
20 County did not did not correct the false claims regarding supplemental feeding programs and did  
21 not revise the FEIR to consider the implications of this new information.

23        57.     The County likewise violated CEQA because the FEIR's analysis was not based  
24 on adequate botanical surveys. As was repeatedly pointed out during the environmental review  
25 process, the botanical surveys relied upon by the FEIR were unreliable and inadequate because  
26 the plant surveys were not timed appropriately. The FEIR impermissibly defers adequate  
27 botanical studies through a mitigation measure that requires post-approval botanical surveys.  
28

1        58.     The FEIR violates CEQA also to the extent that it fails to adequately quantify and  
2 analyze the Project's potential impacts on riparian plants and habitats. The EIR acknowledges  
3 that Project implementation will require construction of roads across Cottonwood Creek and  
4 numerous unnamed ephemeral drainages, yet fails to adequately describe and analyze the  
5 potential impact of such creek crossings and related effects. The Project's potential impacts may  
6 include water quality degradation, loss or damage to riparian plants and the concomitant impact  
7 on riparian-dependent animal species including birds and amphibians.  
8

9        59.     Despite admitting that the Project will require the construction of roads and  
10 underground transmission lines in adjacent land owned and managed by the BLM, the FEIR fails  
11 to analyze the potential environmental of these off-site components of the Project.

12        60.     Despite admitting that road construction can result in significant adverse impacts  
13 on biological resources and water quality, the FEIR does not include a "road plan" describing in  
14 detail the roads needed for the project.

15        61.     The FEIR fails to adequately identify and describe the source of water for the  
16 Project. The EIR claims that all or most of the Project's water demand may be met by extracting  
17 groundwater from onsite wells, yet the FEIR fails to adequately describe the current conditions of  
18 the groundwater basin (i.e. whether the basin is in a state of overdraft) or the Project's impact on  
19 groundwater, including nearby private water wells. Likewise, the EIR fails to analyze the  
20 potential impacts of obtaining water for the project from any other sources, such as the  
21 Tehachapi-Cummings Community Water District. The FEIR impermissibly defers groundwater  
22 studies and thus fails to adequately analyze the Project's potential impact on groundwater.  
23

24        WHEREFORE, Petitioners pray for judgment against KERN, as set forth herein below.  
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## SECOND CAUSE OF ACTION

(Violation of CEQA, Inadequate and unlawfully deferred mitigation and monitoring measures)

62. Petitioners refer to and incorporate herein by this reference paragraphs 1-61 inclusive, of this Petition as though fully set forth herein.

63. Project impacts must be mitigated to the extent feasible. CEQA § 21002.1. Moreover, the "EIR shall describe feasible measures which could minimize significant adverse impacts." CEQA Guidelines 15126.4. (Emphasis added.)

64. The County's approval of the Project violates CEQA because the FEIR and the County fail to impose adequate and meaningful mitigation measures to address the Project's significant impact on avian and bat species and instead, unlawfully and without adequate explanation defer formulation of meaningful mitigation measures without providing clear performance standards.

65. Mitigation measures ("MM") 4.4-20 provides that if post-construction surveys demonstrate that the Project is causing an "unanticipated significant adverse impacts on avian or bat species," the applicant must consult with the County and resource agencies and implement certain listed mitigation measures. MM 4.4-20 violates CEQA for at least two reasons. First, it is unclear what is intended by the phrase "unanticipated", especially in light of the fact that the EIR concludes that Project impacts on avian species and bats is potentially significant. Because the FEIR arguably anticipates an adverse impact on avian species and bats, it would appear that the applicant may never be required to implement any additional mitigation measures no matter what the monitoring data reveals. In other words, it is unclear under what circumstances significant adverse impacts can be considered "unanticipated."

66. MM 4.4-20 violates CEQA also because it does not include any performance standards. That is to say, the FEIR fails to articulate any no stated criteria by which to judge the

1 effectiveness of any mitigation measure(s) imposed, or to determine whether additional mitigation  
2 measures are needed.

3       67. Mitigation measures intended to address the Project's impact on golden eagles and  
4 other raptors, including MM 4.4-4 (habitat restoration), MM 4.4-10 (preconstruction surveys and  
5 buffers around occupied nests), and MM 4.4-20 (post-construction breeding monitoring and  
6 additional conservation measures) are collectively and individually ineffective and inadequate in  
7 that they fail to reduce the likelihood of raptor displacements.

8       68. The FEIR impermissibly defers the formulation of mitigation measures that are  
9 specifically intended to address the potential harm to the condor. These include MM 4.4-4, which  
10 requires the future development of a Habitat Restoration and Revegetation Program and MM 4.4-  
11 5, which requires the future development of a Weed Control Plan. The FEIR fails to explain why  
12 the Habitat Restoration and Revegetation Program and the Weed Control Plan could not have  
13 been described in the EIR for public and agency review and comment.

14       69. The proposed monitoring for bat species is inadequate for a variety of reasons,  
15 including the fact that it fails to require the monitoring of mortality rates by species. The  
16 proposed monitoring, moreover, is inadequate because it is not required for the life of the project.

17       70. The proposed MM 4.4-9, which is intended to address potentially significant  
18 impacts on rare and special status plant species is inadequate and violates CEQA because it  
19 impermissibly defers the formulation of a mitigation plan and lacks any meaningful performance  
20 standards.

21       71. Likewise, MM 4.4-18 purports to reduce avian and bat mortality rates by, for  
22 example, requiring the applicant not to site turbines on or immediately upwind side of ridgecrests,  
23 where "feasible". This measure violates CEQA, however, because it impermissibly defers the  
24 feasibility determination, thus ensuring that members of the public and resource agencies are  
25 completely left out of the process.

72. As explained above, the FEIR does not include a "road plan" describing the location and type of roads necessary for implementation of the Project. MM 4.9-1, which requires the applicant to provide the County with a road plan 60 days prior to commencement of construction, is intended to help the County identify and address potentially significant impacts of road construction on drainages and riparian areas. MM 4.9-1 violates CEQA, however, as (a) it does not include specifically describe the mitigation measures or Best Management Practices that will be needed to address the impacts that would result from road construction, (b) does not include any specific performance criteria, (c) does not include any analysis of the feasibility of mitigation measures required to reduce the impacts of road construction to a less than significant level, and (d) does not include an evaluation of the residual impact after implementation of mitigation measures.

73. The FEIR fails to require adequate mitigation measures to address the Project's potentially significant impacts on groundwater supplies. The FEIR merely requires post-approval groundwater studies and violates CEQA by directing the applicant to formulate a groundwater management plan to address the potential overdraft of the aquifer.

**WHEREFORE, Petitioners pray for judgment against KERN, as set forth herein below.**

### **THIRD CAUSE OF ACTION**

**(Violation of CEQA, Inadequate Alternatives Analysis)**

74. Petitioners refer to and incorporate herein by this reference paragraphs 1-73, inclusive, of this Petition as though fully set forth herein

75. The purpose of the alternatives analysis is to discuss reasonable project alternatives that would “feasibly attain most of the basic objectives of the Project”, but would “avoid or substantially lessen any significant effects of the Project.” CEQA Guidelines §15126.6; Save Round Valley Alliance v. County of Inyo (2007) 157 Cal.App.4<sup>th</sup> 1437, 1456. CEQA mandates denial of a project when feasible alternatives exist that meet most of the project objectives and

1 avoid most or all of the project's significant adverse environmental impacts. PRC §21002,  
2 21002.1, CEQA Guidelines §15021 and 15026.6.

3 76. The FEIR's analysis of alternatives is inherently flawed because it assumes the  
4 mortality rates caused by the Project would be relatively low in comparison with other wind  
5 energy projects in the United States and California. EIR 6-3.

6 77. The County violated CEQA because the FEIR failed to identify and consider a  
7 reasonable range of feasible alternatives that could substantially reduce the Project's significant  
8 adverse impacts, including the significant impact on avian species and bats. Alternative C, the  
9 only alternative (other than the no project alternative) considered by the County does not  
10 significantly reduce the Project's significant adverse biological impacts.

11 78. The County, moreover, violated CEQA by improperly rejecting the  
12 environmentally superior alternatives proposed by the public. As explained in the Staff Report,  
13 the County purportedly rejected these alternatives because they were similar in their impact and  
14 scope to Alternative C. But the evidence in the record does not support the County's contention.  
15 To the contrary, the record shows that the alternatives proposed by the public were carefully  
16 crafted to reduce specific biological impacts that are not adequately addressed by Alternative C.  
17 For example, public commentators suggested that the County explore the alternative of removing  
18 turbines from ridgelines and the most sensitive biological areas, or build shorter towers. The  
19 County unreasonably refused to consider any of these alternatives.

20 79. The County also violated CEQA because the FEIR's "No Project" alternative is  
21 based on hypothetical development scenario which assumes that absent the proposed project, the  
22 Project site would be developed with residential homes, gun clubs, resorts, etc.. There simply is  
23 no evidence in the record to support the County's assumption that without the project, this rural  
24 area with virtually no infrastructure would undergo unprecedented growth.

25 WHEREFORE, Petitioners pray for judgment against KERN, as set forth herein below.  
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#### FOURTH CAUSE OF ACTION

##### (Violation of CEQA: Inadequate Cumulative Impact Analysis)

80. Petitioners refer to and incorporate herein by this reference paragraphs 1-79, inclusive, of this Petition as though fully set forth herein.

81. The EIR must include a discussion of the Project's cumulative impacts when they are significant and the Project's incremental contribution is cumulatively considerable. CEQA Guidelines §15130(a). The lead agency has an obligation to "consider the present project in the context of a realistic historical account of relevant prior activities that have had significant environmental effects." Environment Protection Info. Ctr. v. California Dept. of Forestry (2008) 44 Cal4th 459, 524.

82. The EIR must define the relevant area affected in its analysis of cumulative impacts Guideline §15130(b)(3). The affected area depends on the nature of the impact being analyzed. Guideline §15130(b)(2). The EIR must supply an explanation, based on substantial evidence, for the geographic area selected for the cumulative impact analysis. Guideline §15130(b)(3).

83. The FEIR violated CEQA because the geographic area it selected for cumulative impact analysis was too small and not adequately supported by substantial evidence. The FEIR determined that the appropriate geographic area for assessing the Project's cumulative impact on biological species was a six mile radius. In other words, the EIR only considered the Project's impacts on avian and bat species in addition to projects within a six mile radius of the Project. However, at least 49 wind energy projects are currently proposed or in early stages of development in the Tehachapi area (TWRA) that would affect some of the same avian migratory corridors and the same species as the Projects. At minimum, these 49 projects should have also been considered in the cumulative analysis at the scale of the Tehachapi wind resources area. In addition, 49 wind energy projects are currently proposed in California on public lands alone. An

1 unknown number of additional projects are proposed on private lands, and outside California (e.g.  
2 Baja California in Mexico). The FEIR should also have considered cumulative impacts at other  
3 appropriate scales including regional or statewide and the Pacific Flyway as a whole.

4 84. The EIR thus underestimates the project's Cumulative impact on the Pacific  
5 Flyway by selecting a geographic area that does not correspond to the geographic range of the  
6 biological resources affected by the Project.

#### 7 FIFTH CAUSE OF ACTION

8 (Violation of CEQA: Failure to Recirculate)

9  
10 85. Petitioners refer to and incorporate herein by this reference paragraphs 1-84,  
11 inclusive, of this Petition as though fully set forth herein.

12 86. CEQA requires that if significant new information is added to an EIR after a draft  
13 EIR is prepared, but before certification of the final EIR, the EIR must be recirculated for public  
14 review and comment.

15 87. Following circulation of the Draft EIR, new evidence (i.e. Pine Mountain  
16 Mortality Report and new condor telemetry movement data) demonstrated that the Project's  
17 impact on avian and bat species, including the California condor, would be more severe than  
18 assumed by the DEIR. Despite this significant new information regarding the severity of Project  
19 impacts, Respondents failed to recirculate the EIR, or any portion of the EIR. As a result of  
20 Respondents' failure to recirculate the EIR, the public and other public agencies were deprived of  
21 any meaningful opportunity to review and comment on the Project, its substantial adverse  
22 environmental consequences, and the new information regarding other unanalyzed environmental  
23 effects of the Project.

24  
25 88. Respondents' failure to recirculate the EIR is not supported by substantial evidence  
26 and represents a failure to proceed in the manner required by law. Accordingly, the County's  
27 certification of the EIR and approval of the Project must be set aside.

28 ///



**SIXTH CAUSE OF ACTION**

(Failure to Make Required Findings/Findings not Supported by Substantial Evidence)

89. Petitioners refer to and incorporate herein by this reference paragraphs 1-88, inclusive, of this Petition as though fully set forth herein.

90. CEQA requires lead agencies to make certain findings to explain and support a decision to certify an EIR.

91. The County violated C.C.P. §1094.5 and CEQA by failing to make all the required findings. In some instances, the findings the County did adopt are not supported by substantial evidence.

**SEVENTH CAUSE OF ACTION**

(Violation of CEQA, Inadequate Response to Comments)

92. Petitioners refer to and incorporate herein by this reference paragraphs 1-91, inclusive, of this Petition as though fully set forth herein.

93. The lead agency is required to carefully consider public and agency comments and explain in detail why any specific comments or suggestions were rejected. CEQA Guideline §15088(c). Conclusory or argumentative responses to comments that are not supported by citation to specific facts are inadequate.

94. The County's response to many of the public and agency comments and suggestions in connection were inadequate. Three examples of the County's incomplete or inadequate response to comments are described below:

- a) In its comments, the DFG argued that the DEIR did not include sufficient information to allow an adequate evaluation of the Project impacts on rare and special status plants because the botanical surveys relied on by the DEIR were inadequate. DFG argued that pursuant to CEQA, adequate plant surveys should be conducted before the Project is approved. The County's response offers no explanation for why adequate pre-approval surveys cannot or need not be conducted.

1 Instead, the FEIR merely reiterates that adequate surveys would be conducted prior  
2 to construction. (7-89) This response is inadequate.

3 b) DFG also argued that the EIR must analyze the "whole of the project", including the  
4 roads, underground transmission lines and portions of overhead gen-tie lines that  
5 must be built on federal lands as part of the Project. In response, the County did not  
6 dispute that CEQA requires analysis of all components of a project, or that these  
7 were truly part of the Project. The County's response merely stated that the BLM is  
8 preparing an Environmental Assessment in order to comply with NEPA. This  
9 response does not in any meaningful way address the DFG's main concern that the  
10 Project EIR does not adequately analyze the whole of the Project. 7-83

12 c) In its June 2011 comments on the DEIR, Defenders argued that the DEIR did not  
13 adequately analyze the Project's impact on riparian resources, particularly those  
14 associated with Cottonwood Creek, which Defenders argued was an especially  
15 important feature of the Project landscape. (7-130). Ignoring the thrust of this  
16 comment, the FEIR instead claims that the DEIR adequately characterized  
17 Cottonwood Creek itself. The FEIR thus simply ignores the Defenders main point,  
18 which was that the DEIR failed to adequately analyze the Project's impact on the  
19 riparian resources associated with Cottonwood Creek. Ibid.

21  
22 WHEREFORE, SIERRA CLUB, THE CENTER FOR BIOLOGICAL DIVERSITY AND  
23 DEFENDERS OF WILDLIFE pray for judgment against KERN COUNTY and KERN COUNTY  
24 BOARD OF SUPERVISORS, as set forth below:

- 25 a. That the Court issue an alternative and peremptory writ of mandate commanding  
26 Respondent KERN COUNTY and KERN COUNTY BOARD OF SUPERVISORS  
27  
28

1 to set aside, invalidate and void the certification of the EIR for the project and all  
2 related approvals,

- 3 b. For declaratory judgment, stating that the actions of KERN COUNTY and KERN  
4 COUNTY BOARD OF SUPERVISORS in certifying the EIR and approving the  
5 project were unlawful;  
6  
7 c. For a temporary restraining order, preliminary injunction, and permanent  
8 injunction prohibiting any actions based on the EIR or any of the project  
9 approvals;  
10  
11 d. For an award of costs and attorney's fees, and  
12  
13 e. For such other and further relief as the Court deems just and proper.

12 Dated: October 20, 2011

LAW OFFICE OF BABAK NAFICY

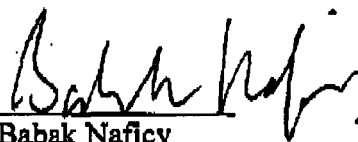
13  
14 By: 

Babak Naficy  
Attorney for Petitioners

VERIFICATION

I, Babak Naficy, am counsel to petitioner/plaintiff and have personal knowledge of the following facts. The offices and governing boards of petitioner/plaintiff, Sierra Club are located outside San Luis Obispo County, the county in which I maintain my office. I have read the foregoing Verified Petition for Writ of Mandate and Complaint for Declaratory and Injunctive Relief. The facts alleged in the above petition are true to the best of my knowledge and belief, and, on that ground, petitioner/plaintiff alleges that the matters stated herein are true.

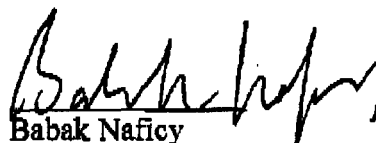
I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this Verification was executed in San Luis Obispo, California, on October 20, 2011.

  
Babak Naficy

VERIFICATION

I, Babak Naficy, am counsel to petitioner/plaintiff and have personal knowledge of the following facts. The offices and governing boards of petitioner/plaintiff, Center for Biological Diversity, are located outside San Luis Obispo County, the county in which I maintain my office. I have read the foregoing Verified Petition for Writ of Mandate and Complaint for Declaratory and Injunctive Relief. The facts alleged in the above petition are true to the best of my knowledge and belief, and, on that ground, petitioner/plaintiff alleges that the matters stated herein are true.

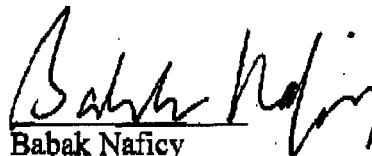
I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this Verification was executed in San Luis Obispo, California, on October 20, 2011.

  
Babak Naficy

VERIFICATION

I, Babak Naficy, am counsel to petitioner/plaintiff and have personal knowledge of the following facts. The offices and governing boards of petitioner/plaintiff, Defenders of Wildlife, are located outside San Luis Obispo County, the county in which I maintain my office. I have read the foregoing Verified Petition for Writ of Mandate and Complaint for Declaratory and Injunctive Relief. The facts alleged in the above petition are true to the best of my knowledge and belief, and, on that ground, petitioner/plaintiff alleges that the matters stated herein are true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this Verification was executed in San Luis Obispo, California, on October 20, 2011.

  
Babak Naficy